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IN THE

Supreme Court of Arkansas

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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

VALLEY PLANTING COMPANY *v.* WISE.

Opinion delivered December 20, 1909.

1. EVIDENCE—ADMISSION IN PLEADING.—A statement contained in a pleading filed by a party in another action between the same parties may be proved against him, but such admission is not conclusive and is subject to explanation. (Page 2.)
2. STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN YEAR.—A verbal contract entered into in December, 1907, to superintend the making and gathering of a crop of cotton for the year 1908 is not within the statute of frauds as one "not to be performed within a year." (Page 2.)
3. EVIDENCE—CONTRACT—INTENT OF PARTY.—While, in construing a contract, it is competent to show what was said by the parties in making the contract and to prove all the attending circumstances, in order to show what was in contemplation of the parties, it was not competent to prove what one of the parties had in contemplation about its effect. (Page 5.)

Appeal from Drew Circuit Court; *Henry W. Wells,* Judge; affirmed.

Williamson & Williamson and *Knox & Hardy,* for appellants.

The contract could not be performed within a year, and was therefore within the statute of frauds. Kirby's Dig., § 3554; 46 Ark. 80. And part performance of such a contract does not take it out of the statute. 48 Ark. 485.

R. W. Wilson, for appellee.

The verdict was in accordance with the law. 46 Ark. 80; 96 U. S. 424; 54 Ark. 189; 56 Ark. 600; 9 Ark. 394; 19 Ark. 671; 39 Ark. 280; 57 Ark. 370; 58 Ark. 617; 78 Ark. 336; 80 Ark. 232; Kirby's Dig., § 5027. The complaint stated a cause of action. 56 Ark. 597. The statute of frauds applies only to

contracts which, by their terms, are not to be performed within a year, but not where they may not be performed within a year. 96 U. S. 404; 46 Ark. 80.

McCULLOCH, C. J. This is an action instituted by appellee to recover damages for breach of an alleged contract for hire. He alleged that appellant, a corporation, hired him as overseer of its plantation in Drew County, Arkansas, to superintend the making and gathering of the crop of the year 1908, and agreed to pay him $1,000 for his services, but discharged him without cause before the expiration of the period of service. He recovered judgment below for the sum of $400.

The evidence as to the terms of the contract is conflicting. The contract was a verbal one, and was entered into in the early part of December, 1907. Appellant's witnesses testified that the right to discharge appellee at any time was expressly reserved in the contract. Appellee denied this, and the verdict of the jury has settled that issue in his favor.

Appellant's witnesses testified that the period of service stipulated in the contract was the whole of the year 1908; but appellee testified that he was employed to superintend the making and gathering of the crop of 1908, no definite time being specified. This issue, too, was settled by the verdict in appellee's favor.

It is insisted that appellee is bound by his statement contained in an answer filed by him in another action between the same parties, to the effect that appellant agreed to furnish him a house to live in for "twelve months from and after January 1, 1908." Appellee's answer in that case was competent evidence in this case as an admission, but it is not conclusive, and is subject to explanation. It was considered by the jury along with the other testimony in determining the terms of the contract.

Appellant pleaded the statute of frauds, and that is the principal question here. The law on this subject applicable to the case is well settled. The contract in question was one, not to perform a service for a definite period of time, but to perform a particular service for a stipulated consideration—that is, to superintend the making and gathering of the crop for the stated compensation of $1,000.

In *Meyer* v. *Roberts*, 46 Ark. 80, Mr. Justice SMITH, speaking for the court, laid down the following general rule: "But

ever since the case of *Peter* v. *Compton,* Skinner, 353, 1 Smith's Lead. Cas. 8th ed. 614, it has been considered settled that the statute applies only to agreements which appear from their terms to be incapable of performance, or such as the parties never contemplated should be performed, within the year."

In *Railway Company* v. *Whitley,* 54 Ark. 199, the authorities on this subject are reviewed at considerable length, and the following rule is summed up as the correct one: "In determining when contracts come within the one-year statute of frauds, courts have been governed by the words, 'not to be performed.' They have treated them as negative words. In construing them it is said: 'It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year.' According to this rule of construction, it is well settled that the statute only includes those contracts or agreements which, according to a fair and reasonable interpretation of their terms in the light of all the circumstances which enter into their construction, do not admit of performance in accordance with their language and intention within a year from the time they were made; and that it includes no agreement if, consistently with its terms, it may be performed within that time."

In Browne on the Statute of Frauds, § 278a, 5th ed., the following rule is stated, and numerous authorities cited in support of it: "An agreement, in general terms, to do a particular act, no time being specified, and the act being such as may be performed by the party promising, under the contract, within a year, is also saved from the operation of the statute, on the principles before stated."

In a very recent work, the following statement of the law on the subject is given as the rule supported by the great weight of authority: "While there are exceptions, the general rule, supported by the great weight of authority, may be stated that the statute does not apply where the contract by any possibility can be fulfilled or completed in one year. Stated in other words, the rule is: If it appears from the contract itself that it was not to be performed, or was not intended to be performed, within a year, it is void; but if it was a contract which might have been performed within a year, and which the plaintiff, at his option, might have required the defendant to perform within a year,

it is not within the statute." Smith on the Law of Fraud and Construction of the Statute of Frauds, § 347. See also 20 Cyc. 199, 200; *McPherson* v. *Cox,* 95 U. S. 404; *Walker* v. *Johnson,* 96 U. S. 424.

Now, according to the principles thus stated, the contract in question did not fall within the operation of the statute of frauds, for it can not be said that it was, according to its terms, "not to be performed within a year." It may or may not, according to the agreement, have been performed within a year. This depended upon the course of the seasons, weather conditions during the planting and crop-gathering seasons, particularly the latter; and also the scarcity or plentifulness of farm labor and appellee's ability to secure labor during those seasons.

We are asked to say, by way of judicial cognizance, that a crop of cotton cannot be made and gathered within a year; or at least, that such a feat is so unusual in this State that it could not have been within the understanding and contemplation of the parties to the present contract; but we are unwilling to make such a declaration. On the contrary, if we should resort to matters of common knowledge among residents of the cotton-growing localities as to the course of the seasons and as to the culture and production of cotton, we should say that a crop of cotton can be, under favorable conditions, planted, harvested, ginned and marketed within a year. That depends mainly upon weather conditions during the gathering season and the amount of farm labor available; and if these conditions are favorable, there appears to be no reason why the crop cannot be made and gathered within a year from the time in which the contract in question was made, which was early in December, 1907. We are not unmindful of the adage among Southern farmers that it requires "thirteen months in each year" to make and gather a crop of cotton, which is perhaps due to the proneness of mankind to magnify the difficulties of one's own task and to regard those of others as less arduous and exacting. But this cannot be accepted as a truism so as to control, in law, the binding force of the contract. According to the terms of the contract in the present case, as established by the evidence accredited by the jury, appellee agreed to perform certain work for a gross stipulated price. Self-interest was a natural incentive to conclude the

engagement by getting the crop gathered as speedily as possible, and he impliedly agreed to do this, his employer having the right to expect and demand as much of him. That being true, we cannot say that it was the understanding and contemplation of the parties, when the contract was entered into, that it was not to be performed within a year.

Plaintiff complains of the ruling of the court in refusing to admit the testimony of appellant's agent who entered into the contract, as to what he had in mind or in contemplation concerning the duration of the contract at the time it was entered into. It was competent to show what was said by the parties in making the contract, and also to prove all the attending circumstances in order to show what was in the contemplation of the parties, but not to prove what one of the parties had in contemplation about its effect.

Judgment affirmed.

FLETCHER v. LYON.

Opinion delivered December 20, 1909.

1. DEEDS—CONSTRUCTION AS A WHOLE.—The premises of a deed should be considered together so as to give effect to it as a whole. (Page 9.)
2. DEEDS—EXCEPTIONS AND CONDITIONS.—Exceptions and conditions contained in the granting clause of a deed will be held to be a part thereof and to limit the grant. (Page 9.)
3. SAME—CONDITIONS NOT REPUGNANT.—Reservations, conditions or limitations which are not repugnant to the granting clause in a deed may appear in any part thereof and be equally effectual. (Page 10.)
4. TIMBER DEED—REASONABLE TIME.—Under a deed which conveys land until the timber on that and other lands shall be cut and removed, and until the manufacturing, shipping and other lumbering and logging operations over and upon the same shall be finished, a reasonable time only is given for the purpose of completing such operations. (Page 10.)
5. DEEDS—MILL SITE—RESERVATION.—Under a conveyance of land which contemplates that it may be used for the purpose of establishing a mill plant, but reserves to the grantors the right to use so much of the land for grazing or farm purposes as the grantee shall not desire to use in connection with any lumber manufacturing or logging operations which he may wish to conduct over it, the grantors are not en-

titled to have any part of the lands set apart to defendants for a mill site. (Page 10.)

6. TIMBER—REASONABLE TIME TO REMOVE.—A timber deed which conveys "all timber, standing or fallen, with the right to cut and remove same at any time," contemplates that the timber should be removed within a reasonable time and without unreasonable delay. (Page 11.)

7. SAME.—Where several conveyances of timber were executed as a part of one transaction, the quantity of timber conveyed by all of them should be considered in determining what is a reasonable time in which to remove it. (Page 11.)

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

J. F. Summers, for appellants.

No time being mentioned for cutting and removing the timber, the vendee should be held to have a reasonable time. 77 Ark. 16. The words "any time" were used in a restricted sense. 66 Ark. 472; 145 Mass. 156. It means a reasonable time. 77 Ark. 116; 164 Pa. 234; 128 N. C. 46; 78 Ark. 408.

Harry M. Woods, for appellee.

The effect of the reservation and agreement to reconvey are not to nullify the grant of the fee. 82 Ark. 210; 93 S. W. 979. The title passes independent of these covenants. 44 Ark. 160. The intention of the parties should be gathered from the deed as a whole. 53 Ark. 185. Persons dealing with a special agent must know his authority. 23 Ark. 411; 74 Ark. 561; 62 Ark. 33; 78 Ark. 30. Appellants cannot be heard to say that they relied upon an agreement not embraced in the instrument. 15 Ark. 542; 24 Ark. 210; 33 Ark. 150. A reasonable time for removing the timber had not elapsed. 91 S. W. 53. The words "at any time" mean an indefinite or unlimited time. 70 Ark. 122; 10 L. R. A. 217; 44 Ill. App. 376. An estate in the timber was created by this deed. 77 Ark. 120; 98 S. W. 238.

McCULLOCH, C. J. There are two cases here between the same adversary parties, each involving the construction of a separate instrument of writing, and each action was instituted by B. A. Fletcher and T. M. Fletcher against Thomas R. Lyon; but each controversy grows out of the same transaction, and they are so interwoven that both cases can, and should for convenience, be disposed of in one opinion.

Pursuant to prior negotiations, on May 11, 1900, the plaintiffs executed and delivered three deeds of conveyance to Thomas R. Lyon. By the first deed plaintiffs conveyed to said Lyon in fee simple about six thousand acres of timber lands in Woodruff County, Arkansas, for a cash consideration of $18,500. These lands contained between sixty-six and sixty-seven million feet of timber.

The second deed, executed by plaintiffs to Lyon for a cash consideration of $800, is as follows (omitting formal parts):

The grantors "do hereby grant, bargain, sell and convey unto the said Thomas R. Lyon, and unto his heirs and assigns forever, the following lands lying in the county of Woodruff and State of Arkansas, towit: (Here lands are described), containing 372 acres.

"The grantors reserving the right to use for grazing or farm purposes the surface of so much of said premises as the said grantee shall not desire to use in connection with any lumber manufacturing, lumbering or logging operations which he may wish to conduct over or upon said premises, or any part thereof; it being understood, however, that said grantee shall in no way be responsible for any damage which may occur on said premises to any property belonging to said grantors.

"It is also understood and agreed that whenever and as soon as said grantee shall have removed all the timber and all the products thereof from the lands described in this deed, and from all other lands (in which lands or the timber thereon the said grantee may now or at any time be interested) in said county or in any adjoining county bought by him from said grantors, or others, and shall have finished all his manufacturing, shipping and other lumbering and logging operations over or upon the same, and shall have removed any tram road or railroad which he may have built thereon, and shall have permanently ceased the operation, for himself or others, of any mill plant he may have erected on said premises, and shall have permanently dismantled and removed such mill plant, then the said grantee shall reconvey by deed to said grantors the said premises herein described.

"At the time of the reconveyance by said grantee as above provided the said premises shall be free and clear of all liens and incumbrances created or suffered by said grantee.

"To have and to hold the same unto the said Thomas R. Lyon and unto his heirs and assigns forever, with all appurtenances thereunto belonging. * * *

"And we hereby covenant with said Thomas R. Lyon that we will forever warrant and defend the title to the said lands against all claims whatever."

This conveyance is referred to in the abstract and briefs as the "mill-site" deed, and it will be thus hereinafter designated for convenience. The lands described in this deed contained about one and one-half million feet of timber.

The third deed executed by plaintiffs to Lyon, for a cash consideration of $500, is as follows (omitting formal parts): The grantors "do hereby grant, bargain, sell and convey unto the said Thomas R. Lyon, and unto his heirs and assigns forever, all the timber, standing or fallen, with the right to cut and remove the same at any time, upon the following lands: (Here follows description of lands), containing 185 acres.

"In further consideration of the above purchase price, the grantors herein hereby convey to said grantee the right and privilege to cross and recross the lands herein described for the purpose of conducting any and all logging and lumbering operations upon the lands herein described, or to cross and to recross the lands herein described for the purpose of conducting any and all logging and lumbering operations on or to and over any other lands, in which lands and the timber thereon the said grantee may now or at any time be interested. To have and to hold the same unto the said Thomas R. Lyon and unto his heirs and assigns forever."

This deed will be hereinafter referred to for convenience as the timber deed, and the lands described therein contained something over 1,000,000 feet of timber. All three of these deeds contained about 69,000,000 feet of timber, and all of them were executed at the same time as a part of the same transaction, and they resulted from the same negotiations.

On December 21, 1900, pursuant to prior negotiations pending at the time of executing the former deeds, plaintiffs for a cash consideration of $21,000 executed to Thomas R. Lyon another deed conveying in fee simple about seven thousand acres of timber lands, which are shown to contain about 61,000,000 feet of timber. It will be thus seen that all of the timber pur-

chased by Lyon from plaintiffs amounted to about 130,000,000 feet.

Plaintiffs simultaneously instituted the present actions in the chancery court of Woodruff County against Thomas R. Lyon on March 31, 1908, seeking in one action to cancel the mill-site deed and in the other to cancel the timber deed. Defendant, Thomas R. Lyon, died while the actions were pending in the chancery court, and they were both revived in the name of the three executors and trustees mentioned in his will. In each case the plaintiffs contended that the rights of defendant to cut or remove timber had expired. The cases were heard separately below, and in each the court found from the evidence that "a reasonable time has not elapsed in which the rights of the defendant to the timber on said lands can be declared forfeited," and dismissed the complaint for want of equity. In the first mentioned suit the plaintiffs also asked that the defendant be required to select a mill-site, and that a commissioner be appointed by the court to lay off a mill-site on the land described in the deed. This relief was also denied. Plaintiffs appealed from both decrees.

In the first-mentioned case, involving the construction of the mill-site deed, the chancellor did not decide that the grant was in fee simple, and that the reservations and conditions therein contained were void; but, inasmuch as counsel for defendants now urge as grounds for affirmance that such should have been the decision, it becomes necessary for us to decide that question. They rely on the case of *Carl Lee* v. *Ellsberry,* 82 Ark. 209, to sustain their contention. There the deed conveyed an estate of inheritance in lands. Words of grant were used which were sufficient, in the absence of qualifying words, to convey an estate in fee simple, and the habendum contained a proviso attempting to limit the estate to one only for life. This court held that the limitation contained in the habendum was repugnant to the granting clause, and was void.

In the present case the reservations, or, speaking technically, the exceptions and the conditions were annexed to the granting clause or premises of the deed as a part thereof and limited the grant. The rule announced in *Carl Lee* v. *Ellsberry, supra,* does not apply, as the whole of the premises of the deed must be

considered together so as to give effect to it as a whole. Moreover, reservations, conditions or limitations not repugnant to the grant may appear in any part of a deed and be equally effectual. 1 Jones on Real Property in Conveyancing, § 624; Martindale on Conveyancing, § 121.

Considering the grant as a whole, it does not convey the title in fee simple. The effect of it is to give to the grantee the beneficial interest only until the timber on that and other lands shall be cut and removed and the products thereof, and also the "manufacturing, shipping and other lumbering and logging operations over or upon the same" shall be finished. No time is specified within which this is to be done; and unless the deed be construed to give an unlimited time, at the option of the grantee, it must be held that a reasonable time was meant. *Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 116; *Hall* v. *Wellman Lumber Co.,* 78 Ark. 408; *Carson* v. *Lumber Co.,* 108 Tenn. 681; *McRae* v. *Stillwell,* 111 Ga. 65; *Hill* v. *Hill,* 113 Mass. 103. The latter, we think, is the proper construction to place upon the deed in question.

Plaintiffs are not entitled to have any part of the lands set apart to defendants for a mill-site. It is not so nominated in the deed, for the effect of that instrument is to grant to defendants the use of the land or any portion of it for "manufacturing, shipping and other lumbering and logging operations," and the reservation to the plaintiffs of the right to use the land for grazing or farming purposes is made subject to the grantee's right of use for the purposes specified. The grantee, according to the terms of the deed, is not to be confined to the use of any part of it.

The timber deed involved in the other case conveys "all timber, standing or fallen, with the right to cut and remove same at any time." Does this mean that the grantee has an unlimited time within which to remove the timber, as contended by counsel? If so, and defendants are allowed to remove it at their own convenience, without regard to lapse of time, then they can, by mere inaction, forever deprive plaintiffs of the enjoyment of the rights which they expressly reserved in the deed. Such is not a reasonable or just interpretation of the language of the contract. *Carson* v. *Lumber Co., supra.*

If the words "at any time" be given their literal meaning, the defendant may await all time to remove the timber; and, if not, the words must be held to mean a reasonable time, without unnecessary delay, the same as if no time at all were specified. We conclude that the latter is the proper interpretation of the language of the deed. This court has said: "What is a reasonable time is generally a mixed question of law and fact. The facts are to be ascertained by an inquiry into the conditions of the land and timber, the obstacles opposing and the facilities favoring, and the conditions surrounding the parties at the time the contract was made. When all the circumstances are considered, and the facts are determined, the law will declare whether reasonable time has expired for cutting and removing the timber conveyed. No fixed rules can be established for ascertaining what is a reasonable time. The facts and circumstances of each particular case must determine this." *Liston* v. *Chapman & Dewey Land Co.*, 77 Ark. 116.

The deeds of plaintiffs, conveying the land and timber to Thomas R. Lyon, were all executed as a part of one transaction, and the quantity of timber conveyed by all of them should be considered in determining what is a reasonable time in which to remove it. The two deeds in controversy expressly recognize the rights of the grantees, with respect to time, to remove all the timber conveyed. All of the deeds conveyed about 130,000,000 feet of timber, and all of it should be considered in determining what is a reasonable time within which the timber in controversy should be removed. The evidence is conflicting, but we are of the opinion that the preponderance is not against the finding of the chancellor that a reasonable time has not elapsed for the removal of the timber. So both decrees are affirmed.

SADLER v. CRAVEN.

Opinion delivered November 29, 1909.

1. COUNTIES—AUTHORITY TO BUILD COURT HOUSE.—Kirby's Digest, § 1011, authorizing the county court to build a court house or jail whenever it shall think it expedient to do so, was not repealed by the subse-

quent statute (Kirby's Digest, § 1502) providing that "no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended." (Page 13.)

2. SAME—POWER OF COUNTY COURT TO MAKE CONTRACTS.—The clause in the Constitution of 1874 (art 16, § 12) which provides that "no money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation," does not affect the power of the county court to make contracts. (Page 14.)

3. SAME—PAYMENT OF DEBTS.—An order of the county court for the erection of a court house is not void for providing that the cost of the building shall not exceed $50,000 in county warrants, since that is the only method whereby counties can pay their debts. (Page 14.)

4. SAME—ERECTION OF COURTHOUSE—IRREGULARITY.—If it be irregular for the county court to provide that the cost of construction of a courthouse shall not exceed a specified sum in county warrants, the remedy therefor is not by injunction, but by appeal to the circuit court. (Page 14.)

Appeal from Logan Chancery Court, Northern District; *J. Virgil Bourland,* Chancellor; affirmed.

Carmichael, Brooks & Powers, for appellants.

An order of the county court for the building of a new court house is void where there has been no levy made for that purpose. No money shall be paid out of the treasury until the same shall have been appropriated by law. Const. 1874, art. 16, § 12. An appropriation cannot be used for any other purpose than that for which it was made. 85 Ark. 171. The extent and exercise of the county court's jurisdiction over the building of court houses is limited and controlled by the statutes. 4 Ark. 483; 61 Ark. 76.

Robert J. White, for appellee.

The Constitution of 1874 does not abrogate sections 1009 to 1025, Kirby's Dig. 63 Ark. 397; 68 Ark. 340; 73 Ark. 523.

McCULLOCH, C. J. The county court of Logan County, at the October term, 1908, made an order for the erection of a new court house at Paris, the county seat, not to exceed the cost of fifty thousand dollars, and appointed a commissioner to execute the order by causing plans to be made and a contract let, subject to the approval of the court. This order was made,

not by the levying court, but by the county court, presided over by the county judge. The levying court, composed of the county judge and justices of the peace, had, on a previous day, voted an appropriation of $2,000 for repairing the old court house.

The county court, in making the order for construction of a new court house, found that the old court house afforded insufficient room, that it was inexpedient to enlarge and repair it, that the erection of a new court house was a public necessity, that it was expedient to erect a new court house, and that the circumstances of the county would permit the levying of a tax sufficient to build it. A contract was duly let, pursuant to this order, for the erection of the new court house, and appellants, citizens and taxpayers of the county, instituted this action in the chancery court to restrain the commissioner and contractors from carrying out the order of the court. The chancellor denied the relief prayed for, and an appeal was taken to this court.

It is contended that the order of the county court is void because the levying court had made no levy of taxes nor appropriation of money to build a new court house.

The statute provides that "whenever the county court shall think it expedient to erect any of the buildings aforesaid (court house and jail), the building of which shall not be otherwise provided for, and there shall be sufficient funds in the county treasury which may be appropriated to the erection of county buildings, or which are not otherwise appropriated, *or if the circumstances of the county will permit such court to levy a tax for the erection of buildings,* such court may make an order for the building thereof, stating in such order the amount to be appropriated for that purpose." Kirby's Digest, § 1011.

This court has held in several cases that the statute in question was not repealed by a subsequent statute providing that "no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended." Kirby's Digest, § 1502; *Durrett* v. *Buxton,* 63 Ark. 397; *Hilliard* v. *Bunker,* 68 Ark. 340; *Bowman* v. *Frith,* 73 Ark. 523.

The case of *Bowman* v. *Frith, supra,* is identical with the present case on the facts. There the levying court of Prairie

County had previously appropriated the sum of $2,500 for the purpose of repairing the old court house, and the county court made an order for the building of a new court house to cost $35,000. Suit was instituted by taxpayers and citizens to restrain the execution of this order of the county court, and this court held that the suit could not be maintained. The same objection was made, as in the present case, that the order of the county court was void because no appropriation had been made by the levying court.

It is insisted, however, that the statute in question is in conflict with a clause of the Constitution of 1874 (art. 16, § 12), which provides that "no money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation;" and that conflict was not considered by the court in the cases above cited. It is true that the question of conflict with the Constitution was not mentioned in the cases referred to, but the court necessarily held that no conflict existed, otherwise the statute would not have been upheld. Nor can we now see any conflict. The Constitution merely provides that "no money shall be paid out of the treasury until the same shall be appropriated by law," etc., but it does not limit the power of the county court to make contracts. The contract made by the county court burdens the county with the obligation to pay, but payment cannot be made without an appropriation. If the county refuses to satisfy an obligation thus created, there are appropriate remedies in the law to compel satisfaction.

Objection is also made to the order of the county court on the ground that it provides that the cost of the new court house shall not exceed the sum of $50,000 in *county scrip*. This means no more nor less than that payment shall be made in county warrants, for the only method whereby counties can pay obligations is by warrants drawn on the treasury. But, even if there was an irregularity in the order of the county court, an appropriate remedy has not been adopted to correct it. This could be done only by an appeal from the order, that court having jurisdiction of the subject-matter. *Bowman* v. *Frith, supra.*

Affirmed.

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

Opinion delivered December 13, 1909.

1. RAILROADS—NEGLIGENCE.—Proof that an engineer allowed his engine to approach a car which plaintiff was loading for a shipper at such a speed that he could not check the engine, and thus caused plaintiff to be injured, was sufficient to justify a finding of negligence. (Page 17.)
2. SAME—WHEN CONTRIBUTORY NEGLIGENCE FOR JURY.—The question whether plaintiff was negligent in remaining in a car when he saw that an engine was about to strike it was properly left to the jury. (Page 18.)
3. INSTRUCTIONS—REPETITION.—The refusal to give an instruction which was asked by appellant was not error where an instruction given by the court specifically covered the same point. (Page 18.)
4. RAILROADS—NEGLIGENCE.—Where an engineer had reason to believe that some one was working in a box car upon a siding, and negligently ran his engine against such car and caused plaintiff to be injured, it was not error to refuse to charge that plaintiff could not recover unless the engineer "knew" that he was in the car. (Page 19.)

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

Kinsworthy & Rhoton, Bridges, Wooldridge & Gantt and *James H. Stevenson,* for appellant.

1. The verdict is not sustained by the evidence. No negligence is shown on the part of the appellant. On the contrary, the evidence shows that the engineer proceeded in the usual manner, gave warning of approach by blowing the whistle at the place he was required by the rules to do so, and applied the brakes at the place where he had been accustomed to apply them, and that the wet condition of the track caused the brakes to lock. No defect is shown either in the brakes or engine. Appellee was guilty of contributory negligence in knowingly exposing himself to the danger by remaining in the car and trying to hold the chairs. 1 Thompson on Negligence, § § 184, 185, 186.

2. The court erred in refusing the second instruction requested by appellant. If the employees in charge of the engine exercised ordinary care and prudence to stop it and make the coupling, and the striking of the car with unusual force was due to such a wet and slippery condition of the rails that the brakes would not stop the engine, then the appellant is not liable.

In the absence of a defect in the brakes, if the failure of the brakes to work was due to the wet rails, then the proximate cause of the injury, recent rain or then falling mist, was an act of God, and no negligence can be imputed to appellant. 1 Cyc. 758.

3. It was error to strike out from the third instruction requested by appellant the words, "and did not know that plaintiff was in the car where he claims to have been injured," and "even though the car was struck with unusual force." There was evidence on which to base the instruction as asked, *i. e.*, that the engineer had no notice or knowledge of plaintiff's being in the car, and the fact that he had no such knowledge, and that there were no circumstances as put him on notice of plaintiff's presence there, was a material circumstance to go to the jury in determining whether, on the whole case, his act was negligent. The unusual force of the impact was not of itself proof of negligence.

E. H. Vance, Jr., for appellee.

If it be true that the rails were wet, the engineer should have gone in on this spur track with his engine under control, instead of going at the unusual speed shown in the evidence. There is nothing on which to base the contention that appellee was guilty of contributory negligence. He had no intimation that the car was coming, nor did he hear any warning. Moreover, he had no reason to anticipate danger, but, from the manner in which the cars had previously been handled, had reason to expect no danger. 78 Ark. 22; *Id.* 220.

McCULLOCH, C. J. The plaintiff, a boy sixteen years of age, instituted this action against the defendant railway company to recover damages on account of physical injuries alleged to have been caused by negligence of defendant's servants in the operation of an engine. Plaintiff was at the time of the injury working for the Ong Chair Factory at Malvern, Ark., and was in a box car situated on a spur track of the defendant running out to the chair factory from the main line of the railroad. Plaintiff, with another employee of the chair factory, was engaged in loading chairs in the car under the direction of a foreman, and the car was then partly loaded when the engine, with cars attached, backed in on the spur track and bumped against the

car with such violence that plaintiff was knocked down, and the chairs thrown on him, and he was severely injured. Braces to hold the chairs in place were usually put in as the chairs were loaded in the car, but at the time the injury occurred the plaintiff and his companion had not yet had time to brace all the chairs loaded. The foreman informed them that the engine of the local freight train was about to back in on the spur track to do some switching, and directed them to hold the chairs so as to prevent them from falling down. This is what the plaintiff and his companion were doing when the impact came. The engine bumped against this car with unusual force, and both of the occupants of the car were knocked down and injured.

Several witnesses say that the car was bumped along from 90 to 110 feet before it stopped. The engineer testified that he was going at the rate of six or eight miles an hour; that just before reaching the car he applied the brakes to slow up, but that, on account of the rails being moist, the brakes locked the drive wheels and caused the engine to slide. He said this was the cause of his striking the car with such force; that it was a misty day, and that it was not an uncommon occurrence for the brakes of the engine to lock the drive wheels on account of wet rails.

Negligence of the engineer is charged in running the engine with such force against the car in which plaintiff was at work. Defendant denied negligence, and also pleaded contributory negligence of plaintiff in remaining in the car when he knew it was to be switched. Plaintiff recovered $600 damages in a trial before a jury, and defendant appealed.

The evidence, we conclude, is sufficient to sustain the charge of negligence. It is true that the uncontradicted testimony of the engineer was that he applied the brakes in time to slow up the engine before reaching the car in which plaintiff was at work, and that the wet rails caused the brakes to lock the drive wheels and let the engine slide, but the testimony of the engineer also shows that the engine was running at six or eight miles an hour along the spur track when he knew, or had reason to believe, that the condition of the track would prevent him checking the speed on approaching the car. It was not uncommon, he said, for the brakes to lock the drive wheels when the track was moist or wet. He knew that the rails were wet that day.

He knew, or ought to have known, that the car at the chair factory was occupied by men at work loading chairs, and he should not have run in on the track at that rate of speed, or he should have attempted to check the speed before he approached the car. These circumstances warranted the jury in finding that the engineer was guilty of negligence, notwithstanding the fact that when the engine struck the car the drive wheels were locked, so that at that time he could not stop the engine or slow up.

It is insisted that the plaintiff was guilty of contributory negligence in remaining in the car for the purpose of holding the chairs when he knew that the engine was backing against the car. This did not necessarily constitute negligence. It was the unusual force of the impact that caused his injury. If the engine had come back against the car in the usual way for making the coupling, the plaintiff doubtless would not have been injured, for he might have been able to withstand the force of such usual impact. The jury could have so found from the testimony, and the question was properly submitted to them.

Error of the court is also assigned in the refusal to instruct the jury to the effect that if the plaintiff knew of the approach of the engine and remained in the car, he assumed the risk of the danger. This instruction was properly refused. The plaintiff did assume the risk of danger from ordinary jolts or impacts, but not from unusual ones caused by negligence of the servants of the company.

Error is assigned in refusing the following instruction asked by defendant: "2. If you believe from the evidence that the engine which struck the car in which plaintiff claims to have been injured was approaching said car in an ordinarily prudent manner, and that the brake did not take effect, and the speed of the engine could not be sufficiently checked because of wet rails, and that the engineer acted in an ordinarily prudent manner in undertaking to make the coupling with said car, then you are instructed that the defendant is not liable, even though said car was struck with unusual force, and plaintiff injured as alleged, and your verdict should be for the defendant."

Some of the judges are of the opinion that the instruction was misleading, in that the jury might have understood it to mean that, if the brake did not take effect because of the condi-

tion of the wet rail, that would exonerate the engineer from the charge of negligence, even though he could, by the exercise of proper care, have checked the speed of the engine before he went on the spur track and approached the car in which plaintiff was working. Be that as it may, we think that defendant's side of the case was fully presented in the following instruction: "If you believe from the evidence that the servants in charge of the train which caused the injury did what men of ordinary prudence and caution would have done under the circumstances, then the defendant was not guilty of negligence, and is not liable." This instruction referred the jury to all the circumstances proved in the case, and in effect told them that if the engineer did what a man of ordinary prudence and caution would have done under the circumstances, his conduct did not constitute negligence and the company was not liable. This instruction was itself sufficiently specific, and submitted the question of negligence arising from the conduct of the engineer fully to the jury.

Error is also assigned in the ruling of the court in modifying the following instructions asked by the defendant: "3. If you believe from the evidence that defendant's employees gave a signal of the approach of the engine, and did not know that plaintiff was in the car where he claims to have been injured, then defendant is not liable for plaintiff's injuries, even though the car was struck with unusual force, and your verdict should be for the defendant." This instruction was incorrect, and the court properly refused to give it in the form in which plaintiff requested it. The engineer may not have known that any one was in the car at the time, yet he had reason to believe that employees of the chair factory were working there at that time. He had no right under the circumstances to act upon the assumption that no one was there and commit an act of negligence which resulted in serious injury to those at work.

Other errors are assigned, which have been duly considered by the court, but we find that the case was fairly presented to the jury upon legally sufficient evidence. The judgment is correct, and is affirmed.

BROWNSON v. STATE.

Opinion delivered December 20, 1909.

1. LIQUORS—CLANDESTINE SALES—DEVICE.—The sale of prohibited liquor, either openly or secretly, under guise of a deceptive name, constitutes a "device" within the meaning of the statute against the clandestine sales of liquors. (Page 22.)
2. INSTRUCTION—ABSTRACT PROPOSITION.—Refusal of the court to give an instruction which was not applicable to the evidence was not prejudicial. (Page 23.)
3. JURY—MISCONDUCT—TASTING LIQUOR.—If it be error to permit the jurors in a case to taste liquor seized upon defendant's premises for the purpose of discovering its character, such error was not prejudicial if it is undisputed that the liquor is of the kind whose sale is prohibited by law. (Page 23.)

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

J. A. Rice, for appellant.

The mere keeping of malt tonic for sale openly and without the aid or intervention of a device of some kind is not unlawful. 45 Ark. 173. The stuff sold or kept for sale must contain the elements necessary to constitute an intoxicating liquor in such form as it may be used as a beverage. 69 Ark. 361.

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

To sell malt liquor indirectly, as by furnishing it as a medicine, rather than directly over the counter, is a device, pure and simple, such as the law was intended to prohibit. 22 S. W. 370; 85 N. W. 12; Black on Intox. Liq., § § 405 and 456. That the officers found either liquor or a United States license on the premises searched makes a *prima facie* case against the defendant. 77 Ark. 143; 83 Ark. 102; 88 Ark. 393. The law forbids the maintaining of a place where liquors are either sold or given away. Kirby's Dig., § § 5140 to 5148; 86 Ark. 567. The statute prohibits the sale of such drinks as a beverage, whether intoxicating or not. Kirby's Dig., § 5093; 56 Ark. 444; 69 Ark. 360. An objection to an instruction cannot be heard here for the first time. 1 Ark. 349.

McCULLOCH, C. J. Appellant was arrested and tried before a justice of the peace in Benton County upon information filed

by the prosecuting attorney charging him with violating the "blind tiger" statute. In the information appellant is charged with using and controlling a certain house in the town of Monte Ne in which he is engaged in conducting a drug business, and that openly and secretly by means of device he unlawfully did sell and give away, and cause to be sold and given away, and kept and allowed to be kept for sale and to be given away, alcoholic, ardent, vinous, malt and fermented liquors and intoxicating spirits and compounds, etc. He was convicted before the justice of the peace, and on appeal to the circuit court a trial before a jury resulted in a conviction, and he appeals to this court.

Upon the filing of the information before the justice of the peace, a warrant was issued for the arrest of appellant, and an order for the search of his premises, and, upon search being made, the officers found in the house a large number of bottles of liquor called "Shuster's Malt and Hop Liquid," stored under the counter. The bottles were in a barrel, which originally contained 100 bottles, but which had only 80 bottles in it when found. This liquor was proved to be nothing more nor less than beer, or, as the witnesses describe it, a cheap grade of beer. It is also conceded to contain a small per cent. of alcohol. The officer also found in the house a special tax stamp issued by authority of the United States to appellant, denoting the payment of special tax on the sale of liquor. This receipt was exhibited to the officers by appellant. The statute under which appellant was tried is as follows:

"Sec. 5140. Any person owning or using or controlling any house or tenement of any kind who shall sell or give away, or cause or allow to be sold or given away, or keep or allow to be kept for sale or to be given away, any alcohol, ardent or vinous spirits or malt liquors, or any compound or tincture commonly called bitters or tonics, whether the same be sold or given away openly or secretly, by such device as is known as 'the blind tiger,' or by any other name or under any other device, shall be deemed guilty of a misdemeanor."

"Sec. 5143. Whenever any person shall file with any justice of the peace, or the mayor of any town or city, a statement, under oath, that he has reason to believe, and does believe, that the person named in the affidavit has violated any

of the provisions of this act, it shall be the duty of the prosecuting attorney, or the attorney so appointed to represent him or the State, to file an information before said justice of the peace or mayor, who shall issue thereon a writ for the arrest of the person so charged and take him before the officer issuing such writ for trial."

"Sec. 5144. If the person making the affidavit shall state the house, room or place in which he believes the things herein prohibited are sold or given away, the officer to whom the writ is delivered shall forthwith enter such house and the different rooms and apartments therein, whether opened or closed, whether by day or by night, and search for such spirits or liquors; and if any be found therein, or a United States license to sell such liquors, it shall be *prima facie* evidence of the guilt of the party owning or controlling the house; and if he find any person else in charge of such liquors, he shall arrest him also and bring him before the officer issuing the writ for trial."

It is insisted, in the first place, that the evidence does not sustain the verdict, but we entertain no doubt that there was sufficient evidence. It will be noted that the statute quoted above provides that, upon search of the premises, "if any (liquor) be found therein, or a United States license to sell such liquors, it shall be *prima facie* evidence of the guilt of the party owning or controlling the house." It is undisputed that appellant owned or controlled the house, and was conducting a drug business therein. The liquor was found therein, as well as the special tax stamp, or "United States license," as it is termed in our statute. Thus it will be seen that a *prima facie* case was made out on two grounds. The evidence shows beyond doubt that the liquor was of the kind the sale or giving away of which is prohibited by law. *Bradshaw* v. *State*, 76 Ark. 562. There is nothing in the evidence to overcome this *prima facie* case, for the testimony plainly shows that the liquor was kept there for sale. At least one witness testifies that he bought some of the stuff from appellant at his place of business, and appellant admitted to the officers that he kept it there for sale, and expected to sell more of it "when the summer trade opened up."

The sale of the prohibited liquor, either openly or secretly, under guise of a deceptive name, constituted a "device" within

the meaning of the statute. *Crawford* v. *State,* 69 Ark. 360.

Appellant complains of the refusal of the court to give the following instruction: "The court instructs the jury that a sale or gift of any of the intoxicants mentioned in the charge to patients or persons at places other than the business place of defendant, and of which he is charged of running as a 'blind tiger,' would not authorize the jury to convict the defendant of running a blind tiger."

Appellant was not prejudiced by the refusal to give this instruction, because there was no testimony introduced tending to show sales at other places, and appellant was not charged in the information with sales made at other places. Moreover, the court did instruct the jury that "the mere furnishing of a sick patient with liquor for a tonic would not of itself constitute the offense charged." The court in its instruction confined the consideration of the jury to the offense prescribed by the statute quoted above and charged in the information.

The record shows that during the progress of the trial a bottle of the liquor seized by the officers was exhibited to the jury, and several of them examined the bottle and tasted its contents. This was objected to by appellant's counsel, and is now assigned as error, on the ground that it gave the jurors an opportunity to discover for themselves and upon their own judgment whether or not the liquor was intoxicating. No misconduct of the jury is shown in drinking any appreciable quantity of the liquor. It only appears that they examined and tasted it merely for the purpose of discovering its character. We do not deem it necessary to pass upon the question whether it was error to permit the jurors to examine and subject it to the analysis of their own taste and smell for the purpose of determining its character and qualities, as we find no prejudice in this case resulting from such course. As we have already said, it is undisputed that the liquor was of the kind which the law forbids the sale or giving away of. Therefore there could be no prejudice in allowing the jury, by subjecting it to taste, to determine whether the liquor was of this kind or not.

We find no prejudicial error in the record, and the judgment is affirmed.

SHERMAN v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered December 20, 1909.

1. RAILROADS—INJURY AT CROSSING—INSTRUCTION.—Where plaintiff's deceased was killed by defendant's train while he was lying or sitting on the track at a highway crossing, an instruction which told the jury that deceased was a trespasser upon the track was not prejudicial, since he was wrongfully there at the time the train was passing. (Page 27.)
2. SAME—CONTRIBUTORY NEGLIGENCE.—Although one killed by the train of a railway company is presumed to have been killed by the company's negligence, no recovery can be had therefor if the deceased was guilty of contributory negligence, unless his situation was discovered by the trainmen in time to avoid killing him, in which case they were bound only to use ordinary care to avert injury. (Page 27.)
3. SAME—CONTRIBUTORY NEGLIGENCE AT CROSSING.—The fact that one is upon a railway track at a highway crossing does not relieve him of the duty to exercise care to avoid danger. (Page 27.)
4. SAME—NEGLIGENCE OF PERSON ON TRACK—INSTRUCTION.—It was not prejudicial error to charge the jury that it was the grossest sort of negligence for the deceased to sit down upon the railroad track where he knew trains frequently passed and were likely to pass at any moment. (Page 28)
5. SAME—DUTY AS TO KEEPING LOOKOUT.—The failure of the fireman on a locomotive to keep a lookout for persons on the track does not constitute negligence if the engineer was keeping a lookout and was able to discover deceased as quickly as the fireman could have seen him. (Page 28.)

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

H. A. Parker, for appellant.

Trains should not run thirty miles per hour where people are constantly using the track, as at public crossings. 81 Ark. 191.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellees.

A man has no more right to sit down on a railroad at a crossing than at any other place on the track. 49 Ark. 257. One injured while sitting on a railroad track at a crossing is a trespasser. 50 Ark. 477. Going upon a railroad track at a crossing without looking and listening is negligence *per se.* 65 Ark. 235; 54 Ark. 431; 56 Ark. 457; 62 Ark. 158. An objection to an

instruction must be preserved in the motion for a new trial. 78 Ark. 374. It is not necessary for both the engineer and fireman to keep a lookout, especially on straight track. 62 Ark. 182. The right of the public in a highway crossing a railroad is simply a right of passage. 65 Mich. 186; 8 Am. St. 876; 28 Am. & Eng. R. Cas. 633.

BATTLE, J. On the 6th day of March, 1908, while Tweed Sherman was sitting or lying upon the railway track of the Chicago, Rock Island & Pacific Railway Company, at a highway crossing, a train of that company ran over and killed him, he surviving only a short time. John Sherman administered upon the estate of the deceased, and in his capacity of administrator brought this action against the railway company and Charley Freeze, the locomotive engineer of such train, to recover damages caused by such injury. The defendants answered; and plaintiff and defendants adduced considerable evidence to sustain their respective contentions. It is unnecessary to set out this evidence at length in this opinion. For it is not for us to decide whether the verdict of the jury was in accordance with the preponderance of the evidence as we find it, but whether there was evidence adduced in the trial which was legally sufficient to sustain it. There was evidence adduced which tended to prove the following facts: On the 6th day of March, 1908, Tweed Sherman sat or lay upon the railway track of the defendant railway company at a highway crossing. While in that position, a train of the defendant ran over him and inflicted injuries of which he died. The engineer of the train kept a lookout, but failed to discover him in time to avoid injuring him; but when he did, he gave alarms and made reasonable efforts to warn him of his danger, and did all he could to avoid injuring him by stopping the train, without success. The deceased could have prevented the injury by the exercise of vigilance, which he failed to do.

Over the objections of the plaintiff the court instructed the jury, in part, as follows:

"No. 4. You are instructed that the plaintiff's intestate, Tweed Sherman, was guilty of negligence in sitting down upon the railroad track of the defendant, C., R. I. & P. Ry. Co.; and if you find from the testimony that plaintiff's intestate, Tweed Sherman, was sitting down by or on the railroad track, and he was injured, he was a trespasser, and the only duty required of either

of the defendants, with reference to him, was not to wilfully or maliciously injure him; and if you find from the testimony that, after the engineer or fireman discovered him on the track, they used ordinary care to prevent the injury, and by the use of ordinary care were not able to stop the train in time to avoid injuring him, after discovering him upon the track, and discovering that he was a live human being, your verdict will be in favor of the defendants.

"5. You are instructed that the deceased was a trespasser upon the track of the railroad company, and that the defendant, Charley Freeze, was only required to exercise ordinary care in the running of its train at the time of the accident; and if you believe that at the time of the accident he was exercising ordinary care and prudence in the running of his train, then you will find for the defendant, Charley Freeze.

"6. You are instructed that the engineer and fireman were not bound to stop the train as soon as they saw an object upon the track; and if they honestly thought it was an inanimate object or a hog, they had a right to run on without slacking the speed of the train, and after they discovered that the object was a man, and that he was alive, if you find that they did discover that it was a man and was alive, they had the right to assume that he would heed the danger signal, and get out of the way and, after giving the danger signal, if you believe they did give the danger signal, as soon as they discovered the object was a man and alive, then, if they discovered that he was not going to get off or heed the danger signal, it was their duty to use ordinary care to stop the train before striking him; and if you believe that they did so, and by use of such care were unable to stop the train in time to avoid injuring him after discovering that he was not going to get out of the way, your verdict will be for the defendant. You are instructed that it was the grossest sort of negligence for the deceased, Tweed Sherman, to sit down upon the railroad track where he knew trains frequently passed and were likely to pass at any moment.

"14. You are instructed that it is not necessary for both the fireman and engineer to keep a lookout, nor is it necessary for both of them to use the means provided for stopping the trains or giving the alarm; and if you find that the engineer kept a lookout and gave the alarm, and also (used) the means provided

for stopping the train, it was not necessary for the fireman to do anything."

The jury returned a verdict in favor of the defendants. Judgment was rendered in their favor, from which the plaintiff has appealed.

Plaintiff objected to the instruction numbered 5 and copied in this opinion, because it told the jury "that the deceased was a trespasser upon the track of the railroad company." He insists that deceased was no trespasser because he was upon a highway crossing. This is not true. He was wrongfully there at a time the train was passing. The railway company had the right to operate its trains over its tracks, and the public had the right to the use of the crossing as a highway. Neither had the right to interfere with a proper use of it by the other. In this case the deceased was not using it as a highway, but was interfering with the proper use of it by the company, and had no right to be there at that time. The use of the word "trespasser" in the instruction was not prejudicial. *St. Louis, I. M. & S. Ry. Co.* v. *Monday,* 49 Ark. 257.

The same objection is urged against instruction number 4. This court has repeatedly held that, "although one killed by the train of a railway company upon its track is presumed to have been killed by the company's negligence, no recovery can be had therefor if the deceased was guilty of contributory negligence in being upon the track, unless his situation was discovered by the trainmen in time to avoid killing him, in which case they were bound only to use ordinary care to avert injury." *St. Louis & San Francisco Railway Company* v. *Townsend,* 69 Ark. 380, and cases cited; *Barry* v. *Kansas City, Fort Scott & Memphis Railroad Company,* 77 Ark. 401, and cases cited; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Freeman,* 36 Ark. 46; *Little Rock & Fort Smith Railway Co.* v. *Parkhurst,* 36 Ark. 371; *Little Rock, M. R. & T. Railway Co.* v. *Haynes,* 47 Ark. 497; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Taylor,* 64 Ark. 364.

The fact that deceased was upon a highway crossing did not relieve him of the duty to exercise care to avoid danger. *Southwestern Telegraph & Telephone Co.* v. *Beatty,* 63 Ark. 65.

The statute making it the duty of all persons running trains to keep a lookout (Kirby's Dig., § 6607) has not changed this

rule. This court in speaking of this statute in *St. Louis, Iron Mountain & Southern Railway Co.* v. *Leathers,* 62 Ark. 235, said:

"In our opinion, it makes the failure to keep a constant lookout by the employees of a railroad company negligence, and puts the burden upon the railroad company to establish the fact that it has kept such lookout. This is the extent of the change made in the law by the statute, which in our opinion does not, in such cases as this, abrogate the doctrine of contributory negligence. It has been repeatedly held by this court that one who is injured by mere negligence of another cannot recover at law or equity any compensation for his injury if he, by his own or his agent's ordinary negligence or wilful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence. * * * This is a doctrine which, according to the great weight of authority, seems founded in reason and justice, and which, in our opinion, the act referred to was not intended to and does not abrogate."

Instruction numbered 8, under the evidence in this case, was proper. The word "gross" used in it was superfluous, but not prejudicial.

Plaintiff's objection to instruction numbered 14 is that it says it was not necessary for the fireman and engineer on the train that killed Tweed Sherman to keep a lookout. It was not if the engineer was so situated that he could have seen the deceased as well as the fireman. *St. Louis Southwestern Railway Co.* v. *Russell,* 62 Ark. 182. The evidence in this case shows that the engineer could and did discover the deceased upon the railroad track as soon as the fireman. This case is unlike *St. Louis, Iron Mountain & Southern Railway Co.* v. *Denty,* 63 Ark. 177, cited by appellant. In that case it did not appear that a lookout by the fireman was unnecessary. We find no reversible error in the instructions of the court. We have considered other questions presented by briefs of counsel, but do not deem it necessary to notice them in this opinion. There was evidence sufficient to sustain the verdict. Judgment affirmed.

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

Opinion delivered December 13, 1909.

1. RAILROADS—LIABILITY FOR KILLING OF DOG.—Dogs are personal property, for the negligent killing of which a railway company is liable. (Page 32.)
2. SAME—PRESUMPTION OF NEGLIGENCE.—Proof that a dog was killed by the running of a train makes a *prima facie* case of negligence on the part of the railroad company. (Page 32.)
3. SAME—EVIDENCE OF NEGLIGENCE.—Where the engineer whose engine ran over plaintiff's dog testified that he first discovered the dog when it was only 100 feet in front of his engine, and that he could not thereafter have stopped the train in time to avoid killing it, but other witnesses testified that the dog ran in front of the engine for half a mile, the jury were justified in finding that the engineer was negligent in failing to keep a lookout. (Page 33.)
4. SAME—NEGLIGENCE—WHEN INSTRUCTION INVADES JURY'S PROVINCE.—It was not error to refuse to instruct that a dog is an animal of superior intelligence, and that an engineer would be justified in believing that a dog would leave the railroad track before being struck by an approaching train. (Page 33.)
5. SAME—NEGLIGENCE TOWARD DOG.—An employee of a railroad company can not rely upon the quickness and celerity of a dog to absolve it from the duty and care to avoid running over the dog. (Page 34.)
6. TRIAL—INSTRUCTIONS—ASSUMING DISPUTED FACT.—It was not error to refuse an instruction which assumed a disputed fact. (Page 35.)

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

Kinsworthy & Rhoton and *James H. Stevenson,* for appellant.

The testimony of the engineer was uncontradicted, and the jury were not warranted in disregarding it. 78 Ark. 234; 80 Ark. 396; 89 Ark. 120. The presumption of negligence is rebutted when it is shown that the engineer, after discovering the dog, could not have prevented the injury. 80 Ark. 396; 78 Ark. 234; 69 Ark. 619. The engineer had a right to presume that the dog would leave the track. 37 Ark. 593; 69 Ark. 619. There is no liability for killing a dog where the engineer has turned loose the steam cocks to frighten it away. 33 S. E. 466. The same degree of diligence is not required as in case of other animals. Elliott, Railroads, § 1190; 40 Fed. 281; 136 N. C. 554; 100 Tenn. 317; 40 L. R. A. 518; 66 Am. St. R. 755; 53 S. E. 534.

J. C. Ross, for appellee.

The presumption of negligence from killing a dog is the same that arises in other stock cases. 117 S. W. 779; 63 Ark. 636. The engineer's testimony that, after discovering the dog's peril, he did not have time to sound the alarm, without going into particulars, will not overcome the presumption of negligence, as the jury might find to the contrary, if all the facts were before them. 76 Ark. 100. Appellee's dog was property, for the negligent killing of which appellant is liable. 63 Ark. 643; 72 Ark. 23.

FRAUENTHAL, J. This was an action brought by the plaintiff below, R. C. Rhoden, against the St. Louis, Iron Mountain & Southern Railway Company for the recovery of damages for the alleged negligent killing of a fine blooded bird dog. The dog was killed about 12 o'clock on October 22, 1907, by one of defendant's fast mail trains. The testimony on the part of the plaintiff tended to prove that just after the train had passed Perla, a station on defendant's line of railroad, the dog was seen upon the railroad track a short distance in front of the train and trotting or running down the track in the same direction in which the train was moving. The dog continued to run in this manner in front of the running train for a distance of about one-half a mile, when it was overtaken by the train and killed. For this entire distance the track was straight, and the dog could readily have been seen by the employees in the cab of the engine. The employees did not give any alarm by whistle, and did not ring the bell, and did not open the cylinder cocks; and as one of the witnesses expressed it, the train "just came right on and hit the dog without doing anything."

The engineer testified that when he first noticed the dog it was running along by the side of the track, and then got on the track at a point about 100 feet in front of the engine; that the train was running at the rate of fifty miles an hour, and that he could not have stopped the train in time to have avoided striking the dog. He stated that when he observed the dog he kicked open the cylinder cocks in order to frighten it from the track; that he did not blow the whistle or ring the bell, because he thought that the opening of the cylinder cocks was the best method to frighten the animal from the track; that he did

not attempt to slacken the speed of the train because at the rate of speed that the train was moving he could not have prevented striking the dog.

On the part of the plaintiff, the court in effect instructed the jury that it was the duty of the defendant to keep a constant lookout for persons and property upon its tracks, and that if the dog was killed by reason of the failure to keep such constant lookout the defendant would be liable. The following instruction was also given at the request of the plaintiff:

"The court instructs the jury that it was the duty of the servants and agents of defendant in charge of the engine of said train to use ordinary care to avoid killing plaintiff's animal by resorting to the usual means of sounding the stock alarm, ringing the bell or opening the cylinder cocks to scare said animal off the track; and if you find that said servants failed to use ordinary care to frighten said animal off the track, and that such failure resulted in the killing of plaintiff's dog, then your verdict must be for the plaintiff."

At the request of the defendant the court in effect instructed the jury that the engineer in charge of the train was under no obligation to try to stop the train until he saw that the dog was in a place of danger and would be injured unless he did stop; and, after discovering the peril of the dog, if he did everything reasonably within his power to frighten the dog from the track, the plaintiff could not recover. It also gave to the jury at the request of the defendant the following instruction:

"5. If you believe from the evidence that the engineer in charge of defendant's train which struck plaintiff's dog was keeping a constant lookout for persons and property on the railroad track, and that, after he saw plaintiff's dog and became aware of its perilous situation, he did everything reasonably within his power to frighten it from the track, and that it was impossible for him to stop his train by the use of reasonable diligence in time to avoid striking said dog, then your verdict should be for the defendant."

The defendant asked the court to give to the jury the following instructions, which were refused:

"1. Under the pleadings and the proof in this case you will return a verdict for the defendant.

"3. You are instructed that when the engineer in charge of defendant's train saw plaintiff's dog running along beside the railroad track he had a right to presume that the dog would leave the track before being struck, and he was warranted in acting upon that belief. If you believe from the evidence that after he became aware of the dog's peril he did what he reasonably could to avoid striking it, he was not negligent, and your verdict should be for the defendant.

"4. You are instructed that the same rule does not apply in the case of dogs as in the case of live stock. A dog is an animal of superior intelligence, and possesses greater ability to avert injury; and the presumption is that he has the instinct and ability to get out of the way of danger, unless his freedom of action is interfered with by other circumstances at the time and place. On this account, the diligence and care which locomotive engineers owe to the owners of dogs is placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties, and the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger, and would get out of the way in time to avoid injury.

"6. There is no presumption of negligence on the part of the defendant from the fact of killing a dog.

"7. If you believe from the evidence that plaintiff's dog was killed while on defendant's track, you are instructed that plaintiff is not entitled to recover therefor, unless you further find that defendant's engineer discovered the dog's peril, and thereafter injured her wilfully, wantonly and recklessly."

The jury returned a verdict in favor of the plaintiff for $50, and the defendant prosecutes this appeal from the judgment entered thereon.

This court has held that dogs are personal property for the negligent killing of which a railway company is liable. And, under the statute making all railroads responsible for all damages to persons and property done or caused by the running of trains (Kirby's Dig., § 6773), this court has declared that the killing of a dog by the running of a train was *prima facie* evidence of negligence on the part of the railroad company. *St. Louis, I. M. & S. Ry. Co.* v. *Stanfield,* 63 Ark. 643; *St. Louis,*

I. M. & S. Ry. Co. v. *Philpot,* 72 Ark. 23; *El Dorado & B. Ry. Co.* v. *Knox,* 90 Ark. 1.

It will thus be seen that the right of property in dogs is fully recognized, and that for a wrongful injury to that species of property a right of recovery is given to the owner. In this regard there is no distinction made between dogs and other property, and therefore the owner thereof is entitled to have this species of property receive the same care that is due to other species of property. The railroad company owes to the owner of a dog the duty to keep the constant lookout for the protection of that character of property which is required by section 6607 of Kirby's Digest, and is liable to such owner for any injury to such property caused by a negligent failure so to do. The court did not therefore commit error in instructing the jury to that effect. But the defendant urges that in this case there was no testimony showing that there was any neglect of any of its employees to keep such constant lookout. We think that there was testimony upon which to base such an instruction. The engineer testified that when he first observed the dog on the track it was only about 100 feet in front of the engine, and that he did not see the dog on the track until then. But two witnesses on the part of plaintiff testified that the dog was running down the track in front of the engine for a distance of probably one-half a mile. If the dog was on the track for that distance in front of the train and the engineer did not see it, then this was sufficient testimony upon which to submit to the jury the question as to whether or not the engineer was keeping a constant lookout.

It is claimed by the defendant that the dog is a very sagacious animal, exceedingly alert and active, and possesses greater ability to avoid injury than almost any other animal. It is urged, therefore, that the court should have instructed the jury to this effect, and should have given the above instruction number 4, asked for by the defendant. But we think that this instruction invades the province of the jury to determine for themselves questions of fact, and that it does not correctly state the degree of care that should be exercised to avoid injuring this character of property. The defendant was only respon-

sible for the negligent killing of the dog, and that negligence would arise from the omission to do something which a reasonably prudent man would have done under all the circumstances of the case, or the doing of something which under such circumstances such a man would not have done. The idea of negligence presupposes the existence of a duty to protect from injury and the failure to perform that duty, from which an injury results. *Hot Springs Railroad Company* v. *Newman,* 36 Ark. 607; *Fort Smith Oil Co.* v. *Slover,* 58 Ark. 168.

This court has held that the killing of a dog by the running of a train is *prima facie* evidence of negligence on the part of the railroad company. This in effect makes it the duty of the railroad company to give to the dog the same care that is due to other species of property under similar circumstances. In this respect there is no distinction made between the dog and other animals. The same care that would be used by an ordinarily prudent man under similar circumstances in regard to other animals should be used in regard to the dog. The mere fact that the dog may be thought by many people to be more intelligent than other animals, and is also alert, would not absolve the railroad company from using that care in the protection of the dog. It owes the same duty to use the same character of care in protecting the dog from injury that it owes to other animals.

In the case of *St. Louis, Ark. & Texas Railway Co.* v. *Hauks,* 78 Tex. 300, it is held that a railroad company is liable in damages for the killing by its engine of a dog which is trespassing on the railroad track if the exercise of ordinary prudence and care on the part of the engineer would have prevented the injury. In the case of *Meisch* v. *Rochester Electric Ry. Co.,* 72 Hun 604, it was held that the employee of the company was not justified in running down a dog trespassing on the track if by reasonable diligence he could have discovered and averted the injury.

In the case of *Citizens' Rapid Transit Co.* v. *Dew,* 100 Tenn. 317, it was held that the employee of the company could not rely upon the quickness and celerity of a dog in order to absolve it from the duty and care to prevent running over the dog; and that the company was liable for the killing of the

dog caused by the negligence of its servant in charge of the train.

We do not think the court erred in refusing to give said instruction number 4 asked for by the defendant.

Nor do we think that any prejudicial error was committed by the court in refusing to give the above instruction number 3 asked for by the defendant. In the first portion of the instruction it assumes as a fact that the dog was running along the side of the track, when this question of fact was controverted; and the latter part of the instruction is fully covered by other instructions that were given by the court.

And the court was right in its rulings upon the other instructions which were asked for by the defendant, and which it refused to give. There is no complaint made of the amount of the recovery. We find no prejudicial error in any of the rulings of the court upon the instructions, and we find that there is substantial evidence in the record to sustain the verdict.

The judgment is accordingly affirmed.

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

Opinion delivered December 13, 1909.

CARRIERS—EXPULSION OF PASSENGERS—DAMAGES.—A passenger is not entitled to recover damages for his expulsion from a train after he had tendered a mileage book or ticket for passage between points within the State, if at the time he entered the train he knew that it was a condition of the issuance of such mileage book that it could not be used for passage between intrastate points after the rate of fare in the State was raised to three cents per mile, and he knew that such raise had been made.

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action of tort brought by C. L. Brown against the St. Louis, Iron Mountain & Southern Railway

Company to recover damages for ejection from one of its passenger trains.

Plaintiff was a citizen of Arkadelphia, Arkansas, which is a station on defendant's line of railroad. On Saturday night of the 17th day of October, 1908, a clerk at the railroad office at said station came into the hotel where Brown was eating supper. Plaintiff asked him what he had in the way of mileage when the three cent rate went into effect. The clerk said that they would sell him a thousand miles for two cents per mile, and Brown replied that he would take it on Monday. On Monday morning, the 19th inst., the day after the three cent rate went into effect, Brown went to the station and asked the agent what he had in the way of mileage under the three cent rate, and the agent replied: "I will give you a thousand miles for two cents." Brown paid the agent $20 and received a thousand mile ticket or mileage book. The mileage book contained the following printed provisions: "Sec. 10. If the maximum rate of three cents per mile is charged in any of the following States, namely, Nebraska, Kansas, Oklahoma, Missouri, Illinois or Arkansas, this ticket will not be honored thereafter for passage in any such State or States, but will be redeemed."

Plaintiff was received as a passenger on defendant's trains on this ticket or mileage for three days without question. Plaintiff says that when he bought the mileage book nothing was said to him about it only being good for interstate passage. That he never read the conditions on it until 3 or 4 days after its purchase. That he was refused passage on one of defendant's trains between points in the State of Arkansas after he had ridden on it for three days. That he then went to the agent to have it redeemed, and that the agent told him that he could not redeem it, but would have to send it in to the general offices at St. Louis, Mo., for redemption. The agent said that it would probably take three weeks. Plaintiff wanted to go to Texarkana at once, and refused the offer.

On the 27th of October, 1908, plaintiff boarded a south-bound passenger train of defendant for Texarkana, and the mileage book was honored. On the 29th inst. he boarded the north-bound passenger train of defendant to return to Arka-

delphia; when the train auditor came around to take up tickets, he refused to receive the mileage book for passage, and told plaintiff that the train stopped at Hope, and that he would have to get off there unless he paid his fare. When the train reached Hope the train auditor took plaintiff's baggage from the train, and plaintiff at the command of the auditor got off the train. Plaintiff admits that he knew the conditions in the mileage book as to it not being good for passage between points in this State when he boarded the train at Texarkana for Hope on the day he was ejected from the train; but, as above stated, he did not know it when he purchased the mileage book. On the 30th inst. plaintiff boarded defendant's train at Hope for Arkadelphia, and the train auditor refused the mileage. Some words passed between him and the plaintiff about it, and the matter was referred to the conductor, who advised that it be honored in order to save the railway company trouble. He was then permitted to ride to Arkadelphia. The railroad ticket agent at Arkadelphia testified that plaintiff wanted to buy the book before the three cent rate went into effect, and wanted to come down to the station on Sunday and pay for it. The agent told him that he could wait until Monday, the 19th, and that he would date the book the 18th at the time the book was bought. The agent testifies that he said to defendant: "I don't know whether this book will do you any good or not. They may not accept it. If they don't, though, you can get your money back on it." Plaintiff denies that this was said to him. The agent further says that when he learned that plaintiff was going to bring this suit he wired the general passenger agent for instructions, and that, pursuant to the instructions received, he redeemed the mileage book.

The jury returned a verdict for the plaintiff for the sum of $50, and the defendant has appealed from the judgment rendered on the verdict.

Kinsworthy & Rhoton and *James H. Stevenson,* for appellant.

When a person buys a ticket at a reduced rate, he will be held bound by the conditions printed thereon. 4 Ell., Railroads, § 1593. One who voluntarily suffers an expulsion from a railway coach in order to lay a foundation for a damage suit can-

not recover damages for his humiliation. 54 Ark. 354; 82 Ark. 128; 77 Ark. 20. The plaintiff was bound by his contract, whether he read it or not. 132 U. S. 146; 4 Ell., Railroads, § 1593.

Callaway & Huie, for appellee.

Appellee was not required to know the rules of the company. 8 Am. St. R. 859. The railway company should have honored his mileage. 65 Ark. 177; 88 Ark. 282.

HART, J., (after stating the facts.) We do not think the plaintiff is entitled to recover in this case. One of the conditions of the ticket was that it could not be used for passage between points in the State of Arkansas after the maximum rate of three cents per mile was charged. The change was made pursuant to the terms of an order of injunction issued by the United States Circuit Court, and a three cent rate for intrastate travel was put into effect on the 18th day of October, 1908; and plaintiff knew of this fact before he boarded the defendant's train for passage on the day he was ejected. The terms of the contract were set forth in the mileage book, and were binding. Plaintiff took the train, well knowing that, by the express terms of his contract, he was liable to expulsion. He should not have taken passage knowing that his mileage book was not good for intrastate travel, and, having done so, should not have been permitted to recover.

Plaintiff relies upon the cases of *Hot Springs Railroad Company* v. *Deloney,* 65 Ark. 177 and *St. Louis, Iron Mountain & Southern Railway Company* v. *Baty,* 88 Ark. 282. The difference between these cases and the case at bar is that in the former the tickets were apparently good on their face, and the passengers had no notice of their defects, which was the result of the negligence of the ticket agent, while in the case under consideration the ticket or mileage book was not good for passage between points in this State, and plaintiff had knowledge of that fact when he entered the train from which he was expelled, and his expulsion was not accomplished by any physical force, and was unattended by any circumstances of insult. For illustrations of the rule that the knowledge of the passenger in such cases precludes a recovery for damages for expulsion from the train, we cite the following cases: *Gulf, C. & S. F. Ry. Co.* v.

Copeland, 42 S. W. (Tex. Civ. App.) 239; *Texas & Pac. Ry. Co.* v. *Wynn,* 97 S. W. (Tex.) 506; *Gulf, C. & S. F. Ry. Co.* v. *Daniels,* 29 S. W. (Tex. Civ. App.) 426; *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Daniels,* 90 Ill. App. 154; *Western Maryland Railroad* v. *Stocksdale,* 83 Md. 245; *Russell* v. *Missouri, K. & T. Ry. Co.,* 12 Tex. Civ. App. 627.

It follows therefore that the court erred in not instructing the jury to find for the defendant as requested by it.

MOORE *v.* SHARP.

Opinion delivered May 31, 1909.

APPEAL—WHEN NOT COLLUSIVE.—A suit was begun and prosecuted in the lower court in good faith to determine the title to a certain tract of land. Appellees had a suit involving the same question with reference to a large body of lands, pending in the United States Court of Appeals; appellant made an arrangement with appellees' counsel to have the latter file an abstract of the record and brief for him, with the hope that counsel for the side opposing appellees in the Federal court would appear in this court and present the argument in favor of appellant's side of the controversy; such counsel did appear and file a brief presenting appellant's side of the case. *Held* that the appeal will not be dismissed as being collusive.

Appeal from Phillips Circuit Court; *Hance N. Hutton,* Judge; motion to dismiss appeal denied.

ON MOTION TO DISMISS THE APPEAL.

PER CURIAM. W. S. Bryan, by his counsel, Messrs. Murphy, Coleman & Lewis, moves the court to dismiss the appeal in this case on the alleged ground that the suit, in its inception and in the trial below, as well as on the appeal to this court, is a collusive one, instituted for the sole purpose of obtaining the opinion of this court on the questions presented so as to influence, as far as possible, the determination of a similar suit involving the same questions now pending in the United States Circuit Court of Appeals, on appeal from the circuit court for the Eastern District of Arkansas, wherein the appellees here (Sharp and Boice) and he (W. S. Bryan) are the con-

testing parties. He alleges that he owns a large body of lands under the same source of title as that asserted by appellant in the present case, and that the issues in this case are identical with those in the case above referred to. He asserts, and undertakes to prove, (1) that there is no real controversy between the parties to the present suit, but that it was instituted solely for the purpose indicated above; (2) that there was no trial of the issues below, but that the judgment of the circuit court was entered practically by consent of parties; and (3) that after the judgment below appellant, Moore, abandoned the litigation, that the appeal was perfected in his name by appellees' counsel, that they prepared the brief on the side of appellant in the name of the latter's counsel, and that the case would not be presented here in an adversary way except for the fact that Murphy, Coleman & Lewis had filed a brief as *amici curiae.*

Responses have been filed to this motion, and affidavits in support thereof, and appellant, Moore, insists that he has never abandoned the controversy, and stands ready to prosecute his appeal.

On consideration of the evidence presented, we are of the opinion that the alleged grounds of the motion are not sustained. Appellant, Moore, purchased the land in good faith and proceeded to cut timber thereon when this suit was instituted. He employed able counsel to represent him in the litigation below, and paid a substantial fee for the services. There was no collusion between the parties in bringing the suit, and it was prosecuted to judgment below free from collusion, though by agreement it was presented to the court on the evidence taken in the case pending in the Federal court. This did not cause the litigation to lose its adversary character, as it is the privilege as well as the duty of litigants to facilitate the trial of cases and to prevent unnecessary expense and delay.

Appellant duly prosecuted the appeal to this court from the adverse judgment below. It appears that appellant's employment of counsel only covered the service of defending the case in the lower court, and lodging the appeal from the adverse judgment. When this service was complete, appellant's counsel suggested to him that, on account of the momentous questions involved in the case, the expense of employing counsel

to brief the case in this court would be out of proportion to the value of the land in controversy, which is not very considerable, and also suggested that a plan might be arranged for Mr. Coleman, of the firm of Murphy, Coleman & Lewis, to appear in the interest of his client in the Federal court. Acting on this suggestion, appellant entered into an arrangement with appellees' counsel for the latter to file an abstract of the record and a brief for appellant, so as to comply with the rules of this court, and thus induce Murphy, Coleman & Lewis as counsel for Bryan to appear in this case and fully present all the arguments in favor of appellant's side of the controversy. This was done, and appellees' counsel caused to be prepared and filed an abstract of the record, the sufficiency and completeness of which is not questioned, and a brief which stated the points of law involved, and adduced arguments and authorities in support of them. Messrs. Murphy, Coleman & Lewis then filed an exhaustive brief on that side of the case, which, with the brief of appellees on their own side, makes the presentation of the case thoroughly adversary, and seems to leave nothing unsaid in support of the respective contentions of appellant and appellees. We therefore see no reason why the appeal should be dismissed. The time for appeal has not expired; and, if we should dismiss this one, appellant could obtain another. He is here now by other counsel, insisting on prosecuting this appeal and adopting the abstracts and briefs filed on that side of the case, and shows that he has never had an intention to abandon it.

We would not permit the case to be submitted on the brief prepared for appellant by appellees' counsel, for, however able and convincing it may prove in the end to be, it is tainted by the fact that it *was* prepared by appellees' counsel or at their instance. But, since the case is so thoroughly and ably presented by Murphy, Coleman & Lewis on one side and appellees' counsel on the other, with appellant insisting on prosecuting his appeal, we see no reason for dismissing it. The case could not, and would not under other circumstances, be more ably or thoroughly presented for our consideration.

Motion overruled.

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

Opinion delivered December 20, 1909.

1. STATUTES—CONSTRUCTION OF PENAL ACTS.—The rule that penal statutes should be construed strictly does not require that the words of a penal statute should be so narrowed as to exclude cases which those words, in their common and ordinary acceptation, would comprehend. (Page 45.)
2. SAME—CONSTRUCTION.—Where the language of a statute is plain and not ambiguous, it needs no construction, and the court should carry into effect the object and purpose of the Legislature. (Page 45.)
3. CARRIERS—OVERCHARGE—MISTAKE.—Under Kirby's Digest, § 6620, imposing a penalty upon railroads for charging, demanding, taking or receiving from any person any greater compensation for the transportation of passengers than is allowed by law, a railroad company is subject to the penalty whenever its agent intentionally charges a passenger an excessive fare, though the overcharge was made under a mistake as to what the lawful fare was. (Page 45.)

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

Kinsworthy & Rhoton and *James H. Stevenson,* for appellant.

Section 6620, Kirby's Dig., does not apply where the agent of the railroad company makes an honest mistake as to the amount of fare to be charged a passenger. 58 Ark. 490.

McMillan & McMillan, for appellee.

Appellant did not plead the agent's mistake as a defense; it is therefore waived. 82 Ark. 320; 69 Ark. 256; 80 Ark. 70; 46 Ark. 132. Besides, the mistake is not a sufficient defense. 60 Ark. 227; 12 Clark & F. 248; 58 Ark. 492. The agent must know the distances over his company's lines. 36 Ark. 58; 50 Ark. 67.

FRAUENTHAL, J. The two plaintiffs below instituted separate actions against the St. Louis, Iron Mountain & Southern Railway Company to recover penalties for demanding, taking and receiving a greater compensation for their transportation as passengers than is allowed by law. The two actions were consolidated, and the cases tried together. On December 27, 1908, the plaintiffs purchased tickets from the agent of defendant at Arkadelphia, Arkansas, and became passengers from

that point on defendant's railroad to Hot Springs, Arkansas, another station on its line. The distance between these stations is 75 miles and a fraction, and the maximum fare allowed by law for the carriage of passengers between these points is $2.27. The agent of defendant at Arkadelphia demanded of each of the plaintiffs for the fare or ticket from that station to Hot Springs the sum of $3.08, and did take and receive that sum for each ticket. At the time of purchasing the tickets the plaintiffs protested to the agent against paying that amount for the tickets, and claimed to him that it was an overcharge, and they thus disputed with the agent about the matter for some time. But the agent insisted upon their paying the said sum for the tickets, which they did. After entering the train the plaintiffs took from the conductor a receipt for their tickets, and wrote to the superintendent of the defendant about the overcharge. The superintendent replied that the matter would be taken up, and they would confer with the plaintiffs later about it, but they did not do this until after the suits were instituted and a few days before the trial.

The agent of the defendant who sold the tickets testified that he had never sold any tickets to Hot Springs before, and that he had no rate sheet showing the exact fare to Hot Springs, direct. That the rate sheet which he had was for the round trip to that point, which was $3.08, and that in charging that amount for the tickets one way he made a mistake by being misled by this rate sheet.

The defendant requested the court to instruct the jury, in substance, that if the overcharge was made on account of the mistake of the agent as to the fare from Arkadelphia to Hot Springs, then they should find for the defendant. This the court refused to do. And thereupon the court instructed the jury to find for the plaintiff, but left the amount of the penalty to be fixed by the jury. A verdict was returned in favor of each plaintiff for the sum of $50. These actions were instituted under and by virtue of the provisions of section 6620 of Kirby's Digest, which is as follows:

"Any of the persons or corporations mentioned in sections 6612, 6613 and 6614 that shall charge, demand, take or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act al-

lowed or prescribed shall forfeit and pay for every such offense any sum not less than fifty dollars nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction. Any officer, agent or employee of any such person who shall knowingly and wilfully violate the provisions of this act shall be liable to the penalties prescribed in this section, to be recovered in the same manner."

It is contended by the defendant that the above statute does not subject the railroad company to a penalty in cases where the ticket agent made a mistake resulting in an overcharge of the passenger fare, and to support this contention it relies upon the case of *Railway Company* v. *Clark,* 58 Ark. 490. In that case the passenger paid his fare to the conductor on the train, and the conductor made a mistake in handing him back the change. In that case the following instruction was requested:

"The language of the statute is 'charge, demand, take or receive.' This means a reception or demanding of an amount that is in excess of what is lawful, knowing that he is receiving that amount. An honest mistake by a conductor in making change, without the knowledge or intention of taking an amount greater than he intended to charge, or than was lawful, and without his attention being called to it by the passenger, will not make the defendant liable."

This court held that the above instruction was substantially the law applicable to the facts of that case, and added: "An honest mistake by a conductor in making change, without the intention of taking an amount greater than was lawful, will not make the defendant liable. * * * If the conductor intends to receive the excess, the company is liable." The case of *Railway Company* v. *Smith,* 60 Ark. 221, involved a suit instituted under this statute for a recovery of penalty for an overcharge of a passenger's fare. In that case the defendant pleaded as one of its defenses that the overcharge was made through a mistake; that an honest mistake had been made in the computation of the number of miles between the two stations, the error in this regard being small. In that case the court said: "The fact that appellants were mistaken as to the distance for

which transportation was charged does not relieve them." And, quoting from Mr. Justice Miller in the case of *United States* v. *Ames,* 99 U. S. 35, 47, this court further said: "Ignorance of the facts is often a material allegation, but it is never sufficient to constitute a ground of relief, if it appears that the requisite knowledge might have been obtained by reasonable diligence." And in the same case Mr. Justice BATTLE, in holding that the railroad company was not relieved from the penalty prescribed by this statute by reason of said mistake, says: "It was their duty to the passengers traveling in their trains to ascertain the distance between the stations on their road, in order to protect them against the payment of excessive rates of fare."

This statute is a penal law, and the legal maxim is that such a law should be construed strictly. But this does not mean that the words of the statute should be so narrowed as to exclude cases which those words, in their common and ordinary acceptation, would comprehend.

The words should be allowed to have their full meaning; and effect should be given to the plain meaning of the words of the statute. Where, therefore, the language of the statute is plain and not ambiguous, it needs no construction; but it becomes the duty of the court only to carry into effect the object and purpose of the Legislature. *United States* v. *Wiltberger,* 5 Wheat. 76; *United States* v. *Hartwell,* 6 Wall. 385; 2 Lewis's Sutherland, Statutory Construction (2d Ed.), § 519. But this statute is also remedial in its nature as well as penal. It provides for the aggrieved party a remedy for the invasion of his rights; and therefore it ought not to be looked upon with disfavor. The plain object and intent of this legislative enactment is to protect the passenger against the payment of an excessive charge for his fare. And if such overcharge is demanded and received, the penalty provided by the statute will cover the expense and annoyance of seeking its recovery, and will be a punishment to cause the railroad company to refrain from making and taking such excessive charge. The overcharge may be and probably would be small in amount, and without such penalty the aggrieved passenger would not ordinarily feel warranted in seeking the recovery of the amount which had been wrongfully exacted, on account of the expense of such procedure; and if, through the negligence, but the ac-

tual intention of the railroad company, the overcharge is made, the result to the passenger would be the same. The statute was enacted for the protection of the passenger, and his protection against the mischief intended to be prevented by the statute should be promoted in its interpretation.

In the act prescribing the penalty against the railroad company the words "wilfully" or "designedly," or other words of equivalent import, are not used, and the wrong is made to consist only in the fact of charging, demanding, taking or receiving any greater compensation for the transportation of the passenger than is allowed by law. It is the duty of the railroad company to comply with the enactment and know the correct amount of such compensation. It should know the distances between its stations and the fares that are thus chargeable. It can only act through its agents, and its agents should therefore have that knowledge. If, through its wilfulness or culpable negligence, it charges and receives a greater amount than the law allows for such fare, it is liable under the statute. If the company or its agent demands and receives for the fare "an amount that is in excess of what is lawful, knowing that he is receiving that amount," then the company is liable for the penalty under this statute. The circumstances relating to a mistake as is claimed in this case would only go in mitigation of such penalty.

It follows therefore that the court was correct in giving the instruction of its own motion to the jury and in refusing the instruction asked for by defendant.

The judgments are affirmed.

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

Opinion delivered December 13, 1909.

1. LIMITATION OF ACTIONS—DIVERSION OF STREAM AND DAMAGE TO LAND.—Where the obstruction of a stream by reason of the construction of an embankment and ditch was of a permanent nature and necessarily injurious to the lands of adjacent proprietors, the damages

thereby caused can be recovered only by suit brought within three years from the time the embankment and ditch were completed. (Page 52.)

2. WATERS—DIVERSION—LIABILITY.—One who diverts the flow of a natural stream or of surface water becomes liable for the damage thereby wrought to the lands of another. (Page 53.)

3. SAME—OBSTRUCTION OF SURFACE WATER—EVIDENCE.—In an action for injuries to land by obstructing the flow of surface water, evidence that a cattle guard on defendant's roadbed was at one time open, but is now closed, is competent as tending to prove an obstruction of the surface water. (Page 54.)

4. EVIDENCE—OPINION OF EXPERT AS TO DAMAGE.—It was not error to permit an expert witness to testify his opinion as to the damage to lands caused by the diversion of a natural stream upon them. (Page 55.)

5. DAMAGES—DIVERSION OF STREAM.—The damages recoverable for the diversion of a natural stream causing subjacent lands to be overflowed is the difference between the value of the land before the diversion and afterward. (Page 55.)

6. SAME—VALUE—ASSESSMENT.—Valuations placed upon plaintiff's lands by the assessor were not evidence of their value before or after an alleged damage to them caused by defendant. (Page 56.)

7. TRIAL—REMARKS OF JUDGE—PREJUDICE.—A colloquy between the court and appellant's counsel in which the court asked counsel not to try to put in any evidence that was not admissible, and added that the court was willing that all legitimate testimony should be brought in, was not prejudicial. (Page 56.)

Appeals from Independence Circuit Court; *Charles Coffin*, Judge; affirmed.

W. T. & R. T. Magness and S. A. Moore sued appellant separately. The actions were consolidated and judgments recovered by each of the plaintiffs.

STATEMENT BY THE COURT.

"Thomas Creek," a stream in Independence County, Arkansas, flowed in a course that was generally south and southwest into "Mud Creek," which latter stream emptied into White River. In 1882 appellant built its railroad across "Thomas Creek." The stream had well-defined banks where the appellant crossed it with a trestle, designated in the evidence as No. 1523. Soon after this trestle was constructed, the stream began to fill up above and below the trestle. The main channel continued to fill, and at a point about a half-mile north of the trestle the waters began to diverge in a southeast course, making a new channel.

Part of the waters of Thomas Creek flowed in this new channel, which gradually cut its way in a southeast direction to the railroad about one-fourth of a mile east of trestle No. 1523. When the waters flowing through this new channel reached the railroad, they flowed over and through the roadbed and continued on south and southeast of the railroad, spreading out through the bottoms and finally into Mud Creek, and thence into White River. In times of high water, both the old and new channels of Thomas Creek would overflow and spread over the lands of one Powell. In 1902 Powell, to protect himself from the overflow of these waters, turned the entire flow of the waters of "Thomas Creek" in low stages through the new channel, by digging a ditch and straightening the new channel in places.

Powell testified that when he bought the land in 1902 he saw that the channel of the old creek was changing east within itself, "scooping a great big channel, and the water was leading from the old creek bed to those places leading from the southeast corner of his field near the cattle gap in the railroad." "He channeled it on through."

One witness testified that the digging of the ditch by Powell did not make any particular difference. Says the witness: "Before that (Powell) ditch was dug, the water would leave the old channel and make across his field, make a southeast course, making down the railroad; some of it would leave it over two-thirds of the way up the ditch from the railroad to the county road; all the way gradually along it would cut out gullies (they are there to be seen yet, some of them), and would cut out gullies, making its course that way; before that the biggest part of the water went that way anyhow; so far as the cutting of that little ditch through that field, it didn't make a great deal of difference in the amount of water that went down the railroad there before the ditch was cut."

After the cutting of the ditch by Powell, the water at low stages even passed through the new channel, and over and across the railroad, and thence south and southeast into Mud Creek. While this condition continued, even in times of highest flood, the waters from Thomas Creek did not damage the land of appellees.

In 1906 appellant raised its roadbed considerably from trestle

No. 1523 east to what is called trestle No. 1522; and cut a wide ditch from the point where the waters of Thomas Creek, through the new channel, reached its track; thence east on the north side of its roadbed to trestle No. 1522. This ditch was cut by the railroad in August, 1906. After the appellant thus raised its roadbed and cut the ditch, the whole volume of the waters from Thomas Creek passed through this ditch. The raising of the roadbed and the digging of the ditch caused the waters of Thomas Creek that had formerly passed over, through and across the railroad now to flow further to the east and south, and in times of flood they spread out over the lands of appellees, producing the injury of which they here complain. . . .

The complaints were separate, each plaintiff alleging the damage he had sustained by reason of the overflow of his land. The alleged cause of action was as follows: That in August, 1906, defendant wrongfully and unlawfully changed the usual, ordinary and natural course of said creek, and the flow of surface water north of said railroad right-of-way and of plaintiff's lands by filling the opening or trestle in the embankment through which said creek had formerly passed, and by digging a large ditch from said point where said trestle formerly existed easterly along the north side of the railroad track to a point near the corporate line of the town of Newark, and about the center of the southeast quarter of the northwest quarter of section 5, at which point defendant constructed a trestle under its said railway track. That, by reason of the construction of said ditch and the raising of its track and embankment, the waters of Thomas Creek were diverted from their usual, ordinary and natural course, and carried down through said ditch and discharged upon plaintiff's lands, and by reason of such wrongful and unlawful diversion of such waters and their discharge upon said lands, such lands have been overflowed, inundated, washed and injured, and will continue to be so overflowed and inundated, and totally and permanently injured and damaged.

W. T. Magness alleged in his complaint damage to his crops for the year 1906 in the sum of $1,047.50. He and the other appellees, in addition to the damage to their lands, asked for other damages subsequent to the year 1906. But it is unnecessary to set out these.

The appellant answered, denying all the material allegations of the respective complaints, and setting up in each case the following defenses: "That, if plaintiff had suffered any damage whatever, such damage was caused by the act of parties other than defendant in interfering with the natural flow of water, and denied that there was any interference or diversion of the natural flow of waters by any act of the defendant;" also contributory negligence and the three years' statute of limitations.

W. T. Magness instituted his suit September 12, 1907; S. A. Moore instituted his suit April 21, 1908; and R. T. Magness instituted his suit October 1, 1908. There was a verdict and judgment in favor of W. T. Magness for $3,200, and in favor of R. T. Magness for $580, and in favor of S. A. Moore for $650. Appellant seeks by this appeal to reverse these several judgments.

Other facts stated in opinion.

Kinsworthy & Rhoton, S. D. Campbell and *Jas. H. Stevenson,* for appellant.

Appellant is not liable, if the diversion was necessary and skilfully made. 86 Ark. 91; 47 Ark. 340; *Id.* 33. To entitle complainant to relief, he must show that the defendant has committed a wrongful act to his injury. Farnham on Waters, § 492; 11 Pa. Super. Ct. 218; 76 Ark. 542; 38 Minn. 179; 8 Am. St. R. 656; 47 Conn. 269; 118 Ill. 487; 9 N. E. 203. Evidence objected to, should be ruled out, unless the pleadings are amended to conform thereto. 70 Ark. 232; 59 Ark. 165; 62 Ark. 431; 75 Ark. 181; 76 Ark. 468. For a deflection of surface water caused by a skilfully constructed roadbed, there is no liability. 60 Mo. 329; *Id.* 334; 78 Mo. 504; 83 Mo. 271; 53 Am. R. 581; 33 Ind. 274. One purchasing the land subsequent to the injury cannot recover damages for the injury. 39 Ill. 205.

S. A. Moore, Ernest Neill and *McCaleb & Reeder,* for appellees.

Flood water which overflows from a natural stream is not surface water. 44 Ark. 363. Where water has for several years been flowing in an artificial channel, a railroad, afterwards constructing its road, must treat it as the watercourse. 3 Farnham on Waters, § 827; 91 Va. 587; 10 L. R. A. (N. S.) 966. And if it diverts the water from such course, it is liable in damages for the injury. 57 Ark. 512; 78 Ark. 589; 87 Ark. 475. Defendant

had no right to obstruct the flow of water, and throw it upon plaintiff's land. 39 Ark. 463; 82 Ark. 447; 35 Ark. 622. Appellant is liable for failing to maintain proper openings in its roadbed through which the water could pass. 47 Ark. 340; 76 Ark. 548; 86 Ark. 406. Testimony as to the decreased value of the land was properly admitted. 51 Ark. 324; 86 Ark. 96; 76 Ark. 261; 67 Ark. 374. The nuisance complained of was of a permanent character, and should be fully compensated. 35 Ark. 623; 39 Ark. 463; 52 Ark. 240; 86 Ark 406. Where both parties direct their evidence to the same issue, a defective complaint will be considered as amended to conform to the proof. 54 Ark. 289; 59 Ark. 223. If particular use of property causes a nuisance, the injured party is entitled to relief. 159 Miss. 147; 122 N. Y. 18; 9 L. R. A. 711; 73 Ind. 268; 82 Mich. 471; 42 S. C. 402; 26 L. R. A. 694; 50 L. R. A. 488. Railroad companies are liable for damages caused by an overflow of surface water discharged through culverts. 71 Ill. 616; 25 Ill. App. 569; 62 S. C. 25; 39 S. E. 792; 98 Mass. 429; 126 Ala. 555; 28 So. 392; 70 Mo. 359; 35 Am. R. 431. So where a ditch cut by the company conducted the water to a culvert, and it overflowed the lands of plaintiff. 68 Mass. 760; 72 Miss. 881; 48 Am. St. R. 589; 16 So. 909; 85 Tex. 88; 19 S. W. 1025; 3 Penn. (Del.) 407; 54 Atl. 687; 114 Tenn. 579; 86 S. W. 1074; 80 Minn. 9; 82 N. W. 979; 118 Ill. 487; 9 N. E. 203; 94 Ind. 24; 50 Atl. 423.

WOOD, J. (after stating the facts). The waters that flowed through the new channel of Thomas Creek as straightened by Powell—"Powell's Ditch," as it is often called in the evidence—were not surface waters, but waters of a well-defined stream that had been diverted into a new and different channel. Whether this diversion was caused primarily by appellant in obstructing the old channel, or by natural causes, or by Powell, is wholly immaterial in this case, because for at least four years the waters of this stream, at low stages and at flood tide, had passed over appellant's railroad in a certain course and had flowed out into other streams without doing any damage whatever to the lands of the appellees. In 1906 appellant obstructed and prevented the flow of these waters in the course they had been flowing over, through and across its roadbed by raising its embankment. Appellant also gathered these waters at the same time into a ditch

cut by it, and turned them in a direction where there were no sufficient natural or artificial outlets for them. As a direct consequence of this conduct of appellant, these waters overflowed the lands of appellees, who were lower proprietors, along the course they were compelled to flow after their obstruction and diversion as above mentioned. These facts are established by the uncontroverted evidence.

The obstruction and diversion by appellant in the manner indicated were of a permanent nature, and necessarily injurious to the lands in the track of the inevitable overflow caused by them. Therefore, according to our cases (some very recent), the damages caused by the construction of the embankment and ditch were original, and could only be recovered by suit brought within three years from the time the embankment and ditch were completed. *St. Louis, I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622; *Little Rock & F. S. Ry. Co.* v. *Chapman,* 39 Ark. 463; *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240; *Turner* v. *Overton,* 86 Ark. 406; *Barton* v. *Board of Directors, St. Francis Levee Dist.,* 92 Ark. 406; *Kelly* v. *K. C. S. Ry Co.,* 92 Ark. 465.

But the undisputed evidence shows that Powell did not divert the new channel of Thomas Creek. It had formed a channel for itself, and he only "straightened it out" in places, and "channeled it through" in the course it had taken. The "little ditch" he cut did not make any "particular difference" in the amount of water that went down to the railroad. The testimony of Powell himself, and of the other witnesses of appellant, makes it clear beyond controversy that Powell did not by his ditch change the new channel of Thomas Creek so that the water passed over appellant's railroad in any manner different from what it would have done had he not cut the ditch. Therefore, the diverted waters from the old creek bed having cut out a new and well-established channel in which they had flowed for several years to the railroad, the appellant could not obstruct and divert this flow in a manner to cause injury to others. The way these diverted waters from the old channel of Thomas Creek passed out over the roadbed of appellant, under the evidence, was the usual and natural course for such waters. They were evidently flowing that way because nature caused them to so flow. Even if Powell assisted, they had cut and were cutting their channel

in that direction, and he was only aiding nature. It is not claimed or shown that Powell cut his ditch so as to divert the waters from the general course they had already taken. Many cases of this court recognize the doctrine that the waters of a stream in their natural flow can not be obstructed or diverted so as to damage the lands of another. One who does so is liable for the damage thus wrought. *Railway Company* v. *Lyman,* 57 Ark. 512; *Railway Company* v. *Cook,* 57 Ark. 387; *St. Louis, I. M. & S. Ry. Co.* v. *Saunders,* 78 Ark. 589; *St. Louis, I. M. & S. Ry. Co.* v. *Hardie,* 87 Ark. 475; *St. Louis, I. M. & S. Ry. Co.* v. *Walker,* 89 Ark. 556.

Even if these waters had been nothing more than surface waters, appellant could not gather them into its ditch and cast them in a body upon the lands of appellees. This was practically the effect of appellant's ditch. For the evidence shows that when the waters of Thomas Creek were by this means added to the waters that usually passed through other lower natural and artificial drains, these drains were insufficient to carry them off, so they passed on over and overwhelmed appellees' lands. One of the experts testified: "Digging a ditch along the right of way and north of the railroad down to Newark would make it run more than ever towards the east and would turn the water on the Magness lands."

Mr. Farnham says: "The rule which prevents a railroad company from casting water in a body into lower proprietors deprives it of the right to place a culvert in its embankment which will carry the water which has accumulated on the upper side out of its course and cast it onto the property on the lower side. But there is no liability for continuing the drainage along its natural course, after the water has begun to flow in a definite channel. And, if the water is conducted to its natural outlet, the fact that, for a portion of the distance, the channel is changed, is immaterial." 3 Farnham on Water and Water Rights, § 909, p. 2675.

The natural outlet for these waters was Mud Creek. The natural course, and the course they were pursuing when diverted, by appellant, was south and southeast. Appellant's ditch turned them almost due east and entirely out of their natural course. True, the evidence showed that the lands were lower

from the point of diversion north of appellant's roadbed toward the east than to the west where was the trestle and opening for the old channel. But it does not show that the lands east were lower than the lands immediately south and southeast of the track, the direction in which these waters were already flowing. These lands immediately south and southeast were bottoms, and it does not appear that any damage would have been done to lower proprietors by proper and skilful trestling and letting them pass on in that direction. Under the undisputed evidence, this was appellant's duty, whether the waters were surface or not. *Little Rock & F. S. Ry. Co.* v. *Chapman,* 39 Ark. 463; *Bentonville Railroad* v. *Baker,* 45 Ark. 252; *Springfield & M. Ry. Co.* v. *Henry,* 44 Ark. 360; *Little Rock & F. S. Ry. Co.* v. *Wallis,* 82 Ark. 447; See also *St. Louis, I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622; *St. Louis, I. M. & S. Ry. Co.* v. *Harris,* 47 Ark. 340; *St. Louis S. W. Ry. Co.* v. *Harris,* 76 Ark. 548; *Turner* v. *Overton,* 86 Ark. 406.

The charge of the court was in conformity with the law as above announced. It could serve no useful purpose to review its rulings upon the several prayers granted and refused.

Among the rejected prayers was the following: "19. As to the suit of S. A. Moore against the defendant, if the plaintiff purchased the lands in question in his suit after the Powell ditch had been dug, and knowing or having full opportunity to know of the construction of that ditch and of its probable effect as to the flow of water, in that event the plaintiff cannot recover, even though you should find that there has been damage to his lands resulting from a cause existing prior to his purchase of the lands."

There was no error in refusing to grant the above prayer. Appellee, Moore, purchased his lands July 5, 1904, as he alleged and as appellant concedes. Moore thus acquired the lands two years before appellant created the obstruction and diversion, and the resultant injury and damage to his lands for which he sued. He was the holder of the title when appellant caused the damage to his lands, and is entitled to recover therefor.

Witness Bone testified: "There was a cattle guard between culvert where Thomas Creek crosses railroad a half mile west of Newark and town of Newark, and this cattle guard was at

one time open, but is now closed." The allegation of the complaint is that appellant "changed the natural course of said creek by filling the openings or trestles through which said creek had always passed," and that by reason of the raising of its track and embankment the waters were diverted, etc. In view of these allegations, the above testimony was relevant to the issues and properly admitted.

The testimony of Ratton as to the effect of the overflow after the diversion of the waters of Thomas Creek was admissible. This testimony tended to show that the overflows that damaged appellees' lands were caused by the diversion of the waters of Thomas Creek.

The hypothetical question asked certain witnesses for appellees was proper. The witnesses who were asked the question qualified themselves to answer the question by showing their familiarity with the lands and the conditions surrounding them before and after the waters of Thomas Creek were diverted by appellant. The evidence that the question elicited tended to establish the correct measure of damages in such cases. *Railway* v. *Combs,* 51 Ark. 324; *St. Louis, I. M. & S. Ry. Co.* v. *Ayres,* 67 Ark. 374; *Little Rock & F. S. Ry. Co.* v. *Evans,* 76 Ark. 261. Almost the identical question was propounded in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Brooksher,* 86 Ark. 91, and was approved by this court. The difference between the facts of that and this case do not call for any difference in the ruling upon the question here presented. The rule of law in conformity with the hypothetical question and the facts established by it is correctly declared by the court in instruction number 4, requested by appellees.* (Reporter set forth in note.) This is the true rule for the measure of damages in such cases. See cases last above cited.

*The hypothetical question referred to in the opinion was as follows: "Taking the actual value of the lands of plaintiffs claimed to have been damaged at the completion of the digging of defendant's ditch and raising of its (defendant's) roadbed, and supposing the consequences to be known at that time, and comparing with what the value would have been if the flow had remained as formerly, and fixing your damage at the difference, what do you think would be the damage to the land?"

Instruction No. 4, requested by appellees, is as follows:

"4. If you find for plaintiffs in this case, then in assessing their damages it would be your duty to take and consider the actual value of their

The court refused to permit counsel for appellant on cross-examination to ask witness W. T. Magness: "How much did you assess these lands for at last assessing time as to their value?" During the examination of witness W. T. Magness, on cross-examination the following occurred between the court and counsel for appellant: By defendant's counsel: "Mr. Magness has stated he made a statement to the assessor as to the value of these lands." By the court: "No, he didn't; he stated he sent his tax receipts. I am trying to hold the law just as the courts have held it. Don't try to put anything in that isn't the law." By defendant's counsel: "I am not, your Honor." By the court: "It looks like it." By counsel for defendant: "I asked Mr. Magness if he had made a statement himself as to valuation of his lands to the assessor. Your Honor ruled that out, and Judge McCaleb (of plaintiffs' counsel) requested you to change that ruling and let him state that. In answer to that Mr. Magness stated he had at some time." By the court: "I am willing for all legitimate testimony to be brought in, but don't want the time of the court taken up and cases padded with what is not legitimate."

The court did not err in refusing to permit Magness to answer the question propounded. Valuations by the assessor were not evidence of the value of these lands before or after the alleged damage to them by appellant. *Texas & St. L. Ry. Co.* v. *Eddy*, 42 Ark. 527; *Springfield & M. Ry* v. *Rhea*, 44 Ark. 258.

The remarks of the court in the colloquy with counsel for appellant were not such as to create a prejudice in the minds of any sensible jury against the rights of appellant. The court in its fourth instruction limited the damages to injury sustained to the lands. The evidence was ample to sustain the verdict, and the judgments based thereon are correct. They are therefore affirmed.

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lands in controversy at the time the work was completed, supposing the consequences to be known, compare it with what the value would have been if the overflow on said lands had remained as formerly, without the waters of Thomas Creek being diverted upon said lands, and the difference in the value of each of said tracts would be the measure of damages in each case."

LEWIS v. BUFORD.

Opinion delivered November 29, 1909.

1. PARTNERSHIP—REAL PROPERTY.—Where real estate is purchased by the members of a firm with partnership funds and for partnership purposes, in the absence of any agreement that it shall be held for their separate uses, it will be treated in equity as partnership property. (Page 61.)
2. SAME—INTEREST OF PARTNER.—The interest of a partner in firm property, so far as his individual creditors are concerned, is his share after paying the debts of the firm, including any debt he may owe to the firm. (Page 62.)

Appeal from Polk Chancery Court; *James D. Shaver,* Chancellor; reversed in part.

W. Prickett and *Pipkin & Martin* and *McPhetrige,* for appellants.

Until the surplus was ascertained, the decree should not have been rendered. 36 Ark. 612; 84 Ark. 172; 11 Gray 179; 76 Ala. 501; Story on Part. 90. The equitable lien of a partner for payment of debts, including debts due him for advances, extends to the real estate of the partnership. 85 Mo. 398. Neither party can convey title to a moiety of the goods, so as to defeat the right of the other to have firm debts paid out of that fund. 9 Me. 28; 5 Johns. Ch. 417; 85 Tex. 22. The real estate must be considered as partnership property, without reference to the record title. 64 N. Y. 479; 55 Ill. 416; 14 Fla. 565; 17 Cal. 262.

Richard M. Mann, for appellee.

The mortgage was fraudulent and void, and should be set aside. 45 Ark. 520; 14 Ark. 69; 64 Ark. 373; 31 Ark. 666. While the business of the firm is still unsettled, it can not be told what portion of the debt is due from any one partner. 72 Ark. 469; 32 S. W. 221. It is the intent to defraud that vitiates the security, and the effect is the same whether that is shown by written terms or by other evidence. 39 Ark. 325; 46 Ark. 112; 41 Ark. 186. If it appear that the creditor was aiding the debtor to defeat his other creditors, the transaction will be held void. 50 S. W. 912; 113 N. W. 872; 13 L. R. A. (N. S.) 554; 106 S. W. 1121.

HART, J. In 1907 J. B. Buford instituted suit in the Little River Chancery Court against appellant J. A. Lewis and one W.

A. Carroll, alleging that they were partners, to recover the amount alleged to be due on a promissory note for $1,000. The chancellor found that there was no partnership, and a decree was entered against Carroll alone. Buford appealed, and this court held that the evidence showed that a partnership existed between Carroll and Lewis. The decree was therefore reversed, with directions to also enter a decree against Lewis. The case is reported in 87 Ark. 412 under the style of *Buford* v. *Lewis*. The opinion was delivered on October 5, 1908. A decree was entered in the Little River Chancery Court on the 18th day of November, 1908, in conformity with the directions of this court, and on the same day a certified copy of the decree was filed in the office of the clerk of Polk County, in which county Lewis resided.

The complaint in the present case, as filed in the Polk Chancery Court against J. A. Lewis, Mary F. Lewis and A. C. Briggs, after reciting the above mentioned facts, alleges that the above mentioned decree is unpaid, and that both Carroll and Lewis are insolvent. That on the third day of November, 1908, the defendant, J. A. Lewis, who was then insolvent, conveyed by warranty deed to his wife, Mary F. Lewis, the following described property in Polk County, Arkansas: lot 5 in block 50 in the city of Mena and the undivided one-half interest in the N. W. ¼ of S. W. ¼ of S. E. ¼ of sec. 8, town. 2 S., range 30 W., containing ten acres; also, equity of redemption in and to an undivided one-third interest in lot 5, block 7, in Eureka Addition to the city of Mena. That on the 10th day of November, 1908, he conveyed by mortgage to A. C. Briggs, his partner in business, his interest in certain personal property of the firm; and that on the same day he also conveyed to his said wife certain shares of stock in a mercantile business. That said transfer and conveyances were made with the fraudulent intent to cheat, hinder and delay plaintiff in the collection of his debt against the defendant J. A. Lewis.

The defendants J. A. Lewis, Mary F. Lewis and A. C. Briggs filed separate answers. The defendant J. A. Lewis admitted making the conveyances, but stated that they were executed in good faith for valuable consideration, and denied that they were made for the purpose of defeating the plaintiff in the collection of his debt.

The defendant Mary F. Lewis, in her answer, stated that she

knows nothing of the matters set up in plaintiff's complaint, and averred that the transfer and conveyances to her were made for the purpose of reimbursing her for certain sums received by her from her father's estate, and which her husband held in trust for her.

A. C. Briggs, for his separate answer to the complaint of the plaintiff, J. B. Buford, states:

"1. That of his personal knowledge he knows nothing in regard to any transactions between his co-defendant Jas. A. Lewis and the plaintiff, J. B. Buford. That he owes the plaintiff nothing, and is in no way liable for any claim or judgment on the part of said plaintiff against his co-defendant J. A. Lewis.

"2. That he and the defendant Lewis entered into a co-partnership in the meat business at Mena in May, 1903, and have remained in said business from that date until the present time, and that during the conduct of said business his co-defendant Lewis has, by reason of advances made to him by this defendant, become heavily indebted to him, all of said indebtedness and all of said advances having been made to the said Lewis by him out of the proceeds of said partnership.

"3. That the amount of the indebtedness existing and due to this defendant by his co-defendant, above set forth, amounts to $1,452, and that the only security that he has for the same is a chattel mortgage for $500, leaving his co-defendant indebted to him as above set forth in the sum of $952, for which said sum he has no security.

"4. That heretofore, towit, on the .... day of November, 1908, his co-defendant J. A. Lewis conveyed to his wife the following described property situated at Mena, Polk County, Arkansas, and of the nominal value of $.....: lot 5, block 50, in the city of Mena; one-half interest in N. W. ¼ of the S. W. ¼, section 8, Tp. 2 S., R. 30 W., containing 10 acres; this defendant adopting so much of the answer of his co-defendant J. A. Lewis, heretofore filed in this cause, as may be applicable to any issue tendered by the pleadings and affecting the interest of this defendant.

"Wherefore, the premises considered, the defendant prays that if the court, for any reason, should find that the conveyance of his co-defendant, J. A. Lewis, to Mary F. Lewis, his wife, is

void or voidable, he prays that the property so attempted to be conveyed to her be, by appropriate decree of the court, vested in him in satisfaction or part satisfaction of the indebtedness existing in his favor, and against his co-defendant J. A. Lewis, and that he be discharged from further day in the court, and recover all of his costs in and about this suit laid out and expended, and for such other general and special legal relief as he may be entitled to under the proof in the case."

The chancellor found that the conveyances of Lewis to his wife were fraudulent, and a decree was entered subjecting said property to the payment of plaintiff's claims.

The chancellor further found that the mortgage to the defendant Briggs was valid, and the cause was dismissed as to him.

The defendants have appealed. Counsel for defendants in their brief say: "So much of said decree as holds the transfer or sale of the real estate to Mrs. Lewis void for fraud is passed without comment for the purpose of the appeal. The conclusion reached by the honorable chancellor we believe to have been correct, but not for the reasons assigned in the decree. The conveyance was void for the reason that Lewis had no power nor right in the subject-matter of the conveyance." Hence it will only be necessary for us to consider the decree of the chancellor, in so far as it affects the rights and equities of the defendant Briggs.

The record shows that the partnership between the defendants J. A. Lewis and A. C. Briggs was formed in May, 1903, for the purpose of running a meat market in the city of Mena, Arkansas, and that it has continued since that time. They were equal partners. Briggs worked in the shop cutting and selling meats, and Lewis attended to the buying, book work and collecting. The deed to lot 5, in block 50, in the city of Mena was made to J. A. Lewis and A. C. Briggs. The consideration was $700, which was paid out of the partnership funds. The lot had a house on it, which was rented about one year after the purchase. They then moved their meat market into it, and have used it for that purpose ever since. The ten-acre tract was purchased for use as a slaughter house and pasture for cattle, and has been used for that purpose in connection with their meat shop since its purchase. The consideration was $475, which was paid out of the funds of the partnership. The property has not increased in

value since its purchase, and the firm has but little assets except the property in controversy. In the case of *Ferguson* v. *Hanauer,* 56 Ark. 179, the court said:

"It may be stated as settled at this time that when land is purchased by partners for the use of the firm and with its funds, and there is no agreement or design that it shall be held for their separate use, it will be treated in equity as vested in them in their firm capacity, whether the title is in all the partners as tenants in common, or in less than all." In the present case the partners were running a butcher shop, or meat market, and the lands purchased were necessary for their use in carrying on their business. The real estate was purchased with partnership funds. It was used exclusively in carrying on the partnership business, and it was their evident intention to purchase it as partnership property. Hence we hold that it was partnership property.

The testimony shows that the defendant J. A. Lewis had overdrawn his share of the partnership funds to the amount of at least $1,500. The defendant Briggs, in his answer, prays that, if the court should find the conveyance of J. A. Lewis to his wife of the partnership real estate to be void, the property should be appropriated to the satisfaction of his claim. In short, he asks for the enforcement of what is known as a "partner's lien." In the case of *Summers* v. *Heard,* 66 Ark. 550, it was held (quoting syllabus): "One who enters into a partnership with another thereby acquires an equity to compel the application of the firm's assets to the payment of debts of the firm, and to have the surplus thereafter remaining applied to a debt due to himself on partnership account and to an adjustment of balances and cross demands between his co-partner and himself, and, upon a dissolution of the partnership, to have his proportionate share of the assets remaining on hand."

The court said: "In recognition and enforcement of such rights and equities, the statutes of this State provide that, when the property of a partnership is levied upon to satisfy an execution against one of the partners, the officer shall not, by virtue of his levy, deprive the partners of the possession of the property levied upon, except for the purpose of making an inventory thereof, and having the same appraised, and that, upon the execution being returned by the officer that he had levied the same

upon the property in which the debtor was * * * partner, and that the same was claimed by the other * * * partners, the execution creditor may proceed by equitable proceedings to subject to the satisfaction of his execution the interest of the debtor so levied upon." See Kirby's Digest, § 3244. The rule applies in the present case. Briggs was not liable for the individual debt of J. A. Lewis. Lewis was indebted to him by reason of having overdrawn his share of the partnership funds. Lewis's interest in the assets of his firm was his half of the surplus, after the payment of the debts of the firm, including the amount due Briggs. The balance due Lewis, if any, was all that Buford could subject to the payment of his claim; and this could not be done before it was ascertained and set apart. *Summers* v. *Heard, supra.* See also Bates on Partnership, § § 820-822; George on Partnership, pp. 179 to 181.

Therefore, the court should have granted the prayer of Briggs, and should have ascertained and settled his equities in the assets of the firm before subjecting the interest of the defendant J. A. Lewis to the payment of the claim of the plaintiff.

The decree, in so far as it affects the rights and equities of the defendant Briggs in the partnership assets, is reversed, and the cause remanded for further proceeding in accordance with this opinion, and the decree in other respects is affirmed.

Mr. Justice WOOD dissents.

AMERICAN INSURANCE COMPANY v. MCGEHEE LIQUOR COMPANY.

Opinion delivered December 20, 1909.

1. INSURANCE—EXECUTION OF DRAFT AS PAYMENT.—Where drafts are executed in settlement of an insurance claim, they do not constitute a payment unless they were accepted as such. (Page 65.)
2. SAME—FAILURE OF INSURER TO PAY DRAFT—REMEDIES.—Where drafts were executed in settlement of an insurance claim, but were not accepted as payment thereof, and the drafts were not paid at maturity, the payees could either sue upon the drafts or recover upon the original policy; but in the latter case they should offer to surrender the drafts for cancellation. (Page 65.)

3. SAME—ELECTION OF REMEDIES.—Where drafts executed in settlement of an insurance claim were not paid at maturity, the payees could not recover upon the policy and upon the drafts in the same action, the two remedies being inconsistent. (Page 66.)

Appeal from Pulaski Circuit Court; *John W. Blackwood,* Judge; reversed.

C. P. Harnwell, for appellants.

Section 4348, Kirby's Dig., does not apply to mutual insurance companies. Act 192 of Acts 1905 is solely applicable. The bondsmen could be sued only under the authority given by section 4380 of Kirby's Dig.

Abner McGehee, Jr., for appellee.

The allowance of the penalty and attorney's fee was proper. Act 115, Acts 1905. When default was made in payment of these drafts, the original debt revived, upon which plaintiffs had a right to sue. 48 Ark. 267. Act 115 of the Acts of 1905 makes no distinction between liquidated and unliquidated claims.

BATTLE, J. On the 15th day of July, 1908, Joe F. Jones and J. H. Davis, partners doing business under the firm name and style of McGehee Liquor Company, brought an action against the American Insurance Company, a corporation organized under the laws of Arkansas and doing business at Little Rock, in this State, and against John B. Driver and A. B. Poe, on two drafts drawn by E. Miles, adjuster, on the defendant, the insurance company, for five hundred dollars each, payable to the order of the plaintiffs, dated the 23d day of March, 1908, one due sixty days after date, and the other ninety days after date, both accepted by the defendant, the American Insurance Company, on the 28th day of March, 1908, and indorsed in blank by the defendants, John B. Driver and A. B. Poe. Plaintiffs alleged that both drafts had been protested for non-payment, and due notice to the indorsers had been given; and asked for judgment against the defendants for the amount of the two drafts, and for interest on the same from maturity until paid, and for costs of this action.

Defendants demurred to the complaint because it did not state facts sufficient to constitute a cause of action.

Plaintiffs amended their complaint by making W. B. Calhoun, Charles S. Driver, J. T. Hughes, E. P. Liston, J. M. Long

and G. A. Kimberly defendants to this action and by alleging that the American Insurance Company was required to give two bonds, in the sum of ten thousand dollars each, to the State of Arkansas, conditioned that the said company would promptly pay all claims arising and accruing to any person by virtue of any policy issued by said company, during the term of the bond, which was to be filed with, and approved by, the Auditor of the State; that the American Insurance Company, on the 28th day of February, 1907, executed, acknowledged and delivered bond of ten thousand dollars, signed by the defendants, A. B. Poe, J. M. Young, G. A. Kimberly, E. Miles and J. T. Hughes; that it did, on the first day of May, 1907, execute, acknowledge and deliver an additional bond of ten thousand dollars, signed by the defendants, J. B. Driver, W. B. Calhoun, Charles S. Driver, E. Miles, J. T. Hughes, A. B. Poe and H. P. Liston; that both of these bonds were given to the State of Arkansas, and conditioned according to the law in such cases made and provided, and were filed with the Auditor and approved by him, and were in full force and effect at the time the losses occurred which were evidenced by the drafts sued on; that during the "term" of the bonds the plaintiffs held policies issued by the insurance company, indemnifying them against loss by fire destroying or injuring their stock of merchandise at McGehee, Arkansas, which was destroyed by fire on or about the 20th day of November, 1907; that the loss caused thereby was adjusted by an adjuster of the insurance company at $1,000; and that the drafts were given "as evidence of that indebtedness"; and by asking for judgment against the defendants for $1,000 and interest, for 12 per cent. thereon as penalty, and for $200 for attorney's fee.

Copies of the protests of the drafts and of the bonds were filed as exhibits.

The defendants, the insurance company, J. B. Driver and A. B. Poe, answered and admitted that plaintiffs suffered a loss by fire as alleged in their complaint, and the same was adjusted at $1,000, as evidenced by the drafts sued on; and alleged that the insurance company, on the 23d day of March, 1908, "settled" that loss by the drafts; that no demand for payment was made of Driver and Poe, both of whom are solvent; and insist that plaintiffs are not entitled to recover penalty and attorney's fee.

The other defendants answered, and made the same allegations and contentions contained in the separate answer of their co-defendants, and in addition thereto made other allegations which it is not necessary to mention.

On the 6th day of January, 1909, the defendants having failed to appear, the cause was submitted to the court upon the complaint of the plaintiffs and the drafts sued on; and the court found that the defendants "are justly indebted to the plaintiffs on account of the drafts, which were given in payment of a fire insurance policy in the sum of $1,000, with interest thereon from the 23d of March, 1908, to date at the rate of six per cent. per annum, amounting in all to the sum of $1,047.35," and rendered judgment against the defendants for that amount and the statutory penalty of twelve per cent., amounting to $120, and for $140 for attorney's fee. Defendants have appealed to this court.

The execution and delivery of the drafts were not payment of the loss incurred by the destruction by fire of property insured in a policy issued by the American Insurance Company against such loss, unless the plaintiff agreed to receive them as payment. *Henry* v. *Conley,* 48 Ark. 267; *Pendergrass* v. *Hellman,* 50 Ark. 261; *Triplett* v. *Mansur & Tebbetts Implement Co.,* 68 Ark. 230; *Sharp* v. *Fleming,* 75 Ark. 556. There was no such agreement, and the drafts were not paid. The plaintiffs had the right to sue upon them and recover judgment. They could not, however, sue upon and recover upon the policy, the original cause of action, unless in the trial of such action they produced and surrendered, or offered to surrender, the two drafts for cancellation, the drafts being negotiable instruments. *Brown* v. *Scott,* 51 Pa. St. 357; *Mooring* v. *Mobile Marine Dock & Mutual Insurance Co.,* 27 Ala., 254, 258; *Myatts* v. *Bell,* 41 Ala. 222, 231; *Brabazon* v. *Seymour,* 42 Conn. 551, 553; *Bank of Ohio Valley* v. *Lockwood,* 13 W. Va. 392, 426, 427; *Morrison* v. *Smith,* 81 Ill. 221; *Jackson* v. *Brown,* 102 Ga. 87; *Price* v. *Price,* 16 M. & W. 231; 2 Daniel on Negotiable Instruments (5th Ed.), § 1272; 22 Am. & Eng. Enc. of Law (2d Ed.), page 567, and cases cited.

In *Brown* v. *Scott,* 51 Pa. St. 864, Mr. Justice Strong, delivering the opinion of the court, said: "Undoubtedly, there is a large class of cases in which it has been asserted that when a ne-

gotiable note (in the case at bar the instruments sued on are two negotiable drafts) has been given for an antecedent debt, though it may not have extinguished that debt, courts will not suffer the creditor to sue and recover on the original contract unless the note has been lost or destroyed, or is produced and cancelled at the trial. And some of the cases go to the extent that the right to sue for the original consideration is suspended while the note is outstanding in the hands of an assignee or indorser for value. Such is the principle of *Small* v. *Jones,* 8 Watts, 265. To determine rightly how far the principle is applicable, we must regard the reason upon which it is founded. That reason is that, if the creditor might sue on the original cause of action, the debtor would be exposed to two suits, one brought by the creditor and one by the holder of the note, which would be a hardship. The rule then is made for the benefit of the maker of the note, and is irrespective of the payment of the debt."

It follows from the rule as stated that judgment could not lawfully be recovered upon the policy and drafts in one action, it being a prerequisite to a judgment on the former that the latter should first be surrendered; and that the judgment upon the policy and the bonds given to the State of Arkansas was without right. The drafts were a new contract, and limited the right of recovery, and bound only the parties to them.

The judgment of the circuit court against all the defendants except the insurance company, Driver and Poe, and as to the penalty of twelve per cent. and attorney's fee, is reversed, and is in all other respects affirmed.

SMITH v. BOSWELL.

Opinion delivered November 22, 1909.

1. WILLS—CONTESTS—BURDEN OF PROOF.—The burden of proving the insanity of a testatrix or her incompetency to make a will, or of proving that her will was procured by undue influence, is upon those who contest the will. (Page 74.)
2. SAME—TESTAMENTARY CAPACITY—OPINION.—Where a witness for the contestants in a will contest testified that the testatrix was physically

and mentally weak, nervous, hysterical and absent-minded, and that the principal legatee had a great influence over her, it was not error to refuse to permit such witness to be asked whether, in view of such condition and the influence of such legatee over her, the testatrix was capable of resisting a request or command of such legatee to convey to her a considerable portion of the estate of the testatrix. (Page 74.)

3. SAME.—UNDUE INFLUENCE.—The undue influence which avoids a will is not the influence which springs from natural affection, but such as results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property, and it must be specifically directed toward procuring a will in favor of particular parties. (Page 75.)

4. SAME—UNIMPEACHABLE WITNESS.—A witness to the handwriting of an alleged testatrix is "unimpeachable," within the meaning of Kirby's Digest, § 8012, when there is no evidence reflecting on the character or testimony of the witness so testifying. (Page 75.)

5. TRIAL—IMPROPER ARGUMENT—INVITED ERROR.—Appellants cannot complain of remarks of opposing counsel if they were elicited by improper remarks of appellants' counsel. (Page 76.)

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

U. L. Meade, for appellants.

1. The burden of proof was on appellee to establish the will by showing that it was in the proper handwriting of the testatrix. Kirby's Dig. § § 3107, 8012; 38 Ark. 482; 63 Ark. 145; 64 Ark. 349; 70 Ark. 88. While, as a rule, the burden is upon contestants, in a contest over an attested will, even in such cases there are exceptions to the rule. 19 Ark. 550; 25 Am. Dec. 282; 6 Lawson's Rights, Remedies & Practice, § § 3196, 3209; 1 Jarman on Wills, 69, 71; 46 Mo. 147.

2. The language used by appellee's attorney in his argument to the jury was prejudicial, and not to be justified on the ground that it was "in answer to Mr. Meade's remarks," for the latter was within the record in his remarks, and had said nothing relative to the matters referred to except that which had been testified to by witnesses. 82 Ark. 432.

3. It was error to permit the affidavit or proof of the will taken before the clerk in vacation to be read to the jury. The same witnesses whose affidavit was taken by the clerk were present and testified at the trial in circuit court. Being improperly admitted, its effect was prejudicial. 77 Ark. 431.

4. The court erred in excluding testimony offered by appellants to show the capacity or want of it of the testatrix to resist a request or overtures of appellee to convey to her, appellee, property by deed, will or otherwise. The witnesses offered severally qualified themselves to testify and to give their opinions by showing their opportunities for becoming acquainted with the mental and physical powers of both the testatrix and appellee and with the influence of the latter over the former. 22 Ark. 95; 15 Ark. 556; 76 Ark. 286; 64 Ark. 523.

5. The testimony of Robert L. Smith was improperly excluded. It was competent as tending to prove overtures, arguments and persuasions of appellee to her mother relative to the disposition of her property, and to bias her mind against her son. 87 Ark. 243; *Id.* 148; 29 Ark. 151. The court should have instructed the jury, as requested in appellant's 13th prayer, to the effect that if Mrs. Smith had sufficient mental capacity to make the will, but on account of her age, infirmities and bodily and mental weakness appellee had obtained an undue influence over her, and, prompted and controlled by such undue influence, she had executed the will, they should find against the will. 87 Ark. 243; 85 Ark. 363; 84 Ark. 490; 15 Ark. 556; 29 Ark. 151; 60 Ark. 301; 1 Jarman on Wills, 143.

6. If Mrs. Smith could, without inconvenience to herself, have called witnesses to attest her will, and did not do so, this was a circumstance which ought to have been submitted under proper instruction of the court to the jury for their consideration in determining whether or not she intended the instrument propounded as her last will and testament. Likewise, in determining the authenticity of the will, the jury should have been instructed to consider not only any circumstances tending to prove it, but also any circumstances, if shown, against its authenticity, and they should have been instructed further that nothing could dispense with the necessity of proof of her handwriting by the unimpeachable evidence of at least three unimpeachable witnesses. The court therefore erred in denying appellant's 17th and 18th prayers for instructions. 19 Ark. 546; 29 Ark. 151; 11 N. Y. 165.

7. A holographic will can be established only by the evidence of at least three disinterested and unimpeachable

witnesses that the body of the instrument, date and signature of the alleged testator thereto are in the genuine handwriting of the deceased; and in such case the law is not satisfied by a mere preponderance of evidence, but the jury must be satisfied by the unimpeachable evidence of at least three disinterested witnesses that the entire body of the instrument propounded, including the signature, is in the handwriting of the alleged testator. 85 Ark. 363; 80 Ark. 204; 86 Ark. 570; Kirby's Dig. § 8012, subdiv. 5; 50 Ark. 511.

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

1. Sec. 3107, Kirby's Dig., relied on by appellants as casting the burden upon appellee, applies only to controverted questions, not to *ex parte* proceedings. That section places the burden, in a controverted question, on the one who would fail if no evidence was adduced on either side. Unless supported by evidence, the charges of appellants would necessarily fall to the ground. Section 8012, relied on by appellants, casts no burden of proof anywhere. It merely permits a holographic will to be established by the unimpeachable evidence of three disinterested witnesses, etc. "Unimpeachable" does not mean "incontrovertible," as used in this section, but that the evidence must be that of persons who are not subject to impeachment for the reasons pointed out by our statutes. The burden was upon the contestants who tendered the issues. 13 Ark. 479; 19 Ark. 533; 29 Ark. 151; 96 Am. Dec. 697; 31 Am. St. Rep. 681, footnote. See also 1 Rice, Civ. Ev. 106, § 62; *Id.* 110, § 67; 88 N. Y. 357; 1 Rice, Civ. Ev. 139; 47 Ohio St. 423; 17 L. R. A. 494; 49 Ark. 367; 15 Ohio St. 1; 31 Mo. 40; 31 Ark. 175; Kirby's Dig. § 8042.

On the question of undue influence the burden of proof was on appellants. 13 Ark. 479; Garner on Wills, § 61; 72 S. W. 1065; 63 S. W. 617; 70 S. W. 136; 52 S. W. 98. So also as to the issue of mental incapacity. 69 Ark. 245; 87 Ark. 243.

2. Opinions of non-expert witnesses are competent where the object is to prove capacity or incapacity to make a contract, provided the facts and circumstances are first disclosed on which such opinions are founded. Opinions of witnesses offered by appellants were properly excluded because they were based, not on disclosures of facts, but upon an *assumed knowledge* of the men-

tal and physical condition of Mrs. Smith, and of the mental capacity of appellee and her influence over her mother.

3. Argument of appellee's attorney, objected to by appellants, if it was improper, was invited by the argument of appellant's attorney, in which he went out of the record in the patent effort to create the impression with the jury that he was a silent witness to Mrs. Smith's mental incapacity to make this will. Being invited, it is not reversible if erroneous. 77 Ark. 1; 75 Ark. 350; 74 Ark. 489.

4. There is no proof of any sort of undue influence exercised by appellee toward her mother. Nothing is shown but that natural love and affection between daughter and mother which the law recognizes as legitimate and approves. 49 Ark. 367; 87 Ark. 243. Neither does the proof sustain the charge of mental incapacity. "Old age, physical infirmities, and even partial eclipse of the mind would not prevent her from making a valid testament if she knew and understood what she was doing." 49 Ark. 367.

5. There was no error in permitting the proof of the will to be read by the jury. Will and proof of it thereto attached were submitted to the jury for their examination. Even if improperly admitted, it was not prejudicial, since the fact it tended to prove was otherwise amply established by the evidence. 74 Ark. 417; 58 Ark. 125; *Id.* 374; *Id.* 446; 7 Ark. 542; 9 Ark. 545.

BATTLE, J. On the 27th day of February, 1907, there was filed before the clerk of the probate court of Pope County the following paper writing:

"February the 18th, 1907.

"My last will and testament.

"I will to my daughter Mattie Boswell all my household goods and kitchen furniture.

"I will to my son Bob one dollar.

"I will to my sister Lou Zachary two hundred dollars ($200.00). I also will to Victory Roe one dollar.

"I will to Charlie Jones one dollar, Grace Jones one dollar, Florence Barton one dollar, Mack Jones one dollar, and Travis Jones one dollar. And all my real estate is deeded to Mattie Boswell, and I want a nice monument put to my grave when I am

gone to rest. And I will all my money and notes, have I any left, to my daughter Mattie Boswell.

"Cyrena Smith."

Annexed to it was the following affidavit and certificate:

"PROOF OF WILL."

"State of Arkansas,
County of Pope.

"Personally appeared before me, A. D. Shinn, clerk of the county and probate courts of Pope County, Arkansas, Edgar Shinn, Alva A. Tucker and R. L. Harkey, three disinterested citizens of the State of Arkansas, to me well known, who, being duly sworn, say that they are acquainted with the handwriting and signature of Cyrena Smith, deceased, have examined this writing purporting to be the last will and testament of said Cyrena Smith, deceased, and that said instrument is in her genuine handwriting, and her signature thereto is her genuine signature.

(Signed) "Edgar Shinn,
"Alva A. Tucker,
"R. L. Harkey.

"Subscribed and sworn to before me this 27th day of February, 1907.

"A. D. Shinn, Probate Clerk."

"State of Arkansas,
County of Pope.

"I, A. D. Shinn, clerk of the county court and ex-officio clerk of the probate court within and for the aforesaid county and State, do hereby certify that the above and foregoing last will and testament was admitted to probate before me in vacation as and for the last will and testament of Cyrena Smith, deceased.

"Witness my hand and official seal as such clerk, this 27th day of February, 1907.

(Seal) "A. D. Shinn, Clerk."

On the 6th day of May, 1907, Robert L. Smith and others filed in the Pope Probate Court what they called a response, as follows:

"In the Probate Court, Pope County, Ark.

"Robert L. Smith, Victoria Rowe, Charlie Jones, Florence Barton and Mack Jones, Jr., and Grace Jones, Travis Jones,

minors, by their father and next friend, J. M. Jones, Contestants.

"v.

"Mrs. Mattie Boswell and (R. N.) Boswell, Contestees.

"RESPONSE OF CONTESTANTS.

"Comes the above-named contestants, and state that they have an interest in the estate of Cyrena Smith, deceased, and that Robert L. Smith is the son of said deceased, and that Victoria Rowe is the only heir and next of kin to Hazie Brown, now deceased, who was one of the children and heirs of the said Cyrena Smith, and that Charlie Jones, Florence Barton, Mack Jones, Jr., and Grace Jones and Travis Jones are the only children of Maggie M. Jones, now deceased, and that Maggie M. Jones was one of the children and heirs of the said Cyrena Smith, deceased. And for the grounds of contest to the pretended will filed in this court on the.....day.....1907, and probated by the clerk of this court in vacation, on the.....day of..... 1907, would respectfully state:

"1st. That said pretended will is not in the proper handwriting of Cyrena Smith, nor neither the body of the instrument nor the signature thereto, and is therefore not the last will and testament of the said Cyrena Smith.

"2d. That, if said proposed will and signature thereto was written by the said Cyrena Smith, she was induced to do so by the undue and improper influence of Mrs. Mattie Boswell and her husband, Van Boswell, and others, to that extent as to render said proposed will void.

"3d. That, if said proposed will was written and executed by the said Cyrena Smith, it was done when she did not possess sufficient reason and mental capacity to dispose of her estate by will or otherwise, and hence said will is void.

"4th. That at the time said will was written, if written at all by the said Cyrena Smith, she did not possess sufficient mind and reason and mental capacity to understand and comprehend the extent and magnitude of her estate, and the just and equitable distribution of said bounty between her children, and the children of her deceased daughters, to that extent as to render a testamentary document void.

"5th. Wherefore, premises seen, contestants pray this honorable court for an order revoking the action of the clerk of this court, in vacation, admitting said instrument of writing to probate as of and for the last will and testament of said Cyrena Smith, deceased.

"And for the further order refusing to allow said instrument to be probated as the last will and testament of the said Cyrena Smith, and for all their cost.

"U. L. Meade and Jeff Davis,
"Attorneys for Contestants."

The contestees filed a reply, denying all the allegations in the so-called response.

The probate court, sitting as a jury, heard all the testimony adduced by the parties, and found that the document purporting to be the last will and testament of Cyrena Smith, and probated in common form before the clerk of the probate court on the 27th day of February, 1907, is such last will and testament, in her handwriting, both body and signature; and that at the time of writing it she was of sound mind and disposing memory, capable of executing it, and did execute it without the undue influence of any one; and approved and confirmed the action of the clerk in admitting it to probate.

Contestants appealed to the Pope Circuit Court. Upon their motion the name of R. N. Boswell was stricken from their pleading as a contestee. A jury was impaneled to try the issues, and the court decided that the burden of proof "in the whole case" rested upon the contestants. After hearing all the evidence adduced by all the parties the jury were required to answer the following interrogatories propounded to them:

"1. Is the entire will in controversy and its signature in the proper handwriting of Cyrena Smith, deceased?

"2. Did she possess sufficient mental and physical capacity to make a will?

"3. Was the will executed under undue influence as defined by the court in the instructions given?"

The jury answered the first two interrogatories in the affirmative and the last in the negative; and returned a verdict in favor of the contestee and the will. Judgment was rendered accordingly, and contestants appealed.

The first error complained of is the ruling of the court as to the burden of proof. As to the insanity of the testatrix and her incompetency to make a will, the ruling of the court is correct. The burden of proof was upon the contestants. *McCulloch* v. *Campbell,* 49 Ark. 367; *McDaniel* v. *Crosby,* 19 Ark. 533; *Bims* v. *Collier,* 69 Ark. 245; *Taylor* v. *McClintock,* 87 Ark. 243. The ruling was also correct as to undue influence. The burden was upon the contestants to prove that the will was procured by undue influence. *Guthrie* v. *Price,* 23 Ark. 396; *Jenkins* v. *Tobin,* 31 Ark. 306, 309; Page on Wills, § 405; Gardner on Wills, page 179, § 61; 3 Elliott on Evidence, § 2693. As to the execution of the will, both parties adduced voluminous evidence, and the appellants were not prejudiced by the ruling of the court, if it be assumed that it was incorrect, but on the contrary was benefited by having the opening and closing of the argument before the jury.

Minnie Brown testified in the trial that the mental and physical condition of Cyrena Smith, the testatrix, during the years she "stayed" with R. L. Smith, her son, was weak; complained of her heart all the time; was nervous, easy to cry, hysterical, have seen her sit on the floor and cry; absent-minded; would forget the day of the week; have seen Mrs. Boswell, the contestee, in company with her; she had a great deal of influence over Mrs. Smith, her mother; her mother did everything Mrs. Boswell wanted her to do, except she went to St. Louis to visit an invalid grandson when Mrs. Boswell did not want her to go; her great desire was to please Mrs. Boswell. After making this statement, the appellants then asked her: "Knowing as you did the mental and physical condition of Mrs. Smith at the time she lived with Bob Smith, and just prior to her death, and her mental capacity and the mental capacity of Mrs. Mattie Boswell, and the influence she had over Mrs. Smith, I will ask you if, in your judgment, was or was not Mrs. Smith mentally and physically able and capable of resisting or refusing a request or command of Mrs. Boswell to convey to her her estate or a considerable portion thereof?" Upon objection of appellee the court refused to permit witness to answer the question. It (court) did not err in so doing. "Proof of relations of friendship and affection between the testator and devisee and of kindly offices and proper con-

duct on the part of the latter does not establish undue influence, as it is natural for a person whose will is not improperly controlled to favor his best friends. The influence of the husband over the wife, that of the wife over the husband, of the parents over the children, and of the children over the parents, are legitimate, so long as they do not extend to positive dictation and control over the mind of the testator." 3 Elliott on Evidence, § 2696, and cases cited.

In *McCulloch* v. *Campbell,* 49 Ark. 367, this court said: "As we understand the rule, the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property, and the influence must be specifically directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiary in the ordinary affairs of life or that he was surrounded by them in confidential relation with them at the time of its execution." See *Sanger* v. *McDonald,* 87 Ark. 148.

The question was improper. The witness did not testify to any facts that tended to prove that Mrs. Boswell could control her mother in any manner, except by affection, or in any manner which was not perfectly legitimate.

Similar questions were asked other witnesses, which the court would not permit them to answer. For the reason given above the court did not err in so doing.

In seven requests appellants, in effect, in various ways asked the court to instruct the jury that they must not find the instrument of writing in contest to be the last will and testament of Cyrena Smith unless it be "established by the unimpeachable evidence of at least three disinterested witnesses that the entire body of said instrument, including the signature thereto, is in the handwriting of the said Cyrena Smith." The court properly refused to grant them. It is true that a statute provides, "when the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix, such will may be established by the unimpeachable evidence of at least three

disinterested witnesses to the handwriting and signature of the testator or testatrix, notwithstanding there may be no attesting witness to such will." Kirby's Digest, § 8012, sub. 5. But this court held in *Arendt* v. *Arendt,* 80 Ark. 204, that the evidence is unimpeachable, within the meaning of the statute, when there is no evidence reflecting on the character or testimony of the witness so testifying. This ruling controls in this case.

The instructions given by the court as to the execution of the will and to mental capacity and undue influence were full, complete, and, construed together, substantially correct, and fairly submitted to the jury the issues in that respect.

Appellants complain of language used by an attorney of appellee while addressing the jury. It was as follows: "Now, this will was made in May, 1906. Mr. Meade, one of the counsel for the opposing side of this case, was the very lawyer that drew that instrument. Why don't he come here and testify as to the mental condition of Cyrena Smith? Why don't he testify to the condition of her mind? He can tell you about it, and he can testify."

This was said by Mr. Brooks, an attorney of appellee, in replying to the argument of Mr. Meade, who had just preceded him in arguing the case to the jury, and who said: "There is more of U. L. Meade in this case than anything else. I know more about these transactions and more about the condition of Cyrena Smith than any other living being. She called on me to write her first will in 1899, and I went and wrote it for her. In that will she failed to give the little children of Mack Jones anything. Again, in the spring of 1906 she sent for me to write her second will, and I prepared it and had her execute it, and in that will she failed to give the little children of J. M. Jones anything. But it is not proper for me to testify about these things."

Appellants objected to the remark of appellee's attorney, and the court excluded them from the jury. These remarks were elicited by the improper remarks of the attorney of appellants, and they therefore had no right to complain. *Pratt* v. *State,* 75 Ark. 350; *Choctaw, Oklahoma & Gulf Railway Co.* v. *Doughty,* 77 Ark. 1.

The evidence was sufficient to sustain the verdict of the jury.

Judgment affirmed.

PECK-HAMMOND COMPANY v. WALNUT RIDGE SCHOOL DISTRICT.

Opinion delivered December 20, 1909.

FIXTURES—RESERVATION OF TITLE—EFFECT.—Where a heating apparatus was sold to the contractor of a public school house, to be installed therein, upon condition that the title should remain in the vendor until the purchase price was paid, but the school board had no knowledge of such condition, and the apparatus was installed in the building, and thus became a part of the structure, the reservation of title could not be enforced.

Appeal from Lawrence Circuit Court, Eastern District; *Charles Coffin*, Judge; affirmed.

E. H. Tharp and *John W. & Joseph M. Stayton*, for appellant.

The heating plant became a part of the realty. Tiedeman on Real Prop., § § 3 and 4; 42 Miss. 71; 26 Grat. 752. As to whether personalty does, in any particular case, become realty, depends upon the understanding of the parties. 40 Mich. 693; 86 Mich. 106; 48 N. W. 692; 28 Vt. 428; 11 Fed. 1; 63 Ga. 499; 24 N. J. L. 287; 47 Kan. 442; 28 Pac. 168. But where title to personalty is retained, it does not become a fixture. 33 N. H. 66. Where the owner of personalty attached to realty mortgages it as personalty, it will be presumed that the parties intended it should remain personalty. 150 Mass. 281; 22 N. E. 900. Unless title passes, it remains personalty. 25 Minn. 173; 7 So. 499; 81 Tex. 99; 53 Fed. 19; 57 Cal. 3; 117 Mass. 471; 91 Mich. 409; 75 N. Y. 542; 17 Pac. 148; 24 Ind. 277; 86 Me. 394; 105 Mass. 239; 56 Miss. 552; 45 O. St. 289; 5 Wash. 787; 40 Am. R. 107; 30 Am. St. 488; 18 Atl. 93; 30 Atl. 14; 21 Mo. App. 69; 15 N. Y. Supp. 39; 32 Pac. 744; 10 L. R. A. (N. S.) 458; 42 Ark. 473; 49 Ark. 63; 55 Ark. 542; 30 Ark. 402; 47 Ark. 363; 48 Ark. 160; 66 Ark. 240; 68 Ark. 230.

H. L. Ponder and *W. E. Beloate*, for appellee.

The intention of the permanency of the installation is the test as to whether personalty becomes a fixture. 88 Ark. 129; 23 S. E. 420; 66 Ark. 80. Appellant waived any title he had to the personalty by erecting it on the land of appellee without notice that he looked to the property for payment or that title did not

pass. 88 Ark. 99; 83 Ark. 383. His only remedy is against the wrongdoer. 5 Hill 116; 134 N. Y. 464; 48 N. Y. 287.

HART, J. In November, 1906, the board of directors of Walnut Ridge Special School District entered into a contract with one J. L. Park for the construction of a school house in the town of Walnut Ridge. The plans and specifications, which were a part of the contract, provided for the installment of a heating plant. Park made a contract with the Peck-Hammond Company, of Cincinnati, O., to furnish the material and install the heating apparatus. The contract provided that the title to the material furnished should remain in the vendor until paid for. The heating plant, with the necessary warm air furnaces, pipes, flues, registers, facings, etc., was duly erected in the school house. Park failed to complete the building, and turned it, with the heating plant which had been installed, over to the board of directors, who had the building finished. The school district paid out more than the contract price to erect the building. They knew nothing of the terms of the contract between Park and the Peck-Hammond Company. They did not know that the contract for the heating apparatus provided that the title to the property should remain in the vendor until paid for. Park failed to pay for the heating apparatus, and the vendor instituted this suit in replevin to recover it.

The Peck-Hammond Company adduced evidence tending to show that the machinery which composed the heating plant could be removed, without injury to the school building. On the other hand, the school district adduced evidence tending to show that it was a part of the building, and could not be detached without defacing and otherwise injuring the building. The court dismissed the complaint against the school district, and the plaintiff has appealed.

We think the judgment was right. The cases cited by counsel for appellant are cases where the contract reserving title in the chattels was made with the owner of the land, and have no application to the facts of this case. Under the facts as disclosed by the record, the present case is ruled by the principle announced in *Brannon* v. *Vaughan*, 66 Ark. 87.

The heating plant was installed under a contract with Park in a building on land belonging to the school district. Appellant

knew that the building was not being erected for occupancy by Park, but that it was built for use as a school house, and that the installation of a heating plant was a necessary adjunct to the building.

The board of directors were not parties to the contract between appellant and Park, and had no knowledge of the condition thereof. Under such a state of facts, there is a necessary inference that the heating plant was affixed permanently to the structure, and a conclusive presumption that it should become a part of the realty.

Judgment affirmed.

GRUBBS v. NIXON.

Opinion delivered December 20, 1909.

LIMITATION OF ACTIONS—WAIVER OF DEFENSE.—A mutual agreement between two parties that cross demands shall extinguish each other is valid and binding, even though one of them is barred by the statute of limitations, as the defense of the statute may be waived.

Appeal from Jackson Circuit Court; *Charles Coffin,* Judge; reversed.

Joseph W. Phillips and *Joseph M. Stayton,* for appellant.

Where there is a conflict in the evidence, the case should be submitted to the jury. 71 Ark. 305; 84 Ark. 57; *Crawford* v. *Sawyer & Austin Lbr. Co.,* 91 Ark. 337.

S. M. Stuckey, for appellee.

There being no evidence before the jury as to a counterclaim, the court rightfully instructed a verdict for plaintiff. 57 Ark. 461; 39 Ark. 419; 52 Ark. 347; 51 Ark. 140; 47 Ark. 567.

HART, J. On the 1st day of July, 1908, Jane Nixon brought suit before a justice of the peace against John M. Grubbs for $89.90 for merchandise alleged to have been sold to him during the years 1906 and 1907. Before the day of trial John M. Grubbs departed this life, and the suit was revived against J. W. Grubbs

as executor under the will of said John M. Grubbs, deceased, and he entered his appearance to the suit.

The justice of the peace rendered judgment in favor of the plaintiff for $75.55. The case was appealed to the circuit court.

On a trial *de novo* in the circuit court, the plaintiff, Jane Nixon, introduced R. W. Anderson, who testified substantially as follows: That he was manager of the mercantile business of Jane Nixon. That John M. Grubbs had traded with them for several years, and had paid his account promptly until the year 1906 and 1907. That he owes $75.55, the last item of which was purchased on November 8, 1907.

The defendant introduced J. W. Grubbs, who testified substantially as follows: That Jane Nixon, through her agent R. W. Anderson, had purchased a bill of goods from the Newport Grocery Company, the last item of which was dated April 1, 1899, and that the account was transferred to John M. Grubbs in February, 1902. That he was present with his brother John M. Grubbs, now deceased, when R. W. Anderson, general manager of the mercantile business of Jane Nixon, demanded payment of the account his brother owed her. That his brother told Anderson that he had purchased the account for $114.66 which Jane Nixon owed the Newport Grocery Company. That Anderson admitted that the account was just, and said that he bought the goods embraced in it for her. That it was expressly understood and agreed between John M. Grubbs and R. W. Anderson, for Jane Nixon, that the amount of her account against Grubbs should be credited on the $114.66 account which Grubbs held against her. That, pursuant to the agreement, John M. Grubbs gave to Anderson a receipt for $75.55, the amount of Jane Nixon's account against him, and entered that amount as a credit on the $114.66 claim held by him against her. That Anderson promised to mark paid the account of Jane Nixon against John M. Grubbs.

R. W. Anderson, for the plaintiff, denied that the conversation and agreement as testified to by J. W. Grubbs was had between him and John M. Grubbs.

The court directed a verdict for the plaintiff, and the defendant has appealed to this court.

The court erred in directing a verdict for the plaintiff. The

testimony of J. W. Grubbs presented an issue of fact which should have been submitted to the jury. John M. Grubbs purchased an account of $114.66 against Jane Nixon, and thus had a debt against her. He was indebted to her in a smaller sum, viz., $75.55. They met and agreed that the claim of Jane Nixon should be discharged by appropriating what was due from Grubbs to her to what she owed him.

If the testimony of J. W. Grubbs to this effect was true, it constituted an executed and not an executory contract. It was a present mutual contract which at once extinguished one debt and reduced the other. This principle of the law was recognized in the cases of *Quinn* v. *Sewell,* 50 Ark. 380, and *Hill* v. *Austin,* 19 Ark. 230. The application of the rule was denied in those cases because there was no agreement that the cross demands should extinguish each other. That the statute of limitations might have been successfully pleaded against the claim of Grubbs did not make the alleged agreement one without consideration, for the statute bar does not operate of itself; and the alleged agreement constituted a waiver of it. R. W. Anderson was the manager of the mercantile business of Jane Nixon, and as such had authority to act for her in the premises.

The view of the law we have expressed necessarily leads to the conclusion that the court erred in directing a verdict for the plaintiff; and for that error the judgment must be reversed, and the cause remanded for a new trial.

WILLIAMS v. STATE.

Opinion delivered December 20, 1909.

1. COUNTY COURTS—DUTY TO REQUIRE SETTLEMENT OF COLLECTOR.—Acts 1905, p. 657, § 6, requiring certain officers of Benton County to make quarterly settlements with the county court, does not make it the duty of the county court to require such settlements. (Page 83.)
2. JUDGES—NONFEASANCE—INDICTMENT.—If a county judge is liable to indictment, under Kirby's Digest, § 1874, for failure to require a sheriff to make a quarterly settlement of the fees and emoluments of his office, an indictment of a county judge for failure to make such

settlement is defective in failing to allege that the sheriff did not make the settlement. (Page 83.)

3. CRIMINAL LAW—SUFFICIENCY OF INDICTMENT.—An indictment should leave nothing to intendment, as an offense cannot be charged by implication. (Page 84.)

Appeal from Benton Circuit Court; *Joseph S. Maples,* Judge; reversed.

STATEMENT BY THE COURT.

The grand jury of Benton County presented an indictment against appellant which (omitting formal parts) is as follows:

"Said Lon Williams, in the said county of Benton, in the State of Arkansas, being then and there duly elected, qualified and acting county judge of said county, and presiding over and holding the county court of said county, at its regular October term, 1908, unlawfully, wilfully and knowingly did fail to require James Hickman, the then and there duly elected, qualified and acting sheriff of said county, to settle with said county court of said county for the quarter ending September 30, 1908, by full and complete report in writing, and pay over to the treasurer of said county in kind all fees and emoluments of his said office collected by him and due said county and file with said quarterly report receipts therefor and an affidavit that he had complied with the law in regard thereto, and that his settlement was full and correct," etc.

Appellant demurred to the indictment on the following grounds:

1st. Because the indictment does not state facts sufficient to constitute a public offense.

2d. Because there is no penalty fixed by law against the county judge for a failure on the part of the judge of the county court to require the sheriff to settle for his fees and emoluments quarterly to the county court.

3d. Because said indictment is indefinite and uncertain as to what offense is attempted to be charged therein and does not state facts sufficient to constitute a public offense against any law in this State.

The demurrer was overruled. Appellant was tried, convicted and appeals.

W. S. Floyd, W. D. Mauck and *J. A. Rice,* for appellant.

Courts cannot create crimes by construction or implication. 19 L. R. A. 141. Act of 1905, p. 653, does not affect the emoluments of the sheriff. The alleged offense must be brought completely within the statute. 47 Ark. 488.

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

The indictment was based on § 7156, Kirby's Dig. Section 1874 prescribes the penalty. The indictment charging that the offense was committed unlawfully, wilfully and knowingly should be upheld. 31 Ark. 39; 53 Ark. 334. It is the duty of the sheriff to settle with the county court. Kirby's Dig., § 7162. The county court shall cause the sheriff to settle. *Id.* § § 7155, 7156, 7157, 7163. The county court can compel him to comply with its orders in this regard by attachment and imprisonment. *Id.* § § 7156, 7164, 7165, 7167.

WOOD, J. (after stating the facts.) Comparing the language of the indictment with the act of May 6, 1905, § 6 (pp. 653-7), it appears that appellant was indicted for failing to require the sheriff of Benton County to make settlement under that act. This act does not make it the duty of the county court to require such settlement. Therefore authority for indicting appellant, if it exists, must be found under section 1874 and sections 7155, 7156, 7163, Kirby's Digest. Conceding, without deciding, that section 6 of the act of May 6, 1905, applies to sheriffs, and conceding, without deciding, that the judge of the county court is liable under section 1874 if he fails to require the sheriff to make the settlement required by the act of May 6, 1905, § 6, the indictment is nevertheless fatally defective in that it failed to allege affirmatively that the sheriff did not make the settlement in the manner prescribed by the act *supra.* If the sheriff settled without being required to do so, the county judge would not be liable under section 1874 above for failing to make the requirement, for the obvious reason that requirement to make settlement under such circumstances would be unnecessary. Suppose the sheriff made the settlement, would the county judge be guilty then because he neglected or refused to require him to make it? Certainly not. Therefore an allegation that the sheriff failed to make the settlement is absolutely indispensable. There is no such allegation.

A criminal offense cannot be charged by implication. Nothing must be left to intendment. *Elsey* v. *State,* 47 Ark. 572; *State* v. *Ellis,* 43 Ark. 693; *State* v. *Davis,* 80 Ark. 310; *St. Louis & San Francisco Rd. Co.* v. *State,* 83 Ark. 249.

The judgment is therefore reversed, and the cause is remanded with directions to sustain the demurrer.

INDUSTRIAL MUTUAL INDEMNITY COMPANY *v.* ARMSTRONG.

Opinion delivered January 3, 1910.

1. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—Where error appears upon the face of a judgment, a motion for new trial is unnecessary to bring it to the attention of the appellate court. (Page 85.)
2. INSURANCE—PENALTY AND ATTORNEY'S FEES.—Where plaintiff, suing upon a fire insurance policy, recovered less than the amount sued for, he is not entitled to recover a penalty and attorney's fee. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, followed. (Page 85.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed in part.

STATEMENT BY THE COURT.

Appellee sued appellant in justice's court on certain accident insurance policies. In her complaint she asked for judgment for $70 and interest, also $10 per week during continuance of disability, and for 12 per cent. penalty and attorney's fees. She obtained judgment in the justice's court. And on appeal by appellant to the circuit court appellee again obtained judgment in the sum of $30, and also 12 per cent. penalties and $15 for an attorney's fee. Appellant moved to modify this judgment by eliminating the amount recovered as penalty and attorney's fee.

The court overruled the motion, and judgment was entered for the $30 and for the penalty and attorney's fee.

Appellant appeals from that part of the judgment for the penalty and attorney's fee. The amount demanded of the company was $70 and $10 per week during the continuance of her disability. The jury returned a verdict for $30.

Jas. E. Hogue and *Calvin T. Cotham,* for appellant.

1. No motion for new trial was necessary, the error complained of appearing in that part of the judgment which imposed the penalty and attorney's fee. 57 Ark. 370; 61 Ark. 33.

2. The act of 1905 imposing the penalty in question provides that the company, upon failure to pay within the time specified in the policy and after demand made therefor, shall be liable to pay the penalty. A fair construction of its meaning is that a defaulting company shall pay the penalty when the company is at fault for the delay. There must be a just demand for payment. 11 Ark. 44; 67 Ark. 562.

R. G. Davies, for appellee.

The act of 1905 is constitutional as to the penalty, and it was properly assessed. 58 Ark. 407; 65 Ark. 343.

WOOD, J., (after stating the facts). The court erred in rendering judgment for the penalty and attorney's fee. The error appeared in the judgment. A motion for new trial was therefore unnecessary to bring it to the attention of this court. *Gates* v. *School District,* 57 Ark. 370; *Norman* v. *Fife,* 61 Ark. 33.

The question here involved is ruled by the decision of this court in the recent case of *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378. The judgment for penalty and attorney's fee is reversed, and judgment is entered here for appellee in the sum of $30, and appellee will pay the costs of this appeal.

HAGLIN v. ATKINSON-WILLIAMS HARDWARE COMPANY.

Opinion delivered January 3, 1910.

1. APPEAL AND ERROR—ABSTRACT.—Where appellant's abstract does not show that a motion for new trial was filed and that it was denied, it will be taken as correct, unless questioned by appellee's abstract. (Page 86.)

2. SAME—ABSENCE OF MOTION FOR NEW TRIAL—ERRORS CONSIDERED.—Where there is no motion for a new trial, only errors in the rendition of the judgment which are apparent on the judgment record will be considered. (Page 87.)

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

W. A. Gillenwaters, for appellant.

Winchester & Martin, for appellee.

HART, J. This is an action by the Atkinson-Williams Hardware Company against Ed Haglin to enforce a lien for material furnished for a building to be erected on defendant's lots in the city of Fort Smith, Sebastian County, Arkansas.

There was a trial before a jury, and a verdict for the plaintiff. The defendant has appealed from the judgment rendered upon the verdict.

Counsel for appellant says that the only question raised by the appeal is: "Can appellee enforce its lien against the property for material that did not go into the building and become a part thereof."

He insists that the court erred in modifying an instruction asked by him on this point. He sets forth in his abstract the instruction asked by him on this point and the modification thereof by the court, but does not set out the other instructions given by the court. He also sets out a portion of the testimony adduced at the trial, which tends to show that a part of the materials furnished were not used in the construction of the building, but does not set out all the testimony or the substance thereof. Nowhere in his brief or abstract is there any reference to a motion for a new trial. The cause was brought and tried in the Sebastian Circuit Court for the Fort Smith District.

Counsel for appellee has not attempted to supply the omissions in the abstract of appellant, but relies solely upon the right to have the judgment of the lower court affirmed for a noncompliance with Rule 9 of this court. His brief was filed on the 3d day of December, 1909, in ample time before the submission of the case for counsel for appellant to have presented to the court his excuse for the alleged omissions in his abstract, had he desired to do so.

Rules of procedure are eminently proper and absolutely necessary to the orderly dispatch of the business before the court. Rule 9 has been adopted for many years, and has been uniformly enforced where no sufficient excuse for not complying with it has been made to the court. The question then is squarely raised: Has Rule 9 been complied with? If it has not, according to numerous decisions of the court, extending over a period of many years, the judgment of the lower court must be affirmed.

It is not necessary to discuss the question whether the modification of the instruction complained of, and the testimony abstracted, were sufficient to raise the issue intended to be presented; for the abstract is fatally defective in that it does not show that appellant filed a motion for a new trial in the lower court, and that the same was overruled.

It is the settled law of this State that where there is no motion for a new trial only errors in the rendition of the judgment which are apparent on the record proper will be considered. We take the abstract of the appellant as the record showing the proceedings of the court below except where its correctness is questioned by appellee. We do not interpret our rules otherwise than reasonably. For instance, we do not require that the motion for a new trial be set out in full in the abstract of appellant.

We recognize the abstract to be what its name implies; and where it states that a motion for a new trial was filed and overruled, that is sufficient to show that the lower court refused to correct the alleged errors. And we take the assignment of errors presented and urged in the brief as causes for reversal as being properly set out and raised in the motion for a new trial unless that fact is challenged by appellee. In which case we examined the transcript to settle the disputed issue. Otherwise each judge in turn would be compelled in all cases to explore the transcript to ascertain if the assignments of error were properly saved, or rely upon the statement of the judge in whose care the transcript is lodged. The latter course would make the opinion that of one judge, and not that of the court.

We have heretofore uniformly recognized and enforced this interpretation of the rules. Hence the citation of only a few cases is necessary for illustration of its application. *Wallace* v. *St. Louis, I. M. & S. Ry Co.*, 83 Ark. 359; *McDonough* v. *Williams*, 86 Ark. 600; *St. Louis, I. M. & S. Ry Co.* v. *Boyles*, 78 Ark. 374.

For the reason that appellant has not in his abstract and brief shown that a motion for a new trial was filed and overruled in the lower court, the judgment will be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. BURDG.

Opinion delivered January 3, 1910.

MASTER AND SERVANT—ASSUMED RISK—NEGLIGENCE OF FELLOW SERVANT.—The common-law rule that the negligence of a fellow servant is assumed by one who undertakes service under a master has, as to all railroad and coal companies and all corporations, been repealed by the act of March 8, 1907, making the master "responsible to a servant who, while exercising due care for his own safety, is injured by the negligent act of a fellow servant, the same as if the negligence was that of the master."

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

S. H. West and *Bridges, Wooldridge & Gantt,* for appellant.

1. The only allegation of negligence is as to plaintiff's fellow-servant and co-employee. Defendant is therefore liable, if at all, only under the provisions of the Fellow Servant Act of 1907, which abrogates the common-law rule under which a master was liable for injuries caused by the negligence of a fellow-servant only when there had been a lack of ordinary care on the part of the master in selecting and employing competent servants to work with the injured servant, and makes the master liable for such injuries in the same manner and to the same extent as if the negligence causing the injury was that of the master. No presumption of negligence arises from the mere occurrence of the act, and the burden is on plaintiff to prove negligence before there can be a recovery. 44 Ark. 527; 46 *Id.* 555; 51 *Id.* 467; 74 *Id.* 19; 79 *Id.* 81; 79 *Id.* 437; 82 *Id.* 375; 179 U. S. 658. In this case the negligence can consist only of the cause which started the iron to fall; and the evidence must show that this cause was some act or omission on the part of Duckett, plaintiff's fellow-workman, which amounted to negligence. This the evidence fails to establish, and defendant was entitled to a peremptory instruction.

2. Furthermore, it was necessary for plaintiff to show that he himself was, at the time of the injury, "in the exercise of due care," as provided by said act. Acts 1907, p. 162; 41 A. & E. R. Cas., N. S. 834, and cases there cited. Plaintiff has failed to show that he was "in the exercise of due care," and the judgment should therefore be reversed.

3. The court erred in refusing to give defendant's instruction number 2, which submitted to the jury the question of plaintiff's assumed risk, which defense is not changed by the above act. 56 Ark. 206; 54 *Id.* 389; 87 *Id.* 513; 90 Ark. 543; 70 Iowa 561; 81 Wis. 563; 3 Elliott on Railroads (2 ed.), § 1289.

FRAUENTHAL, J. J. M. C. Burdg, the plaintiff below, instituted this suit against the St. Louis Southwestern Railway Company to recover damages for injuries which he alleged that he received while in the employment of the defendant as a car carpenter. On October 24, 1907, plaintiff was in the employ of the defendant as a car carpenter, and was engaged in the duty of taking a brake rod off of a box car for the purpose of repairing the car. Another employee of the defendant was at the time engaged at work on the top of the car in loosening a heavy iron brake plate which encased the brake rod. The plaintiff was on the ground, and in the performance of his work was lifting the brake rod out of a socket so as to lower it when, as plaintiff alleged, the employee on the top of the car negligently and carelessly suffered and permitted the brake plate to drop or slide down the brake rod from the top of the car upon the plaintiff's right hand, thereby breaking, wounding and permanently disabling his hand.

The defendant admitted the employment of the plaintiff, but denied all other allegations of the complaint; and pleaded contributory negligence and assumed risk on the part of the plaintiff as a defense to his recovery.

The evidence on the part of the plaintiff tended to prove that the end of the box car had been knocked out, and that the plaintiff and his fellow-servant were engaged in removing the brake rod. This rod was encased in the brake plate at the top of the car, and this plate was fastened to the car with screws; and when the plate was entirely loosened, it would slide down the rod. The employee on top of the car had loosened the plate from the car by removing the screws, and was holding the plate against the side of the car while the plaintiff on the ground took hold of the lower end of the brake rod and was raising it out of the socket. The employee on the top of the car let the iron plate drop or slide down on the plaintiff while he was thus raising the rod. He gave no warning of letting the plate drop, and at the time the plaintiff was looking down while engaged in the duty

of raising the rod and did not see the plate as it fell. From the facts and circumstances detailed we are of the opinion that the evidence is sufficient to sustain a finding that the fellow-servant was negligent in permitting or causing the brake plate to fall upon the plaintiff; and that at the time the plaintiff was in the exercise of due care.

The court, amongst other instructions, gave to the jury the following:

"The fact that the plaintiff was injured is not, within itself, sufficient to enable him to recover; but he must prove that his injury was caused by the negligence of some employee of defendant company. There is no presumption of negligence against defendant in this case, and the plaintiff, before he is entitled to recover, must prove by a preponderance of the evidence that his injury was caused by the negligence of his fellow-workman, and that but for such negligence his injuries would not have occurred."

And, at the request of the defendant, the court gave the following instructions:

"9. It is alleged in the complaint that plaintiff was injured by the carelessness and negligence of his fellow-workman in permitting an iron brake-plate to drop and fall upon plaintiff, so plaintiff must prove by a preponderance of the evidence that his injury was caused by the negligence of his fellow-workman in permitting said iron brake-plate to fall and injure plaintiff; and, if he fails to do this, then he is not entitled to recover, and your verdict should be for the defendant.

"10. It is the duty of an employee to exercise ordinary and usual care in the performance of his work; and if he did not do so, and want of care contributed in any degree to the injury to himself, then he is guilty of contributory negligence, and cannot recover in such case, even though the master or a fellow-servant were negligent in causing the alleged injury. If you find from a preponderance of the evidence that plaintiff was assisting his fellow-worker to take from the car the iron brake-plate, and in doing so he did not exercise what was ordinary prudence and care under the circumstances, and that his want of care contributed to the happening of plaintiff's alleged injury, then your verdict should be for the defendant.

"11. Contributory negligence is the want of ordinary care

on the part of the party injured; that is to say, the want of such care as an ordinary prudent person would have exercised under same or similar circumstances."

The defendant requested the court to give the following instruction, which was refused:

"2. You are instructed, as a matter of law, that an employee, when he enters the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service in which he engages; and if you believe from the evidence that the injury to plaintiff was only the result of one of the risks ordinarily incident to the work in which plaintiff was engaged, and not otherwise, then he cannot recover in this case, and your verdict should be for the defendant."

The jury returned a verdict in favor of the plaintiff for $200. The defendant prosecutes this appeal.

It is contended that the court erred in refusing to give the above instruction number 2 at the request of the defendant, which relates to the assumption of risk by the plaintiff while engaged in this employment. The plaintiff alleged in his complaint that the sole cause of the injury was the negligent act of the fellow-servant in permitting or causing the brake-plate to fall on him. The testimony upon both sides was directed to this issue, and there was no testimony showing that the injury occurred from any other cause. The fellow-servant permitted or caused the plate to drop which injured the plaintiff. And the sole issue was whether or not the fellow-servant was negligent in this act. There was no evidence indicating that the injury was caused by any other act or cause or from any risk or peril that was incident to the work in which plaintiff was engaged other than this negligence of the fellow-servant. The instruction was therefore not applicable to the facts and evidence adduced upon the trial of this case and the sole issue involved in the case, unless as a matter of law the plaintiff assumed the risk and peril consequent upon the failure of the fellow-servant to properly perform his duty. If under the law the plaintiff did not assume the risk of the negligence of his fellow-servant, then under the pleading and testimony in this case said instruction was abstract. According to the common law, the master is not responsible for the injuries of the servant caused by the negligence of a fellow-servant. This

has been a well-recognized principle of the law, and the reason that was and is generally assigned for this doctrine is that the negligence of the fellow-servant is one of the risks that are incident to the service and assumed by the servant when he enters the employment. It was considered that by taking the employment the servant impliedly agreed and contracted to assume the risks ordinarily incident thereto, and that the negligence of the fellow-servant was one of these risks. But by the act of the General Assembly of March 8, 1907 (Acts 1907, 162), it was provided that a railroad company should be held responsible for injuries to a servant caused by the negligence of a fellow-servant. That act is as follows:

"Section 1. That hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company, whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer." Acts 1907, p. 162.

This statute abolishes the above common-law doctrine which held that the servant assumed the risk of danger caused by the negligence of a fellow-servant. As is said in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Ledford,* 90 Ark. 543, this statute "prevents as to certain classes of employers the application of the doctrine which treats a danger created by negligence of a fellow-servant as one of the ordinary risks of the service assumed by the servant." By virtue of this statute the negligent act of the fellow-servant is, as far as the rights of the injured servant are concerned, the same as if it was the negligent act of the master. *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587; *Aluminum Co. of N. A.* v. *Ramsey,* 89 Ark. 522; *Ozan Lumber Co.* v. *Bryan,* 90 Ark. 223.

Now, it has been uniformly held that the servant, in enter-

ing the employ of the master, does not assume the risks of the dangers or perils that arise from or which are consequent upon the negligence of the master. He has a right to assume that the master has exercised due care and diligence, and to act upon the presumption that the master has exercised and will exercise that care for his protection. *Choctaw, O. & G. Rd. Co.* v. *Jones*, 77 Ark. 367; *Southern Cotton Oil Co.* v. *Spott*, 77 Ark. 463; *Choctaw, O. & G. Rd. Co.* v. *Craig*, 79 Ark. 53; *Pettus* v. *Kerr*, 87 Ark. 396; *St. Louis, I. M. & S. Ry. Co.* v. *Harmon*, 85 Ark. 503; *St. Louis, I. M. & S. Ry. Co.* v. *Birch*, 89 Ark. 424.

By virtue of the above act of March 8, 1907, the master is made "responsible to a servant who, while exercising due care for his own safety, is injured by the negligent act of a fellow-servant, the same as if the negligence was that of the master." The servant has therefore the right to presume that his fellow-servant will exercise due care and diligence; and he does not assume the risk of danger or peril caused by the negligence of the fellow-servant.

It follows that the court did not err in refusing to give said instruction number 2 asked for by the defendant.

We have examined the instructions given on the part of the plaintiff and all other instructions requested by the defendant, and find no reversible error in the rulings of the court thereon. As stated above, we think that there was sufficient evidence to warrant the jury in finding that the plaintiff at the time of the injury was in the exercise of due care and diligence, and that the injury received by him was solely due to the negligence of the fellow-servant.

The judgment is affirmed.

DAVIS v. DAVIS.

Opinion delivered January 3, 1910.

1. INJUNCTION—TRESPASSES.—Equity will not restrain trespasses upon real property when the injury is not irreparable and destructive of plaintiff's estate, or where he has an adequate remedy at law. (Page 101.)
2. CONTRACT—CONSTRUCTION.—Under an agreement by a father to leave his lands to his children at his death if they would live with him, they acquired no interest in the lands. (Page 101.)

3. HUSBAND AND WIFE.—ADVANCEMENT.—A husband is not liable to refund money furnished by his wife to improve his home. (Page 102.)
4. IMPROVEMENTS—COLOR OF TITLE.—One who makes improvements without having color of title is not authorized, under Kirby's Digest, § 2754, to recover compensation therefor. (Page 103.)
5. CONTRACT—BREACH—DAMAGES.—Where a father agreed to furnish a home to his daughter, and afterwards broke such agreement, she will not be entitled to hold him liable for such amount as she might have earned elsewhere. (Page 103.)
6. SET-OFF AND COUNTERCLAIM—INDEPENDENT MATTER.—In a suit to enjoin defendant from trespassing upon plaintiff's land, defendant is not entitled by way of counterclaim to set up that she is entitled to compensation for domestic services rendered to plaintiff. (Page 103.)

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

J. A. Rice, for appellant.

No issue was raised as to improvements, either in the pleadings or evidence. Hence the court was without power to render judgment for improvements. 1 Black on Judgments, 2d Ed. 183; 15 S. W. 870; 133 Cal. 228; 40 S. W. 1041; 51 S. W. 337; 32 S. W. 250. The value of improvements can be recovered only by those claiming under color of title. Kirby's Dig., § § 2751-2754; 59 Ark. 144; 47 Ark. 62; *Id.* 528; 53 Ark. 545. The instrument referred to as the will of E. J. Davis is not established as such by the evidence. 80 Ark. 204; Kirby's Dig., § 8053. To constitute a liability for money advanced by the wife to the husband, there must be a loan by her to him in good faith, and upon his promise to repay. 49 Ark. 430.

R. F. Forrest, for appellees.

There was a definite contract or agreement by appellant to give one-fourth each to Mrs. Beauchamp, Oscar and Ella, and one-fourth to the two boys. This appellant admits, and, the grantees being placed in possession, it has the force of a conveyance, and should be so construed. 75 Ark. 87; 50 Ark. 367; 74 Ark. 105; 6 Ark. 119; 68 Ark. 544; Warvelle on Vendors, § 347; Tiedeman, Real Prop., § § 815; Thornton on Gifts, § § 174-5; 77 Ark. 89. Having placed appellees in possession under a parol contract, appellant is estopped from claiming the benefit of, or protection under, the Statute of Frauds. 42 Ark. 246; 5 L. R. A. 323 and notes; 82 Ark. 42; 32 Ark. 97; 32 W. Va. 463; 1

Ark. 392; 19 Ark. 25; 21 Ark. 110; 30 Ark. 250; 44 Ark. 424; 2 Story, Eq. § 761; 83 Ark. 414. A gift *inter vivos,* accompanied by such delivery as the nature of the property will admit and the circumstances render reasonably possible, operates *in praesenti,* and, between the parties, is irrevocable. 43 Ark. 307; 44 Ark. 42; 59 Ark. 191; 60 Ark. 169; 84 Ark. 109; 20 Cyc. 1212.

The presumption of gratuitous service by the child to the parent may be overcome by proof of an express or implied agreement to pay for such service. 11 L. R. A. (N. S.) 899; 56 Ark. 383; 67 S. C. 240; 181 Mass. 471; 63 N. E. 947; 7 Cal. 511; 41 Mo. 441. The proof is uncontradicted that the instrument called the will of Eliza J. Davis is in her handwriting, and the signature hers; and the court correctly construed it as she intended it. 50 Cal. 595; 118 N. C. 202; 80 Ark. 205.

BATTLE, J. William Davis, Eliza J. Davis, Oscar F. Davis, Lelia A. Beauchamp and Ella B. Davis, William being the father, and Eliza J. Davis being the mother, of the other three, constituted one family. Discord reigned among them. Father and children lost respect for, and confidence in, each other, and indulged in disparagement; and paternal feeling and filial love and affection seemed for awhile to have departed from their midst. Finally the mother died, and was buried, and the children made ready to depart, and the old man softened, and invited them to remain with him in the old homestead, and they accepted his invitation. They remained a short time when the same old bickerings, ill-will, discord and vituperation returned. The old man grew tired of the children, and brought this suit against them, on the twenty-first day of August, 1908, in the Benton Chancery Court, to drive them from his home. He alleged in his complaint that he is the owner of a certain tract of land containing forty acres, "and that he resides thereon, and cultivates the same as his only means of support, and that for a long time the defendants have habitually and unlawfully, against his will and consent, interrupted plaintiff in the possession and quiet enjoyment of his property by persisting in residing thereon and assuming the authority to manage and control same, and by preventing plaintiff's tenants and other employees from occupying and cultivating the same, and by otherwise unlawfully interfering with plaintiff's peaceable enjoyment of said premises and to his great personal discomfort and financial injury and damage, and threaten

to and will continue to do so unless restrained from so doing. He asked that they be perpetually enjoined from such interference and interruption in plaintiff's quiet and undisturbed enjoyment of his property and his home."

Mrs. Beauchamp, a defendant, answered and admitted that the legal title in the land is vested in the plaintiff, but denied the other allegations in his complaint. And she alleged:

"And this defendant says that in the month of August, 1907, she was requested by the plaintiff to take up her residence upon said premises; that in compliance with the said request she did so; that plaintiff agreed that if she would do so he would make title to this defendant, to her brother, Oscar F. Davis, and to her sister, Ella B. Davis, to an undivided one-fourth interest each in the lands and premises set forth in the complaint, and, as a further consideration for her doing so, that he would deed to her sons, John L. Beauchamp and Earl R. Beauchamp, an undivided one-eighth interest each in the lands and premises. * * * * That by reason of her contract with plaintiff she declined an offer of $65 a month and her expenses as a traveling saleslady; that she could have made during said time as saleslady the sum of $780, but that, instead of accepting the sum, she, in compliance with her contract with plaintiff, has devoted all of her time and attention to him and his business, to her great loss, towit, in the sum of $780. And the defendant, further answering, says that, as a part of her contract with William Davis, she was to occupy the land and premises during the lifetime of William Davis, free from any charge for rent or otherwise from her, together with her brother, Oscar F. Davis, and her sister, Ella B. Davis. And this defendant prays that this plaintiff be enjoined and restrained from in any manner selling or disposing of the real estate, or from mortgaging or incumbering the same in any manner whatever. And defendant, having fully answered, prays that, upon a final hearing of this cause, she be decreed an undivided one-fourth interest in the lands; that the court find that she is entitled to occupy the same in connection with her brother, Oscar F. Davis, during the lifetime of the plaintiff. That she have and recover all her costs in their behalf laid out and expended, and that she have and recover all other proper legal and equitable relief to which in good conscience she is entitled, and will ever pray."

Oscar F. Davis answered, and made the denials contained in the answer of Mrs. Beauchamp, and by way of cross-complaint pleaded the same contract with the plaintiff, and asked for specific performance of the same.

Ella B. Davis answered and denied the allegations contained in the complaint of plaintiff, and, further answering, said:

"The defendant, answering further and by way of cross complaint, states that on or about the 14th day of December, 1895, Eliza J. Davis, the mother and wife of plaintiff, inherited as her share from her father's estate the sum of $357.76, and gave of this inheritance $300 to the plaintiff, with which plaintiff built the house upon the premises, and otherwise improved the same. That Eliza J. Davis, prior to her death, bequeathed to the co-defendant, Ella B. Davis, this money, together with her interest in the land, and requested the plaintiff to pay the money to this defendant, which the plaintiff has failed to do. That this defendant has an interest in the S. W. ¼ S. W. ¼ of section 5, township 17, R. 33 W., in the sum of $300 and interest at the rate of 6 per cent from the 14th day of December, 1895. And the defendant, further answering, states that in the year 1885 the plaintiff employed her to labor as a domestic in his family and agreed to pay her reasonable compensation per week for her services. That she labored for the plaintiff as domestic for twenty-three years. That her services were reasonably worth the sum of $5 per week, and that there is due her for services aforesaid the sum of $5,980. That eighteen years ago plaintiff employed this defendant as a nurse to nurse and care for his sick wife, and agreed to pay her therefor what her services were reasonably worth, and that her services as a nurse were reasonably worth the sum of $1 per day, and that the plaintiff is justly indebted to her in the sum of $6,205 for services as nurse. That, from the time that the defendant entered the services of the plaintiff, there has been running between them a mutual running account, and that no settlement has ever been had with the plaintiff for the services so rendered by this defendant, and that there is now due and unpaid to this defendant the sum of $12,185. And the defendant, further answering, says that in the month of August, 1907, the plaintiff approached Mrs. L. A. Beauchamp, and stated to her that he desired this defendant, her brother, Oscar F. Davis, and Mrs. L. A. Beauchamp to remain with him

and care for him during his declining years, and stated that, as compensation for their care and attention, he would leave to each of them a one-fourth interest in the lands and premises hereinbefore described in plaintiff's complaint, and would leave to John L. Beauchamp and Earl R. Beauchamp an undivided one-eighth interest in said estate. And this defendant thereupon accepted the proposition so made by William Davis, and has since continued to remain at his home and to do and perform all duties incumbent upon her and to care for and nurse and minister to the said William Davis and look after his wants and household affairs as best her abilities would permit."

And she prayed as follows:

"The premises being proved, this defendant prays that the court determine what interest she has in said premises, and that she have partition thereof. That she have specific performance of the contract so entered into by and between William Davis and this defendant. That the court declare her entitled to an undivided one-fourth interest in the lands and premises subject to the life estate of William Davis, and that William Davis be enjoined and restrained by the court from in any way selling or disposing of the lands or from in any wise mortgaging or incumbering the same, and that upon a final hearing of this cause she have such other general, proper and equitable relief as equity and good conscience may require."

The plaintiff answered the cross-complaints of Mrs. Beauchamp and Oscar F. Davis, and denied that he entered into an agreement, orally or otherwise, with either of them that he would convey to them, or either of them, a one-fourth interest in the lands, or that either of them, in pursuance of any such agreement, rendered any service whatever; that Mrs. Beauchamp, at the time of his alleged contract with her, had any definite contract or understanding with any other person whereby she was entitled to a monthly salary of $65 per month, or any other sum.

And for further defense he stated: That the contract set out in the cross complaints and relied upon by Mrs. Beauchamp and Oscar F. Davis, if made, was oral, and under the statute of frauds is void, which he expressly pleaded.

And he answered the cross-complaint of Ella B. Davis as follows:

"Plaintiff, in his answer to the cross complaint of Ella Davis,

denied his liability in any sum whatever to her, or that he ever employed her as a domestic or nurse, or that she rendered any services in pursuance of such employment or understanding, or that he ever at any time agreed to pay her for any such services. During the time of alleged services she was a member of his household, residing with him as a child and member of his family, and whatever services she rendered, either as a domestic or as a nurse in caring for her sick mother, were rendered as a child and member of the household and without any expectation or understanding that she was to be compensated therefor, other than to share in the home in common with the other members of the family, which she did; and that at no time prior to the bringing of this suit did she disclose to the appellant that she expected him to pay for said services. And he further shows that her claim for compensation for such services is stale, outlawed and barred by the statute of limitation, which is pleaded as a defense herein, and that the alleged contract to convey an interest in the lands to her was never made, and if made was oral, not in writing and is void under the statute of frauds, and was without consideration, and that the defendant has no vested rights or claims against the lands, either presently or prospectively. He denies that she ever rendered any service in pursuance of any such contract.

"And, for further defense to her cross complaint, he denies that Eliza J. Davis, mother of defendant, Ella Davis, had any interest in the lands other than a widow's inchoate right of dower, but admits that in the year 1895 his wife, Eliza J. Davis, inherited some $350 from her father's estate, and that a portion thereof was used by appellant and his wife, Eliza J. Davis, in the construction of a residence, or dwelling house, upon the property in controversy, some ten or twelve years ago, and that the remainder of said inheritance was used by the family for the common uses and benefits of all the members of the family, including Eliza J. Davis, and without any understanding that the same was a loan by her to her husband to be repaid, or that the same was ever to become a charge against him, personally, in his lifetime or against his estate at his death."

The plaintiff demurred to the separate cross-complaint of the defendants, and for cause stated:

"1. That the facts set forth in said cross-bills, if true, do do not constitute a cause of action against the plaintiff.

"2. Because the alleged contract set forth in said cross-bills, under and by which the defendants claim an interest in the lands described in the complaint, is oral, not in writing and void under the statute of frauds and of no force and effect.

"3. Because the claim for services set forth in the cross-bill of defendant Ella Davis shows upon its face to be stale and barred by limitation; and because the claim for service set forth in said cross-bill cannot be litigated or adjudicated as a defense to plaintiff's action."

A motion was filed to dismiss the complaint as to Ella B. Davis.

The court, after hearing the evidence adduced by all the parties, dismissed the complaint as to Ella B. Davis, and found as follows:

"1. That plaintiff, William Davis, is the sole owner of the lands and improvements thereon and described as follows: S. W. ¼ sec. 5, twp. 17 north, range 33 west, Benton County, Arkansas, and is entitled to the peaceable and quiet and uninterrupted possession thereof, as against the defendants L. A. Beauchamp and Oscar F. Davis.

"2. That the defendant, Oscar F. Davis, is entitled to recover of appellant, William Davis, $21 for improvements on the premises by him.

"3. That L. A. Beauchamp is entitled to recover of appellant $275 for improvements made on the place by her.

"4. That the defendant, Ella Davis, is entitled to recover of appellant $250 'for improvements made on the lands with money bequeathed to her by her mother, Eliza J. Davis.'

"5. That the contract set forth in the cross-complaints whereby cross-complainants claim an interest in the lands has become burdensome and impracticable, and that it would be unreasonable to specifically perform and enforce the same as against the plaintiff, William Davis.

"6. And the court enjoined the defendants, Oscar F. Davis and L. A. Beauchamp, from going on and residing upon the lands described against the consent of the plaintiff, except for the purpose of visiting Ella Davis, while residing thereon.

"7. And the court declared a lien upon the land hereinbefore described to secure the payment to the several defendants

the several sums of money hereinbefore mentioned and adjudged to be due them, with interest, provided neither of said sums shall become due and payable until the death of appellant, William Davis, or until he should sell the lands, and that the lien shall be nonenforceable so long as plaintiff, William Davis, remains the owner of the same.

"8. And the court adjudged and decreed in accordance with the foregoing findings and judgments, and that one-half of the cost be paid by each party, except Ella Davis, who recovers all her costs against the plaintiff."

Both parties have appealed.

Plaintiff is not entitled to the relief prayed for in his complaint. Courts of equity do not grant injunctions to restrain trespassers when the injury is not irreparable and destructive of plaintiff's estate, or where he has a full and adequate remedy at law. *Myers* v. *Hawkins,* 67 Ark. 413; *Haggart* v. *Chapman & Dewey Land Company,* 77 Ark. 527; *Western Tie & Timber Company* v. *Newport Land Company,* 75 Ark. 286; *McCarty* v. *Wilson,* 81 Ark. 115; *Hall* v. *Wellman Lumber Company,* 78 Ark. 408; *Terry* v. *Rosell,* 32 Ark. 478, 489; Ex parte *Foster,* 11 Ark 304. It is true that plaintiff alleged in his complaint that defendants have been and are now trespassing upon his land, to his irreparable injury, but the evidence failed to sustain the allegation. On the contrary, the court found that they had improved his land, and awarded sums of money to each of them for improvements.

The defendants base a claim to an interest to the land upon a request of them to remain at his home, made by plaintiff about the second day of September, 1907, the day after their mother was buried. This claim is based upon the testimony of the defendant, Mrs. Beauchamp. She testified that her father said:

"Lelia, I know that you intend to leave. If you will stay here, and you go and beg Oscar and Ella to stay, I will give you one-fourth of the place, Ella and Oscar each one-fourth, and your two boys the other one-fourth." He said: "There is no other little clod of dirt that will be home to you." And he said: "I will do different to what I have ever done. I will do what you say. I won't be here long."

Plaintiff testified: "A day or two after my wife died, notwithstanding the family had been living very disagreeably and

unpleasantly for a number of years, I suggested to Mrs. Beauchamp one morning that I would like for us all to live together, in case that we could live and get along in peace; live as a family should live; I emphasized that. I repeated that because we had not got along together for a number of years. But I suggested to her that we would try to live together if we could live together as a family ought to, and live in peace, and spoke about it being pleasant for us all to live together if we could get along, and, further, that if we all could live together peaceably, not saying we had to remain on that place or that they should remain, I remarked that at my death, in case of our living together as a family should, if I had anything left, to whom it would belong. I told them that the land should be divided between Mrs. Beauchamp, Oscar and Ella Davis in equal parts, and John and Earl Beauchamp, Mrs. Beauchamp's sons, one-quarter each. That what I had left should be divided among them equally." This conversation had reference to the division of his land at his death. All of them seem to have understood that the father would hold the land during his life, and that at his death it would be divided among them in the proportion stated. The promises were made gratuitously. There was no contract. The whole burden was upon the father. The children were to stay on his place. They were to pay no consideration, and have no control of the farm or the lands, and to receive no part of its profits. There was no stipulation that they would do anything for him, but only stay—make their home with him, he furnishing the home. They acquired no interest in his lands.

Ella B. Davis acquired no right to or against the land by the paper writing handed to her by her mother. It was as follows:

"After my death, when this place is sold, I want Ella to have the $250 that is in it, and that I give her the wardrobe and sewing machine and the bedstead, and I want my children to have my part of the land.

(Signed) "E. J. Davis."

The body of it and the signature to the same are in the handwriting of Mrs. Davis. It is unattested, and, under the statutes of this State, must be established, if at all, by the unimpeachable evidence of at least *three disinterested witnesses.* Kirby's Digest, § 8012, sub. 5. The writing in this case was

not so established, and was not competent evidence. If it was, there was no evidence that the $250 mentioned therein was used in the improvement of the lands in question under the contract or promise of plaintiff, Mrs. Davis's husband, to return the same. Plaintiff testified that there was not. She had the right to give it to him, or contribute it to the improvement of their home, and he cannot be forced to return it. *Pillow* v. *Sentelle,* 49 Ark. 430, 438.

The improvements for which the court allowed the defendants compensation were not made under color of title, and under the statute they were not entitled to compensation for the same. Kirby's Digest, § 2754. And there were no rents against which they could set off improvements in equity. *Teaver* v. *Akin,* 47 Ark. 532.

Plaintiff was not liable to Mrs. Beachamp for the $65 a month she failed to earn as a traveling agent to sell. He had not undertaken to pay her that amount, nor was such a failure the result of the breach of contract that she alleges that she made with the plaintiff.

The claim of Ella B. Davis for compensation for services she rendered plaintiff as a nurse or domestic is entirely distinct and independent from the subject-matter of this suit, and cannot be legally or equitably litigated in the same.

The decree of the chancery court is reversed, and the cause is remanded with directions to the court to dismiss the complaint and cross-complaints for want of equity.

PETERS v. TOWNSEND.

Opinion delivered January 3, 1910.

1. INSANITY—JURISDICTION OF COURTS.—Section 34, art. 7, of Const. 1874, providing that probate courts shall have "exclusive original jurisdiction in matters relative to * * * persons of unsound mind and their estate," does not exclude the jurisdiction of other courts to hear and determine suits by or against insane persons, whether under guardianship or not, and whether they have been adjudged insane by the probate court or not. (Page 106.)
2. SAME—PROCEDURE IN SUITS BY OR AGAINST INSANE PERSONS.—The statute requiring that actions by an insane person shall be prosecuted

by a guardian or next friend and that actions against him must be defended either by a regular guardian or by one appointed by the court (Kirby's Digest, § § 6026-9) is intended to protect all persons of unsound mind, whether judicially declared to be such or not. (Page 106.)

3. SAME—JURISDICTION OF CIRCUIT COURT.—The power of the circuit court to hear and determine an action against an insane person involves the power to inquire into the mental condition of the defendant, so as to protect his interest in the litigation, but the inquiry is only for the purpose of that particular case, and extends no further. (Page 107.)

4. SAME—RELIEF AGAINST JUDGMENT.—A judgment of the circuit court against an insane person will not be set aside in equity because the plaintiff in the original action was permitted to testify concerning a transaction with defendant, as such error could have been corrected by appeal. (Page 108.)

5. SAME—ENFORCEMENT OF JUDGMENT.—Before an adjudication of the mental unsoundness of a judgment debtor, the creditor may enforce his judgment against the debtor by execution and have the debtor's property sold. (Page 108.)

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

Wood & Henderson, for appellant.

1. The judgment of the circuit court against Augustus Peters in favor of appellee was void for want of jurisdiction, he being at the time, and before the institution of the suit, insane, and having no guardian to represent him in the action. 1 Black on Judgments, § 205; 1 Freeman on Execution, § 152; art. 7, § 34, Const. 1874; Acts 1873, p. 120, § 4; art. 6, § 10, Const. 1836; *Id.* § 3; English's Dig., chap. 48, § 5; Rev. Stat., chap. 43, § 6; 77 Ark. 355; 49 Ark. 51; 50 Ark. 34; 34 Ark. 71; 33 Ark. 575; *Id.* 728; 53 Ark. 45; 48 Ark. 544.

2. If it was a valid judgment, the real estate of Augustus Peters could, nevertheless, not be sold under an execution issued upon the same. 51 Ark. 366; 12 L. Ed. (U. S.) 1007; Kirby's Dig., § § 4020-4031, incl.

3. The third paragraph of the complaint states sufficient grounds to authorize a court of chancery to set the judgment aside and relieve Augustus Peters therefrom. 2 Pomeroy's Eq. Jur. § 823; 17 S. E. 317; 61 Ark. 341; 22 Cyc. 1245; 11 Cent. Dig. 1.

A. J. Murphy, for appellees.

1. The judgment was valid, and it was not necessary that

the circuit court await an adjudication by the probate court of unsoundness of mind of Augustus Peters. 1 Black on Judgments (1891), § 205; 16 Am. & Eng. Enc. of L. (2d Ed.), 600-601; Wharton & Stille on Med. Jur., c. 16, p. 299, § § 282, 283, 284, 285; 29 Ark. 373; 51 Ark. 224, 229.

2. Execution may issue on such judgment as a matter of right, and a sale of the defendant's real estate thereunder is valid. Freeman on Executions (2d Ed.), 40, § 22.

3. If there was error in permitting plaintiff to testify with reference to transactions had with the defendant (which is not conceded), it was such an error as could have been cured on appeal to the Supreme Court from the circuit court, and was therefore not within the jurisdiction of a chancery court to review. 36 Ark. 383; 51 Ark. 341; 61 Ark. 348; 73 Ark. 555; 15 Am. & Eng. Enc. of L. 15; 75 Ark. 37; 85 Ark. 101.

McCULLOCH, C. J. This is an action instituted in the chancery court of Garland County by Augustus Peters, an insane person, suing by his guardian, to set aside a judgment rendered against him for debt in favor of Mary E. Townsend, and also to set aside a sale of real estate under execution issued pursuant to said judgment. This action is against the judgment creditor and the purchasers at the execution sale. The chancellor sustained a demurrer to the complaint, and the plaintiff appealed.

The facts with reference to the action and judgment in the Garland Circuit Court are set forth in the complaint in the present action, and are as follows: Mary E. Townsend filed her complaint in said circuit court against Augustus Peters to recover judgment on account for services claimed to have been rendered. Summons was served on the defendant, and in default of an appearance judgment was rendered for the amount of the plaintiff's claim. On a subsequent day Abraham Peters, who is the son of Augustus Peters, and appears in the present action as guardian of the latter, appeared in the Garland Circuit Court and filed a motion to set aside the judgment on the ground that the defendant was an insane person. That court sustained the motion, and set aside the judgment. The court also made an order appointing Abraham Peters as guardian *ad litem* of said defendant, and he filed his answer as such, raising an issue upon the allegations of the complaint and pleading the statute of limita-

tions as a bar to the plaintiff's right of recovery. He also pleaded a counterclaim against the account. The case proceeded to trial before a jury, both sides being represented by counsel, which resulted in a verdict and judgment in favor of plaintiff for the sum of $2,800. No appeal was prosecuted, and execution was issued, and real estate sold thereunder. Subsequently Augustus Peters was, by the probate court of Garland County, adjudged to be insane, and his son, Abraham Peters, was appointed as his regular guardian, and he instituted the present action. Was the judgment a valid one?

Section 34, article 7, of the Constitution of 1874 provides that probate courts shall have "exclusive original jurisdiction in matters relative to * * * persons of unsound mind and their estates;" but an insane person not under guardianship can sue and be sued the same as a sane person, and the foregoing provision of the Constitution does not exclude the jurisdiction of other courts to hear and determine suits by or against insane persons, whether under guardianship or not. *Jetton* v. *Smead,* 29 Ark. 372; *Cox* v. *Gress,* 51 Ark. 224; 1 Black on Judgments, § 205; 1 Freeman on Judgments, § 152; 22 Cyc. 1222, 1224; *Flock* v. *Wyatt,* 49 Ia. 466; *Van Horn* v. *Hann,* 39 N. J. L. 207; *Maloney* v. *Dewey,* 127 Ill. 395; *Stigers* v. *Brent,* 50 Md. 214; *Livingston* v. *Livingston,* 67 N. Y. Supp. 789; *Prentiss* v. *Cornell,* 31 Hun 167; *Sanford* v. *Sanford,* 62 N. Y. 553.

The statutes of this State confer ample protection to the rights of insane litigants, either plaintiff or defendant, by requiring the court in which the action by or against such person is pending to see that he is represented by a next friend or guardian. An action by such person must be brought by guardian or next friend, and the defense of such person must be by his regular guardian or a guardian appointed by the court, and no judgment can be rendered against him until after a defense by guardian. Kirby's Digest, § § 6026-6029. The statute refers in express words only to persons judicially found to be of unsound mind; but it is not to be doubted that the Legislature intended to give equal protection to persons of unsound mind in actions by or against them, though not judicially declared to be such. The language of the statute warrants that construction.

Chief Justice COCKRILL, speaking for the court in *Cox* v.

Gress, supra, so construed the statute, and, after referring to the common-law rule that a lunatic could be sued without the intervention of a guardian or committee, said: "In equity the practice was different. That court would not proceed without the intervention of a guardian to protect the interests of the insane defendant. If he had been judicially ascertained to be insane, his committee or guardian was required to conduct his defense; but if they were hostile in interest to him, or if for any reason it was deemed best for his interest, the court appointed some other person competent to protect his interest as guardian *ad litem.* It was regarded as error to proceed against him without such guardian. If the insanity of a defendant in a pending suit was suggested, but had not been judicially ascertained, the court gave opportunity for an inquisition to be held, or took the necessary steps to determine the question for itself; and, having ascertained that the defendant was mentally incapable of making his defense, it appointed a guardian *ad litem* for him, and thereafter imposed upon him the restraints of infancy.

"Our statute regulating proceedings against lunatics adopts substantially the former practice in equity, and makes it applicable to all proceedings. Mansfield's Digest, § 4960 *et seq.* It is therefore incumbent upon the court in every civil case, where an insane person is defendant, to see to it that he is represented upon the record by a competent guardian, and it is error, as in a proceeding against an infant, to proceed without it."

It is insisted, however, that, under the constitutional provision which confers exclusive jurisdiction on the probate court in matters relating to persons of unsound mind and their estates, the adjudication of unsoundness of mind must be in that court, and, conceding that the jurisdiction of the circuit court to proceed with the action against such person after adjudication of unsoundness of mind is not excluded, the latter court must, before proceeding, await an adjudication by the probate court of the question of mental unsoundness. This contention cannot be sustained, and the decision of this court referred to above is directly against it.

It being seen that the jurisdiction of the circuit court to hear and determine an action against an insane person is not excluded by the constitutional provision hereinbefore quoted, it

necessarily follows that that court possesses the power to inquire into the mental condition of a defendant not already judicially found to be of unsound mind, for the purpose of ascertaining whether or not his defense must be made by a guardian. The power to hear and determine the case necessarily involved the power to inquire into the mental condition of the defendant, so as to protect his interest in the litigation, and the inquiry as to his mental condition is only for the purpose of that particular case, and extends no further. 22 Cyc. 1233; *Denny* v. *Denny,* 8 Allen (Mass.) 311; *Plympton* v. *Hall,* 55 Minn. 22; *Isle* v. *Cranby,* 199 Ill. 39; *Abbott* v. *Hancock,* 123 N. C. 99; *Wager* v. *Wagoner,* 53 Neb. 511; *Newcomb* v. *Newcomb,* 13 Bush (Ky.) 544; *Bensieck* v. *Cook,* 110 Mo. 173.

The next point relied on to set aside the judgment is that the plaintiff in the original action was permitted by the trial court to testify concerning transactions with the defendant, an insane person. This error could have been corrected by appeal. We are not aware of any principle of equity which would require a court of equity to set aside a judgment of a court of law on account of errors occurring in the trial of the case which could have been corrected by appeal. The statutes of this State provide that circuit courts may vacate their own judgment after the expiration of the term "for erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Kirby's Digest, § 4431. The statute does not, however, apply to this judgment, for the reason that the condition of the original defendant appeared in the record. The error, therefore, could have been corrected by appeal. And when the condition of such person appears in the record, and he is properly represented by a guardian, equity will not set aside such judgment for mere errors which could have been presented on appeal.

The most serious question in the case is whether the property of an insane person can be sold under execution to satisfy a judgment against him. The Revised Statutes of 1838 (chap. 78) on the subject of insane persons and their property, which, with certain amendments, remains in force to this day, contains ample authority for the management of such persons and their

estates by the courts exercising probate jurisdiction and for the sale of property through the orders of such courts for the payment of debts. The same statute, however, contains a provision that "on judgment against such ward, or his guardian, as such, the execution shall be against his property only, and in no case against his guardian's estate, unless he shall have rendered himself liable thereto by false pleading or otherwise." Kirby's Dig., § 4035. It appears, therefore, that the Legislature intended not to exclude the right of a judgment debtor to have ordinary process against the property of an insane judgment creditor for the enforcement of his judgment. On the contrary, the statute seems to clearly recognize that right, and to provide no exemptions in favor of the estate of an insane person. But, even in the absence of such clear statutory recognition, the authorities sustain the right of a judgment creditor to resort to ordinary process to enforce his judgment against an insane judgment debtor. 1 Freeman on Execution (3d Ed.), § 22; *Pollock* v. *Horn,* 13 Wash. 626. *Contra: Buckler* v. *Reese,* 100 Ky. 336.

In the present case the complaint does not allege that the sale under execution occurred subsequent to the judgment of the probate court of the mental unsoundness of the judgment debtor. Therefore, we need go no further than to hold that before such adjudication the property of such judgment debtor can be sold under execution.

Judgment affirmed.

SCHOOL DISTRICT NO. 4 *v.* SCHOOL DISTRICT NO. 84.

Opinion delivered January 3, 1910.

1. SCHOOLS—TRANSFER OF TAXES—EFFECT.—The transfer of a landowner's school tax from one school district to another does not have the effect of transferring such land, so as to transfer the school tax of a railway company which subsequently acquired an easement in the land; the easement and the fee being taxable separately. (Page 112.)
2. INJUNCTION—DIVERSION OF SCHOOL TAX.—Equity has jurisdiction to restrain the illegal diversion of a school tax. (Page 112.)

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

J. W. Story, for appellant.

Equity will not enjoin a judgment merely because it is void. The plaintiff must show in his bill for injunction that he had no adequate remedy at law, either by appeal from the judgment, or by certiorari, or by application to the court which rendered the judgment, or in other legal manner. 48 Ark. 510; *Id.* 331; 58 Ark. 316; 82 Ark. 330; 55 Ark. 52. In this case injunction was sought on the ground that no notice was given of the application for the order. That such notice was not given appears on the face of the order and upon the record. If appellee had a right of action, he had a complete remedy by appeal or by certiorari. 82 Ark. 330; 55 Ark. 52; 68 Ark. 205. If the defect in the order did not appear of record, then the record could, and should, have been corrected so as to speak the truth. Kirby's Dig., § 4431; 33 Ark. 475; 75 Ark. 12; 51 Ark. 317; 40 Ark. 224. There is no allegation of accident, fraud or mistake, so as to afford ground for equitable interference. 73 Ark. 444; Black on Judgments, § 321.

2. Jones, his land and children, had been transferred in the manner provided by law to the appellant school district for educational purposes, previous to time the railway company obtained its easement over his land by an order of court; but the fee remained in Jones. 69 Ark. 569. Appellee is not chargeable with the education of Jones's children, and is not entitled to the taxes arising from the railroad located on said land.

Crump, Mitchell & Trimble, for appellee.

1. The chancery court had jurisdiction. The complaint alleges irreparable injury. 22 Cyc. 789; 30 Ark. 131. Jurisdiction also exists to avoid a multiplicity of suits. 30 Ark. 101. And because appellee had no complete and adequate remedy at law, either by certiorari or by appeal. The only relief that could have been obtained by way of certiorari would have been the cancellation of the order complained of as void for want of notice, which would have settled nothing, as the losing district could again have commenced suit, making appellee a party. No appeal from the order of the county court by this appellee would lie until it had been made a party. Moreover, an appeal afforded no adequate remedy as to the taxes for the present year, and none at all for future taxes. Chancery was the proper forum in which to settle finally the question of taxes, present and future. 16 Cyc.

60; 22 Cyc. 788; 33 Ark. 633. The statute authorizes the proceeding in equity. Kirby's Dig. § § 3966, 1285, 1294. If it be conceded that the complaint failed to state a cause of action cognizable in equity, appellant's answer and cross-complaint did state such a cause of action by its allegation that appellee had for two years previous converted the school funds, and prayer for judgment for same. 77 Ark. 575; 32 Ark. 545; 2 Story, Eq. Jur., 1252.

2. The order of the county court was void. 82 Ark. 330 and other cases cited by appellant; Black on Judgments, § 226. The statute, Kirby's Dig., § 7639, is personal to the one who seeks a transfer, and affects no property except his own. See also § § 7640, 7641, *Id.;* 69 Ark. 429. And appellant district has no right to the tax from the railway company's right of way. Kirby's Dig., § § 6940, 6945; 69 Ark. 569; Kirby's Dig., § 6976; Elliott on Railroads, § 739; 25 Am. & Eng. Enc. of L. (1st Ed.), 120; *Id.,* 130.

McCULLOCH, C. J. This is a controversy between two school districts of Boone County, Nos. 84 and 4, over the district school tax assessed against the St. Louis, Iron Mountain & Southern Railway Company on its roadbed and right of way located within the territorial boundaries of the first-mentioned district. J. C. Jones resided within the bounds of District No. 84, and owned a tract of land therein. During the year 1898 he obtained an order of the county court for educational purposes transferring his children and district school tax to District No. 4, which was an adjoining district. Subsequently the railway company constructed its railroad through District No. 84 and over and through Jones's land, after having condemned and paid for a right of way over the land.

In 1908 the county court made an order reciting the former order transferring Jones's children and school tax to District No. 4, and directed that the school tax assessed in District No. 84 against the railroad property be changed to the other district and paid over to the use of the other district. District No. 84 instituted the present action in the chancery court to restrain the enforcement of the order of the county court and the consequent diversion of the school tax belonging to that district. The court rendered a decree in favor of plaintiff, and defendant appealed.

The effect of the first order of the county court was merely to transfer the children of Jones and his district school tax to an adjoining district for educational purposes. Kirby's Dig., § § 7639-7644. The order did not have the effect of transferring the land owned by Jones from one district to another, nor of changing the boundary lines of the district so as to exclude it from the old district and include it in the new. A totally different method of procedure is provided by statute in case of proposed changes in the boundaries of school districts. Kirby's Dig., § § 7540, 7544. Any change in the ownership of the property taxed released the school tax levied thereon from the further operation of the court order transferring Jones's children and school taxes to another district, and left it free to be assessed in the school district wherein it was situated. Though the railway company acquired only an easement over the land, the fee remaining in the original owner, the property rights of the railway company were separate and distinct from the owner of the fee, and are separately taxed. The assessment for taxation of the property rights of the railway company in School District No. 84 was not affected by the prior transfer of Jones's school tax levied on the land out of which the railway company's easement was carved. It follows, therefore, that the school tax of the railway company was properly assessed in District No. 84, and the order of the county court changing it to the other district was void.

We are also of the opinion that a court of equity had jurisdiction to restrain the illegal diversion of the school tax. If the tax should, pursuant to the void order of the county court, be paid over to the credit of the other district and spent, the district to which it properly belonged would be remediless. The remedy at law is not complete, and a court of equity should interfere to give appropriate relief.

The decree is affirmed.

FORTE v. CHAMBERLIN.

Opinion delivered January 3, 1910.

1. INSURANCE—LIABILITY ON BOND OF MUTUAL COMPANY.—According to the terms of act of April 24, 1905, regulating mutual fire insurance

companies, the liability of the sureties upon the bond for $15,000, therein provided for, is (*a*) to pay to policy holders all losses sustained by them on property in Arkansas, and (*b*) to pay a sum sufficient to replace any deficit in the reserve of fifty per centum of the premium caused by the unauthorized use of such reserve for purposes other than the payment of losses, the action on the last named liability to be instituted by the Auditor of State. (Page 114.)

2. SAME—POWERS OF RECEIVER OF INSOLVENT INSURANCE COMPANY.—While a receiver of an insolvent mutual insurance company is authorized to enforce the rights of the corporation, he is not entitled to sue the sureties of such company upon the $15,000 indemnity bond given under the act of April 24, 1905 their liability being collateral merely, and not an asset of the corporation. (Page 115.)

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

Carmichael, Brooks & Powers, for appellant.

Appellants at the time they were enjoined were pursuing a plain statutory remedy in a court of equal and concurrent jurisdiction against the bond. Acts 1905, § § 4 and 6, approved April 24, 1905. The statute under which the receiver was appointed comprises § § 949 to 952, inclusive, Kirby's Dig. The bond is not an asset in the hands of the receiver. The word assets used in the statute, § 950, was used in its legal sense, and, when applied to a corporation, embraces its real estate as well as personal property, stock and choses in action. 2 Pears. (Pa.), 38, 39; N. Y. Laws, 1869, c. 902; 3 N. E. 193-4; 100 N. Y. 279. The liability upon the bond is nothing more than a chose in action, and not such a chose in action as belongs to the corporation, because it could never maintain a suit upon it. 36 L. R. A. 647; 91 N. Y. 308; 180 Ill. 608; 72 Am. Dec. 236. See also 47 L. R. A. 620, 621; 38 L. R. A. 418. The statutory liability is to the creditors. The corporation could not enforce it, and where the corporation could not sue, the receiver cannot. Beach on Receivers, 433; High on Receivers, § 315; 20 Am. & Eng. Enc. of L. 13. The right of action against the bondsmen is only upon fire losses. Kirby's Dig., § § 4376, 4377.

T. N. Robertson and *Horace Chamberlin,* for appellees.

The chancery court was correct in exercising jurisdiction

over the affairs of the insolvent insurance company, and in appointing a receiver. Kirby's Dig. § § 950, 951, 952 and 954, 6342, 6348. In addition to the statutory grounds, the fact that claims in excess of the limited liability on the bond were filed with the receiver, and the fact that all the bondsmen were not equally liable on all claims, constitute grounds for equity jurisdiction. If the statute *supra,* § § 950-954, enacted in 1893, conflicts with § 4376, relied upon by appellants, and enacted in 1891, the later law will prevail. 6 Ark. 24; 27 Ark. 419; 40 Ark. 448. For further authorities as to jurisdiction of the chancery court, see 93 U. S. 228; 113 U. S. 302; 92 Md. 245; 41 Minn. 91; 84 Fed. 10; 29 C. C. A. 529; 102 Ill. 350.

The bond was an asset in the hands of the receiver. Kirby's Dig., § 6348; 3 Cyc. 1111; 44 Minn. 37; High on Receivers, § § 314, 316, 317a; 107 Mo. 590; 74 Mo. 516; 103 Mo. 212; 75 Ark. 40.

McCULLOCH, C. J. The Commercial Fire Insurance Company, a mutual fire insurance corporation, was by order of the Pulaski Chancery Court, at the instance of certain creditors and stockholders, on allegations of insolvency, placed in the hands of a receiver to wind up its assets and affairs, and appellee was appointed as such receiver. Authority for the proceeding is found in the following statute:

"Any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporations, and upon such application the court shall take charge of all the assets of such corporation and distribute them equally among the creditors after paying the wages and salaries due laborers and employees." (Sec. 950, Kirby's Digest.)

The corporation had given, and prosecuted its business as an insurance company under, certain bonds required by the act of the General Assembly, approved April 24, 1905, entitled, "An Act to regulate mutual fire insurance companies." Section 4 of that act provides that, "before any such company or association shall do business in this State, it shall file in the office of the Auditor of State a qualified indemnity bond with three or more sureties or with a surety or trust company authorized to do business in this State, to be approved by the Auditor, in the sum of

fifteen thousand dollars, to be conditioned for the prompt payment of all claims arising and accruing to any person or persons during the term of said bond by virtue of any policy issued by any such company or association upon any property in Arkansas, whenever the same shall become due, and shall faithfully comply with and perform all and singular the duties and obligations imposed upon them by the laws of the State." In the same clause it is further provided that any such company or association may, upon giving an additional bond in the sum of $10,000, conditioned as aforesaid, issue non-assessable policies. Section 6 of the act contains the following provision:

"Any company or association organized and operating under this act shall reserve not less than fifty per centum of its premium for the payment of losses and the benefit of its policy holders, and such reserve shall not be used for any other purpose. Should it come to the knowledge of the Auditor of State that any company or association is not complying with this provision, it shall be the duty of the Auditor of State to institute suit on the bond mentioned in section 4 of this act, in the name of the State for the benefit of the policy holders of such company or association, against the obligors of said bond in any court having jurisdiction thereof, and liability of said obligors on such bonds shall be in a sum sufficient to increase said reserve to an amount equal to fifty per centum of the premiums received, not to exceed, however, the sum of fifteen thousand dollars."

It is, therefore, seen that, according to the terms of the statute, liability on the bond is for losses sustained by policy holders on property in Arkansas, and also for a sum sufficient to replace any deficit in the reserve of fifty per centum of the premiums caused by the unauthorized use of such reserve for other purposes than the payment of losses, the action on the last-named liability to be instituted by the Auditor of State.

Appellants were policy holders on property in Arkansas, and sustained a loss before the insolvency proceedings were instituted, and they instituted an action at law against said corporation and the sureties on one of said bonds to recover the amount of their said loss. The receiver filed a petition in chancery court, praying that appellants be restrained from prosecuting their action against the sureties on said bond, and the court overruled their demurrer

to the petition, and rendered a decree perpetually restraining them from prosecuting said action.

The petition of the receiver sets forth all of the foregoing facts, and in addition it is alleged therein "that the only assets of any appreciable value of the defendant company is the liability of the sureties on the above-mentioned bond, and that the total amount of claims against defendant for losses accruing under policies issued by it, and filed in this cause by intervention, is far in excess of the total assets of said defendant." It is not claimed that any part of the required reserve of fifty per centum of premiums was ever used for any other purposes than the payment of losses, or that there exists any liability on the bonds on that account. The decision of the case turns on the question whether the liability of the sureties on the statutory bonds to holders of policies on property in Arkansas for losses is an asset of the insolvent corporation which passes to the receiver, and whether the receiver can maintain an action on the bonds to enforce such liability. The language of the statute hereinbefore quoted answers both questions against the contention of appellees. The liability on the bonds is to a class of policy holders as creditors, and is in no sense an asset of the corporation. The corporation is principal in the bonds, and could never, under any circumstances, maintain an action thereon, either for itself, its stockholders or any creditor, not even the special class of creditors for whose benefit the bonds were given. It is true that the receiver for an insolvent corporation is the representative of the creditors and stockholders of the corporation as well as the corporation itself, but only to the extent of the assets of the corporation, and not for the enforcement of collateral liabilities to the creditors. *Jones* v. *Harris,* 90 Ark. 51; *Bailey* v. *O'Neal,* 92 Ark. 327.

"While the receiver of an insolvent corporation," says Mr. High, "is thus treated as the representative of both creditors and shareholders, so far as any beneficial interest is concerned, yet, for the purpose of determining the nature and extent of his title, he is regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it. For purposes of litigation, therefore, he takes only

the rights of the corporation, such as could be asserted in its own name, and upon that basis only can he litigate for the benefit of either shareholders or creditors except when acts have been done in fraud of the rights of the latter, but which are valid as against the corporation itself, in which case he holds adversely to the corporation." High on Receivers, § 315.

There is a distinction between this case and *Jones* v. *Harris, supra,* where the receiver and the president of an insolvent banking corporation sought to enjoin creditors from enforcing the statutory liability of the president and secretary on account of their failure to file the annual statement required by statute. There the liability of those officers to creditors was an unlimited one, whilst in the present case the liability is limited to the amount of the bond. But this distinction does not operate to the advantage of the receiver in his assertion of the right to enforce liability on the bond for the benefit of creditors. Where the liability is limited, as in the present case, to a certain amount and to a certain class of creditors, the sureties on the bond, or those creditors who are entitled to share in the amount to be recovered on the bond, might insist that the liability be enforced in a court of equity, where a multiplicity of suits could be avoided, and the amount to be recovered could be distributed among those entitled to share. *Hornor* v. *Henning,* 93 U. S. 228. But this is of no concern to the receiver, who in no event can enforce the liability nor be a necessary party to the suit to enforce it. In *Bailey* v. *O'Neal, supra,* we held that an action against the directors of an insolvent corporation for intentional neglect to perform the duties required of them by statute could be maintained by creditors of the corporation. It was insisted by the defendants in that case that the action could be maintained only by the receiver of the corporation.

The only decision of this court which would appear to be in any degree against the conclusion now expressed is in the case of *Corn* v. *Skillern,* 75 Ark. 148, where, under a statute prescribing that "if the capital stock of any such corporation shall be withdrawn and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be liable to any creditor of such corporation, in an action founded

on this statute, to the amount of the sum refunded to them respectively" (Kirby's Dig., § 861), a receiver was permitted to sue for capital improperly withdrawn by stockholders. The effect of that decision was to hold the capital wrongfully withdrawn to be assets of the corporation. The distinction between the two classes of cases is quite clear. High on Receivers, § § 315, 320, 321; *Minnesota Thresher M. Co.* v. *Langdon,* 44 Minn. 37; *Minneapolis Baseball Co.* v. *City Bank,* 66 Minn. 441.

The decision in *Corn* v. *Skillern, supra,* has no controlling force in the present case, for here the liability of the sureties on the bond is purely collateral, and, as has already been stated, is in no sense an asset of the corporation. The conclusion we reach is in accord with the weight of authority. *Runner* v. *Dwiggins,* 147 Ind. 238; *Colton* v. *Mayer,* 90 Md. 711; *Jacobson* v. *Allen,* 12 Fed. 454; *Farnsworth* v. *Wood,* 91 N. Y. 308; *Attorney General* v. *Atl. Mut. L. Ins. Co.,* 100 N. Y. 279; *Wincock* v. *Turpin,* 96 Ill. 135; *Young* v. *Stevenson,* 180 Ill. 608; *Minneapolis Baseball Co.* v. *City Bank,* 66 Minn. 441; *Fourth Nat. Bank* v. *Franklyn,* 120 U. S. 747; *Parker* v. *Carolina Savings Bank,* 53 S. C. 583, 69 Am. St. 888.

The Supreme Court of Indiana, in *Runner* v. *Dwiggins, supra,* states the correct rule, we think, as follows: "Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent." Precisely the same language was used by Judge Wallace in his opinion in *Jacobson* v. *Allen, supra.*

In *Minneapolis B. B. Co.* v. *City Bank, supra,* the court said: "The right of the receiver, representing the creditors, to recover the capital so given away rests upon the same basis as does his right to recover any other property disposed of by the corporation in fraud of creditors. But there is no analogy between such an action by the receiver to reclaim assets at one time belonging to the corporation, which it has fraudulently transferred, and an action to enforce the individual or double liability of the stockholder for the debts of the corporation. Such liability sustains the relation of surety for the debts of the corporation. Hence,

from its very nature, it is not, and never can be, an asset of the corporation."

Learned counsel for appellee rely mainly upon *Boston & Albany Rd. Co.* v. *Mercantile Trust & Dep. Co.*, 82 Md. 535, which is claimed to be an analogous one in favor of their contention as to the right of the receiver to sue on a collateral obligation for the benefit of creditors. That case is, however, totally different from this. There the company had, whether as a voluntary act or in compliance with a statutory requirement the court found it unnecessary to determine, placed in the hands of the Treasurer of State guaranty funds for the benefit of policy holders, and a court of equity ordered the State Treasurer to surrender these funds to the receiver for distribution among the creditors. The fund in question, though deposited as a guaranty fund to creditors, was nevertheless an asset of the corporation, and was properly placed in the hands of the receiver for distribution among the creditors found to be entitled thereto. The ground of that decision is that the deposit was an asset of the corporation and a trust fund for the benefit of creditors, and therefore the proper subject of equitable control and distribution. No analogy exists between that case and the present one.

As we have already mentioned, there is no allegation of any improper use of any of the reserve of fifty per centum of the premiums, so as to confer a right of action on the bonds in that regard. But, if that were alleged, and if it be conceded that the receiver succeeds to the right of action conferred by statute upon the Auditor of State for the recovery of a sum sufficient to restore the reserve, still that would not give the receiver the right to recover and distribute the full amount of the bonds. He could only recover the sum necessary to restore the improperly depleted reserve. We conclude, therefore, that the decree of the chancellor is erroneous, so it is reversed, and the petition of the receiver is dismissed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* JACKSON.

Opinion delivered January 3, 1910.

1. CONTINUANCES—DISCRETION OF COURT.—Questions as to continuance of cases rest so much in the sound discretion of the trial court that

it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct. (Page 122.)

2. SAME—REFUSAL—PREJUDICE.—The refusal of the trial court to grant a continuance asked upon the ground of surprise and to enable the appellant to secure witnesses as to a certain transaction was not prejudicial where it affirmatively appears that appellant had all the material witnesses that it needed. (Page 122.)

3. EVIDENCE—OPINION.—It was not error to permit a witness to testify that he had been a passenger on defendant's freight train a great number of times, and that he was familiar with the ordinary jerks and jars incident to travel on such trains, and that the ordinary shocks were not as severe as the jar which caused plaintiff's injuries. (Page 124.)

4. SAME—EXPRESSION OF PAIN.—It was not error to permit a witness to testify that immediately after plaintiff, a passenger, was thrown down by a sudden jar of the train he complained of being badly hurt; the weight and credit to be given to such testimony being a question for the jury. (Page 124.)

5. DAMAGES—PERSONAL INJURIES.—It was not error, in a personal injury suit to permit the plaintiff to testify as to the amount that he had been earning, by the personal labor of himself and by his management of other laborers. (Page 125.)

6. SAME—EXCESSIVNESS.—Where the evidence was that plaintiff, for seven months, suffered severe pain by reason of personal injuries received upon a train, that he was compelled to use crutches for six or eight weeks, and was unable to work for seven months, and would be unable to labor for some time in the future, an award of $750 as damages was not excessive. (Page 125.)

7. INSTRUCTIONS—APPLICABILITY.—It was not error to refuse to give an instruction which was not applicable to the issues in the case. (Page 126.)

8. CARRIERS—PASSENGERS ON FREIGHT TRAINS—DEGREE OF CARE.—While a passenger on a freight train assumes the ordinary risks and inconveniences that are incident to travel on such trains, the railway company owes to such passenger the duty to exercise the highest degree of care consistent with the practicable operation of such train to protect the passenger from injury. (Page 126.)

9. SAME—NEGLIGENCE.—Where the evidence tended to prove that plaintiff was riding on the caboose of a freight train as a passenger, and that he was thrown to the floor by a sudden jerk of unusual violence, it was a question for the jury to determine whether the railroad company was negligent in causing the injury. (Page 126.)

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

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

1. The court erred in refusing to grant a continuance, because defendant was not prepared to meet the issues presented in the pleadings as to any other than the specific date named therein. Sec. 6140, Kirby's Dig.; 29 Ark. 372; 59 *Id.* 165; 67 *Id.* 142; 69 *Id.* 363; 70 *Id.* 232; 71 *Id.* 197; 75 *Id.* 466; 78 *Id.* 536.

2. The opinion of witness Stair as to the shock or jar of the train was not properly admissible. 66 Ark. 494; 50 Mo. App. 666; 117 Mass. 137. Nor was his testimony as to statements made by plaintiff after he had stepped off the train competent, same not being a part of the *res gestae.* 48 Ark. 33; 61 *Id.* 52; 66 *Id.* 494.

3. It was error to permit plaintiff to testify as to the amount of his earnings, there being no allegation in the complaint to warrant such testimony, or a recovery for such loss. The verdict is therefore excessive.

4. The court should have given defendant's instruction No. 1.

Harry M. Woods, for appellee.

1. The motion for continuance was premature and without foundation, and was properly overruled. Continuances are matters in the discretion of the trial judge, and "each case must be judged according to its peculiar facts." The subsequent testimony established the date on which the injury occurred to be the same as that alleged in the complaint. 82 Ark. 393; 88 *Id.* 88; 121 S. W. 943.

2. The testimony of witness Stair as to the violence of the shock was competent. 5 Enc. Evidence, 714; 62 Ark. 259; 79 *Id.* 248. His testimony as to statements made by plaintiff on leaving the car, that he was "bad hurt," was also competent, as a part of the *res gestae.* 72 Ala. 112; 20 Ark. 225; 43 Ark. 99.

3. Plaintiff's testimony as to his loss of earnings was clearly admissible, and was responsive to the allegations of the complaint. The court properly instructed the jury on this question, and the verdict was not excessive.

4. There was not a scintilla of evidence upon which to base instruction No. 1 asked by defendant, and the court properly refused to give it.

FRAUENTHAL, J. This was an action instituted by Zolley Jackson, the plaintiff below, against the St. Louis Southwestern Railway Company to recover damages for personal injuries al-

leged to have been sustained while he was a passenger on one of defendant's trains. In August, 1908, the plaintiff paid his fare, and became a passenger on one of defendant's local freight trains from Fair Oaks to Brinkley. The evidence on behalf of the plaintiff tended to prove that when the train arrived at Brinkley and stopped at the place where passengers are accustomed to alight from such trains there were several passengers on the caboose with the plaintiff who prepared to leave the train. The plaintiff arose from his seat, and at that moment the train made a sudden backward movement with a violent impact of the cars, and with such force that it threw the plaintiff forward for a distance of twelve or fourteen feet and against the front end of the caboose. The sudden jerk threw him against the car with such force that it injured him severely in the back and wrenched his ankle. Immediately on leaving the train he stated that he was badly hurt, and on the same day had to be assisted in returning to his home. He had his ankle examined, and applications of liniment placed thereon at a drug store on the same day; and later secured the services of a physician. He was compelled to use crutches for six weeks or two months, and was unable to perform any labor for a number of months thereafter; and at the time of the trial, about seven months after the injury, he still suffered great pain in his back and ankle therefrom, and was unable to do a day's work. Upon the trial of the cause the jury returned a verdict in favor of the plaintiff for $750; and from the judgment rendered thereon the defendant prosecutes this appeal.

It is urged by the defendant that the lower court erred in refusing to grant a continuance of the trial of the case. Upon the trial of the case the plaintiff introduced as a witness J. L. Stair, who testified that he was a passenger upon the freight train at the time that the plaintiff was injured. He testified further that the injury occurred about the 17th day of August, 1908; that he was not positive as to the exact day of the month, but it was about August 17, and on Friday. It was alleged in the complaint that the injury occurred on August 17, 1908. When the witness testified that it was about the 17th of August, and not positively as to the exact day of the alleged injury, the defendant asked that the case be taken from the jury and continued because

it was taken by surprise; that, relying on the allegation in the complaint as to the time of the injury, it had subpoenaed as witnesses its employees and Miss Julia Julien, who were on the freight train on August 17, and that it had subpoenaed no persons who were on said train on another date. The court overruled the motion to continue the case. We do not think that there was any error in this ruling of the court.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and that discretion will not be controlled by this court unless it has been manifestly abused. In the case of *Watts* v. *Cohn,* 40 Ark. 114, Mr. Justice SMITH, speaking for the court, said: "Questions as to the trial or continuance of causes rest so much in the sound discretion of the trial court that it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct." *Magruder* v. *Snapp,* 9 Ark. 108; *Hunter* v. *Gaines,* 19 Ark. 92; *Wilde* v. *Hart,* 24 Ark. 599; *Supreme Lodge K. of P.* v. *Robbins,* 70 Ark. 364.

The only object that the defendant in the case at bar could have had in asking for a continuance was to procure witnesses who were on the train at the time of the injury, whether it was on the 17th day or some other day of August. At the trial of the case it had subpoenaed and introduced as a witness Miss Julia Julien, who testified that she was a passenger on defendant's freight train to Brinkley on a certain Friday in said month of August, and that the following Monday was the 17th day of August; and while she testified that she did not see any person injured on the train on that day when she was a passenger, she also testified that several passengers were on the train, and amongst them a colored man. The other witnesses of defendant who testified at the trial of the cause were a brakeman and conductor. The brakeman stated that he and the conductor were on the train on the same day in August on which Miss Julia Julien was a passenger. Now, the plaintiff, who is a colored man, stated that the day upon which he was injured was the only day that he was ever a passenger on defendant's freight train, and that the young lady, Miss Julia Julien, was a passenger on that train. The witness, J. L. Stair, testified that Miss Julia Julien was a passenger on the train at the time that the plaintiff

was injured. So that the exact date of the injury was definitely fixed, and the defendant had at the trial as witnesses this young lady and its employees, who were on the train at the time, and had prepared its defense with the knowledge that this was the occasion upon which the plaintiff alleged that he was injured. There was, therefore, no mistake made by either party as to the exact date upon which it was claimed that the injury occurred. The defendant could not have been prejudiced by the refusal to grant a continuance. The exact day of the month upon which the alleged injury occurred was not material under these circumstances. *Smith* v. *Weatherford,* 92 Ark. 6.

In the course of his testimony the witness J. L. Stair stated that the impact of the cars upon the backing of the train made a "violent jar;" that he had been a passenger on defendant's freight trains a great number of times, and that he was familiar with the ordinary jerks and jars incident to travel on such trains, and that the "ordinary shocks were not as much" as the shock on this occasion. The defendant objected to this testimony of the witness upon the ground that it was the expression of the opinion of the witness. But we do not think that this objection is tenable. The witness was describing the force of the jar or shock, and in the use of the word "violent" he only expressed the idea of the degree of force with which the impact of the cars was made. He had been a passenger on freight trains a great number of times, and was familiar with the ordinary and usual jerks and jars of such trains. In describing the force of this jar or jerk it was competent for him to compare it with those with which he was familiar; and it was also competent by this testimony to show that it was an unusually hard impact of the cars and an extraordinary jar and shock.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Richardson,* 87 Ark. 101, the following language of a witness relative to the shock or jar on such a train was quoted with approval as to its competency: "Hawley testified that he was in the habit of riding on local freights, and that it was the heaviest jolt he ever got on a car." *St. Louis & S. F. Ry. Co.* v. *Brown,* 62 Ark. 259; *Little Rock Traction & Electric Co.* v. *Hicks,* 79 Ark. 248.

The defendant urges that the lower court committed an error in permitting the witness Stair to testify as to certain state-

ments made by plaintiff. The witness testified that the plaintiff immediately on getting off the train complained of the injury, and said he was "hurt and hurt bad." It is contended that this testimony was not admissible because it was not a part of the *res gestae.* The testimony thus complained of was not a narration of how the injury happened, but only an expression of pain made at the time of the suffering, and as an undesigned incident of it. The testimony of the witness as to the statement of the plaintiff of pain was in effect a description of the injury or wound on the person of the plaintiff. The expression of pain thus used by the plaintiff at the time was illustrative of the character and extent of the injury; and the witness, in testifying as to the exclamation of the plaintiff, was describing the condition of the plaintiff, just as if he had testified to the fact that the plaintiff limped, or staggered, or fell down, or otherwise gave physical evidence of the suffering from or condition of the injury. It was therefore testimony relative to the injury itself, and directly describing its nature and extent, and it was not a declaration of its cause or of the occurrence which produced its result. The testimony of the witness as to the words of pain emanating from the plaintiff was in effect the description by the witness of verbal acts which was competent like testimony as to any other relevant fact. What weight should be given to such declarations and what credit were matters for the jury to pass on. *Insurance Co.* v. *Moseley,* 75 U. S. 397; *Gray* v. *McGlaughlin,* 26 Iowa 279; *Kennard* v. *Burton,* 25 Me. 39; *Matteson* v. *New York Central Rd. Co.,* 35 N. Y. 487.

We are also of the opinion that no error was committed by the lower court in permitting the plaintiff to testify as to the amount he earned by the personal labor of himself and in the management of other laborers. This testimony showed the value of his earning capacity, and was therefore a proper element of his damage, if by the injury he was unable to perform labor or the duties of managing the other laborers. It is also urged by the defendant in this connection that the verdict is excessive. We have carefully examined the testimony of the plaintiff and the physician who attended him. The plaintiff has suffered pain for at least seven months from the injury, and at times has suffered intensely, and in all probability will suffer pain therefrom for

some future time. This, in connection with the loss of his time and labor and his decreased ability to labor for some time in the future, convinces us that the verdict is not excessive.

The defendant requested the court to instruct the jury, in substance, that, if the train stopped at the station a sufficient length of time to have permitted the plaintiff by the use of ordinary care and diligence to leave the train before the jar that caused the injury occurred, the plaintiff cannot recover. But there is no testimony in the case upon which the instruction can be based. The plaintiff and his witness testified that, immediately upon the train having stopped, the passengers prepared to leave the train, and the plaintiff arose from his seat for that purpose. The witnesses on the part of the defendant testified that there was no jar or shock, and that no one was thrown down in the caboose, and that no one was injured. The sole question for the jury to determine under the evidence was whether or not there was an unusual jar or jolt of the train, and whether or not the plaintiff was thrown forward and down in the caboose and thereby injured. That was the issue, and no evidence was adduced as to any other issue. The instruction was therefore abstract, and was correctly refused.

In the case at bar the defendant accepted passengers on its local freight train and undertook their carriage on that character of train. The passenger riding in the caboose of a freight train assumes the ordinary risks and inconveniences that are incident to the travel on such trains. But the railway company owes to the passenger on its freight train the duty to exercise the highest degree of care consistent with the practicable operation of such train to protect the passenger from injury. Failing in exercising that care, the railroad company is guilty of negligence; and if that negligence is the proximate cause of the injury complained of, it is liable for the damages consequent on such injury. In the case at bar the plaintiff was riding in the caboose of a freight train as a passenger; he was thrown to the floor and severely injured by a sudden jar or jerk of unusual violence; from that testimony it became a question of fact for the jury to determine whether the railroad company did exercise that high degree of care which it owed to the plaintiff to protect him from injury, or whether it was guilty of negligence in causing the

injury. *Rodgers* v. *Choctaw, O. & G. Rd. Co.*, 76 Ark. 520; *Pasley* v. *St. Louis, I. M. & S. Ry. Co.*, 83 Ark. 22; *St. Louis, I. M. & S. Ry. Co.* v. *Richardson*, 87 Ark. 101; *St. Louis, I. M. & S. Ry. Co.* v. *Brabbzson*, 87 Ark. 109; *Arkansas Central Rd. Co.* v. *Janson*, 90 Ark. 494.

The court instructed the jury in accordance with the above principles of law applicable to the facts of this case, and the verdict returned by the jury was warranted by the evidence.

The judgment is affirmed.

WARREN & OUACHITA VALLEY RAILWAY COMPANY *v.* WALDROP.

Opinion delivered December 20, 1909.

1. COSTS—BOND—NON-RESIDENT ADMINISTRATRIX.—Kirby's Digest, § § 959-961, requiring that a nonresident plaintiff shall give a bond for costs, has no application to a nonresident who sues as administratrix. (Page 136.)
2. ADMINISTRATION—REMOVAL FROM STATE.—The removal of an administratrix from the State does not, of itself, operate to revoke her letters of administration. (Page 138.)
3. INSTRUCTION—SPECIFIC OBJECTION.—An instruction upon the measure of the damages of a widow by reason of the killing of her husband, which failed to limit her right to recover to her probable expectancy of life, was not erroneous if she appeared before the jury, so that they could judge of her probable expectancy, and if no specific objection was taken to the instruction on this ground. (Page 139.)
4. MASTER AND SERVANT—DUTY TO KEEP LOOKOUT—NEGLIGENCE.—Where it was a question whether an engineer, in backing his engine, was negligent in failing to keep a lookout, whereby plaintiff's intestate was killed, a charge that if the engineer was negligent in failing to keep a lookout, and such failure was the cause of decedent's injury, and he was free from negligence, plaintiff should recover, was not prejudicial where the court further instructed the jury that it was the engineer's duty to keep only such a lookout as was consistent with the performance of his duties in holding his engine, and that a necessary momentary failure to keep such lookout was not negligence. (Page 139.)
5. DEATH—DAMAGES.—A railroad brakeman was killed at a time when he was earning $60 a month, with a promising future, at the age of 33; his body was mangled, and he suffered excruciating pain, and lingered for five days, having been conscious during that period; he was childless, and was in the habit of turning over to his wife his entire salary. *Held*, that a verdict of $8,000 for his widow and $2,000 for his estate was not excessive. (Page 140.)

Appeal from Bradley Circuit Court; *J. G. Williamson,* Special Judge; affirmed.

STATEMENT BY THE COURT.

G. A. Waldrop was thirty-three years of age on February 22, 1908. He had been married a year, and was on the date mentioned acting as a brakeman for appellant, earning a salary of $60 a month. He had previously been acting as conductor at a salary of $90 a month. He was regarded as a first-class railroad man, and had a promising future before him. He and his wife lived at Warren, and they had no children. His next of kin were his father and mother. On the date mentioned G. A. Waldrop was killed while in the employ of appellant, and in the performance of his duties. He was run over by the cars of appellant, his body mangled, and he died five days later as the result of his injuries, having endured excruciating agony from the time of his injury until the time of his death, and having been conscious during all of this period. His widow was appointed administratrix of his estate by the probate court of Bradley County, and brought suit against the defendant railroad company as administratrix for the benefit of the widow and estate.

She alleged: "That, while engaged in the performance of his duties, deceased uncoupled from the train one freight car, which was intended to be left on the siding; that, immediately after uncoupling the said cars, the deceased signaled to the engineer in charge of the said engine to pull the remainder of the train west, and after giving said signal the deceased then went back east to the end of the car connecting with the baggage car, which was left standing on the track for the purpose of connecting the air hose between the baggage car and the box car which was left on the track, in order to have everything in readiness for the engineer to perform his duty by moving the engine west in obedience to the signal, and the deceased proceeded to couple said air hose; while in this position between the cars, the engineer, in violation of the signals given to him, started the engine east with great force, causing cars to knock the deceased down and run over him."

Then follow allegations of the injury, pain, conscious suffering and death as the result; also of the amount that Waldrup

was earning and the amount he contributed to his widow, with a prayer for $20,000 for the benefit of his estate and $30,000 for the benefit of his widow and next of kin. Appellant answered, denying all the material allegations and pleading contributory negligence, stating that the deceased had no right to go in between the cars without advising the engineer in advance as to his intention to do so or without giving the usual stop signal.

The facts are substantially as follows: On the day of the accident two coaches were placed on a side-track at appellant's station at Warren, Arkansas. These coaches, a passenger and baggage or express, were to go out in the train from Warren that afternoon. The train was being made up for its departure. The side-track on which the coaches were placed was on a down grade of about one per cent. towards the depot, and the brakes were set on these two cars, so that they would not move down the grade. Three freight cars were attached to the engine. One of these cars was to be weighed and returned and attached to the two coaches, and the other two freight cars were to be taken and delivered to the Iron Mountain railway upon a connecting track between that road and appellant. The freight car was weighed, and the engine had backed it down, and it was coupled on to the two coaches that were on the side-track. When the engine started out with the two remaining freight cars attached to it to deliver to the other road, it stopped to take slack, or else backed after starting without warning, and the injury to Waldrop occurred. One witness for appellee testified that it occurred as follows:

"The engine was bringing the box-car back, setting it in on that spur to be connected with the express car. They uncoupled from the box-car, and pulled up, leaving the box-car standing attached to the baggage car, while they started forward with two or three cars. I was standing on the north side of the track. I saw Waldrop go in between the cars for the purpose of coupling air. I did not see him give any signals to the engineer. The engine was up on the west end of the spur. I saw it had pulled up a little just at the time he went in there. I never noticed him looking toward the engine before going in between the cars. He might have signaled, and I not noticed them, as I do not understand railroad signals, but at the time the engine started I

noticed him go in between the cars for the purpose of coupling air. He went in between the box-car and the baggage car, and after he went in the engine moved back. I could not tell you how far the engine had pulled the detached cars west before it backed, and I would not undertake to say how far it went. It might have been five or six feet or more, but in a few seconds after it started I heard it bump back and the cars bumped together. It sounded to me just like a railroad train sounds when the engine backs and is taking up slack. That is what I thought they were doing."

This witness was asked how much space there was between the two cars when it started back, and answered that it might have been half a car. He said that he could see that there was space between the cars, but he could not tell with anything like definiteness the distance between the cars. When asked whether it was two, three, four, five or six feet, he answered that it must have been more than two feet. He says he was standing about thirty steps from the track, and hardly a car length down the track from where the cars came together. When he looked at the cars from the angle he was standing, it was done so quickly he could not tell how much space of light he could see between them. "It was so quick he could not tell anything about it." He "could see an opening, and that was all he could tell." Another witness on behalf of appellee testified that he was standing about one hundred yards from Waldrop at the time of the accident. He was at a place directly ahead of the engine and on the opposite side of the track from Waldrop. He thought he noticed the engine go forward after they had struck the other cars, and it stopped. They only went forward very little; after the engine came forward it went back. He had seen the operation gone through with very often before that time, had seen Mr. Waldrop at other times couple the air hose before leaving it. It was necessary to go in between the cars to couple the air hose, and it was necessary for him to stoop over in order to make the coupling.

Witness Smithy, who was the other brakeman, testified for appellant substantially as follows: "George (Waldrop) and I were standing there talking, and I pulled the pin, and George gave the signal with his right hand to go ahead, and the engine

went ahead one, two or three feet, as near as I could tell, and then he took the slack, and when he had taken the slack I still held the lever. By taking the slack I mean he backed up to get the slack, so he could go ahead. When he backed up to take slack, the cars came back and hit the car that had been cut off, causing it to roll back a half-car length, or a car length. The car that was attached to the engine came back nearly three or four feet. The last I saw of George before the accident, he was standing opposite the car where I cut off, talking to me. I was on the south side of the track, and he was on the north side, opposite the opening between the car we were leaving attached to the baggage car and the two head cars that we carried out. I had hold of the lever that pulls the pin to uncouple the cars, and kept hold of it to keep the cars from coupling when he took the slack, so he could go on out. I expected that slack would be taken, and took hold of that lever to keep the pin from dropping back and making a coupling. I saw George turn around to go towards the rear end of the train, and he passed out of the line of my vision. The next I saw of him was after he was hurt, lying under the car. No one, besides George Waldrop, as far as I saw, gave any signal to the engineer. I have been in the railroad business operating trains about three years as a brakeman. The brakemen are the ones who do nearly all of the signal giving. When a brakeman gives the signal to go head, he expects that the engineer, if he cannot start his train on the first attempt, and finds it necessary to take slack, will take slack without any further signal being given. I went to George Waldrop when he was hurt, and helped take him out from under the car and lay him on some cross-ties. He said at the time that it was his own fault, his own carelessness.

"It was not the custom to couple up the air hose at the time the cars were set in. I had never seen Waldrop do that before. Waldrop was an experienced railroad man. When Waldrop gave the signal to go ahead to the engineer, the engineer responded to it as quick as he could, and moved forward two feet or two and a half feet, and then came back to take the slack. The engineer gave no warning that he was coming back. The track was up grade the way the engine was headed, and he came back to take slack; I mean by that to get the play between the cars.

There is not quite a foot of play between those cars. If he only had one car, he could take up all the slack by backing one foot. There were two cars behind this engine. The brakes were set on these cars and on the passenger cars to hold them from running down hill. The brakes were set just enough to keep the cars from rolling down by their own weight. When the train came back, it knocked these three cars with the brakes set on them a car length. When I went to Waldrop, after the accident, he was lying about under the second wheels. His shoulders were within about six inches of the second wheels. The first trucks had passed over him."

The engineer, on behalf of appellant, testified: "After we had backed in and stopped, I got the signal to go ahead. I tried to go ahead, but failed to pull the cars. We had hold of three cars. We were figuring on leaving one on that track. I got the signal to go ahead, and started ahead, but the engine failed to pull the cars, and I reversed the engine to try to pull them again, and as I started them the second time I saw Mr. Brewer flagging me. Thinking there was some trouble, I put on the brake. The other brakeman, Smithy, then came across the track to the engine, and told me that George was hurt. I then went to him, and found that one end of the car had run over him and cut off his right arm. When I started to pull the cars ahead in response to the signal, I started off easy, and gave the engine steam, but it would not go, and I could not pull the cars, so I threw the engine in back motion to throw it the other way, in order to get it so it would roll, as it is customary to keep on trying to go until you get signals to stop. So that was the reason I reversed the engine, to get the engine and cars in a different position, so they would roll. In railroad parlance, we call it 'taking slack.' Mr. Waldrop was on the north side of the track at the time he gave me the signal to go ahead. In turning the reverse lever for the purpose of putting the engine in back motion I had to face the fireman's side, and in that position I could not see anything on the north side of the track. The 'go-ahead' signal was given me by Mr. Waldrop himself. It takes both hands to throw the reverse lever, if there is steam in the cylinder. The reason the engine could not pull the cars the first time I started them was because the brakes were set on the cars, and the engine got on the

center. The engine will not pull anything much when it is on the center. When the engine gets on the center, it is the duty of the engineer, and customary always, to reverse it and take the slack, and get the engine in a different position, where he can get more out of it than the way it was standing at first. When the engineer gets the signal to go ahead, and finds that the engine won't go, it is the rule among railroad men to reverse and take slack without giving or receiving any further signals. I asked Waldrop how he came to get hurt, and he told me he was coupling the air hose.

"When the engine is standing still, and the engineer wants to back up, the usual signal is to ring the bell or blow the whistle, to let the crew know he intends to move the engine, so, if they are in the way, they can get out. It is the duty of the engineer to be on the lookout for the trainmen. The two cars which were attached to the engine were loaded with lumber. When I started forward the first time, I did not start with as much steam as it took to pull them out; and when I found it took more, I had to back up and take the slack. I do not remember just how hard I went back against the freight cars. It was not so very hard and not so very easy, of course. When I reversed the engine for the purpose of going back to take up the slack, I did not open the throttle. The steam that was already in the cylinders, that I had thrown in there to go ahead, made the engine go back."

It was shown that the engine was a good one, had immense horse power, and could move thirty cars on a level. Many experienced railroad men were introduced, and testified as experts. They showed what the custom was in "taking slack;" that when an engineer received a signal to go ahead and found that the engine could not pull the train, it was necessary for him to "take slack," and it was not customary for him to give a signal that he was going to do so. A movement of a few inches would take up the slack in two cars; about eighteen inches would take up the slack in two cars.

One of the engineers testified: "The locomotive engines are built with the piston rods on the quarter on each side, so that if the engine stops with one exactly 'on the quarter,' the one on the other side would be exactly 'on the center.' If the slack is all taken up when the train stops, and the engine stops

with one of its cylinders on the dead center, there would be only one cylinder to take steam to start with. The engineer, not knowing the position of the cylinders and starting to pull out, would find that the engine did not start, and would naturally reverse the engine, which would drop the weight of the engine back against the tender, the tender back against the car behind it, and so on back until it took the slack up, so he would have both of the engines in connection to start with, so that, after he took the slack, both cylinders would take steam. Before taking the slack, the engine would have to start pulling all the cars, but, after taking slack, it would only have to start its own weight, and the others would follow.

In certain positions of the cylinders the engine might start ahead just far enough to take up the slack in the train, and then stop on the center. If that would happen, the engineer would have to reverse the engine and take slack before he could go ahead again.

In practical railroad work the taking of the slack is something that might be expected to happen at almost any time, and in prudent good railroading train operatives take into consideration the fact that slack is apt to be taken at any time in conducting their movements about the train.

This expert on cross examination testified as follows:

"When the cylinder on one side is on the dead center, the one on the other side has the maximum of power, which is just one-half the power of the engine. An engine with one side on the center, on level track, with the slack all out of the train, may be able to start three or four cars under ordinary circumstances. If the slack was not taken up, and the engine could get the advantage of the slack, she could probably start her usual load, which would be about thirty cars. If an engine had two cars on it, and should run ahead as much as half a car length, I do not think there would be any need of taking slack because the engine would have gained all the benefit it could if it went ahead half a car length. If the engine had two cars on it, and ran forward half a car length, and then backed half a car length, I would think it was an extraordinary way for an engine to act, though it might act that way on account of the reverse lever throwing the engine over. It might have happened that the en-

gine got away from the engineer for just a second. I have had experiences of that kind in trying to move a car. I would give the reverse lever a turn, and it would get away from me, and I would go up and hit the car harder than I had intended to hit it. This would happen from some little unguarded point in the engine that you couldn't control, and it would not show that there was anything wrong with the machinery.

"If an engine moves forward a few feet, and stops of her own motion, without the engineer shutting off the steam or trying to stop it, then it would be necessary to take slack in order to get a start. When the engine, under such conditions, is reversed for the purpose of taking up the slack, if she comes back without opening the throttle to turn on the steam, it is the steam already in the cylinders and dry pipes that moves her back. The engineer has no control over the amount of that steam; and when she comes back, she has to come back with all the force in that steam, and is likely to jam against the cars behind."

Other expert witnesses testified that if the engine moved forward as much as a half-car length there could be no occasion to "take slack."

Mrs. Waldrop, the appellee, testified that at the time of her husband's injury he was receiving a salary of sixty dollars per month, which he turned over to her, and she paid all the expenses of the family.

After several witnesses for appellant had been examined, it "moved the court to require the plaintiff to give bond for the costs of the action, on the ground that the plaintiff was a nonresident of the State of Arkansas, and asked that the action be abated until such bond be given; but the court refused said motion, and allowed the action to proceed. To said ruling of the court the defendant duly saved its exception.

The jury returned a verdict for plaintiff, assessing her damages for her pecuniary loss at $8,000, and the damage to the estate at $2,000. Other facts stated in opinion.

Austin & Danaher and *Purcell & Bradham* for appellant.

Defendant's motion to require plaintiff to give bond for costs should have been sustained. Kirby's Digest, § § 959, 960, 961, 2 Ark. 109. Where there is no evidence to support the verdict, the jury should be so instructed. 120 S. W. 984; 65 Ark. 429; 63

Ark. 177. The party should have used more than ordinary care for his own safety. 51 Ark. 467. The verdict was excessive. 77 Ark. 405.

Goodwin & McHaney and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

When an injury is shown to have been sustained in the operation of a train, or by the train while in operation, there is a *prima facie* case against the railroad company. 88 Ark. 207; 87 Ark. 308. The employees in the yard must keep a lookout, as well as those engaged in the operation of trains. 83 Ark. 61; 80 Ark. 528; 88 Ark. 207; 78 Ark. 22; 80 Ark. 535.

WOOD, J., (after stating the facts). First. Unless the engineer was "taking slack," as explained in the evidence, he was negligent in backing the cars over Waldrop. For the evidence shows that, in order to move back after his train had started forward (unless he was merely taking slack), it was his duty "to get the consent of the crew," as one of the witnesses expressed it. Where he is not "taking slack," he should not move back without a signal. He should give the "back-up" signal, consisting of three short blasts of the whistle, the purpose of which was a warning to the crew. It was also the duty of the engineer to keep a lookout for the safety of his co-employees, if for any purpose other than "taking slack" he moved his engine back after having first started same forward. *Little Rock & H. S. W. Rd. Co.* v. *McQueeny,* 78 Ark. 22; *Kansas City So. Ry. Co.* v. *Morris,* 80 Ark. 528; *St. Louis, I. M. & S. Ry. Co.* v. *Standifer,* 81 Ark. 278; *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61; *St. Louis, I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 207.

Appellant concedes that none of these precautions were taken, and for the reason it contends that the train was not backed except for the purpose of "taking slack." Therefore, the negligence of appellant is established if the evidence is sufficient to show that the engineer was not "taking slack." On the other hand, if he was "taking slack," the appellant was not negligent and is not liable. It has been a very close question with us to determine whether or not the evidence was sufficient to warrant a finding that the engineer at the time he backed the cars down upon Waldrop was "taking slack." We have finally reached the conclusion that the evidence, the material parts of which we have

set forth at length in the statement, was sufficient to warrant the verdict. The jury might have found that the engineer had moved the two cars, to which his engine was attached, a greater distance than was necessary for "taking slack" before he commenced to back them. The testimony of the witnesses for appellee, giving it its strongest probative force in her favor, tended to show this. After the engine started forward, Waldrop had time to go the entire length of a car, to go between them and to stoop over to connect the air hose before the cars came back upon him, tending to show that the engine must have gone forward more than a very few feet.

While the witnesses could not tell in feet the length of space the cars went forward, and did not undertake to estimate it because it was done so quickly, yet one of them who stood to one side said that it must have been more than two feet, and might have been "a half-car length." He remembered seeing the "light space," and he was standing about forty or forty-five feet ("hardly a car length") from where the cars came together, and down the track in the direction they started, and about thirty yards away. While he says he thought they were "taking slack," he describes the forward movement and the "light space," and gives the jury room to conclude from his testimony that the cars "might have gone forward as much as half a car length." The other witness, who stood some one hundred yards directly in front of the train, saw the engine, he thought, go forward and stop. He says it came a very little distance toward him before it stopped; then it went back. In view of evidence in the record to the effect that only eighteen inches backward movement would be sufficient to take up all the slack in the two cars, the jury were warranted in finding from the above evidence that the engineer had moved his train forward a sufficient space to give it momentum and to make the "taking of slack" unnecessary, and that when he stopped his engine after starting same forward, and then backed same, this latter movement was not necessary for the "taking of slack," whatever else might have been its purpose. The jury might also have found that the backward movement was not "taking slack" because the impact with the two coaches caused them to move about a car length, dragging the body of Waldrop and finally running over and crushing his arm. This,

too, notwithstanding the brakes were set loosely to keep these coaches from moving of their own weight down the track. That the mere "taking of slack" would not have caused this unless the engineer had lost control of his engine, of which there is no evidence. There was testimony in the record by the witnesses for the appellant, experts, that warranted the jury in concluding that an engine of the size and in the condition of the one under consideration could move always (barring accidents) from a dead stop at least as many cars as were attached to his engine. If the engine had moved forward as much as a half-car length, as the jury might have found under all the evidence, then, according to practically all the testimony of the experts, it was wholly unnecessary to stop the engine and to "take slack." Having gone that far forward, the train would continue to move in that direction unless stopped and set in motion in the opposite direction for some other purpose than "taking slack." It could not be useful to farther discuss the evidence. It suffices to say that it was a question of fact for the jury as to whether appellant was negligent in the manner alleged in the complaint. It was also a jury question as to whether Waldrop was guilty of contributory negligence. These questions were submitted upon correct instructions.

Second. The court did not err in refusing to abate the action until appellee should give bond for costs. Sections 959, 960, 961, Kirby's Digest, do not apply to an administratrix in this State* She had given a bond as administratrix, and she was not liable personally for costs in a suit brought in her fiduciary ca-

*Sections 959, 960 and 961 of Kirby's Digest read as follows:

"959. A plaintiff who is a non-resident of this State, or a corporation other than a bank created by the laws of this State, before commencing an action shall in the clerk's office file a bond, with sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant, or to the officers of the courts.

"960. An action in which a bond for costs is required by the last section, and has not been given, shall be dismissed on the motion of the defendant at any time before judgment, unless in a reasonable time to be allowed by the court after the motion is made therefor such bond is filed, securing all past and future costs; and the action shall not be dismissed or abated if a bond for costs is given in such time as the court may allow.

"961. If the plaintiff in an action, after its institution, becomes a non-resident of this State, he shall give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter."

pacity. See by analogy *Johnson* v. *Duval,* 27 Ark. 599; *Tucker* v. *West,* 31 Ark. 647. The removal of appellee to Missouri did not, *ipso facto,* revoke her letters as administratrix. The probate court had not revoked her letters, and the fiduciary status in which she sued she still retained in Arkansas. *McCrary* v. *Taylor,* 38 Ark. 393.

Third. There was no prejudicial error in giving appellee's fifth prayer.† Appellee was before the jury. They could judge of her probable expectancy from her appearance. If the instruction was defective in omitting this idea, the appellant could, and should, have reached it by specific objection. Appellant in a separate prayer should have presented this feature if it intended to insist on it here. It is difficult to conceive that a sensible jury would make an allowance to extend beyond the time when the beneficiary of such allowance would probably be dead. They were to find, under the instruction, the amount he would have contributed to her, and of course he could not have contributed to her after she was dead. The instruction is not like that condemned in *Fordyce* v. *McCants,* 51 Ark. 509.

There was no prejudicial error in giving appellee's prayer number eight.‡ This prayer must be considered in connection

†Appellee's fifth prayer, which was given by the court, was as follows:

"5. If you find for the plaintiff you will assess the damages at such amount as will fairly compensate deceased's widow and estate for such damages as is shown by the proof to have been sustained by each, if any, caused by the injury and death of G. A. Waldrop, allowing the widow such amount of pecuniary damage as she has suffered, if any, by reason of the injury and death of her husband, basing such damages on the present value of the amount that in your judgment deceased would have contributed to the support and well-being of his wife during his lifetime, having regard to the probable duration of his life, the amount he has customarily contributed to the support and well-being of his wife, if anything, and what, in your judgment, he would have contributed to her during the remainder of his life but for the accident causing his death, taking into consideration the age, health, habits, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time, his earning power and rate of wages, and you will award his estate such amount of damage as will fairly compensate for the mental and physical pain and suffering endured by the deceased, if any, between the time of his injury and the time of his death."

‡Appellee's prayer number 8, given by the court, was as follows:

"8. If you find from the evidence that the engineer was guilty of negligence in failing to keep a lookout when he backed his engine, and such failure, if any, was the proximate cause of the injury to the deceased, and deceased was free from contributory negligence, your verdict will be for the plaintiff."

with appellant's prayer number eight.§ The two instructions correctly declared the law applicable to the evidence in the case. It is undisputed that the engineer did not have to keep a lookout if he was only "taking slack." The instruction could only have referred to his duty if he was backing his engine for some other purpose.

Fourth. The verdict was not excessive. This case is unlike the case of *St. Louis, I. M. & S. Ry. Co.* v. *Caraway,* 77 Ark. 405, where the court held the verdict excessive, because there was no evidence in that case to show the amount that the deceased in his lifetime had contributed to his wife.

Here the evidence shows the amount, and, when the jury considered, as they must have done, the probable increase in the earning power of one who was in the line of promotion, and who from his character and habits would deserve it, we are of the opinion that the verdict under the evidence was not excessive.

The judgment is therefore affirmed.

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§Appellant's prayer number 8, given by the court, was as follows:

"8. While it was the duty of the engineer to keep a lookout, the law only requires him to keep such a lookout as is consistent with the performance of his duties in handling the engine. If it was necessary for him to turn around and thus momentarily prevent him from keeping a lookout, the company cannot be held guilty of negligence on account of such momentary failure to keep a lookout."

SOUTHERN ANTHRACITE COAL COMPANY *v.* BOWEN.

Opinion delivered December 13, 1909.

1. ACTIONS—CONSOLIDATION.—Where the pleadings and evidence in two actions for personal injuries were the same, it was not error to consolidate them. (Page 144.)
2. WITNESSES—EXCLUSION FROM COURT ROOM.—Under Kirby's Digest, § 3142, providing that "if either party require it the judge may exclude from the court room any witness of the adverse party," it is within the discretion of the court to exclude witnesses from the court room. (Page 144.)
3. TRIAL—ARGUMENT OF COUNSEL.—The making of an improper remark by appellee's counsel in his opening statement to the jury was cured by an instruction to the jury not to consider such remark where it was not of such prejudicial nature that its effect could not be removed in that way. (Page 144.)

4. INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—The court's charge to the jury must be read as a whole, and all of its parts considered in determining its meaning; and when reference is made in one instruction to some other part of the charge, or when words are used in some instructions that are correctly defined in others, the other parts of the charge referred to and the other instructions must be considered in determining whether or not the particular instructions under consideration are correct. (Page 149.)

5. SAME—WHEN MISLEADING.—Where two separate causes of action in favor of two plaintiffs against the same defendant were consolidated, and there was evidence tending to establish a defense to the cause of action of one plaintiff, but not to that of the other, an instruction which ignored this defense in the one case was misleading. (Page 150.)

6. SAME—CONSTRUCTION AS A WHOLE.—Where the instructions in a case, when construed as a whole, are so conflicting as to mislead the jury and not give them a certain guide to follow in making their verdict, the error of giving them is prejudicial. (Page 151.)

7. MASTER AND SERVANT—ASSUMED RISK.—Where a servant is required by the master to make his place of work safe, and fails to do so, and is injured, he assumed the risk of his failure to discharge such duty. (Page 152.)

8. INSTRUCTIONS—WAIVER OF OBJECTIONS—Where appellant moved that the court modify an instruction in a certain particular only, other objections to the instruction will be deemed waived. (Page 152.)

Appeal from Pope Circuit Court; *J. H. Basham,* Judge; reversed.

STATEMENT BY THE COURT.

Appellees were carpenters, and in the employ of appellant in and about its coal mine. The mine was operated by a shaft, separated into two divisions by wooden partition. Two cages were used to hoist the coal and to let down and hoist men and material. To these cages wire ropes were attached, and the ropes passed over a drum, and the cages were propelled up and down by an engine. They were so arranged that one went up while the other went down. On October 15, 1907, as the cage on the north division of the shaft was coming up with a car of coal, it toppled over within about twenty feet of the top, and the coal falling back down the shaft displaced the timbers below and caused the descending car in the south division to stick in the shaft about forty feet from the bottom. Appellees went down to unfasten this cage, and while they were on the cage same fell with them to the bottom, and they were seriously injured. They

each filed separate complaints against appellant, in which they allege, among other things, the following: "That the general manager then in charge of said mine carelessly and negligently, and without proper and reasonable care for the safety of plaintiff, caused said wire rope attached to said hung cage to be fastened and held in an insufficient and dangerous way; that is to say, only by means of clamping wire rope at the top of said shaft by fastening and bolting together timbers with said rope between. The said wire rope was one inch in diameter, and worn very slick and smooth, and was also oily. And the said timbers used as clamps were oak and pine with a small iron clamp above. This plaintiff objected to the manner in which the wire rope was being fastened or clamped, and suggested to said general manager that it should be tied to a large timber 12 x 13, which was bolted and fastened to other timbers, being a part of the foundation of the engine, which manner of fastening said rope was practicable and feasible. But this suggestion by plaintiff was not adopted by the general manager in charge of said mine, but the other manner or mode of fastening said rope by means of clamping it as above explained was ordered by said general manager, stating that it was sufficient and would be safe. Whereupon said general manager ordered and directed plaintiff to go down to the hung cage then fastened and replace and adjust all timbers and to loosen and unfasten said cage. In obedience to said order plaintiff and his co-employees (naming them) went down to said cage thus hung, and, in order to adjust the timber and said cage, it became necessary for plaintiff and co-employees to get on to said cage that was fastened. And, after getting upon said cage and loosening it and readjusting the timbers which were holding it, said cage became loose, and all obstructions removed, and on account of the careless and insufficient manner in which said wire rope had been clamped or fastened, and without fault upon the part of plaintiff, the weight of the said cage, together with the weight of said two men, jerked the rope through between said two timbers, and fell with great force and velocity to the bottom of said shaft, from which fall plaintiff was seriously and permanently injured.

There was the further allegation in one of the complaints that the defendant was negligent in failing to furnish said cage

with, and attach thereto, sufficient spring catches to prevent the consequence of cable breaking or the loosening or disconnecting of the machinery attached to said cage.

The injuries received by the respective complainants were described in their complaints. Appellee Bowen laid his damages at $5,000, and appellee Thrasher laid his damages at $20,000.

The appellant answered the respective complaints, denying all the material allegations and setting up the defenses of injury by fellow servants, contributory negligence and assumed risk. The causes were consolidated over appellant's objection, and the jury returned a verdict in favor of appellee Thrasher for $5,000 and in favor of appellee Bowen for $500. Judgment was entered in favor of each appellee for the amount of the verdict obtained by him, and this appeal has been duly prosecuted. Other facts stated in the opinion.

Read & McDonough, for appellants.

Before cases can be consolidated they must relate to the same question. 83 Ark. 288; 145 U. S. 285. If consolidation prejudices the rights of any of the parties, it should not be ordered. 84 N. Y. S. 503; 74 Ark. 54; 57 Atl. 257. If the issues are different, there can be no consolidation. 19 Wend. 23; 142 Mass. 220; 55 Fed. 769; 21 S. W. 757; 124 Mo. App. 600. The master is not an insurer of the safety of his employees. 44 Ark. 524; 76 Ark. 436; 71 Ark. 518; 88 Ark. 295. While a master cannot relieve himself from liability by delegating his authority, yet he can relieve himself from liability to the servant to whom the authority is delegated. 44 Ark. 524; 88 Ark. 292; 58 Ark. 217; 76 Ark. 69. The proof does not show any failure of duty on defendant's part. 76 Ark. 69.

U. L. Meade and *Davis & Pace,* for appellees.

These cases were properly consolidated. 86 Ark. 130; 83 Ark. 290. Matters of practice within the discretion of the trial court will not be reviewed by the Supreme Court unless that discretion has been abused. 10 Ark. 428; 5 Ark. 208. Consolidating cases, under the act of 1905, p. 798, is left to the discretion of the trial court. 145 U. S. 285. There was no error in refusing to enforce the rule against the witnesses. 56 Ark. 404; 77 Ark. 603. Erroneous statements of counsel are cured

by the court's directing the jury to disregard it. 58 Ark. 353; 74 Ark. 256; 75 Ark. 347. If the instructions given present every phase of the law applicable to the case, they are sufficient. 88 Ark. 524; 83 Ark. 61; 77 Ark. 458; 69 Ark. 558; 67 Ark. 531; 75 Ark. 325; 74 Ark. 377.

WOOD, J. (after stating the facts). First. The causes were of "a like nature" and "relative to the same question." The cause of action alleged in each case grew out of the same state of facts. The defenses alleged in each were the same, although the evidence in support of the defenses of contributory negligence and assumed risk in the Thrasher case was different from that in the Bowen case. The injury to each was caused at the same time and by the same agency, proceeding from the same source. The appellees had to rely upon the same evidence to support their alleged causes of action. The issues raised by the pleadings were precisely the same, and the court, after the evidence was in, by correct instructions might have prevented any confusion in the application of the doctrine of contributory negligence and assumed risk as applicable to the respective plaintiffs. The causes here were certainly as appropriate for consolidation as any of the following where it was approved: *St. Louis, I. M. & S. Ry. Co.* v. *Broomfield,* 83 Ark. 290; *American Insurance Co.* v. *Haynie,* 91 Ark. 43. See also *Mahoney* v. *Roberts,* 86 Ark. 130.

Second. Under the statute providing that "if either party require it the judge may exclude from the court room any witness of the adverse party" (Kirby's Dig., § 3142), it is within the discretion of the court to exclude witnesses from the court room. Where the court overrules a motion to exclude, there is no error unless it appears that some prejudice resulted. No prejudice is shown here. *St. Louis, I. M. & S. Ry. Co.* v. *Pate,* 90 Ark. 135.

Third. Counsel for appellees in the opening statement to the jury said: "The owners are not the ones that are liable." This was only tantamount to a declaration that appellant expected to prove that it was not the one who was liable for any injuries sustained by appellees. The remarks were not prejudicial in themselves. The ruling of the court withdrawing them and instructing the jury not to consider them,

removed any possible prejudicial inference that the jury might otherwise have drawn from them. *Little Rock & Fort Smith Ry. Co.* v. *Caveness,* 48 Ark. 106; *Kansas City S. Ry. Co.* v. *Murphy,* 74 Ark. 256; *Carpenter* v. *Hammer,* 75 Ark. 347. The remarks were not of such prejudicial nature that the effect could not be removed by instructions of the court to disregard the remarks.

Fourth. The testimony on behalf of appellees tended to show that the wire rope attached to the cage that was fastened in the shaft was clamped between two pieces of oak timber, held together by bolts. The rope was fastened in this way at the top of the shaft. The purpose in so securing it was to prevent the cage from falling after the men had gone down and unfastened it. The rope was clamped in this manner under the directions of the manager and general superintendent. Both were present. Thrasher suggested a method of fastening the rope which he regarded as more secure, but the manager did not adopt his suggestions, but proceeded to have the rope fastened in the manner indicated. While the rope was being fastened, appellees were called away, and when they were called back and were directed by the manager to go down to unfasten the cage, they made no further examination of the manner by which the rope was fastened at the top. Thrasher and Bowen obeyed the orders of the general manager and superintendent to go down and unfasten the cage. They went down without inspecting the manner in which the rope wast fastened "because the mine owner directed it. He was a practical man and a miner, and the other man (the superintendent) had been around shafts all his life," and appellees went down in the shaft because they "supposed it was safe." When they got down to the cage, it appeared to them to be necessary to get on the cage that was fastened in order to get same loose. They therefore got on the cage and unfastened it. When it was set free, it immediately dropped to the bottom of the shaft. The wire rope was oily and slick, and the clamps did not grip it tight enough to hold it, so as to prevent its slipping through and letting the cage fall. There was testimony tending to show that the cages were originally provided with "catches," which were designed to stop the cage and hold it in place, should the cable give way. These "catches"

were forced into the timber when the cage dropped by means of a spring. One leaf of the spring had been removed prior to the accident, and this had a tendency to weaken the spring. The catches would not work on the day of the accident. The catches or stays would not work except when the weight of the cage tightened the rope, but when the cage fell the rope slipped through and never became taut at all. Thrasher suggested to the manager that the wire rope should be fastened by clamping it to the top timbers. It should have been fastened to a 12 x 12. A kink could then have been placed in the wire rope which would have made it secure.

The testimony on behalf of appellant tended to prove that it was a part of Thrasher's duty to fasten the rope, that he was the head carpenter, having supervision of the carpenter work in general, and that Bowen was working under him. It was his duty, if a cage was caught in a shaft, to release it and to take what help he needed. Thrasher was directing the work. There was no other one to do the work except Thrasher. Thrasher was the judge as to whether a rope was safe when clamped in the manner it was done that day. "If the clamping had been done sufficiently tight, it would have held the cage." Thrasher had charge of the men that were fixing the rope that day, and had fixed it that way before, and never objected to fixing it that way on the day of the accident, and did not suggest any other way to fix it. The above is, in substance, what the evidence tended to prove in support of the respective contentions.

We are of the opinion from the evidence in the whole record that it was a jury question as to whether the appellees sustained injuries through the negligence of appellant. It was also a question for the jury as to whether appellee Thrasher had assumed the risk, or whether he was guilty of contributory negligence. The uncontroverted evidence showed that Bowen did not assume the risk, and was not guilty of contributory negligence. The rulings of the court on the prayers for instructions offered by appellant were correct. The prayers granted covered such of the rejected prayers as were correct. The appellant complains of the ruling of the court in giving, among others, the following instructions:

"1. I charge you that it is the duty of the master to fur-

nish a servant a reasonably safe place in which to work, and in this case if you find that the plaintiffs, W. B. Thrasher and W. R. Bowen, were on October 15, 1907, in the employ of the defendant, the Southern Anthracite Coal Company, and while so engaged were ordered by the defendant to go down in the shaft of the mine of the defendant to unfasten or unloosen the cage that was hung on the south side of said shaft, and the plaintiffs in obedience to said order went down into said shaft, and, while at work upon said cage, the same fell with them and injured them, without fault on their part, and that said injury was occasioned because the defendant had negligently failed to securely fasten said cage by means of the wire cable attached to it, or by other good and sufficient means, you will find for the plaintiffs, and assess their damages at such a sum as you believe, under the law and evidence, will compensate them for the injuries they received.

"2. I charge you that it is the duty of a servant to obey all reasonable orders given him by the master.

"3. The court instructs the jury that, before the defendant can ask the jury to consider the defense of contributory negligence, it must show that the plaintiffs, or either of them, were guilty of negligence that directly contributed to the injury, and that without such negligence on their part the injury would not have occurred; and the law requires this to be proved by a preponderance of the evidence in this cause, and, unless so proved, you are instructed not to consider it.

"4. The court instructs the jury that contributory negligence means negligence that contributed to the injury, and it consists in doing something that a reasonably prudent person would not do, or in failing to do something that a reasonably prudent person would do; and in this case if you find that the plaintiffs, or either of them, did anything at the time they were injured or failed to do something that they should have done, that would [not] have been done by a reasonable prudent person, situated as they were, and that their actions as above set forth brought about the injury or contributed to it, they would be guilty of contributory negligence.

"4½. The court instructs the jury that if you find the injury was the direct result of the negligent failure of defendant

to securely fasten the wire cable that held the cage, and that plaintiffs were not guilty of contributory negligence as defined in these instructions, you will find for the plaintiff.

"5. The court instructs the jury that if you find that either of the plaintiffs were guilty of contributory negligence, such as will defeat his cause of action, and the other not, you may return a verdict in favor of the one that was not guilty of negligence.

"6. It is only when the danger or risk of injury from obedience to the commands of the master is so apparent to the servant as to render it under the circumstances unreasonable and imprudent for him to obey the master's orders, and he then voluntarily obeys and is injured, that he is guilty of contributory negligence.

"7. In obeying the commands of the master, the servant does not assume any risk occasioned by the negligence of the master, unless he has knowledge of such negligence and the danger incident thereto, and he with such knowledge accepts the risk and takes his chances, then in that event he cannot recover.

"8. I charge you that the duty resting on the master to provide a reasonably safe place for his servant to work is a duty that he cannot delegate to another, and the master cannot escape liability by leaving to another the discharge of that duty, if there is failure to provide a reasonably safe place for his servant to work."

The defendant moved the court to modify said instruction No. 8 as follows:

"But if the defendant delegated the duty to Thrasher and Bowen, or either of them, to make the place safe, then it was their duty or the duty of the one upon whom was imposed that obligation so to do."

"9. You are further instructed that one of the charges of negligence in plaintiffs' complaint is that defendant failed to furnish the cage with, and attached thereto, sufficient spring catches to prevent the consequence of the cable breaking; and if you believe that defendant was negligent in not furnishing said catches sufficient for the purpose, and that such negligence was the cause of the injury, without fault on the part of the plaintiff, you will be authorized to find for the plaintiff."

Appellant contends specifically that prayer number one was erroneous because the same made it the positive duty of the master to furnish a safe place to work, and in effect made the master the insurer of the servant's safety, and further because said instruction confused the right of recovery of both plaintiffs, and submitted the question to the jury upon the theory that each plaintiff might recover upon the same testimony.

When the first part of instruction number one that defines the master's duty as to providing a safe place for the servant is read in connection with the part that tells the jury that the defendant is not liable unless it *"had negligently failed to securely fasten said cage by means of the wire cable* attached to it," etc., the instruction can not fairly be construed as making it the absolute duty of appellant to provide appellees a safe place. While the instruction tells the jury that it is the duty of the master to provide a reasonably safe place for the servant, it also tells them that, before the master can be held liable for his failure to perform that duty, it must be established that his failure was *negligent*. Then, when we look to the fourth and eleventh instructions given at the instance of appellant, we see that the court has correctly told the jury that the defendant was negligent if, under the evidence, it failed to exercise ordinary care. Instructions four and eleven are as follows:

"4. The defendant is not an insurer of the tools and instrumentalities furnished the plaintiffs. The law requires that the defendant use ordinary care to provide its employees with reasonably safe appliances; and if the defendant used such care in fastening the rope as a person of ordinary prudence would use, considering the danger, plaintiffs cannot recover."

"11. If the usual and ordinary way of securing said rope was to clamp same as described in the evidence, or if it was secured at this time better than was ordinarily done, and if the person whose duty it was to fix said rope used ordinary care in fixing same, then there can be no recovery, and the jury will find for the defendant."

Each instruction must be read as a whole, and all of its parts must be considered in determining its meaning; and when reference is made in one instruction to some other part of the charge, or when words are used in some instructions that are

correctly defined in others, the other parts of the charge referred to and the other instructions must be considered in determining whether or not the particular instructions under consideration are correct. The rule is well stated in *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61, as follows: "It is generally impossible to state all the law of a case in one instruction. If the various instructions given in a case separately present every phase of the law, as a harmonious whole, there is no error in a particular instruction failing to carry qualifications which are explained in others." And counsel cite some of our later cases that support the rule: *Louisiana & Arkansas Ry. Co.* v. *Ratcliffe,* 88 Ark. 524; *St. Louis, I. M. & S. Ry. Co.* v. *Day,* 86 Ark. 104; *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458; *Blair* v. *State,* 69 Ark. 558; *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 531; *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325; *Arkadelphia Lumber Co.* v. *Posey,* 74 Ark. 377.

Instruction number one, when considered as a whole, and in connection with the other instructions mentioned *supra,* is not open to the particular objection now under consideration.

The instruction, however, fails to recognize the difference, developed by the evidence, in the relations of Thrasher and Bowen to appellant. The evidence on behalf of appellant tends to show that Thrasher was a vice-principal in the matter of making the place safe for the descent of himself and co-employees into the mine. According to appellant's evidence, that was his duty. The undisputed evidence shows that Bowen had no such duty to perform. He was not the foreman of the carpenter work, but worked under Thrasher. Under the evidence, therefore, the jury might have found that Thrasher was not entitled to recover because it was his duty to make the wire rope secure, and that he assumed the risk of not doing so, or was guilty of contributory negligence if he failed to do so, and made unsafe descent when he knew, or by the exercise of ordinary care should have known, that the wire rope was insecurely fastened. But this evidence that might have defeated him, if believed by the jury, would entitle Bowen to recover, unless he knew, or should have known, of Thrasher's negligence, if he was negligent. The instruction ignored the evidence showing the difference in the relation of the respective plaintiffs to appellant. The effect of the

instruction was to tell the jury that if appellant had no defense to Bowen's claim under the evidence, neither did it have to Thrasher's. It practically told the jury that their rights, under the evidence, were the same. This was confusing, misleading, and prejudicial to appellant as to the claim of Thrasher. For appellant under the evidence may have had a complete defense to Thrasher's claim, and yet have been liable to Bowen.

Instructions 3, 4 and 4½, when considered in connection with each other, tell the jury in effect that the contributory negligence of either one, or both, of the appellees, if established by a preponderance of the evidence in the case, would defeat recovery. Under these instructions the contributory negligence of one of the appellees would defeat recovery by the other, although that other might himself be free from contributory negligence. But, when these are read in connection with number 5, it is clear that the court meant to tell the jury that if both defendants were guilty of contributory negligence they could not recover, and that, if one was guilty of contributory negligence and the other not, the finding might be for the one that was free from such negligence. The instructions, as thus framed, might have been prejudicial to appellees, but not to appellant. The instructions recognize that there may be a finding of contributory negligence on the part of one of the appellees, and not on the part of the other, thus leaving room for the jury to consider the evidence tending to show the difference in the relation that the appellees sustained to the appellant. But in this respect they were in conflict with instruction number 1.

While it was not prejudicial error to give these instructions in the form presented, they do not cure the error of the court in giving instruction number one. The rule we have announced *supra* requires that the instructions, when taken together, should not be so conflicting as to confuse or mislead the jury, not giving them a certain guide to follow in making their verdict. When presented from the conflicting viewpoints of the respective parties litigant, the above instructions are well calculated to mislead the jury. The error is in giving instruction number one and others that, while not prejudicial to appellant, are in direct conflict with it. The instructions can not be reconciled, and instruction number one should not have been given. *St. Louis, I. M. & S. Ry Co.*

v. *Beecher,* 65 Ark. 64; *St. Louis, I. M. & S. Ry. Co.* v. *Luther Hitt,* 76 Ark. 224; *Grayson-McLeod Lumber Co.* v. *Carter,* 76 Ark. 69; *Miller* v. *Nuckolls,* 77 Ark. 64. Instructions numbered 2, 6 and 7 announce correct general principles, without applying them to the particular phases of the evidence. This practice is not to be commended. But we find no prejudicial error in this under the evidence in this case. For these instructions were doubtless based upon the evidence tending to show that Thrasher and Bowen were directed by the master to go down in the shaft and unfasten the cage.

Instruction number eight was erroneous and prejudicial to appellant, so far as Thrasher is concerned, because it ignored the evidence tending to prove that it was the duty of Thrasher to fasten the wire rope. If appellant deputed to Thrasher the duty of making the wire rope secure, and he neglected to perform this duty, he assumed the risk of injury from his negligence in failing to discharge the duty imposed on him, and the master is not liable to him for the injury resulting. *St. Louis, I. M. & S. Ry. Co.* v. *Harper,* 44 Ark. 524. If Thrasher was appointed to make the wire rope secure, he assumed the risk of not doing so in a prudent and skilful manner. *Murch Bros. Const. Co.* v. *Hays,* 88 Ark. 292. See also *Railway Co.* v. *Torrey,* 58 Ark. 217.

The instruction was also in conflict with instructions number four and eleven given at the request of appellant, in that it told the jury without qualification that it was the duty of the master to provide a reasonably safe place, etc., for his servants to work. Appellant waived any error in this respect, however, by asking for a modification which did not include this. As to Bowen, there was no evidence to show that it was his duty to fasten the wire rope. The instruction was not misleading as to him.

There being no prejudicial error in the record as to Bowen's claim, the judgment in his case is affirmed. As to Thrasher, the judgment is reversed, and the cause remanded for new trial for error in instructions mentioned.

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

Opinion delivered January 10, 1910.

1. MASTER AND SERVANT—ASSUMED RISK.—Where a fireman upon a railway locomotive, at the time of entering service, knows that the feed glass of the lubricators of two-thirds of the company's engines are unscreened, and is injured by explosion of an unscreened feed glass, he will be held to have assumed the risk therefrom. (Page 155.)
2. SAME—DUTY TO WARN SERVANT.—It is not the duty of a master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties where experience is not necessary to enable him to do with safety the work he is employed to perform. (Page 155.)
3. SAME—FAILURE TO WARN SERVANT—EFFECT.—Failure of a railway company to notify a fireman that the feed glass of the engine's lubricator was liable occasionally to burst was not the cause of the glass breaking and injuring such fireman. (Page 155.)

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

E. B. Kinsworthy and *Lewis Rhoton,* for appellant.

The court erred in refusing a peremptory instruction for defendant. 71 C. C. A. 338; 122 U. S. 189; 101 N. Y. 520; 5 N. E. 358; 54 Am. R. 722; 100 U. S. 214; 90 Tenn. 711; 18 S. W. 387; 12 Lea 63; 47 Am. R. 319; 94 Fed. 73; 36 C. C. A. 94; 29 S. W. 544; 9 Tex. Civ. App. 100; 59 Tex. 19; 86 Tex. 96; 23 S. W. 642; 85 C. C. A. 240; 170 U. S. 665; 28 Ind. App. 31; 84 C. C. A. 573; 184 Mass. 243; 165 Mass. 368; 130 N. C. 34; 73 Wis. 404; 35 Wash. 544; 48 Ark. 347; 56 Ark. 238; 170 U. S. 673; 152 U. S. 112; 94 Fed. 73; 122 U. S. 189; 152 U. S. 145; 54 Ark. 389; 74 Ind. 440; 31 Ill. App. 75; 29 C. C. A. 219; 167 Mass. 539; 113 Mass. 396. One who enters the service of a railway company assumes the risks of such dangers as are open to observation. 67 Ark. 209; 14 L. R. A. 552; 122 U. S. 189.

J. H. Harrod, for appellee.

The defendant was not entitled to a peremptory instruction. 77 Ark. 367; 79 Ark. 53. The question of whether a risk was assumed is a question for the jury. 79 Ark. 53; 88 Ark. 548.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railway Company from a judgment rendered against

it in the Lonoke Circuit Court in favor of W. H. Wells for physical injuries received by him on account of the alleged negligence of the railroad company in not screening or shielding the feed glass of the lubricator on one of its engines, whereby his right eye was destroyed by the bursting of said feed glass. The statement of facts is substantially as follows:

W. H. Wells, the plaintiff, was 22 years of age. Until about 20 years old, he worked on a farm. He then worked for a railroad company in the capacity of car repairer and engine watchman. About six months before the injury occurred, he was employed by the defendant company as fireman, in which capacity he worked until the time of the injury of which he complains. His usual run as fireman was on the central division between Little Rock and Van Buren in the State of Arkansas. He was directed at the beginning of each run to fill the lubricator on the engine, and did so unless the engineer arrived first and filled it. He had no other duties to perform in connection with the lubricator. The oil feeds through a glass tube, and the lubricator is right above the boiler in plain view of the engineer and fireman when on their seats. The engines are equipped with screens and wire shields to the feed glass when they leave the shops, but these are soon taken off by the engineer so that he can better watch the oil feed through the glass to the cylinder. On the road in question the shields and screens had been removed from as many as two-thirds of the engines. The plaintiff first saw the engine in question on February 18, 1908, when he left Little Rock on it as fireman. His run was to McGehee in this State. The next morning at McGehee when the plaintiff climbed upon the engine, the engineer told him that he had already filled the lubricator. The engineer went back to the tank to see about the water. While he was gone, the plaintiff noticed some steam escaping from the bottom of the feed glass. He says that he thought this might be dangerous and decided to shut off the steam. He went forward toward the lubricator, and started to take hold of the condenser, and about that time the glass burst. A piece of the glass flew in his eye, and injured it so severely that it had to be removed.

The above statement of facts is uncontradicted, and thus raises the issue of whether the court erred in giving a peremptory instruction in favor of the defendant.

The plaintiff was a man of average intelligence. He had been employed by the defendant as fireman for six months. He knew that only one-third of its engines were equipped with shields or screens on the feed glass of their lubricators. The lubricators were on the boiler immediately in front of him where but to look would be to know whether or not the feed glass was guarded by shield or screen. Plaintiff said that he had never known one of the feed glasses to break before, but any one with his experience must have known that glass will sometimes break.

There was nothing inherently dangerous about the use of the feed glass. The only danger was that which might arise from the occasional breaking of it just as any other tool or implement might break. It is not contended that there was any defect in it. We think, under the undisputed facts, it was one of the risks incident to the service which the plaintiff assumed when he entered the employment of defendant as fireman on one of its locomotives. *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102; *Louisiana & Arkansas Railway Company* v. *Miles,* 82 Ark. 534.

Besides, "it is not the duty of a master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties where experience and instruction are not necessary to enable him to do with safety the work he is employed or required to perform." *Ford* v. *Bodcaw Lumber Company,* 73 Ark., at p. 55.

The only duty plaintiff had to perform in connection with the lubricator was to fill it when directed by the engineer. There was nothing inherently dangerous in working near it. If the plaintiff had been warned that the feed glass might occasionally burst, it could not have lessened the likelihood of explosion in this case. Hence the mere fact that he was not told that the feed glass might sometimes break in no wise contributed to cause his injury. *Brands* v. *St. Louis Car Co.,* 112 S. W. (Mo.) 511.

Therefore, we conclude that the court erred in not directing the jury to return a verdict for the defendant.

For that error the judgment must be reversed, and the cause dismissed.

CROSBY v. STATE.

Opinion delivered January 10, 1910.

1. WITNESSES—INFANTS.—In the case of an infant under fourteen years there is no presumption that he is competent to testify as a witness; but if he appears to have sufficient natural intelligence and to have been so instructed as to comprehend the nature and effect of an oath, he should be admitted to testify, no matter what his age may be. (Page 158.)
2. SAME—DISCRETION OF COURT.—The question of the competency of an infant witness is left to the discretion of the trial judge, subject to review for clear abuse or manifest error. (Page 158.)
3. SAME—INFANTS—CAPACITY.—Where a witness ten years old testified that it was wrong to tell an untruth, and that he did not know what would be done to him if he did not tell the truth, it was error to permit him to testify without requiring a showing that he knew the danger and wickedness of false swearing or comprehended the obligation of an oath. (Page 158.)
4. EVIDENCE—CONFESSIONS.—Confessions voluntarily made by the accused were properly admitted in evidence. (Page 159.)

Appeal from Conway Circuit Court; *Hugh Basham,* Judge; reversed.

Sellers & Sellers and *Moose & Reid,* for appellant.

The indictment must allege the means and manner of the killing, and the State must prove every material allegation. 34 Ark. 263; 27 Ark. 496; 26 Ark. 323. The competency of witnesses under fourteen years of age must be made to appear by proper examination in the presence of the defendant. 25 Ark. 92; 10 Cal. 66. A fourteen year old boy who states that he knows that it is wrong to lie, but does not know what will be done with him if he does, has not the requisite capacity for a witness. 88 Ala. 181; 72 Ala. 191; 24 S. C. 185. The confession of appellant was improperly admitted as evidence. 84 Ala. 430; 12 Cyc. 466.

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

Will Howard was a competent witness. Greenl. on Ev. 367; Wharton, Ev., § 398; Phillips, Ev. 11; Rice, Ev. 289; 18 La. Ann. 342; 15 Mo. App. 86; 50 Ala. 164; 58 Mo. 204; 5 N. Y. S. 756; 31 Neb. 255. The capacity of a child to testify as a witness in a criminal case is left to the discretion of the judge and

jury. 19 La. Ann. 120; 28 *Id.* 328; 80 Md. 489; 77 Mo. 138; 102 Mo. 289; 107 Mo. 42; 132 Mo. 198; 8 N. M. 96; 33 N. Y. 991; 9 Ore. 479; 27 Tex. App. 289; 88 Wis. 180; 12 Tex. App. 127; 10 Col. 66. The confession of appellant was properly admitted in evidence. 42 Ark. 72; 69 Ark. 602; 110 Pa. St. 269; 14 Minn. 105; 37 N. Y. 303; 33 Miss. 347; 23 Ala. 28; 73 Ark. 497; 19 Ark. 156; 35 Ark. 35. The remarks of the prosecuting attorney were not prejudicial. 74 Ark. 256; *Id.* 491; 86 Ark. 607; 73 Ark. 458.

HART, J. Will Crosby was indicted, tried and convicted in the Conway Circuit Court for the crime of murder in the first degree; and has duly prosecuted an appeal to this court.

The State relied for a conviction upon the confession of the defendant and the testimony of Will Howard, a little negro boy ten years old, who was a witness to the killing. No evidence was adduced in behalf of the defendant. The killing occurred in Conway County, Arkansas. Both the deceased and the defendant were colored, and both were boys. The witnesses for the State, except the sheriff, stated that the defendant was 16 or 17 years old. The sheriff said he looked to be 21 or 22 years old. The killing occurred in the night time, and the weapon used was a cane hoe. The views we will hereinafter express render it unnecessary to make a detailed statement of the circumstances of the killing. It will be sufficient to say that the confession made to the sheriff, together with the testimony of the boy Will Howard, if competent, was sufficient to warrant a verdict for murder in the first degree.

Counsel for defendant object that the witness Will Howard was incompetent on account of his tender years and his inability to comprehend the nature and binding obligation of an oath. The examination made by the court is as follows:

"Q. What is your name? A. William Howard. Q. Were you sworn with the other witnesses a while ago? A. Yes, sir. Q. How old are you? A. Ten years old. Q. Do you know what it means to be sworn? A. No, sir. Q. Do you know what you mean when you hold up your hand and take the oath? A. Yes, sir. Q. What is it? A. Tell the truth. Q. If you was not to tell the truth, what would be done to you? A. I don't know, sir. Q. Would it be wrong? A. Yes, sir."

Whereupon the court held him to be a competent witness, and counsel for defendant saved exceptions to the ruling of the court.

In the case of *Warner* v. *State,* 25 Ark. 448, the court held that in criminal cases the common-law rule in relation to the competency of witnesses had not been changed by the Code. And in the case of *Flanagin* v. *State,* 25 Ark. 92, the rule is stated as follows: "As to children, there is no precise age within which they are absolutely excluded, or the presumption that they have not sufficient understanding. At the age of fourteen all persons are presumed to have common discretion and understanding, until the contrary appears; but under that age it is not presumed; hence inquiry should be made as to the degree of understanding which the child, offered as a witness, possesses; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he should be admitted to testify, no matter what his age may be." To the same effect, see 1 Grenleaf on Evidence (15th Ed.), § 367; Underhill on Criminal Evidence, § 205; Wharton's Criminal Evidence (8th Ed.), § § 366-8; Wigmore on Evidence, vol. 1, § 508, and vol. 3, § 1820.

It will be seen from the above authorities that under the age of fourteen there is no presumption of capacity, and inquiry will be made on that point. The question of his competency is left to the legal discretion of the trial judge, and, in the absence of clear abuse or manifest error, the judicial discretion is not reviewable.

In the present case we do not think the examination of the witness by the circuit judge was sufficiently comprehensive. The child must not only have intelligence enough to understand what he is called upon to testify about and the capacity to tell what he knows, but he must also have a due sense of the obligation of an oath, by which is meant, as we deduce from the authorities *supra,* that the promise to tell the truth must be made under "an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness of falsehood." See also Bouvier's Law Dictionary, p. 529.

In answer to a direct question the boy stated that it was wrong not to tell the truth, but also said that he did not know

what would be done to him if he did not tell the truth. The examination proceeded no further. He was not asked nor did he state anything from which it could be inferred that he had a sufficient sense of the danger and wickedness of false swearing, or that he comprehended and appreciated the sanctity and obligation of an oath.

Counsel for the defendant objected to the admission of the evidence of his statements as made to Sheriff Hervey and to George Brooks. The confession to Brooks was made while the defendant was in jail, and that to the sheriff was made at a later date in the jail yard. The record shows that both statements were voluntarily made; and the statements were properly admitted in evidence. *Hammons* v. *State,* 73 Ark. 495; *Youngblood* v. *State,* 35 Ark. 35, and cases cited.

We have carefully examined the instructions given by the court, and find them to be correct.

Counsel for defendants urge upon us as a ground for reversal certain remarks made by the prosecuting attorney in his argument to the jury, but this assignment of error will not likely occur on a new trial and need not be considered.

For the error in holding that the boy Will Howard was competent to testify under the examination as disclosed by the record, the judgment will be reversed, and the cause remanded for a new trial.

McCULLOCH, C. J. (dissenting). I dislike to record a dissent in a case involving human life, but it seems to me that the court, in holding the admission of the child's testimony to be reversible error, is not only making a mistake, but is taking a backward step in the law of evidence, which is a field in which there has been a more wholesome growth than in any other branch of the law. The test of the competency of children under the age of fourteen, as witnesses in criminal cases, is that they must be found on examination "to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath." *Flanagin* v. *State,* 25 Ark. 92. This must be left largely to the sound discretion of the trial judge, who has an opportunity to see the child and judge of the degree of intelligence which it possesses. An appellate court should not disturb the trial court's exercise of this discretion unless it clearly

appears to have been abused. I understand this to be the rule universally followed by all appellate courts.

In the present case the learned trial judge vouched for the competency of the child's testimony by his finding as to the latter's intelligence and understanding of the nature of an oath, and there is nothing in the record to show that the finding was erroneous. The child in his examination declared his belief that an oath meant to tell the truth, and that it is wrong not to do so. The court heard these declarations, and observed from the appearance of the child not only its degree of intelligence but the sincerity with which they were made. We ought, therefore, to accept the finding of the trial judge, and in failing to do so we discard his exercise of discretion, when no abuse appears. It is true, the child said he did not know what would be done to him if he failed to tell the truth. Whether he understood the question to refer to future punishment or to that to be immediately inflicted by the court for perjury, we do not know, but doubtless the trial judge understood what the child meant.

The authorities on this question are collected in a note to the case of *State* v. *Meyer* (135 Ia. 597), in 14 Am. & Eng. Ann. Cas., p. 1, and I think that, according to the great weight of authority, both English and American, the majority has reached the wrong conclusion in reversing the judgment on this point. I understand the effect of the decision to be that, before we can sustain the ruling of a trial court in admitting the testimony of a child, the record must affirmatively show that the child took the oath under an immediate sense of responsibility to God. In other words, that his answers must affirmatively show that he has an intelligent conception of his responsibility to God and takes the oath under a sense of that responsibility. This is in conflict with the decision of this court in *Flanagin* v. *State, supra,* where the test is declared to be sufficient intelligence and a capacity to comprehend the nature and effect of an oath. I think this is the only test approved by the great weight of authority.

It seems to me that the court falls into error in holding that the record must affirmatively show the capacity of the child. In *Wheeler* v. *United States,* 159 U. S. 523, Judge Brewer, speaking for the court on the admissibility of the testimony of a child witness, said: "This depends on the capacity and intelligence of

the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. * * * So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear."

The best and most concise statement of the rule, and one fully sustained by the authorities, is found in *State* v. *Reddington*, 7 So. Dak. 368, as follows: "No witness, whether child or adult, is required to be able or willing to discuss with the court or counsel either the fact or condition of a future state. He may even have no established views of general theology. He is only required to be able to distinguish the moral difference between right and wrong; and, when the law or the court says he must understand the obligation of an oath, it means only that, possessing such ability to discriminate, he understands that his position as a witness imposes upon him the moral and legal duty to tell only what is true. Whether a witness is so qualified is left in the first instance to the discretionary judgment of the trial court, after informing itself by proper examination."

The Kentucky Court of Appeals, in a very recent case, in passing on the ruling of a trial court as to the testimony of a child, said: "His evidence was clear, and showed mental capacity, understanding and memory sufficient to qualify him. It appears that he was conscious that the oath bound him to speak the truth, and he knew the difference between telling the truth and telling a lie. It did not disqualify him as a witness that he was not able to define the legal obligation of an oath. Whether his religious training had been so developed that he compre-

hended his responsibility to God for lying was not made clear, nor was it material as affecting his competency." *Bright* v. *Com.*, 120 Ky. 298.

The same court in an earlier case said: "The intelligence of the witness is the true test of competency, and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of 'God' and of the evil of lying and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed." *White* v. *Com.*, 96 Ky. 180.

The Pennsylvania court, in a case of this kind, said: "It seems to us that the crude and shadowy beliefs of small children concerning God and the hereafter are so uncertain that the tests, based upon religious instruction, even though given by the trial judge himself, are of little or no moment, and should rather be discarded than followed in this enlightened age. The whole purpose of the trial is to ascertain the truth, and the oath is in pursuance of that object. If the witness understands that this is demanded and that punishment will follow its violation, it is sufficient. It is the substance, instead of the form, that is required; and if we secure this, there would seem to be little benefit in pursuing the shadow. A witness may easily show intelligence and understanding, without being asked each perfunctory question."

The evidence in the present case shows that the defendant is guilty of the horrible crime of which he was convicted. The testimony of the child witness was heard by the trial judge, who pronounced him of sufficient natural intelligence and of sufficient capacity to comprehend the nature and effect of an oath. The trial was a fair one, and the record is, I think, free from error, and the judgment should be affirmed.

FIDELITY MUTUAL LIFE INSURANCE COMPANY *v.* CLICK.

Opinion delivered November 15, 1909.

1. INSURANCE—PAYMENT—RECEIPT AS EVIDENCE.—A receipt for the payment of an insurance premium is merely *prima facie* evidence, which may be overcome by testimony showing that no payment was made. (Page 165.)

2. SAME—RECEIPT OF PREMIUM—REBUTTAL.—Where a life insurance company, sued upon a policy of insurance, seeks to rebut its receipt for an annual premium by proof that such receipt was delivered under a mistake of fact, but fails to explain why such mistake was never discovered for three years after it was delivered and until after the death of the policy holder, such rebuttal presents such an unusual and unreasonable story as raises a question of fact for the jury to determine whether it should be credited. (Page 166.)

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

W. C. Rodgers and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

The sole issue is, was the third annual premium paid? The appellee relies upon a receipt for that premium unfortified by any other proof. The receipt alone was only *prima facie* proof of payment. The evidence on the part of appellant is clear and uncontradicted that this receipt was issued by mistake, and that this premium was never paid. This testimony was consistent and reasonable throughout. 84 Ark. 368; 53 Ark. 96; 67 Ark. 514; 78 Ark. 234; 80 Ark. 396; 81 Ark. 368; *Id.* 405; 84 Ark. 333; 86 Ark. 465; 87 Ark. 70; 84 Ark. 368.

W. P. Feazel, for appellee.

HART, J. This is an appeal by the Fidelity Mutual Life Insurance Company from a judgment rendered against it in favor of Mary E. Click for $2,000 on a life insurance policy. The case turns on the payment of the third annual premium. If this premium was not paid, it is conceded that the policy sued on was void, and that appellee should not recover. On the other hand, if this premium was paid, the policy was in force at the death of the assured, and the appellee should recover.

To show payment, the appellee relied upon the following receipt:

"The Fidelity Mutual Life Insurance Company of Philadelphia received $62.16 for annual premium due September 18, 1905, subject to conditions indorsed hereon, under policy of life insurance indicated by number and name.

"L. G. Fouse, President.

"O. C. Bosbyshell, Treasurer.

"David E. Click, Mineral Springs, Howard County, Ark. ELP 140593. Countersigned at Little Rock, Ark, on the 23d

day of October, 1905.

"R. C. Bright, Cashier."

The above was the receipt for the third annual premium. The policy provided that after three years premiums had been paid it could be automatically extended for four years and seven months without any further payment. The assured died in August, 1908.

The defendants thereupon introduced the following testimony to sustain their defense: O. C. Bosbyshell: "I was the treasurer of the defendant Fidelity Mutual Life Insurance Company during the years 1903 to 1906, inclusive. My duties were to receive and receipt for all premiums paid upon policies of insurance issued by said defendant. The third annual premium upon the said policy in suit in this action was never paid to defendant, Fidelity Mutual Life Insurance Company. Although said premium was never paid to said defendant, I wrote and mailed to the cashier at said defendant's office in the city of Little Rock, Ark., a letter directing said cashier to countersign and deliver to the insured under said policy a receipt for such third annual premium; said letter was so sent because of a clerical error made by one of the employees of the defendant insurance company in mistaking the record of the payment of the premium on another policy which had been paid for the premium on the policy in controversy, this record being on a line of the books immediately next to the record of the policy in controversy; and the mistake was made in losing the proper line when running it out for any payments, and thereby a payment on another policy was mistaken for the third annual payment on the policy sued on. Said letter was erroneous, and said receipt should not have been countersigned and delivered by said cashier, as said premium had not been received by defendant insurance company, as stated in said receipt."

William L. Hunter: "I am the employee of the defendant, the Fidelity Mutual Life Insurance Company, who made the clerical error referred to in the testimony of O. C. Bosbyshell. The third annual premium was not paid to the defendant insurance company."

Francis V. Shannon: "I was the bookkeeper employed by the defendant, Fidelity Mutual Life Insurance Company, at its

Little Rock office, at the time the letter referred to in the testimony of O. C. Bosbyshell was written and mailed to the Little Rock office by him. Said letter was received by me, and, as instructed therein, I countersigned and mailed to David E. Click the official receipt for the third annual premium upon the policy in suit. Said premium was not paid to or received by me at any time. Said receipt was not issued because the said premium was paid, but was so countersigned and mailed by witness because of the letter mentioned from O. C. Bosbyshell, and for no other reason."

It is not contended that the third annual premium was paid unless the receipt itself is sufficient to establish that fact. It is conceded that the receipt only makes a *prima facie* case, which may be overcome by testimony of witnesses, unimpeached, uncontradicted, reasonable and consistent in itself; and such is the rule recognized and followed by this court. *Industrial Mutual Indemnity Co.* v. *Perkins,* 87 Ark. 70; *Southern Express Co.* v. *Hill,* 84 Ark. 368, and cases cited.

We think the evidence on the part of the appellant overthrew the *prima facie* case made by the delivery of the receipt. The receipt was countersigned at Little Rock and mailed to the assured because the officers of the company there received an express order to that effect. That order was given because a clerk in the home office, whose duty it was to make up from the records of the company a list of premiums paid, by mistake reported the books as showing that this premium was paid when in fact such was not the case. The testimony plainly showed that the receipt was issued and delivered by mistake.

Counsel for appellee insists that the explanation is not reasonable and consistent, because the mistake was made in October, 1905, and no attempt was made to show why it was not discovered before the death of the assured, which did not occur until nearly three years later. But it is not shown that the appellant would have been likely to have discovered the mistake. Indeed, it seems unlikely that the company, considering the magnitude of its business, should have discovered it unless there had been occasion for further examination of the records of payment of premiums in regard to this policy, which does not appear to have been necessary.

Under the testimony as disclosed by the record, the court should have directed a verdict for the defendant. Therefore the judgment is reversed, and the cause remanded for a new trial.

ON REHEARING.

Opinion delivered December 20, 1909.

McCULLOCH, C. J. The introduction of the receipt, in regular form, properly signed and countersigned by those authorized to do so, raised a presumption of payment with the terms of the receipt, and cast upon appellant the burden of overcoming this presumption by affirmative proof of nonpayment. Appellee introduced no other proof of payment, and perhaps had none, as the person shown by the face of the receipt to have made the payment was then dead, and the receipt was executed nearly three years prior to his death. She rested merely on the presumption of payment raised by the receipt. This presumption reached to every available mode of payment, and in order to overcome it the burden was on appellant to close up by affirmative proof every avenue through which payment could have been made. Appellant's witnesses attempt to show that the receipt was executed and delivered by mistake. They do not pretend to know or to state from personal recollection that the premium could not have been paid to some other authorized agent of the company. Those who testified could not have known that payment was not made to some other agent. They merely attempted to show that they did not receive payment, and that the receipt was executed and delivered through mistake. The explanation given of the alleged mistake is that the record of another policy was "on a line of the book immediately next to the record of the policy in controversy, and the mistake was made in losing the proper line when running it out for any payments, and thereby a payment on another policy was mistaken for the third annual payment on the policy sued on." The witness who so testified did not make the error himself, but he says it was made by another employee. That other employee does not give any explanation of it, but merely says that he is the one who made the error referred to, and that no payment was ever made. Neither explain why the error was never detected and an effort made to recall the receipt. It would appear to be quite unusual for a receipt to

be executed and mailed out without some entry being made on the cash book or other book evidencing the daily receipt or remittances. It is a matter of common knowledge that in fairly well regulated business institutions of any considerable magnitude an accurate system of bookkeeping is practiced whereby there is a corresponding debit entered for each credit, and *vice versa.* The accounts should balance at all times, and a discrepancy will necessarily discover itself to a competent bookkeeper or accountant. It need not be assumed that appellant, in the operation of its business, practiced the usual accurate methods of keeping accounts, but the suggestion of such a glaring mistake and the failure to detect it for so long a time calls for some explanation. The fact that for nearly three years after the delivery of this receipt the alleged mistake was not detected, or, if detected, that no effort was made to recall the receipt—the fact that nothing was said about the alleged mistake until after the death of the policy holder, is significant and raises some doubt about the correctness of the statement of the witnesses. To use the language of this court in a case quite similar to this, "it presents an unusual, if not unreasonable story," and makes a question of fact for the jury to determine whether or not it should be credited. *Industrial Mut. Indemnity Co.* v. *Perkins,* 81 Ark. 87.

The decisions of this court in *Southern Express Co.* v. *Hill,* 84 Ark. 368, and *Industrial Mut. Indemnity Co.* v. *Perkins,* 87 Ark. 70, where the testimony of witnesses was found to be uncontradicted, reasonable and consistent, should not, we think, be held to control the decision in the present case, when we conclude that the testimony given by the witnesses in contradiction of the receipt is not reasonable and consistent, or at least when we can see that the jury could have regarded it as unreasonable.

It is true that these witnesses were not examined, but an admission as to what they would testify was read to the jury in order to obviate postponement of the trial. They might, if examined and cross-examined, have given a more reasonable explanation of the transaction. We must, however, assume that the statements of their testimony, prepared by counsel for appellant, contained all that the witnesses would say on examination.

A careful re-examination of the evidence introduced convinces a majority of the court that it presented a disputed issue

of fact, which was properly submitted to the jury. A rehearing is therefore granted, and the judgment is affirmed.

BATTLE and HART, JJ., dissent.

BOWMAN v. STATE.

Opinion delivered December 20, 1909.

1. APPEAL AND ERROR—FORMER DECISION.—The decision of the Supreme Court upon a former appeal is the law of the case. (Page 169.)
2. STATUTES—CLERICAL MISTAKE.—Where the act of Congress ceding the territory called the "Choctaw Strip," adjoining the city of Fort Smith, to the State of Arkansas, and the acts of Arkansas accepting such grant, describe the land ceded by permanent lines so that its location may be understood, a mistake in the particular description of the strip, using the word "east" instead of *west,* was a merely clerical error, and will be disregarded. (Page 170.)
3. APPEAL AND ERROR—AMENDMENT OF RECORD.—The record in a felony case may be amended in the circuit court, so as to speak the truth, after an appeal or writ of error has been prosecuted; the prisoner being brought into court and the amended record brought up to the Supreme Court by certiorari. (Page 172.)
4. JURY—SELECTION—PREJUDICE.—It was not prejudicial error, where 11 jurors had been obtained from the regular panel, to order one talesman at a time to be summoned, instead of summoning twice that number, as required by Kirby's Digest, § 2348, if appellant did not exhaust his peremptory challenges. (Page 173.)
5. RAPE—CONSENT—INSTRUCTION.—It was not error to instruct the jury in a rape case that if the prosecutrix was under the age of 12 years she was incapable of understanding and consenting to the sexual act, even though there was no evidence as to her understanding the nature of such act, as the law in such case presumes that she was incapable of consenting, in the absence of proof to the contrary. (Page 174.)
6. WITNESSES—IMPEACHMENT—INSTRUCTION.—An instruction to the effect that the testimony of an impeached witness should be considered by the jury, if they believe it, or if it be corroborated, was not prejudicial where the facts to which the impeached witnesses swore were established by other and uncontradicted witnesses. (Page 175.)

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

C. T. Wetherby, for appellant.

There was error in drawing the jury. Kirby's Dig., § 2348; 74 Tex. 287; 11 S. W. 1117; 45 Cal. 323; 80 Ill. 251; 70 Miss. 554; 12 So. 582. There was error in the remarks of the prosecuting attorney. 24 Tex. App. 433; 6 S. W. 540; 6 Tex. App. 19; 24 Mo. 475; 90 N. C. 688; 126 Ill. 150; 18 N. E. 817.

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

The proceedings of the court are presumed to have been regular. 72 Ark. 590. Appellant cannot complain here for the first time that the demurrer was not overruled. 73 Ark. 407; 76 Ark. 280. The description of land in the act is sufficient. 115 Ill. 463; 66 Cal. 15; 78 Ala. 119; 92 N. C. 172; 8 Allen 214; End. on Int. of Stat., § § 27, 28, 39, 298 to 302. The word "east" will be construed "west" when it is evident that it was so intended. 61 Wis. 215. There was no error in drawing the jury (19 Ark. 156) for appellant had not exhausted his challenges. 30 Ark. 328; 35 Ark. 639; 45 Ark. 165; 69 Ark. 322; 50 Ark. 492. The error in the prosecuting attorney's remarks was cured by the court. 75 Ark. 246; 75 Ark. 437; 65 Ark. 475.

HART, J. This is an appeal by William Bowman from a judgment of conviction of rape, and is the second appeal in the case. William Bowman was indicted for the crime of rape. A demurrer to the indictment was sustained by the circuit court, and the State appealed to this court. The demurrer to the indictment raised the question whether the circuit court of Sebastion County for the Fort Smith District had jurisdiction over crimes committed in the territory locally known as the "Choctaw Strip." This court held that it had such jurisdiction, and the cause was remanded with directions to overrule the demurer. The case is reported in 89 Ark. 428, under the style of *State* v. *Bowman.*

On the remand of the case the defendant again raised the question of jurisdiction by demurrer, which was filed and overruled on August 5, 1909. The decision on the former appeal became the law of the case, and the demurrer was properly overruled.

The ground of the motion to quash the indictment is that the act of Congress approved February 11, 1905, ceding the ter-

ritory commonly called the "Choctaw Strip" to the State of Arkansas, and the acts of our Legislature accepting the same, approved February 16, 1905, and March 14, 1905, are not effective, for the reason that said acts do not describe any territory at all.

The act of Congress granting the land and the acts of our Legislature accepting the grant describe the land ceded as "all that strip of land in the Indian Territory, lying and being situated between the Arkansas State line, adjacent to the city of Fort Smith, Arkansas, on the Arkansas and Poteau rivers, described as follows, namely:

"Beginning at the point on the south bank on the Arkansas River, 100 paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running southwesterly along the bank of the Arkansas River to the mouth of the Poteau River to the center of the current of said river; thence southerly up the middle of the Poteau River (except where the Arkansas River intersects the Poteau River) to the point in the middle of the current of Poteau River opposite the mouth of Mill Creek and where it is intersected by the middle of the current of Mill Creek; thence up Mill Creek to the Arkansas State line; thence northerly up the State line to the point of beginning."

In the case of *Beardsley* v. *Nashville,* 64 Ark. 240, Mr. Justice RIDDICK, speaking for the court, after quoting as the rule of construction, the following: "A deed is to be construed according to the intention of the parties as manifested by the entire instrument, although such construction may not comport with the language of a particular part of it," said: "When a deed contains two descriptions of the land conveyed which are inconsistent with each other, that description must control which best expresses the intention of the parties, as manifested by the whole instrument and the surrounding circumstances."

Applying these rules, there can be no doubt as to the territory intended to be ceded to the State of Arkansas. The general description, both in the act of Congress and the acts of our Legislature, in general terms describes it by permanent lines, so that its location could not be mistaken. In the particular description it is perfectly plain that the use of the word "east" in the clause, "Beginning at a point on the south bank on the Arkansas River

100 paces east of Old Fort Smith," was a clerical mistake; for the point designated as the beginning point was one "where the western boundary line of the State of Arkansas crosses the said river." Obviously, the word intended to be used was "west," instead of "east." The particular description in the present case can be made effective by either rejecting as surplusage the mistaken description "100 paces east of Old Fort Smith," or by substituting the word "west" for "east." *Palms* v. *Shawano County,* 61 Wis. 215; Endlich on Interpretation of Statutes, § 319.

Therefore, the court correctly overruled the motion to quash the indictment. A change of venue was granted to the defendant, and the case was tried in Scott County.

It is conceded by counsel for defendant that there was sufficient evidence to support the verdict, and this is clearly apparent from a reading of the record.

The girl alleged to have been raped was only 11 years old, and had known the defendant nearly all her life. He had stayed all night at her father's house on the night before, and had left the house with him on the morning of the alleged rape. Later in the morning he returned, and, as testified to by Ella Banks, he grabbed her, threw her down and raped her. She described her resistance and his manner of accomplishing his purpose. We omit the details, and only state that they were abundantly sufficient to establish the crime of rape. Ella Banks was corroborated by her aunt, who ran for assistance after the defendant had overcome the prosecutrix. Ella Banks was examined by a physician in the presence of some of the neighbors shortly afterwards, and her private parts were all torn and bleeding. Other evidence was also adduced to corroborate her testimony.

The defendant, William Bowman, testified that he stayed all night at the home of the father of Ella Banks the night before the crime was alleged to have been committed, and left the house in company with Mr. Banks the next morning. He testified that soon afterwards he went to a saloon in Fort Smith, got drunk and does not remember anything more until he was arrested. Said that he did not remember to have gone back to the neighborhood where Mr. Banks lived on the morning in question.

It is proved that the crime was committed in the territory hereinbefore referred to as the "Choctaw Strip" in the Fort Smith District of Sebastian County.

After the appeal to this court, it was discovered that the transcript did not show that the mandate of this court upon the reversal of the case on the former appeal had ever been filed in the circuit court, and that there was no judgment of the circuit court overruling the demurrer of the defendant as directed by the mandate.

In the case of *Lafferty* v. *Rutherford,* 10 Ark. 454, the court said: "We are clearly of the opinion that the circuit court has no power to retry a cause which has once been brought to trial and final judgment until the same shall have been regularly reversed by this court, and that fact shall have been directly communicated by this court, accompanied with instructions to proceed."

In the case of *Hollingsworth* v. *McAndrew,* 79 Ark. 194, the court said: "The remand of the cause by this court and the filing of the mandate with the clerk of the lower court within the time prescribed by the statute gave the lower court jurisdiction."

Upon the representation of the Attorney General that the mandate had been filed in the circuit court before it again assumed jurisdiction of the case, and that the defendant's demurrer to the indictment had been overruled, permission was given to apply to the Sebastian Circuit Court for the Fort Smith District to have the record in these respects amended.

In the case of *Goddard* v. *State,* 78 Ark. 228, the court, speaking through Mr. Justice RIDDICK, said that "the rule is established in this State that a court has authority to amend its records so as to make them speak the truth as to what was done, and may do so upon any competent legal evidence."

In the case of *Binns* v. *State,* 35 Ark. 118, the court held: "Where there is a change of venue, and the transcript to the court to which it is changed contains no entry showing the opening of the court from which it was changed, at the term at which the indictment was found, and no entry showing the impaneling of the grand jury, the omitted entries may be obtained by certiorari, and the transcript perfected after a verdict of guilty; and a pending motion in arrest of judgment for these omissions in the transcript be then overruled."

In the case of *Sweeney* v. *State,* 35 Ark. 588, the court, through Chief Justice ENGLISH, said: "It is well settled in this

court that the record of the circuit court may be amended, so as to make it speak the truth, in a criminal as well as a civil case, after appeal or writ of error, the prisoner in a criminal case being brought into court and the amended record brought up to this court by certiorari."

Notice of the application to amend the record was given to the defendant's counsel, and the defendant was brought into court when the same was heard and determined. The court found that the mandate of this court, with indorsement on it by the clerk of the date of its filing, showed that it was filed in the circuit court of Sebastian County for the Fort Smith District on the 7th day of June, 1909. This, with the presiding judge's own recollection, he being the judge who had presided throughout all the proceedings in this case, was sufficient evidence upon which the court could base a finding that the defendant's demurrer had been overruled in accordance with the directions of the mandate, on the 8th of June, 1909, and for the entry of a judgment *nunc pro tunc*.

Besides, the record was amended so as to include the mandate and the date of its filing in the circuit court, which was on June 7, 1909, a date before the day when the court again assumed jurisdiction of the case. As we have already seen, the filing of the mandate of this court in the circuit court within the time prescribed by the statute gave the circuit court jurisdiction to retry the cause; and if we treat the demurrer of the defendant as not having been acted upon, and the case as having proceeded to final adjudication without judgment on the demurrer, the demurrer will be considered as waived. *Kiernin* v. *Blackwell*, 27 Ark. 235. Then, too, the demurrer which was filed and overruled August 5, 1909, and which has been heretofore discussed, was a special demurrer, and one of its grounds also raised the question of whether the "Choctaw Strip" was within the jurisdiction of the Sebastian Circuit Court for the Fort Smith District. That issue was, as we have already stated, settled adversely to the defendant in the opinion on the former appeal, which is the law of the case.

Counsel for defendant insists that the jury was not drawn according to law. The record shows that eleven jurors were obtained before the regular panel was exhausted. At that time the State had seven and the defendant seventeen peremptory chal-

lenges. The defendant objected to the court having one talesman at a time summoned, and asked that as many as three be summoned, in order to permit him to draw. He based his request upon section 2348 of Kirby's Digest, which provides that where the regular panel is exhausted "the court shall order the sheriff to summon bystanders to at least twice the number necessary to complete the jury, whose names shall be placed in the box and drawn." Our statutes provide that a judgment shall be reversed for prejudicial errors only. The court has held that this statute was passed for the purpose of obviating "the necessity of reversing judgments of conviction on account of mere errors of form which do not affect the substantial rights of the defendant." *Lee* v. *State,* 73 Ark. 148; *Hayden* v. *State,* 55 Ark. 342. The error in not complying with the statute was not prejudicial in this case because the defendant selected the remaining juror and failed to exhaust his peremptory challenges. We have had occasion to pass upon the question lately in the case of *York* v. *State,* 91 Ark. 582, where our former decisions on the subject are reviewed.

In his opening statement to the jury, one of the attorneys for the State said that the defendant "had chosen to remove the trial of said cause from the county of its alleged commission and bring the same to Scott County for trial." The court admonished him to state to the jury the facts upon which the State relied for a conviction. The attorney then withdrew the remark, and said the State wanted the defendant to have a fair and impartial trial. It is manifest that no prejudice resulted to the defendant. The court admonished the attorney, and the remark was withdrawn. Besides, the reading of the indictment to the jury and the whole testimony in the case showed that the crime, if committed, was committed in Sebastian County.

Counsel for the defendant predicates reversal upon the action of the court in giving instruction No. 4, which is as follows:

"If the jury find from the evidence that at the time of the alleged commission of the offense the prosecuting witness, Ella Banks, was under the age of twelve years, and that on account of her tender years she was incapable of understanding the nature of the act, her consent would be no protection to the defendant."

The objection made to the instruction is that there was no

evidence to show that Ella Banks was incapable of understanding the nature of the act. This is true; but, as she was only eleven years of age, the presumption was that she was incapable of consenting, in the absence of proof to the contrary. *Coates* v. *State,* 50 Ark. 336. Besides, there was no testimony whatever tending to show that she consented to the act.

The court, after correctly instructing the jury upon the subject of reasonable doubt and that they were the sole judges of the weight of the evidence, defined the manner in which a witness may be impeached. The court then gave the following:

"10. But the credibility of a witness, though his character for truth is impeached, is still a question for the jury; and if the jury believes his testimony, it should be taken and considered, notwithstanding his impeachment.

"11. If an impeached witness be corroborated, his testimony should be taken and considered by the jury, notwithstanding his impeachment."

Counsel for the defendant urges upon us that instruction No. 11 was erroneous because it invaded the province of the jury in telling it what weight to give to the evidence. Conceding this to be true, there was no prejudice to the rights of the defendant.

Rose Frost, Ola Miller and Mary Coleman were the witnesses impeached. Their testimony was as to matters that were proved by evidence that was undisputed. The witnesses, Rose Frost and Ola Miller, testified that they went to the house immediately after the crime was alleged to have been committed, and that Ella Banks was crying; that they were present when she was examined, and detailed the result of the examination. Their statement was the same as that of the other witnesses who testified in regard to the same matters, and there was no contradiction to the testimony.

Mary Coleman testified that she saw the defendant going towards the Banks house on the morning in question, and that he had a bottle of whisky, and said that he was going to stop in there (meaning the Banks house) and "get a maidenhead." This was also testified to by Steve Frost, and was not disputed by any other fact or circumstance adduced in evidence.

The sole defense of the defendant was that he became so drunk on the morning that he did not remember anything that

occurred. He made no attempt to account for his whereabouts at the time the crime is alleged to have been committed. The only testimony adduced in his behalf except his own as to his drunkenness was that of witnesses to the effect that he had previously borne a good reputation. This defense was submitted to the jury under proper instructions. As above stated, there was ample evidence to sustain the verdict of the jury.

We have carefully examined the record, and find no prejudicial error therein. The judgment is therefore affirmed.

PENIX v. RICE.

Opinion delivered January 10, 1910.

1. TAXATION—DEED—PATENT AMBIGUITY.—A tax deed which describes the land sold for taxes as part of a certain forty-acre tract is void on its face. (Page 178.)
2. SAME—LIMITATION.—Kirby's Digest, § 7114, providing that actions to test the validity of certain tax proceedings "must be commenced within two years from the date of sale, and not later," has no application where a tax deed shows on its face that the forfeiture for non-payment of taxes was void. (Page 179.)
3. ADVERSE POSSESSION—SUFFICIENCY OF POSSESSION.—Where a sister-in-law, residing with the owner of land, purchased it at tax sale, but there was no visible change of possession, and thereafter the owner mortgaged the land and placed improvements thereon and exercised other acts of ownership, the possession of the tax purchaser was not adverse. (Page 179.)

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

G. J. Crump, for appellants.

Appellee cannot rely on her deed, because it shows on its face that it is absolutely void. 77 Ark. 576; 56 Ark. 172; 59 Ark. 172; *Id.* 460; 69 Ark. 532; *Id.* 357. Fraud is a question of law when the facts are undisputed. 2 Wend. 466; 20 Am. Dec. 635. In equity fraud may be inferred from circumstances. 33 Ark. 69. If one sells real estate and retains possession of it, it is a badge of fraud. 2 Ga. 1; 46 Am. Dec. 368; 14 Ark. 69.

Pace & Pace, for appellee.

Evidence heard in the lower court without objection cannot be complained of here. 1 Ark. 228. Fraud must be specifically alleged. 44 Ark. 499; 41 Ark. 378; 34 Ark. 71. If the holding be not hostile, but in subordination to the true owner whenever asserted, then the statute does not run. 77 Ark. 293. Equity has the same power to prevent a cloud that it has to remove it. 37 Ark. 515; 39 Ark. 202; 30 Ark. 90.

HART, J. This action was commenced in the Boone Chancery Court by Alforetta Rice against C. A. Penix and Joe E. Keef on the 19th day of March, 1909.

The complaint alleges that certain real estate in Boone County, Arkansas, was assessed for taxation as a part of the S. W. ¼ of the N. W. ¼ of Sec. 4, Twp. 20 N., R. 18 W., and as such was forfeited to the State for nonpayment of taxes. That on the 5th day of November, 1898, she purchased the same from the State, and obtained a deed therefor from the Commissioner of State Lands. That she went into possession of same, and has continuously held possession of same ever since. That C. A. Penix became the owner of a judgment heretofore rendered in said court in favor of J. N. Milum against John Morrow, and has caused an execution to be issued and levied upon said real estate as the property of said John Morrow. That said levy was made by the defendant Joe E. Keef as sheriff of Boone County. The prayer of the complaint is that a sale under said execution "be suspended until the rights of the parties are determined," and "for all general and equitable relief."

The defendants answered, and admitted that the levy of the execution was made as alleged in the complaint, but aver that plaintiff's deed is void. They deny that plaintiff took possession of the land, and that she has held adverse possession of the same ever since.

The chancellor granted a temporary injunction, restraining defendants from proceeding further under the execution until the final hearing of the cause.

The facts are substantially as follows: The land involved in this suit comprises 2.25 acres. It originally belonged to John Morrow, and was used by him for a mill and gin site. It was assessed for taxes as a part of the S. W. ¼ of N. W. ¼ of Sec. 4, Twp. 20

N., R. 18 W., and in the year 1894 was forfeited to the State under that description for the nonpayment of taxes. On the 5th day of November, 1898, the plaintiff, Alforetta Rice, purchased said land from the State, and obtained a deed therefor under the description above set out. The purchase price was $3.81. Alforetta Rice was a sister of the wife of said John Morrow, and lived with him as a member of his family. At the time the plaintiff purchased the land from the State, all the improvements on it had been burned off except an engine and boiler. Afterwards John Morrow and his son, Brice Morrow, who were at the time partners in business, bought new machinery and placed it on the land. On the 17th day of September, 1896, John Morrow as guardian for Brice Morrow, a minor, John Morrow and Mary J. Morrow, his wife, executed a mortgage on the following described lands in Boone County, Arkansas: "A part of S. W. ¼ of N. W. ¼ of Sec. 4, Twp. 20 N., R. 18 W., containing three acres." The land is further described as the land on which is situated the mill site and residence of said John Morrow. The mortgage was given to secure the purchase price of certain machinery bought and placed on the mill site. Later John Morrow sold his interest in the machinery to Brice Morrow, in consideration that he finish paying for it. Brice Morrow then erected some new buildings on the land, and paid the balance of the purchase money on the machinery. Both he and the plaintiff testify that she rented the mill site to him. There was no agreement as to what he should pay as rent except he was to pay the taxes and give her feed for her turkeys. Both he and the plaintiff lived with John Morrow as members of his family, and when Brice Morrow was away John Morrow ran the mill. The plaintiff only claims the land and engine and boiler. She says that the buildings and machinery erected on the land by Brice Morrow belong to him.

On final hearing the chancellor found that the plaintiff was the owner in fee simple of said lands, and the temporary injunction was made perpetual. The defendants have appealed.

In construing descriptions in tax deeds similar to the one in question, this court has held that the deed does not purport to convey the title to any land, because none is described therein. *Dickinson* v. *Arkansas City Improvement Company*, 77 Ark. 570 and cases cited. In that case the court said: "A deed failing to

describe the land is equivalent to no deed at all. In order to put this statute (referring to section 7114, Kirby's Digest) in operation, the adverse holding must be under a deed purporting to convey the land pursuant to a tax sale." The deed in question upon its face, therefore, shows that the forfeiture of the land for the nonpayment of taxes was void, and did not put the statute of limitations in operation.

The defendants in their answer denied that plaintiff had been in adverse possession of the property for the statutory period and thereby acquired title. The proof establishes that fact. Both the plaintiff and Brice Morrow lived with John Morrow as members of his family at the time of the alleged forfeiture for nonpayment of taxes. There was no evidence of a visible change of possession. The alleged forfeiture occurred in 1894, and in 1896 the Morrows executed a mortgage on the land and machinery situated thereon. They proceeded with the erection of buildings to take the place of those burned down, and exercised the same acts of ownership over it that they had always done. The mill site was adjacent to and in the same subdivision of land as the residence of John Morrow. No fixed amount of rent was ever agreed upon or paid. Taking into consideration all the facts and circumstances connected with the transaction, it is manifest that the possession of the plaintiff was colorable only, and not with intent to hold the property as her own. *Baldwin* v. *Williams*, 74 Ark. 316.

Therefore the decree is reversed with directions to dismiss the complaint for want of equity.

CAPITAL FIRE INSURANCE COMPANY *v.* DAVIS.

Opinion delivered January 10, 1910.

1. INSURANCE—EVIDENCE—BURDEN OF PROOF.—One who sues an insurance company, alleging that it has assumed the liability under a policy issued by another company, undertakes the burden of proving such allegation. (Page 182.)
2. SAME—PROOF OF CONSOLIDATION OF COMPANIES.—A letter from the secretary of an insurance company to the agent of another insurance company in which reference is made to the fact that the latter company had been consolidated with the former is insufficient to prove such consolidation. (Page 182.)

Appeal from Cleveland Circuit Court; *Brice B. Hudgins,* Judge; reversed.

C. S. Collins and *Ratcliffe, Fletcher & Ratcliffe,* for appellant.

1. Assuming that a "merger" contract existed, it was in legal effect an effort on the part of the officers of appellant, a mutual company, to reinsure the policy of appellee in the Arkansas Mutual Fire Insurance Company, which was illegal. Under the act of March 9, 1899 (Secs. 4348 *et seq.,* Kirby's Dig.), it would appear that the officers of mutual companies are merely the agents of the members of said companies, without authority to reinsure the policies of other companies. 1 Cooley's Briefs on Law of Insurance, p. 52 and cases cited; 28 Century Dig. 67. Thus we have an effort on the part of the officers and directors of appellant, a mutual company, without authority, to bind its members with an insurance policy upon property not owned by the contracting parties. This was illegal. 1 Cooley, 52; 45 N. W. 356; 50 Pa. 331; 80 Pa. 464; 93 N. W. 749; 72 S. W. 1099.

2. The evidence failed to sustain the allegations of the complant as to a "merger" contract.

Geo. W. Reed and *Mitchell & Thompson,* for appellee.

BATTLE, J. J. H. Davis and Thomas W. Davis, partners doing business under the firm name and style of J. H. Davis & Son, brought this action against the Capital Fire Insurance Company and others. They alleged that they, on and prior to the 29th day of April, 1905, were engaged in the business of general merchants at Wolf Bayou, Arkansas; that they owned the building in which they conducted their business, as well as a stock of general merchandise; that the building was of the value of $400 and the merchandise was of the value of $2,500; that, on the 29th day of April, 1905, for and in consideration of $45 to be paid by the plaintiffs, the Arkansas Mutual Fire Insurance Company, a corporation organized under the laws of the State of Arkansas, insured the building at $225 and the stock of goods at $1,275 for a period of one year, commencing on the 10th day of June, 1905, and continuing until the 10th day of June, 1906; that they paid $15 of the $45 to the Arkansas Mutual Fire Insurance Company on the 20th day of June, 1905, and the remainder on the 20th day of July, 1905, to the Arkansas Insurance Company.

"That on or about the 1st day of July, 1905, the Arkansas Mutual Fire Insurance Company changed its corporate name to that of the Arkansas Insurance Company, under which name it conducted an insurance business until on or about the 20th day of May, 1906, when the Arkansas Insurance Company was merged in the Capital Fire Insurance Company, one of the defendants herein. That, by the terms of the merger, the Capital Fire Insurance Company assumed and agreed to pay all liabilities of the Arkansas Mutual Fire Insurance Company and the Arkansas Insurance Company.

"Plaintiffs further said that on the 27th day of December, 1905, and while the insurance policy was in full force and effect, the building and stock of merchandise so insured was consumed by fire, and that their loss was total, with the exception of goods of the cost value of $28.92."

Plaintiffs made other allegations in their complaint, and asked for judgment against the Capital Fire Insurance Company and others for the sum of $1,500 debt, $180 statutory penalty, and $500 for attorney's fee.

The defendant, Capital Fire Insurance Company, answered, and, among other things, denied that there was any so-called "merger" of the Arkansas Insurance Company in this company, or that any privity of relations were established by any contract of re-insurance between this company and plaintiffs; the facts being that the contract was special and as to a certain list of contested claims, including the one of plaintiffs, the Capital only guaranteed fifty per centum of the entire list. That this defendant has long since complied with this part of its contract, and neither it or its bondsmen are liable thereon to plaintiffs or any one, but it denies that the contract was of such a nature as to establish privity between it and plaintiff or any policy holder of the Arkansas Insurance Company, or a right of action against it at all." And it pleaded many defenses.

The jury in the case, after hearing the evidence and instructions in the case, returned a verdict in favor of the plaintiffs for $1,500 and six per cent. per annum interest; and the court rendered a judgment against the Capital Fire Insurance Company for that amount and interest, and for $180 penalty and $200 for attorney's fee; aud the said defendant appealed.

The plaintiffs alleged and the defendant denied that the Arkansas Insurance Company "merged" in the Capital Fire Insurance Company, and that by the terms of the merger the latter assumed and agreed to pay all liabilities of the Arkansas Mutual Fire Insurance Company or the Arkansas Insurance Company. The latter alleged that it agreed to pay only fifty per centum of the former's loss, which was $750, and that it has long since complied with this part of its agreement; but the former recovered $1,500 and interest and penalty and attorney's fee.

The burden was upon appellees, plaintiffs, to prove that appellant became bound to them by consolidation with the Arkansas Insurance Company, or other contract, to pay the amount due them, if any, on the policy of insurance sued upon in this action. They have failed to do so. The only evidence they adduced was the following letter, which was read as evidence over the objection of the defendant:

"Little Rock, Ark., May 19, 1906.

"H. F. Fix, Heber, Ark.

"Dear Sir: You have, of course, been advised by separate letter of the consummation of arrangements between the Arkansas Insurance Company and the Capital. The writer of this letter, who will be secretary of the consolidated company, has been advised that you are one of the most valued agents of the Arkansas.

"The letter, which you received, advises you that in future I will be in charge of the management of the office of the consolidated company, and I only write in this personal manner to you to express my continued confidence in you as an agent, and with the hope that the future business relations between you and the Capital Fire Insurance Company will be as pleasant as those which existed between you and the Arkansas.

"With kindest personal regards, I am

"Yours very truly,

"G. B. Sawyer, Secretary."

The separate letter referred to was not offered as evidence, and its contents were not shown. The evidence adduced was insufficient and incompetent to show a consolidation. There was no statute authorizing such a consolidation, and there was no evidence that the stockholders of the two companies undertook

to consolidate or authorize a consolidation, or, if undertaken, the terms of it. The evidence was insufficient to sustain the verdict and judgment recovered.

Reversed and remanded for a new trial.

WOOD, J., not participating.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* FROST.

Opinion delivered December 6, 1909.

1. WITNESSES—IMPEACHMENT—FOUNDATION.—A witness whose deposition was taken on behalf of plaintiff cannot be impeached by showing that he offered whisky to another witness and tried to induce the latter to give testimony favorable to plaintiff, unless such deponent was first interrogated as to such matters and given an opportunity to admit and explain or deny them. (Page 189.)
2. INSTRUCTIONS—CONSTRUCTION.—A too general statement in one instruction may be cured by a more particular statement in another. (Page 189.)
3. DEATH BY WRONGFUL ACT—PARTIES.—Under Kirby's Digest, § 6290, providing that an action for damages on account of the death of one caused by the wrongful act, neglect or default of another shall, in the absence of a personal representative, be brought by the heirs at law of such deceased person, *held* that in such a case the mother was not an heir and not entitled to sue, although the deceased contributed to her support in his lifetime. (Page 189.)
4. SAME—DAMAGES FOR LOSS OF PARENT.—Infant heirs whose parent is killed by another's negligence are entitled to recover the probable aggregate amount of his contributions to them, reduced to present value, the question whether such contributions would probably cease after minority or continue thereafter being for the jury. (Page 190.)
5. SAME—DAMAGES—EXCESSIVENESS.—Where the evidence established that plaintiff's intestate had been earning from $80 to $125 per month, that he was 34 years old and had an expectancy of 31¾ years, was industrious, attentive to business, economical, strong and healthy, affectionate and kind to his family, a verdict awarding to plaintiffs, his minor heirs, the sum of $15,000 was not excessive. (Page 190.)

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

Read & McDonough, for appellant.

The happening of the accident does not show negligence. 79

Ark. 439; 82 Ark. 372. The children are not entitled to recover beyond their majority. Kirby's Dig., § 6290; 53 Ark. 117; 63 Ark. 563.

Wilkins & Vinson, Webber & Webber, and *Wolfe, Hare & Maxey,* for appellee.

The wife for herself and as next friend for the children was the proper party to prosecute this suit. Kirby's Dig., § § 2690, 2708, 2636; 71 Ark. 258; 157 U. S. 195. It is the province of the jury to determine the weight of the evidence. 101 S. W. 738. The law does not restrict a recovery to the minority of the children. Kirby's Dig., § 2690; 87 Ark. 443; 112 S. W. 967. Evidence to impeach a witness is not admissible where no foundation therefor has been laid. 5 Ala. 564; 8 Clarke 463; 32 La. Ann. 407; 98 N. C. 708; 3 S. E. 687; 4 Ore. 52; *Id.* 238; 4 Pac. 128; 14 S. W. 41; 21 S. W. 488; 12 S. W. 575.

BATTLE, J. On the 14th day of November, 1906, H. L. Frost was a switchman in the employment of the Kansas City Southern Railway Company at Mena, Arkansas. On the night of that day Frost and others were engaged in making up a freight train. While he was standing on the platform or steps of a car, it with other cars was moved against the end of a standing car, and in the collision he was fatally injured, insomuch that he died about six hours thereafter. He left surviving him Daisy Frost, his widow, and Earl Frost, Bernice E. Frost and Hardy L. Frost, his children, who are minors, and his only heirs at law. He died intestate, and no one administered upon his estate. His widow and children, by next friend, brought an action against the railroad company for the damages sustained by them through the death of the deceased. They relate in their complaint the manner in which the deceased was injured as follows:

"That on the 14th day of November, 1906, said H. L. Frost in the capacity of switchman, together with other employees of the defendant, were engaged in making up a fast merchandise freight train for the north; that said train was being made up on said track number 3, and as a part of the work of making up said train, after a great number of cars had been placed on said track number three, there was a caboose, coach and three other cars standing on said track number two, which were to be pulled out on the lead track and placed on said track number three, and

coupled to the cars that were standing on said last-named track; that the switch engine was taken in on said track number two and coupled to the said caboose, which was connected to said coach and said three other cars on track number two, and said caboose, coach and said three other cars were pulled off of track number two onto said "lead track" and then backed in on track number three to be coupled to the cars that were on track number three to finish making up said train.

"That, while said caboose, coach and three other cars were being moved backward on said track number three, which was being done at the proper, customary speed and in a careful manner, the said H. L. Frost was standing on the caboose platform and on the west side and the north end thereof, which was the proper and customary place for him to be in the discharge of his duties, the northernmost of said moving cars struck the south car of the string of cars that were standing on said track number three and all heavily loaded, and the coupling apparatus at the south end of said coach gave way, causing the platform of said coach to telescope the north platform of said caboose, and the said H. L. Frost was then and there caught between the north end of said caboose and said south platform of said coach, and was mashed and crushed and so injured that he died by reason of said injuries.

"That the death of H. L. Frost was directly and proximately caused by the negligence of defendant in this, that the coupling apparatus of said coach at the south end of same was old and worn and out of repair in whole and in every part and parcel of it, and was improperly and negligently constructed and so constructed that the said coupling apparatus and every part and parcel of it was without sufficient strength and power of resistance to withstand the blows, knocks and bumps ordinarily and usually incident to the switching and making up of freight trains, such as being done at the time said H. L. Frost was fatally injured, and it was negligence to allow or permit said coach to be put into and made a part of said train, as was being done. And said coach was not properly a part of said train, was not necessary to the uses to which said train was intended to be applied, and was indeed a menace to the defendant's employees, as defendant well knew, and the platform, drawheads, coupling ap-

paratus and bumpers on said coach were constructed and placed higher than were the platform, drawheads, coupling apparatus and bumpers on said caboose, and were negligently allowed to be and remain in that condition by defendants, making the same dangerous; that the platform and coupling apparatus on the north end of said caboose was out of repair, was sagged down and lower than the coupling apparatus and platform on the south end of said coach, and was negligently allowed to be and remain in that condition, so that a coupling between said coach and caboose could not be made so as to withstand the jars, knocks and bumps received in the switching and handling of the same, in that said coupling would not hold, and would permit the drawheads on said coach and said caboose to slip by each other and the platform of said coach to telescope the platform of said caboose, thereby rendering the same dangerous to the life of defendant's employees, and especially the plaintiff's decedent; that the defendant knew or should have known the facts in this paragraph alleged in time to have remedied the same, but the same were unknown to the said H. L. Frost, and he was himself free from any negligence or want of care."

The defendant denied these allegations.

From the evidence adduced in the trial in the action we find that the jury in the case could have reasonably found the facts as follows: On the 14th day of November, 1906, about 8:45 o'clock in the evening, in defendant's yards at Mena, Arkansas, Frost and others were engaged in making up a train No. 52, which was interstate and carried freight into the States of Oklahoma, Missouri and Kansas. The first part of it had already been made up, and the night crew were completing it. In the train was a caboose, No. 554, and a coach, No. 126. Frost was the switchman who followed the engine and passed signals to the engineer. In operating the engine the engineer received signals from Frost and another switchman named Clements. The engineer was moving several cars, one of which was coach No. 126, which was then coupled to the caboose and was a part of so much of the train as was already made up by the day crew. He received a signal from Frost and Clements to slow up, and then another to go ahead. At this time Frost was standing on a step or the platform of the caboose, where he could pass signals

to the engineer. It was not his duty to stand or be in any particular place, further than to be where he could receive and pass signals. The engine, at the time the signal to go ahead was given, was moving about two miles an hour; had just enough steam to keep it moving. When the signal to go ahead was given, the engineer barely touched the throttle of the engine. The cars moved by the engine struck other cars which were standing. The platform of the caboose went under the coach, knocking off the steps of the coach and breaking the hand railings on the caboose. One witness testified that two follow plates, the carrier irons and the timbers in the platform of the coach were broken; and that the follow plates were made of wrought iron, and were "26 x 12 inches and two inches thick." No other platforms, drawheads or apparatus was broken in that train at that time. Frost was seriously injured by the collision, and died in about six hours afterwards.

The drawhead on the caboose was five or six inches lower than the drawhead on the coach, and an effort was made once or twice to couple them, and they would not stay coupled. One witness noticed the condition of the drawhead on the caboose about one week before the accident. The effect of this condition was to let the caboose drawhead go under that of the coach.

The deceased at the time of the accident was thirty-four years old; his widow was thirty-seven; his son, Earl, was twelve years; Bernice was six years old in March, 1909; and Hardy at the time of the trial, on the 7th of December, 1908, was about four years old. Deceased was industrious, attentive to business and economical, affectionate and always kind to his children. He was qualified to discharge the duties of switchman and conductor on railroads. His widow testified that he earned as switchman from $80 to $90 per month. The pay checks introduced in evidence showed that he averaged $67.43 per month from January 1st to the date of his death. He was conductor at one time, and earned from $100 to $125 a month. He used his earnings in supporting his family.

In the progress of the trial O. H. Lowry's deposition was read as evidence in behalf of the plaintiff. His testimony was important and material. Defendant offered to prove by Gano Scott that Lowry offered to him whisky, and tried to induce him

to make a statement in the case to the effect that the cars were defective. Upon objection of the plaintiff the court refused to admit the testimony.

The court gave the following instruction over the objection of the defendant:

"I. You are instructed that it was the duty of the defendant to exercise ordinary care and prudence to provide the said H. L. Frost with cars and appliances reasonably safe for use in and about the work that said H. L. Frost was engaged in at the time he was injured; and if you believe from the preponderance of the evidence that said H. L. Frost came to his death by reason of the failure of said defendant to exercise such care and prudence in furnishing such cars and appliances, reasonably safe for use in the work that he was then engaged in, and that he was killed as a direct and proximate result thereof, and that said deceased at that time was engaged in the performance of his duties as an employee of said defendant, and that said deceased was not guilty of such negligence as contributed to his injury, then it will be your duty to return a verdict in favor of the plaintiff."

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

"II. If the jury find from the evidence that Mrs. M. R. Frost was the mother of the deceased, H. L. Frost, and that said mother was in part supported by said H. L. Frost, they will find for the defendant."

"XXVII. If the jury find for the plaintiffs, they will find for the children such damages as they are entitled to as compensation from the time of the death of H. L. Frost to the majority of each child. The girl will arrive at her majority when she is 18 years of age, and the boys when they are 21 years of age."

"XXVIII. If the jury find for the plaintiffs, in assessing the damages they will consider the amount of damages due each plaintiff, allowing each of the children such compensatory damages as will fairly compensate him for the loss of his father to the date of his majority; and to the plaintiff, Daisy Frost, such compensatory damages as will fairly compensate her during the expectancy of her life, if she was older than her husband, or during the expectancy of his life, if he was the older."

The plaintiffs recovered a verdict and judgment for $15,000, and from that judgment defendant appealed.

No foundation was laid for the admission of the testimony of witness Scott. Witness Lowry was not interrogated as to the matters about which the defendant offered the testimony of Scott, the object of which was to discredit the testimony of Lowry, the same object, in effect, as is sought to be accomplished by showing that a witness has made contradictory statements. The same methods should be observed, if practicable, in the former as in the latter case. There is no good reason why a witness should be entitled to greater consideration in one case than in the other. Lowry should have been first interrogated about that which the defendant proposed to prove by Scott. It could have done so; and it was right and just that Lowry should have had the opportunity to admit and explain or deny before his credibility or testimony was attacked. *Weaver* v. *Traylor,* 5 Ala. 564; *State* v. *Stewart* (Or.) 4 Pac. 128; *Edwards* v. *Sullivan,* 30 N. C. 302; *State* v. *Angelo,* 32 La. Ann. 407; *Hollingsworth* v. *State,* 53 Ark. 387.

The defendant objected to the instruction given by the court over its objection and copied in this opinion, because it "is general, indefinite and permits a recovery, no matter what the defect in the cars may have been." The objection may be abstractly true, but the instruction should be read in the light of the evidence, which was confined to the issues made by the pleadings. Then, too, this instruction was limited by another instruction given at the instance of the defendant, in which the jury, in effect, were told that the only negligence they could consider was that alleged in the complaint.

The defendant's request numbered II and copied in this opinion should not have been granted. There was no administration upon the estate of H. L. Frost, deceased, and this action was properly brought by his widow and children. The right of action was created by a statute which, in the absence of a personal representative, provides that an action for damages on account of the death of one caused by the wrongful act, neglect or default of another shall 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 they are such as can take as distributees of the estate under the laws of descent and distribution. *Kansas City So. Ry. Co.* v. *Henrie,* 87 Ark. 443. The deceased in this case having left children, his mother was not an heir, and had no right to sue, notwithstanding the son contributed to her support in his lifetime. Kirby's Digest, § 6290.

The defendant sought by instructions to confine the right of the children to recover in this case to the damages they will suffer during their minority. The right to recover is limited only by the statute to the damages suffered, and not to any period of life. The right of the children to recover beyond minority depends upon evidence. Their damages are the pecuniary loss suffered by them, which is "the probable aggregate amount of his contributions to them, reduced to present value." *Kansas City Southern Ry. Co.* v. *Henrie,* 87 Ark. 454. It is probable the contributions of a father to the support of a child after he reaches his majority may cease altogether, or be less. That of course will depend upon the ability of the child to take care of himself and his success in life. Parental affection for the child will not, probably, cease after minority, and the father may still continue to contribute to the support of the child. That is a question for the jury to decide according to the evidence of the assurance the parental affection may give of aid and support to the child after minority. *Railway Co.* v. *Davis,* 55 Ark. 462.

Defendant contends that the damages recovered were excessive. Mrs. Frost testified that deceased earned as a switchman from $80 to $90 a month, and that he served as conductor at one time and earned from $100 to $125 per month. He was thirty-four years old, and his expectancy was thirty-one and three-fourths years. He was industrious, attentive to business, economical, strong and healthy, affectionate and always kind to his family. He used his earnings in support of his family. Plaintiffs recovered $15,000. The evidence was sufficient to sustain the verdict of the jury. *Kansas City So. Ry. Co.* v. *Henrie, supra.*

The evidence was sufficient to sustain the verdict. The jury could have found from the evidence that the signal to go ahead did not accelerate the speed of the engine, and that no act of plaintiff contributed to his injury; and that the defendant was

guilty of the negligence charged in the complaint, and that it (negligence) was the proximate cause of his injury.

Judgment affirmed.

MONTGOMERY v. ARKANSAS COLD STORAGE & ICE COMPANY.

Opinion delivered January 10, 1910.

1. TRIAL—DIRECTING VERDICT.—In testing the correctness of a peremptory verdict given by the court the testimony should be viewed in the light most favorable to appellants. (Page 194.)
2. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING.—Where a written contract for the storage of apples provided that it was subject to all rules and regulations governing the storage of apples, but was silent as to what such rules and regulations were, parol evidence was admissible to show what those rules and regulations were. (Page 194.)
3. SAME—AMBIGUOUS WRITTEN CONTRACT—PAROL EVIDENCE.—Where a written contract is ambiguous on its face, parol evidence is admissible to explain it. (Page 194.)
4. WAREHOUSEMEN—CONTRACT OF STORAGE—MEASURE OF DAMAGES.—Upon breach of a contract for the storage of apples in a cold storage warehouse the owners of the apples could not augment their damages by allowing them to remain out of cold storage because the warehouseman wrongfully demanded additional charges for keeping the apples; the measure of damages in such case being the additional amount which the warehouseman demanded for keeping them. (Page 195.)

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; affirmed on remittitur.

McDaniel & Dinsmore, for appellants.

1. The issues should have been submitted to the jury. 80 Ark. 194; 82 *Id.* 86; 73 *Id.* 568.

2. The testimony of witnesses Payne and Swan, in support of appellants' counterclaim, was admissible to show the agreement of the parties. The written order being silent, parol evidence was clearly admissible to show fully the agreement of the parties. 9 Cyc. of Ev. p. 350; 27 Ark. 510; 55 *Id.* 353; 81 *Id.* 389. Parol evidence was also admissible to show the agreements made by the agents of appellee as an inducement to the signing of the written order, which constitutes the contract in this case. 100

N. C. 178; 6 Am. St. 577; 32 Am. St. 436; 55 Ark. 112; 17 Cyc. 717.

3. The written order stipulates that all space contracted for is subject to all the rules and regulations of appellee. It is not shown that any rule or regulation against the making of such a contract as appellants' witnesses testify to was ever brought to the notice of appellants. They therefore had the right to assume that agreement and understanding had with its manager was not inconsistent with its rules and regulations, and it is bound by such contract.

Walker & Walker, for appellees.

The construction of the contract was for the court, not the jury. 11 A. & E. Enc. Law, 241; 89 Cal. 327; 44 N. J. L. 331. The effect of the testimony offered by defendants was, not to show anything in the rules and regulations of plaintiff company to sustain his contention, but to establish an entirely separate, different and distinct contract, and one contrary to the rules and regulations of the company. Appellants' contention as to this point is therefore absurd. The testimony offered in support of defendants' counterclaim was inadmissible, it being inconsistent with the terms of the written contract. 141 U. S. 510; 71 Fed. 477; 29 Fed. 260; 9 Enc. Ev. 347.

McCULLOCH, C. J. Appellee operated a cold storage plant at the city of Fayetteville during the season of 1907 and 1908, and sued appellants in the circuit court of Washington County for a balance alleged to be due on a contract for the storage of apples, as follows:

"Fayetteville, Ark., August 31, 1907.

"Arkansas Cold Storage & Ice Co.,

"Gentlemen: Please reserve for me space in your storage for 2,800 standard size barrels of apples, for which I hereby contract for and agree to pay you for said reservation the sum of $0.50 per barrel for the above stated number of barrels, subject to all your rules and regulations governing the storage of apples.

"Montgomery & Co.,
"Swan."

"Accepted, Ark Cold Storage & Ice Co.,
"By W. S. Nettleship, Genl. Mgr."

Appellants pleaded as a defense and counterclaim that "their agents, W. E. Payne and J. H. Swan, applied to W. S. Nettleship, the general manager, to store about 3,000 barrels of apples, and at the time fully explained to said general manager of plaintiff the manner in which defendants intended to use and utilize said space in said storage; explained to him that defendants were apple dealers, engaged in buying and selling fruit, and that, after storing apples in the space so leased, they would expect from time to time, as they sold and removed apples from the space so leased, to refill the space, during the storage season, with other apples. That, after so disclosing to plaintiff's general manager the manner in which the space applied for would be used, the said manager assented to such use of said space, and assured defendant's said agents that plaintiff would not object to such use of such space by defendants, and that, if defendants contracted for said space, they would have the right to refill the same with other apples as often as they might make shipments of fruit from said room. That they, said defendants, contracted for said cold storage, and stored therein from 2,800 to 3,000 barrels of apples, and signed the written order set forth in the complaint, in reliance upon the assurance of plaintiff's agent and manager that defendants would have the right to refill with apples the space so leased, from time to time during the storage season, as sales and shipments might be made therefrom. That, in reliance upon such assurance of plaintiff, they purchased and had in dry storage other apples which were well preserved up to a date long subsequent to the time when sufficient shipments of their apples in cold storage had been made, so as to admit other apples so held by them outside said cold storage. That plaintiff refused to permit defendants to refill such space with other apples. That defendants had on hand, outside of said cold storage, about 722 barrels of apples which they could and would have placed in the space so leased from plaintiff in cold storage, if permitted by plaintiff to do so; that, after being denied by plaintiff the right to refill in said cold storage so leased, the apples so held by them in dry storage, without fault on their part, greatly deteriorated, whereby defendants were damaged in the loss of apples by decay and in the inferior quality of those thereafter placed upon the market in the aggregate sum of $1,277.30."

The jury returned a verdict in favor of appellee on peremptory instruction of the court for the full amount claimed. Judgment was rendered on the verdict, and appeal was taken to this court.

In testing the correctness of the peremptory instruction given by the court, we must of course view the testimony in its strongest light most favorable to appellants, for, if they introduced testimony sufficient to warrant a verdict in their favor, the case should have been submitted to the jury. They introduced their two agents, Payne and Swan, who executed the contract for them, and the testimony of both these witnesses tended to establish every allegation of the defense and counterclaim. We are of the opinion that the issue of fact should have been submitted to the jury with appropriate instructions.

The meaning of the written contract is not altogether clear, whether so much space was rented for storage purposes, or whether merely the given number of barrels was to be stored. If the former be the correct interpretation, then of course appellants had the right to refill the space when barrels were removed, subject to established rules and regulations. But, be that as it may, the written contract is silent as to what the rules and regulations were, and it was necessary to resort to evidence *aliunde* to ascertain what they were. The evidence introduced by appellee shows that there were printed rules and regulations, but none on the question at issue. The most that is shown with respect to the practice of allowing customers to refill space is that instructions were given to the manager of the plant. There being no established rule or regulation on this subject which was brought to the attention of appellants when they entered into the contract in question, the statement and verbal agreement of the manager who executed the contract for appellee had the effect of establishing a regulation governing the performance of this contract. The manager was clothed with power to execute a contract. He was a general agent, and in contracting with appellants he stood in the place of his principal, and the latter cannot be permitted to deny appellants the privileges which were held out to them as an inducement to enter into the contract. The written contract is neither varied nor contradicted by the parol testimony showing what was held out to them as the regulation governing the performance of the contract. The testimony merely makes certain

that which the face of the contract leaves uncertain as to what the intention of the contracting parties was. *McCarthy* v. *McArthur,* 69 Ark. 313.

We do not, of course, undertake to decide what the facts of the case were, but there was sufficient evidence introduced by appellants to warrant a submission of the case to the jury.

Appellants were not, however, entitled to recover on their counterclaim, or as a defense to reduce appellee's claim, more than the price for storing the 722 barrels of apples which appellee refused to allow refilled into the storage place. Appellants could not augment their damage by allowing the apples to remain out of cold storage because appellee wrongfully refused to permit them to put them in cold storage without further charge. This charge for cold storage amounted to $361; and if the jury had found in favor of appellant, they would have been entitled to that much and no more.

If appellee will, within 15 days, remit this much of the amount recovered, the judgment will be affirmed; otherwise it will be reversed, and the case remanded for new trial.

MAJESTIC MILLING COMPANY *v.* COPELAND.

Opinion delivered January 10, 1910.

1. SALES OF CHATTELS—BREACH.—A vendee cannot complain of his vendor's failure to ship the articles sold if he failed to furnish shipping directions therefor. (Page 204.)
2. SAME—WHEN BROKEN.—In order for one party to a contract of sale to be justified in treating it as broken by the other, there must have been a distinct and unequivocal intention, manifested either by words or conduct of the other, not to perform the contract. (Page 204.)
3. SAME—DELAY IN PERFORMANCE—WAIVER.—Delay on the part of the vendor of chattels in making delivery during the time specified in the contract was waived where the vendee consented to such delay. (Page 204.)

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

Hawthorne & Hawthorne, for appellant.

This suit was instituted on the theory that plaintiff had given specifications for all the flour, and that defendant had refused to

ship. On the trial of the cause it developed that all specifications given by plaintiff were promptly filled, except the Jericho car, which was cancelled by plaintiff, and the Paragould car, which was delayed by defendant for a time, but promptly shipped after a slight change in the specifications by plaintiff. The court then permitted plaintiff to change his theory and amend his allegations so as to predicate a breach on the defendant's part upon the failure to ship the Paragould car promptly. Although this was error, the evidence failed to establish a breach by defendant, even under this theory. Benj. Sales, § 568; 33 Pac. 266; 39 S. E. 410. Moreover, if it be conceded that defendant did breach the contract, plaintiff did not elect to declare a breach and sue for his damages. By waiving the delay, plaintiff lost his right to maintain an action for the failure to ship until he could show that he gave specifications for all the cars called for by his contract. 178 U. S. (44 L. Ed.) 953; 7 Atl. 98; 55 Atl. 599; 52 S. E. 829; 15 Wall. 36; 30 L. R. A. 33 and notes; 85 Ark. 596; 87 Ark. 52; 101 S. W. 128; 147 Fed. 532; 4 Ark. 532. Defendant had the entire sixty days in which to ship the flour, under the contract. It could not be guilty of a breach until it failed to ship within that time. 117 U. S. 490; 21 Ohio 114; 61 N. Y. 643; 75 Pa. 138; 18 Ill. 155.

Lamb & Carraway, for appellee.

1. Defendant violated the contract by disabling itself from performing it. Beach, Cont. § 403; 2 Mechem on Sales, 1097; 13 Minn. 264; 43 N. J. L. 512; 93 N. Y. 576; 54 Cal. 228; 76 Md. 9, s. c. 20 Atl. 127; 111 U. S. 264; 121 U. S. 264; 103 U. S. 146; 72 Atl. 301. Plaintiff was not thereafter under obligation to give further shipping directions or to tender performance in any way. 92 Ark. 111; 13 Minn. 264; 53 N. Y. 115; 43 N. J. L. 511; 93 N. Y. 576; 17 Kan. 271. Defendant by its contract rendered it practically impossible for plaintiff to proceed further under the contract. 85 Ark. 596.

2. Appellee did not waive the breach of which appellant was guilty. Appellee's leniency cannot be construed as a waiver. 2 Mechem on Sales, 1071-4; 15 Ia. 555; 81 N. Y. 419; 47 N. E. 1020; 104 U. S. 252; 41 N. E. 561. Nor was his acceptance of appellant's deficient performance so unconditional and voluntary as to constitute a waiver. 2 Mechem, 1078; 72 N. W. 25; 65 N. W. 980; 39 N. E. 814, 17 C. C. A. 34; 5 N. D. 432, s. c. 67 N. W. 208. Whether or not appellant broke the contract, and

whether or not appellee waived the breach, were proper questions for the jury, and their finding supported by ample evidence, is conclusive. 67 N. W. 208.

3. Appellant's theory of the case is erroneous, and the rulings of the court as to instructions were correct. 55 Atl. 599.

McCULLOCH, C. J. Plaintiff, Rudy Copeland, was engaged in business at Jonesboro, Ark., under the trade name and style of Copeland Commission Company, and defendant, Majestic Milling Company, was operating a flouring mill at Aurora, Mo. On February 16, 1907, plaintiff gave a written order, which was accepted by defendant, for one thousand barrels of flour, said order being in the following form:

"Majestic Milling Company, 2-16-07.

"Ship to Copeland Commission Company at Jonesboro, Ark.

How ship: 60-day shipment.

Terms: Net A-L Att. Amt. $.....

1,000 Bbl Flour			Base
Majesty	48		3.70
Show Me	48		3.30
Uncle Joe	48		2.70
Prince	48	Base	3.60

"Draw through Bank of Jonesboro.

"D. R. Bradford. Copeland Com. Co.

"By Rudy Copeland."

D. R. Bradford was defendant's agent and solicited the order. There is no controversy as to the construction of the contract; it being conceded that, according to its terms, the flour was to be shipped within sixty days from date thereof. And it was understood that, in accordance with plaintiff's method of doing business, the flour was to be shipped to his order in carload lots, whenever he gave shipping directions from time to time.

About the time this contract was entered into, plaintiff was given the exclusive right to sell defendant's flour in certain territory in northeastern Arkansas and southeast Missouri. Another contract for one thousand barrels of Majesty, the higher grade of flour, was entered into February 22, 1907, but no directions were ever given for shipments under that contract, and that feature of the case passed out in the trial below, and there is no controversy here concerning it. Defendant delivered a part of the flour—360 barrels—under the contract of February 16, and this

action was instituted by plaintiff to recover damages for an alleged breach of the contract on the part of defendant in failing and refusing to deliver the remainder. Plaintiff recovered judgment below, and defendant appealed.

The point at issue in the trial below was whether or not defendant failed or refused to deliver the flour in accordance with the contract. Plaintiff contended that defendant was unable to perform the contract and refused to do so. On the other hand, defendant contended that the failure to deliver the flour was due entirely to plaintiff's failure or refusal to give shipping directions.

The evidence shows that the grade of wheat used by defendant produced three grades of flour, which were branded "Majesty," "Show Me" and "Uncle Joe," the proportion being 80 per cent. Majesty, 17 per cent. Show Me, and 3 per cent. Uncle Joe. It became necessary, therefore, for defendant to adjust its sales so as to conform to the proportion in which the several grades of flour were produced, otherwise the capacity of the mill would be overtaxed, and storage space become congested with unsold grades. The capacity of the mill was one thousand barrels per day.

All of the transactions between the parties were conducted by written correspondence, and there is no dispute as to what passed between them. That part of the correspondence which reflects the conduct of the parties with reference to the alleged breach of the contract by defendant in failing or refusing to ship the flour occurred on and after March 14, 1907, and will be copied in full, except that the letters concerning an order for shipment of a carload to Jericho, Ark., on March 14, which order was afterwards by agreement cancelled, are omitted. The correspondence related to a carload of flour, ordered by plaintiff on March 14 to be shipped to Paragould, Ark., which he had sold to Bertig Brothers.

"March 14, 1907.

"Majestic Milling Co.,
"Aurora, Mo.

"Dear Sirs:

"Please ship us at once on our contract to Paragould, Ark., *via* Frisco and Cotton Belt:

50 Bbls. Show Me Flour in wood.
75 " " " " 48's
30 " " " " 24's

"Please get the car in transit as soon as possible, and send all papers through the Bank of Jonesboro as usual. The customer to whom we sold this flour has four other cars booked with us, and is one of our very best customers. We usually sell him ten cars at a time. He has been using 'Comet' manufactured by the Eisenmeyer Milling Co., and is their second patent. He has also used a few cars of Bulte's 'Pelican,' which is his third grade. We have assured him that 'Show Me' will come up to either of these flours, and if it does he will make us a splendid customer, and we hope we will not be disappointed in the quality of the goods.

"Yours truly,
"Copeland Commission Company."

"March 15,1907.

"Messrs. Copeland Commission Co.,
"Jonesboro, Ark.
"Gentlemen:

"Beg to acknowledge receipt of your specifications for two cars, one dated March 13, and the other March 14. These shipments will move on dates specified unless we have instructions to ship sooner from you. We do not see much change in the equipment situation. However, we are living in hopes, though we may die in despair. We appreciate your kindness in furnishing the specifications early in order that we may be able to give you better service.

"Yours very truly,
"Majestic Milling Company."

"Aurora, Mo., March 26, 1907.

"Messrs. Copeland Commission Co.,
"Jonesboro, Ark.
"Gentlemen:

"We are just in receipt of your wire of even date with reference to Paragould car. We immediately wired you 'Badly oversold on 'Show Me.' Do all can. Can't you change specifications any?' By way of explanation will state that our former manager, Mr. Wilson, used such extremely poor judgment and sold long on this special brand, which is causing us no end of trouble. We are gradually getting out of our cramped condition, and if you can in any way change the specifications of this car with some other brand we would certainly appreciate this. This will assist

us greatly in giving prompt shipment. If you cannot do this, we will move car at the earliest possible moment.

"Yours very truly,

"Majestic Milling Company,

"W. H. Roark, Manager."

"Aurora, Mo., March 26, 1907.

"Messrs. Copeland Commission Co.,

"Jonesboro, Ark.

"Gentlemen:

"With reference to the car for Paragould to be shipped at once, we note that this is a straight car of 'Show Me,' our extra fancy brand. Would like to ask if you can in some way use a portion of this car in some other brand, as we are in a very bad condition, and it will be impossible for us to fill this order promptly, as our mill is now full of flour of the high grade, and, in order to manufacture this special grade we are compelled to make more Majesty, and we absolutely have not the room in which to put it. We would consider it a special favor if you could make some change in specifications, and help us out on our badly congested condition.

"We would also be more than pleased to have some specifications on your 1,000-barrel order given us on February 22. For your information will state that our former sales manager, Mr. Wilson, sold us long on this special brand, as we have been doing everything in our power to work ourselves out of this cramped condition, and have succeeded thus far fairly well. However, it seems that we have just about reached the climax, and if we cannot get some of our high patent moved, the 'Show Me' orders are bound to receive some serious delay."

(No signature.)

"March 27, 1907.

"Majestic Milling Co.,

"Aurora, Mo.

"Dear Sirs:

"Our customer at Paragould is unable to change specifications on car of flour. Therefore we will thank you to make every possible effort to get car out soon as possible, and oblige,

"Yours truly,

"Copeland Commission Company."

"Aurora, Mo., March 28, 1907.

"Messrs. Copeland Commission Co.,
"Jonesboro, Ark.

"Gentlemen:

"With reference to your letter of the 27th inst., we will await further shipping instructions on the Jericho car as requested. We would, however, be pleased to move this car as soon as possible, as we are very much congested for space. With reference to the car for Paragould, we are very sorry that specifications could not be changed, but will do our utmost to move this car at an early date, but, as previously stated, our mill is full of high grade flour, and it is utterly impossible for us to fill this order until we can get some storage room in order that we may make the extra fancy which goes in this car. We would be pleased to have another of your valuable orders at any time.

"Yours very truly,
"Majestic Milling Company,
"W. H. Roark, Manager."

"March 29, 1907.

"Majestic Milling Co.,
"Aurora, Mo.

"Dear Sirs:

"We are in receipt of your favor of the 26th, and sorry to note your cramped condition on 'Show Me.' We have already written you the condition our customer is in on this, and beg to say that we would be only too glad to have him take his contract in Majesty, but the class of trade he handles would not warrant him in doing so. We have another car of 'Show Me' sold for prompt shipment to Jonesboro, but can arrange to delay that some time yet, but the Paragould customer is entirely out, and we will have to arrange to get him a car some place else of a similar grade if you are unable to make shipment. Kindly advise us by wire upon receipt of this if you can possibly arrange to get this car out tomorrow or Monday.

"Yours truly,
"Copeland Com. Co."

"Aurora, Mo., March 30, 1907.

"Messrs. Copeland Commission Co.,

"Jonesboro, Ark.

"Gentlemen:

"Replying to your kind favor of the 29th, will state that we have just advised you with reference to Paragould car, stating that it would be satisfactory to us for you to cancel this order, and we now confirm the same. As previously stated, we dislike to cancel orders, but wish to thank you for being so kind to us under the circumstances, and assure you that we certainly appreciate your kind consideration. As previously stated, Mr. Wilson got us in very bad shape on this 'Show Me' brand of flour, and we have been doing all in our power to get out of this cramp, but in order to fill any orders of 'Show Me' we must have time. We assure you that when we are able to get out of this position, we will not be so blind as to get into it again.

"Again thanking you for your kindness, and hoping to hear from you again, we remain,

"Yours very truly,

"Majestic Milling Company,

"W. H. Roark, Mgr."

"April 4, 1907.

"Majestic Milling Co.,

"Aurora, Mo.

"Dear Sirs:

"We had to buy a car of flour for our Paragould customer and have gotten it to him, but you may keep the order you now have for Paragould entered to ship out about the 20th of this month. Suppose you will be sufficiently caught up with your orders by that time to make shipment. This customer uses about one car every two weeks, and he will have the car we have just shipped to him used up by that time.

"Yours truly,

"Copeland Commission Co."

"April 5, 1907.

"Messrs. Copeland Commission Co.,
"Jonesboro, Ark.
"Gentlemen:

"Referring to your order given our Mr. Bradford February 16 for 1,000 barrels to be shipped out 60 days from date, we would appreciate it very much if you could give specifications, so that we could get this flour moving, as we are very much congested for room, and the time is getting short.

"Yours very truly,
"Majestic Milling Company."

"April 8, 1907.

"Majestic Milling Co.,
"Aurora, Mo.
"Dear Sirs:

"We wrote you a few days ago to let the Paragould order remain as booked to ship out in ten days. We have a letter from our customer there changing specifications slightly, and request car to come out at once.

"Please change specifications to read:
"60 Bbls. Show Me in wood.
"70 Bbls. " " " 48's.
"30 Bbls. " " " 24's.

"Ship to us at Paragould as quickly as possible. Upon the quality of this flour depends much future business, and we hope you will see to it that it is fully up to the standard.

"Yours truly,
"Copeland Commission Co."

"April 11, 1907.

"Messrs. Copeland Com. Co.,
"Jonesboro, Ark.
"Dear Sirs:

"Enclosed please find invoice covering C. O. & G. 10336, flour shipped you today. We would like to have the balance of your valuable specification covering our contract now pending as soon as possible, as the sixty days is about up.

"Anxiously awaiting your prompt reply, beg to remain,
"Yours very truly,
"Majestic Milling Company."

This concluded the correspondence up to the date of the expiration of the sixty-day period specified in the contract. A carload of flour, the order for which is contained in the letter of April 8, copied above, was shipped out on April 10, 1907. It is not contended that plaintiff ever gave directions for shipment of flour during the lifetime of the contract after the last shipment on April 10, 1907; nor is it contended that defendant ever expressed any unwillingness or inability to fully perform the contract, further than may be implied from the correspondence hereinbefore copied. The question then arises, does the evidence establish a breach of the contract on the part of defendant? For, if the plaintiff was the first to break the contract, or if he failed to perform his part of the contract by giving directions for shipment of the flour, then he cannot complain of defendant's failure to perform. *Townes* v. *Oklahoma Mill Co.*, 85 Ark. 596. Defendant could not ship the flour until proper directions were given, and plaintiff was at fault in not giving directions, unless defendant first repudiated the contract and refused to deliver the flour in accordance with its terms. If, however, defendant first repudiated the contract and broke it by failure or refusal to deliver the flour after being requested so to do, then plaintiff was not bound to give further shipping directions, for he had the right to treat the contract as at an end and sue for the damages sustained by reason of the breach. *Spencer Medicine Co.* v. *Hall*, 78 Ark. 336; *John A. Gauger & Co.* v. *Sawyer & Austin Lbr. Co.*, 88 Ark. 422; Benjamin on Sales (7th Ed.), § 568; *Dingley* v. *Oler*, 117 U. S. 490; *Wilhers* v. *Reynolds*, 2 Barn. & Ad. 882.

But the rule is well established that, in order for one party to a contract to be justified in treating it as broken by the other, and claiming damages for the breach, there must have been a distinct and unequivocal intention, manifested either by the words or conduct of the other, not to perform the contract. *Spencer Med. Co.* v. *Hall, supra; Armstrong* v. *St. Paul & Pac. Coal & I. Co.*, 48 Minn. 113.

The evidence in this case does not warrant the conclusion that defendant ever refused to perform the contract. On the contrary, the correspondence shows a willingness on its part to perform, and up to the last it called on plaintiff to furnish specifications for shipping the flour. This was the last word between the parties during the lifetime of the contract. There was some

delay in making shipments, but plaintiff consented to it, and the last request for shipment was promptly complied with. He waived the delay by consenting to it. *Tidwell* v. *Southern Engine & Boiler Works,* 87 Ark. 52.

Nor does the evidence warrant the finding that defendant was unable to deliver the flour. The most shown is that defendant could not promptly deliver the brand of flour called for; but the delay was consented to. There is nothing to indicate that, if delivery of the flour had been insisted on, it could not have been furnished within the lifetime of the contract. The capacity of defendant's mill was one thousand barrels per day, 17 per cent. of the output being of the grade and brand called for, and it is easy to see that performance of the contract with plaintiff was within the capacity of the mill. It is true that defendant had other orders for the same grade of flour; but there is nothing to show that, if plaintiff had insisted on the fulfillment of his orders for that grade, it could not have been done. He had no right to treat defendent's request for delay as an abandonment of the contract, especially when he consented to the delay.

It is unnecessary to decide whether, according to the terms of the contract, defendant had the right to delay shipment until the last day of the specified time; for no further requests for shipment were made, and plaintiff is in no attitude to complain. Upon the whole, we are of the opinion that the verdict of the jury is not sustained by the evidence. The judgment is therefore reversed, and the cause remanded for new trial.

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

Opinion delivered January 10, 1910.

1. RAILROADS—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—In an action against a railroad company for personal injuries from stepping on a spike in a slab while defendant's employees were repairing a depot platform, an instruction that if plaintiff stepped on the spike without looking to see where he was stepping "this would not constitute negligence that would render the defendant liable," would have been better expressed by saying that the facts recited would constitute contributory negligence on plaintiff's part. (Page 208.)

2. SAME—DEFECTIVE PREMISES—CONTRIBUTORY NEGLIGENCE.—One who goes upon a railway platform, knowing that the platform is being torn away and that the debris is scattered around, and fails to look where he steps, and is injured by stepping on a slab having a spike in it, is guilty of contributory negligence and cannot recover. (Page 209.)

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

Rice & Dickson and *J. A. Dickson,* for appellant.

Appellant was not a trespasser (48 Ark. 493), and appellee's foreman could, by warning him of the presence of the spiked slab, have prevented his injury. The failure to do so presented a question for the jury as to appellee's negligence; and appellant's failure to look where he stepped, when but a moment before the way had been clear, should not have been made the test. 87 Ark. 325; 89 Ark. 496; 90 *Id.* 543. The court erred in telling the jury that appellant's failure to look where he stepped was contributory negligence; and the giving of other correct instructions did not cure the error. The court's instructions were general, and it was error to refuse appellant's instructions Nos. 5 and 6, which were specific. 87 Ark. 531; 90 Ark. 247. There are no facts upon which to base the law of assumed risk, as appellant was not an employee.

W. F. Evans and *B. R. Davidson,* for appellee.

Appellant knew, when he entered the station, that the platform was being torn up, and he assumed the risk of any injury on account thereof. 65 Fed. 48; 67 *Id.* 507; 116 *Id.* 335; 117 *Id.* 122. The evidence shows without contradiction that appellant, though cognizant of the fact that the platform was being torn up, stepped out of the door with the buggy top held in front of him, so that it obstructed his vision. Appellee was therefore entitled to a peremptory instruction, there being no jury question. 60 Ark. 106; 60 *Id.* 438; 63 *Id.* 427; 57 *Id.* 76; 4 S. E. 587; 106 N. Y. 136.

McCULLOCH, C. J. Plaintiff, Henry Hanna, instituted this action against the St. Louis & San Francisco Railroad Company to recover damages for personal injuries alleged to have been caused by negligence of defendant's servants. The trial jury returned a verdict in favor of defendant, and plaintiff appealed. The alleged negligence upon which the action was based consisted in leaving exposed on the ground in front of the station at

Beaty, Ark., a plank or slab with a spike in it, and the injury was caused by plaintiff stepping on the spike as he walked out of and away from the station.

Plaintiff lived, and was engaged in the mercantile business, at Beaty, and was agent of the express company, a position which he accepted and held to accommodate the people there. It seems that the railroad company did not keep an agent there, and plaintiff was entrusted with the keys to the depot, so that he could have access to it at all times.

The wooden platform in front of the station was about worn out, and defendant sent a crew of men to remove it and to replace it with a platform of dirt and cinders. The men proceeded with the work, and while it was going on plaintiff went over to the station to get a buggy top which had come by express that day and was stored in the depot. This was near the middle of the day, and plaintiff knew what the men were doing. In fact, he had called the attention of the roadmaster to the necessity for a new platform. He went into the depot, and as he came out of the door carrying the buggy top in his hands he stepped on the slab containing the spike, which was lying on the ground in front of the depot. The spike pierced his foot and inflicted a very painful injury. He was carrying the buggy top in front of him, so that he could not see where he was stepping, and he says that he did not look to see where he stepped.

Plaintiff testified that when he went into the depot the platform had been completely torn away and the old material carried off; that the slab with the spike in it was not lying on the ground in front of the door, and the workmen were at that time digging a ditch in front of the door preparatory to building the new platform of dirt and cinders. Witnesses introduced by the defendant testified that when plaintiff went into the depot the men were still at work tearing the platform away, and that the loose plank and debris had not been moved, but was scattered about on the ground. One testified that no change was made in the situation while plaintiff was in the depot.

The court fairly submitted the case to the jury on instructions requested by plaintiff and by defendant and of the court's own motion. Error is assigned in giving the following two instructions:

"1. I charge you that, if you find from the evidence that

the defendant company was causing this platform to be torn up for the purpose of substituting another, that the workmen were engaged in removing the planks, that while so doing one of the planks was left for a short time where it had fallen with a spike turned up before the plank was removed, that the plaintiff entered the building while these servants were engaged in tearing up and removing said lumber, that the plaintiff came out of the house and stepped upon the nail without looking to see where he was stepping, and the injury was thereby inflicted, this would not constitute negligence that would render the defendant liable."

"3. I charge you that it is the duty of one who goes upon the premises knowing that the platform is being torn up for the purpose of substituting another platform, and who enters a building knowing that the platform is torn away, or being torn away, to look where he steps as he leaves the building. If he fails to do this, and is injured thereby, he is guilty of contributory negligence."

The first instruction would perhaps have better expressed the issue by saying that the state of facts recited could constitute contributory negligence on the part of plaintiff which would preclude a recovery of damages, instead of saying that such a state of facts "would not constitute negligence that would render the defendant liable." This inaccuracy was, however, harmless, for plaintiff admitted that he did not look to see where he was stepping when he came out of the station door; and if he knew when he went into the station that the work of tearing away the platform was going on, that the debris was still scattered around on the ground, and he failed to look where he stepped when he came out, he was guilty of contributory negligence which barred a recovery. The instructions fairly submitted the question whether or not the work of tearing away the platform was completed and the debris removed when plaintiff went into the station. This particular instruction, as well as others, submitted that question, and the jury found that issue against plaintiff; so, with that issue settled against him, it followed as a matter of law that if he knew of that situation and failed to look where he stepped when he came out, he cannot recover. The situation was one of danger, of which he was fully apprised, and it was an act of negligence for him to ignore the danger entirely and blindly walk out without looking where he stepped.

The case is unlike one where a person goes upon the platform of a railroad company to transact business, without reason to suspect danger. There it is generally a question for the jury to determine whether he is blameless in his own conduct, and it cannot be said as a matter of law that he must be on the lookout for danger. *St. Louis, I. M. & S. Ry. Co.* v. *Fairbairn,* 48 Ark. 491. But such is not the rule where the danger is known to the injured person, and he takes no precaution whatever for his own safety. Under these circumstances, there is nothing to submit to the jury, for it is not a matter about which men will differ, that one who is fully aware of a dangerous situation and takes no precaution at all against the danger is guilty of negligence.

We find no error in the instructions, and the judgment is affirmed.

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

Opinion delivered January 3, 1910.

1. CARRIERS—DUTY TO DRUNKEN PASSENGER.—Evidence tending to prove that a passenger was put off a train while known to the trainmen to be helplessly drunk, with no one to assist him and exposed to danger from a train which was to pass soon, and that he was run over by such train and injured, was sufficient to sustain a finding of negligence upon the carrier's part. (Page 212.)
2. EVIDENCE—ADMISSIONS.—Statements made by a party to a suit against his interest, touching material facts, are competent and original testimony. (Page 214.)
3. INSTRUCTIONS—SPECIFIC OBJECTION.—Ambiguity in an instruction should be reached by a specific objection. (Page 215.)
4. DAMAGES—PAIN AND SUFFERING—INSTRUCTION.—While it is difficult to fix a measure of damages for pain and suffering, for the reason that none would be an acceptable inducement to suffer it, yet in determining the amount of compensation for it the jury must be governed by the evidence in the case; and it is error to instruct them that they may render verdict for any amount which they deem right for pain and suffering, regardless of the evidence. (Page 215.)

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

Fred Dallas brought suit against the St. Louis, Iron Mountain & Southern Railway Company, for injuries alleged to have been received by him in being wrongfully ejected from one of its passenger trains, and in being left in an unconscious condition near the tracks of its line of railway, whereby his leg was cut off by another of defendant's trains, which passed shortly afterwards.

Fred Dallas, the plaintiff, testified substantially as follows:

On September 29, 1907, about 2 o'clock P. M., he took defendant's passenger No. 806 at El Dorado for Camden, Arkansas. When the train reached Camden, he concluded to go to Malvern, Ark., and paid his passage to that place. The train auditor, upon receipt of his fare, put the usual check in his hat. When plaintiff boarded the train, he was sober, but he began drinking whisky on the way, and became drunk. When the train stopped at Walco, a station about two miles south of Malvern, he started out to look around. When he reached the steps, some one (he thinks was one of the train crew) pushed him from the steps of the coach. He says he fell backwards, and did not remember anything more until the next morning. When he recovered consciousness, he found that his leg had been cut off, but says that he does not remember any of the attendant circumstances.

Other passengers on train No. 806 on the day in question testify that they saw one of the train crew shove the plaintiff from the steps of the coach. One witness said that when the plaintiff fell the brakeman kicked him out of the way. Other witnesses testified that they saw him lying within eight or ten feet of the track, and that he was unconscious. Others say that he was unconscious, but was some distance further away.

The train crew were witnesses for the defendant, and deny that the plaintiff was kicked or shoved off of the steps of the train, or that they knew he was drunk, or was left lying near the track in an unconscious condition. The train stopped at Walco about 8 o'clock P. M., which at that season of the year was shortly after dark. The train proceeded to Malvern, about two miles distant, and while there defendant's passenger train No. 223, southbound, passed it. When it arrived at Walco, two or three passengers got off, and the train started up. Just then other passengers came out of the coach, and the train was again stopped

to discharge them. It had moved up about thirty (30) feet. When it made the second stop, a cry of distress was heard from the rear of the train. An investigation was made, and plaintiff was found under the rear trucks under the rear coach, with the wheels resting on his legs. He was released as quickly as possible, placed on a cot and carried to Malvern, where his leg was amputated. Walco is a station two miles south of Malvern, established for the benefit of a lumber mill and its employees.

There was a trial by jury, and a verdict for the plaintiff. The defendant has appealed from the judgment rendered upon the verdict.

Kinsworthy & Rhoton, Bridges, Wooldridge & Gantt, and *James H. Stevenson,* for appellant.

1. The evidence does not sustain the verdict. No presumption of negligence arises from the mere fact of the injury, and the doctrine of *res ipsa loquitur* does not apply unless the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from negligence on the part of the passenger as the carrier. 75 Ark. 479, 491. In this case the passenger was sober when he boarded the train, and became drunken thereafter, and there is no showing that those employees who were in charge of the train had any notice or knowledge of his drunken condition. In such case they owed him no duty beyond that which was due to the ordinary passenger. 2 Hutchinson on Car. § 994, p. 1145; *Id.* § 1083, pp. 1261-2; 94 Ind. 276; 130 Mich. 666; 88 Ky. 232; 44 S. W. 648; 32 O. St. 345; 183 Pa. 638; 21 Ia. 15. Intoxication is a self-imposed disability which does not relieve one of his duty to exercise proper care to avoid danger. 71 Tex. 361; 136 Ala. 178.

2. The seventh instruction given at plaintiff's request was erroneous in stating that "the law furnishes you no measure of damages for pain and suffering. The amount to be assessed by you, if any, must be left to the sound judgment and fair discretion of the jury." Such an instruction leaves the jury at liberty to assess any amount they may see fit as damages. While there is no definite rule, there is nevertheless a "measure of damages" in such cases, and that is such an amount as is *compensation for the suffering.*

3. It was error to refuse to allow the witness Ellington to

read to the jury the statement of the plaintiff made to him in writing and signed by said plaintiff. 31 Ark. 684.

Henry B. Means and *John C. Ross,* for appellee.

1. Where the ejection of a passenger who is in a drunken condition, and is at the time incapacitated to care for himself, is wrongful, and is made in an improper manner, time, place and circumstances of the passenger considered, the carrier is liable; otherwise not. 83 Ark. 6; 82 Ark. 289; 42 Ark. 321; 56 Ark. 603; *Id.* 51; 80 Ark. 158; 84 Ark. 241. In this case the wrongful ejection was the proximate cause of the injury. Carriers of passengers are held to the highest degree of care, and are responsible for the smallest negligence. 40 Ark. 298; 51 Ark. 459; 2 Hutchinson on Carriers, § 1083, pp. 1260, 1261-2; *Id.* § 994, p. 1144.

Where the ejection is rightful, made in a proper manner and at a proper time and place, yet if there is want of proper care in view of the passenger's condition and the place where he is left, the carrier may be held liable for his subsequent injury. 108 Ala. 62, 67; 60 Ala. 621; 27 Conn. 393; 3 O. St. 172; 58 Ia. 348; 37 Cal. 400; 97 Ky. 330; 33 Kan. 543; 3 Wood on Railroads, § § 363-4; 1 Am. & Eng. Enc. of L. 748. See also 120 Ind. 470; 118 Mass. 251; 32 O. St. 345; 21 Ia. 15; 52 Ia. 533; 81 Ky. 624.

2. The refusal to allow the witness Ellington to read appellee's statement to the jury was proper. He was permitted to refer to it in testifying, and it was unnecessary to read the whole of it to the jury. The request was to read the whole statement, and not any alleged contradictory part thereof, which was improper. 68 Ark. 587. Moreover, appellant did not bring itself within the rule requiring a specific request to read an alleged contradictory part of the statement. *Id.*

HART, J. (after stating the facts). 1. It is earnestly insisted by counsel for defendant that there is not sufficient evidence to support the verdict. The duty of the carrier to a drunk passenger and its liability for the neglect of it is stated by Mr. Hutchinson as follows:

"And this rule is true whether the attendant danger arises from the natural infirmity of the person or was self-imposed. Thus, if a person on a train is so intoxicated as to render him unconscious of danger and unable to appreciate his position, surroundings and perils and his duty to avoid them, or he does not possess the power of locomotion, and is put off the train by a con-

ductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of recklessness and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected in a proper manner and at a proper place." 2 Hutch. Carr., § 1083, p. 1260.

"Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place and under conditions and circumstances which would expose him unnecessarily to great peril of life or bodily harm, and, this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor under such circumstances that constitutes the act culpable or wilful wrong. If the deceased was intoxicated to the degree that he was unconscious of danger, could not grasp his position and surroundings, and his duty to avoid danger from passing trains, or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages resulting from such misconduct. * * * Mere intoxication, which did not take away consciousness and the power to consider and understand the danger to which he was exposed, nor deprive him of physical capacity to take care of himself and to avoid danger, would not relieve him from the responsibility of exercising due care, after he was put off the train; and, if he was killed in consequence of such neglect of duty on his part, the plaintiff cannot recover. The killing under these circumstances would be the result of his own negligence, which proximately contributed to it." *Johnson* v. *Louisville, etc., Rd. Co.* (Ala.), 53 Am. St. Rep. 39.

In the case of *Black* v. *New York, New Haven & Hartford Railway Company,* 193 Mass. 448, 9 Am. & Eng. Ann. Cas. 485, the court held:

"Where the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation, which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury, as the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct and proximate cause of it." The reason of the rule is that the law subordinates personal rights to the preservation of life. The rule is firmly established, but the application of it sometimes gives rise to difficult questions. In the case at bar the defendant's theory of the case was that plaintiff was injured while trying to board its southbound train when in motion; but the jury might have found that the plaintiff was shoved from one of the defendant's passenger trains by its employees, and was left lying close to the track in an unconscious condition; that, with knowledge of his helpless condition and of the further fact that it was dark, and that there was no one there to render him assistance, they left him near the track exposed to the dangers of a train which would necessarily pass in a short time, and that, as a result thereof, the plaintiff was injured. Hence we conclude that there was sufficient evidence to support the verdict of the jury.

2. The claim agent of the defendant testified that on the 21st day of October, 1907, the plaintiff gave a statement of the facts and circumstances of his injury. The said statement was in writing and signed by the plaintiff. Plaintiff admitted his signature to the statement, but denied having said any of the matters contained in it. Defendant offered to introduce the statement in evidence, and assigns as error the action of the court in excluding it. The court should have admitted the statement in evidence. The rule in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Faisst,* 68 Ark. 592, invoked by counsel for plaintiff, is not applicable; for plaintiff sustained two relations to this suit. He was both plaintiff and witness. As said in the case of *Collins* v. *Mack,* 31 Ark., at p. 694, "the acts and declarations of a party to a suit, when they afford any presumption against him, may be proved by the opposing party." It is a well recognized rule of evidence that any statements which may have been made by a party to a suit against his interest, touching material facts, are competent

as original testimony. *Black* v. *Epstein,* 120 S. W. (Mo.) 755; *Louisville & N. R. Co.* v. *Joshlin,* 110 S. W. (Ky.) 382.

3. Counsel for defendant also insist that the court erred in giving instruction No. 7 at the instance of the plaintiff. The instruction is to some extent ambiguous and misleading in this that it might be inferred from it that the jury should render a verdict for any amount they deemed right for the pain and suffering, regardless of the evidence. But the defect could have been cured by a specific objection. For that reason we would not reverse the case for this alleged error; but, inasmuch as the case must be reversed for the error already indicated, we deem it proper to caution the court in regard to the form of the instruction.

While, as we have said, it is difficult to fix a measure of damages for pain and suffering, for the reason that none would be an acceptable inducement to suffer it, yet, in determining the amount of compensation for it, the jury must be governed by the evidence in the case. See *Aluminum Company of North America* v. *Ramsey,* 89 Ark. 522; *Ward* v. *Blackwood,* 48 Ark. 396; *Railway Company* v. *Dobbins,* 60 Ark. 485; *St. Louis, I. M. & So. Ry. Co.* v. *Cantrell,* 37 Ark. 522; *Barlow* v. *Lowder,* 35 Ark. 496.

For the error in excluding the written statement of plaintiff from the jury the judgment will be reversed, and the cause remanded for a new trial.

LOVE v. CAHN.

Opinion delivered December 20, 1909.

1. PARTIES—HOW DEFECT OF, RAISED.—A general demurrer does not reach the defect of a want of proper parties. (Page 219.)
2. SAME—DEFECT OF PARTIES CURED WHEN.—The error of suing upon a non-assignable claim without making the assignor a party is cured where the assignor was permitted to enter his appearance and become a party to the action after it was instituted. (Page 220.)
3. LIMITATION OF ACTIONS—NEW SUIT AFTER NONSUIT.—Kirby's Digest, § 5083, providing that a plaintiff may bring a new suit within a year after he suffers a nonsuit, does not narrow the period of limitation in such case, but extends the period provided by the general statute of limitation applicable to the cause of action. (Page 220.)

4. ASSIGNMENTS—RIGHTS UNDER SUPERSEDEAS BOND.—The assignment of a claim under a supersedeas bond vests in the assignee an equitable right to the claim. (Page 221.)

5. PARTIES—REAL PARTY IN INTEREST.—Under Kirby's Digest, § 5999, providing that actions shall be brought in the name of the real party in interest, the assignee of a claim growing out of the breach of the supersedeas bond is entitled to sue in his own name for the enforcement of such claim. (Page 221.)

6. LANDLORD AND TENANT—WHEN RELATION EXISTS.—The relation of landlord and tenant is one of contract, and is not created by an order of the court to the effect that defendant should remain in possession of the land in controversy as plaintiff's tenant. (Page 221.)

7. APPEAL AND ERROR—SUPERSEDEAS BOND—CONSTRUCTION.—The liability incurred by the execution of a supersedeas bond is fixed by the legal import of its terms, which should be construed according to the ordinary and reasonable meaning of the language employed. (Page 222.)

8. SAME—LIABILITY UNDER SUPERSEDEAS BOND.—Under a supersedeas bond obligating the appellant to pay "all rents of which the appellee is kept out of by reason of the appeal," the bondsmen are liable for all prior rents, the collection of which is stayed, and all subsequent rents down to the time when the appeal was disposed of. (Page 222.)

Appeal from Chicot Chancery Court; *Zachariah T. Wood*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This was an action originally instituted in the Chicot Circuit Court by the appellee, Uda Cahn, against the appellants to recover upon a supersedeas bond executed by them in connection with an appeal to the Supreme Court taken from the decree and proceedings of the Chicot Chancery Court rendered in a cause wherein J. Kaufman was plaintiff and Henry and Mattie Love, his wife, were defendants. Upon said appeal the decree was affirmed and finally disposed of by this court on March 7, 1904; and the opinion rendered thereon is reported under the style of *Love* v. *Kaufman*, in 72 Ark. 265.

On September 10, 1900, the Chicot Chancery Court in said cause rendered a decree in favor of J. Kaufman and against Henry Love for the recovery of $1,126.04 and the foreclosure of a mortgage on certain land in Chicot County, which had been executed to secure said indebtedness. The said land was sold by a commissioner under and by authority of said decree to said J. Kaufman for $1,100; and that sale was duly confirmed on June 3, 1901, and a deed duly executed by the commissioner to

said Kaufman for said land in pursuance thereof. In said decree of confirmation the chancery court made also the following order: "And, it further appearing that the defendant, Henry Love, is occupying and has a growing crop on the improved portion of said land, it is further ordered that he remain in possession of said land for and during the year 1901, as the tenant of said J. Kaufman, and that he pay the said J. Kaufman the sum of five dollars per acre rent therefor, and that he surrender possession of said premises to the said J. Kaufman on the first day of January, 1902."

During 1901 Henry Love made said payment for the possession of said land under said order for the year of 1901 to Kaufman; but the court in the trial of the case at bar found that he did not surrender thereafter the possession of the land to Kaufman; and we think that there is sufficient evidence to sustain that finding.

On September 9, 1901, Henry Love duly prosecuted and perfected in the Supreme Court an appeal from said decree and proceedings of said chancery court, but without supersedeas bond at that time. Subsequently, on May 4, 1903, a supersedeas bond was executed and filed in the Supreme Court in said cause; and it is alleged in the complaint that a supersedeas was duly issued therein, which allegation was not denied. The supersedeas bond was executed by the appellants, Henry Love and Baldy Vinson, and was to the effect that the appellant would perform all the requirements and conditions named in section 1218 of Kirby's Digest, providing for the execution of such bond. At the same time said Vinson, who was the attorney of said Love, believing he had the authority to do so, signed the name of E. A. Bolton, his associate attorney in said case, to said bond as such associate attorney.

In his complaint in the case at bar the appellee alleged that during the pendency of said appeal, and by reason of the stay of proceedings secured by said supersedeas, said Love retained possession of and kept said Kaufman out of the rents of said land for the years of 1902, 1903, 1904 and 1905, aggregating $1,440, and did also damage said land by committing waste to to the amount of $200. He further alleged that said Kaufman did in 1906, by writing duly executed, transfer and assign to him all the claim and right of action growing out of the lia-

bility of appellants on said supersedeas bond; and he sought a recovery for the amount of said rents and damages. In said complaint said Kaufman is also made a party defendant, but no process was issued for him.

The appellants filed a general demurrer to the complaint, which was overruled, and they filed an answer, in which they denied that Love refused to surrender the possession of the land to Kaufman on January 1, 1902; and they claimed that any possession that he held thereafter was as tenant of Kaufman. They also denied the transfer of the claim upon which this action is based by Kaufman to appellee. They made the answer a cross complaint, and amongst other things made certain allegations upon which they based a prayer for affirmative relief against Kaufman, and they asked that process issue for him. They also asked that the cause be transferred to the chancery court, which was done.

At the trial of the cause Kaufman filed an answer in the case, and also appeared as a witness. In his pleading and in his deposition he stated that he had transferred and assigned the claim upon which this action is based to the appellee, as alleged in the complaint.

Upon the disputed questions of fact the court found that Love did not surrender the possession of the land to Kaufman on January 1, 1902, nor at any time thereafter, but upon his threatening to take possession Love perfected his appeal from said decree and secured the supersedeas thereof. That the claim and right of action upon which this suit is based was duly transferred and assigned by said Kaufman to appellee. That said Bolton, one of the defendants, did not execute said bond. That, by the execution of the bond sued on, all proceedings under the decree and orders of the chancery court in said cause, wherein Kaufman was plaintiff and Love was defendant, were stayed pending said appeal to the Supreme Court; and that said Love retained possession of the land, and Kaufman was deprived of the rents thereof. That the said decree was affirmed on March 7, 1904, when the liability on the supersedeas bond ceased. It found that the evidence did not show that any waste was committed on said land after said affirmance of the decree. It found that appellee was entitled to recover on said bond for the value of the rents of the years of 1902 and 1903, which it found

to be $360 for each year. It entered a decree dismissing the complaint as to said Bolton, and in favor of appellee and against appellants Love and Vinson for the said value of the rents for the years of 1902 and 1903. It denied any recovery for rents for any other years and for any alleged waste. No appeal was taken from that portion of the decree dismissing the complaint as to defendant Bolton. The other parties, plaintiff and defendants, to the suit below appeal from said decree.

Ratcliffe, Fletcher & Ratcliffe, for appellee; *Baldy Vinson,* of counsel.

Kaufman was a necessary party, either plaintiff or defendant. Kirby's Digest, § 509; 47 Ark. 541; 10 Ark. 304; 57 Ark. 469. And he must have been made a party within one year from the taking of his nonsuit. Kirby's Dig., § 5083. The commencement of an action is the filing of the complaint and issuance of summons. Kirby's Dig., § 6033; 57 Ark. 231; *Id.* 460; 62 Ark. 401. A surety's obligation cannot be extended beyond its terms. 71 Ark. 44; 82 Ark. 208; 44 Ark. 178; 76 Ark. 415. And only applies to the nature of the case appealed. 73 Ark. 67; 66 Neb. 891.

Allen Beadel and *W. G. Streett,* for appellee.

A supersedeas bond is assignable. Kirby's Dig., § 509. A general demurrer does not raise the question of defect or nonjoinder of parties. 33 Ark. 497; 34 Ark. 73. And the objection not raised by demurrer or answer is waived. 75 Ark. 288. Sureties on such bond are liable for all damages accruing during the pendency of the appeal. 59 Ark. 32; 51 Ark. 232.

FRAUENTHAL, J., (after stating the facts.) 1. Before considering the questions involving the rights upon the one hand and the liabilities of the parties on the other hand, in this case, we will determine the objection urged by the appellants to the pleadings. It is contended that the claim or right of action growing out of the liabilities accruing upon the alleged breach of the supersedeas bond is not assignable, and that therefore the said Kaufman, who was the obligee in said bond, was a proper party to this suit. The appellants in the court below did not file a demurrer on the ground that there was a defect of parties, but only filed a general demurrer. A general demurrer does not reach the defect of the want of proper parties. *Eagle* v. *Beard,*

33 Ark. 497; *Chrisman* v. *Jones,* 34 Ark. 73; *Less* v. *English,* 75 Ark. 288. But, furthermore, in this case Kaufman was actually made a party to the suit. In the complaint he was specifically named as a party defendant, and in their cross-complaint the appellants asked that process issue for him and asked for affirmative relief against him. While no process was issued for him, he did file an answer, and thus did enter his appearance in the case, and thereby was made a party thereto as effectively as if he had been duly served with process of summons. And, even though it should be considered that the claim sued on was not assignable so as to conclude the rights of Kaufman, and on that account he was a proper party, this defect was remedied by thus making him a party after the action was begun. And the court did not abuse its discretion by permitting him to enter his appearance and file his pleading in the case. *Boles* v. *Jessup,* 57 Ark. 469. If he was a necessary party, he thus actually became a party to the suit; and any claim or right that he may have in the cause of action is concluded by the decree of the court, against which, therefore, the appellants are thus fully protected.

But it is urged further by appellants that Kaufman had at one time instituted suit upon this claim, and thereafter did suffer a nonsuit; that his answer in this case was not filed, and his entry of appearance in the cause was not made, until more than one year after said order of nonsuit; that any right of action on the claim was therefore barred as to him; and that on this account he could not be made a party, and the cause of action must fail. But the statute (Kirby's Digest, § 5083) which tolls the statute of limitation for one year where the plaintiff suffers a nonsuit does not narrow the period of limitation in which an action may be brought upon a claim which is not otherwise barred by the general statute of limitation applicable to such claim. This provision of the statute only applies to those causes of action which, under the general statute of limitation applicable to such cause of action, would otherwise be barred before the running of one year from the time of taking such nonsuit. The statute, instead of shortening the period of limitation, really extends the period provided by the genral statute of limitation applicable to the cause of action.

It follows, therefore, that any right or interest that Kauf-

man may have had in the claim sued on was not barred at the time of the filing of his answer in this case. It follows also from this that the further contention made by appellants that the claim sued on was not assigned or transferred by Kaufman to the appellee, Cahn, cannot be sustained. For Kaufman is a party to this suit, and is concluded by the decree. If the appellants owe the claim sued on, they cannot be injuriously affected by the decree which finds that Cahn, and not Kaufman, is the true owner thereof.

But we are further of the opinion that Kaufman did transfer and assign this claim to appellee prior to the institution of this suit, and that he had not disposed of it prior to said assignment. Kaufman had been conducting a mercantile business at Coriola, Arkansas, and the claim herein sued on grew out of that business. He transferred to appellee by written instrument all assets and claims of that business and all "rights of action" in the State of Arkansas owned by him, and also conveyed to appellee the lands from which these rents issued. In his answer he stated, and in his deposition he testified, that he had transferred and assigned the claim herein sued on to appellee. By this transfer Cahn became the equitable assignee of this claim. By section 5999 of Kirby's Digest it is provided that actions shall be brought in the name of the real party in interest; and under that statute we are of the opinion that appellee had a right to sue in his own name for the enforcement of this claim. *Hartman* v. *Franks,* 36 Ark. 501; *Caldwell* v. *Meshew,* 44 Ark. 564; *Lanigan* v. *North,* 69 Ark. 62; *Maloney* v. *State,* 91 Ark. 485; 4 Cyc. 97.

2. It is contended by the appellants that Love was in effect a tenant of Kaufman for all the years he had possession of the land after 1901, and that Kaufman was not therefore kept out of the rents thereof for those years. They base this contention on that portion of the decree which provided that Love should retain possession of the land until January 1, 1902, and should remain in possession of the land during 1901 as tenant of Kaufman; and that his possession of the land after 1901 was that of a tenant of Kaufman holding over. But this provision of the order of the court was only made for properly securing to Love the possession of the land and postponing the possession of Kaufman. Instead of making Love give a bond for the

payment of the use and occupation of the land, or of appointing a receiver of the land, the court permitted Love to retain its possession, and provided a character of lien for the security of the payment for its use and occupation. There was no relation of landlord and tenant created by this order between these parties. They did not make any agreement to that effect. To create the relation of landlord and tenant, there must be a valid contract between the parties. There must be both a privity of estate and contract before that relation can arise, so as to justify the recovery of rents, on the one hand, or the presumption, on the other hand, that the possession is subordinate to and the actual possession of the party having the legal title. 24 Cyc. 877; *Tucker* v. *Byers,* 57 Ark. 215.

This order of court was not a contract, either express or implied, between the parties, and it did not create the relation of landlord and tenant between them, so that it can be said that the posession of Love was the possession of Kaufman subsequent to January 1, 1902. The chancery court found that Love refused to surrender the possession of the land after that date and held in opposition to the rights and claim of Kaufman; and we think that there is sufficient evidence to sustain that finding. We are of opinion therefore that Kaufman was not in possession of said land through Love as his tenant, but was kept out of the possession and rents of the land.

3. And we are of the opinion that Kaufman was kept out of said rents by reason of said appeal. By the execution of said supersedeas bond the appellants contracted "to pay all rents or damages to the property during the pendency of the appeal, of which the appellee is kept out of possession by the appeal."

The liability incurred by the execution of the bond is fixed by the legal import of its terms, and these should be construed according to the ordinary and reasonable meaning of the language employed. 1 Enc. Pl. & Pr. 1015; 5 Cyc. 752.

The bond should not be held to cover a liability occurring before its execution unless its terms make provision to that effect. But in this case the bond expressly provides for the payment of "all rents of which the appellee is kept out of by reason of the appeal." By virtue of the appeal having been taken to the Supreme Court the case was wholly and absolutely removed to that court. Upon the execution of the supersedeas

bond and the issuance of the supersedeas all the proceedings in the chancery court were wholly suspended and stayed. Elliott on Appellate Procedure, § 541; 2 Cyc. 908; *Harrison* v. *Trader*, 29 Ark. 85; *Miller* v. *Nuckolls*, 76 Ark. 485.

While the supersedeas does not annul or vacate the judgment or decree appealed from, it does prevent the further taking of any step thereunder, and leaves the matters in the condition in which they were when the supersedeas took effect and until the questions involved in the appeal are finally disposed of by the appellate court. 20 Cyc. 1240.

The supersedeas stayed the enforcement of the right of Kaufman to the possession of the land, and it also stayed the enforcement of the recovery for its use and occupation. Under the evidence and finding of the chancellor Love had the possession of the land for the year of 1902, and kept Kaufman out of rents thereof for that year. Kaufman could thereafter have instituted suit or taken legal steps to have recovered for the use or rent of the land for that year. But on May 4, 1903, the supersedeas bond was executed and the supersedeas issued, and Kaufman was thereby stayed from the enforcement of a recovery for the use or rent for that year. It will not do to say that he could have attempted to collect the amount for the use or rent of the land before that date; he had a right also to do this after that date, and he was kept from doing this after that date by reason of the appeal and supersedeas.

Giving to the terms of the bond their full and reasonable effect, it covered the rent of the land for 1902. *Wilson* v. *King*, 59 Ark. 32; *United States Fidelity & Guaranty Co.* v. *Fultz*, 76 Ark. 410; 2 Cyc. 909.

The liability under the bond continued only until the cause was determined and disposed of by the appellate court. 20 Enc. P. & P. 1245; 2 Cyc. 909; Elliott on Appellate Procedure, § 394.

It follows therefore that the appellants were also liable under said bond for the rents of the land for the year of 1903 and until March 7, 1904, when the said appeal was finally disposed of by the Supreme Court. The chancellor found that no damage accrued by reason of the failure to rent the land from January 1, 1904, to March, 1904, when said appeal was disposed of. The property consists of farm land that is rented, not by

the month, but by the year, and probably under the evidence it could have been as readily rented in March for said year as in January. At least, there is no evidence showing any damage on this account, and we cannot say that the finding of the chancellor in this respect is erroneous. There is no evidence showing that any waste was committed on the land during the pendency of the appeal. Any alleged waste may under the testimony have been done after March, 1904, and after the liability under the bond had ceased. This was the finding of the chancellor; and in this conclusion we find no error.

After a full examination of the pleadings and testimony in this case, we do not find that the chancellor has made any error either in the findings of fact made by him or in the conclusions of law at which he arrived.

The decree is accordingly affirmed.

PARAGOULD & MEMPHIS RAILROAD COMPANY v. SMITH.

Opinion delivered January 17, 1910.

1. EVIDENCE—SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE.—An issue may be established by all the facts and circumstances proved in a cause, and the falsity of testimony may be established by evidence of the same character. (Page 227.)
2. PAYMENTS—APPLICATION.—Where there are two accounts between parties, and a payment is made which could be applied to either, the application of such payment is determined by the intention of the parties. (Page 227.)

Appeal from Mississippi Circuit Court, Chickasawba District; *Frank Smith,* Judge; affirmed.

J. H. Bradley and *M. P. Huddleston,* for appellant.

A new trial should be granted where there is no evidence to support the verdict, or where it fails in some material link. The jury will not be allowed to supply such missing link by inference or presumption from other facts unless they be legitimate and fair. 11 Ark. 630; 34 Ark. 632. Whether or not the evidence in a case possesses any probative value is a question of law and not of fact, and the appellate court will set aside a

judgment when the record shows no substantial evidence in support of the verdict. 122 Mo. App. 213.

T. A. Turner and *Taylor & Little,* for appellee.

Where the debtor directs the application of payments, he cannot afterwards divert or change the application without the consent of the creditor. 30 Cyc. 1231-1233; 2 Am. & Eng. Enc. of L. 435; 32 Ark. 665. Under the evidence it would have been unreasonable for the jury to have returned any other verdict.

FRAUENTHAL, J. This was an action instituted by D. A. Smith, who was the plaintiff below, to recover the sum of $2,110 for work done for the defendant. The defendant pleaded payment.

The defendant by written contract employed the plaintiff to clear and grade 187 stations of its right-of-way, and agreed to pay him therefor $10 per station; and later it employed him to make 2,000 ties, for which it agreed to pay 12 cents per tie. It was admitted that the plaintiff had performed all this work. The defendant was engaged in building to its main line of railroad a spur track which extended to a large body of timber land which was owned by the Decatur Egg Case Company, a foreign coroporation with its domicil at Decatur, Indiana. A short time after entering into the above contracts with the defendant, the plaintiff entered into a contract with said Decatur Egg Case Company by which he agreed to do logging for that corporation, and under said contract performed work for it. The two corporations were separate and distinct, but, by arrangements made between them, the Decatur Egg Case Company made payments to the plaintiff for the defendant upon the work done by him for defendant; and it also made payments from time to time to plaintiff for the work done by him for this latter corporation upon said logging contract. The plaintiff admitted that he had received from the defendant through the Decatur Egg Case Company the sum of $1,800. This sum was paid by three drafts. The first two drafts were for $500 each, and were signed by the Decatur Egg Case Company, and made payable to the order of plaintiff, and were drawn on the Decatur Egg Case Company at Decatur, Indiana. In one of the drafts it was written that it was given for cutting right of way, and in the other that it was given for building spur. The third draft was executed for $1,400, and was also signed by the Decatur

Egg Case Company and drawn on the same company. It, however, stated that $800 of the draft was paid on the account of the switch contract, and $600 on the account of the logging contract. A few days after this the Decatur Egg Case Company gave to the plaintiff a draft on the same drawee for $382.80. This draft was made payable to the order of the Crescent Commission Company, and in the draft it stated that it was for feed account of plaintiff, and also stated therein the following: "Charge to timber." This draft was used by plaintiff in paying for a car load of feed stuff which he had purchased from said Crescent Commission Company. It is contended by the defendant that this payment by the above draft for $352.80 was made for the defendant, and should be applied upon the account of the plaintiff with the defendant for clearing said right of way and making said ties. It is contended by the plaintiff that this draft was given to him in payment upon the account and contract which he had with the Decatur Egg Case Company for logging. The sole question involved in this case is: to which of these accounts should this payment be applied? For, if it shall be applied to the account between plaintiff and defendant, it will more than pay the balance of $310, which is the largest amount which the plaintiff, under his admission, can in any event claim to be due to him by the defendant. But if this draft for $352.80 shall be applied upon the account of plaintiff with the Decatur Egg Case Company, then, according to the uncontroverted testimony in the case, the defendant is indebted to the plaintiff in the sum of $310 and interest.

The cause was tried by a jury, which returned a verdict in favor of plaintiff for the sum of $310 and interest. The defendant did not in the lower court, and does not here, complain of any instruction given or refused by the circuit court. So that the sole question to be determined upon this appeal is whether or not there is sufficient evidence to sustain the verdict of the jury.

The plaintiff was performing work for these two corporations under separate contracts. For the plaintiff he was clearing its right of way and making ties; and he was logging for the other corporation. While the Decatur Egg Case Company was making payments upon these two accounts, it was making the payments upon one account for the defendant and charged

such payments to the defendant; and on the other account it made the payments for itself. The two accounts were therefore distinct and separate. The manager of the defendant testified that when the draft for $1,400 was given the plaintiff spoke to him relative to the amount due by him to the Crescent Commission Company for the feed, and that he stated to the plaintiff that when draft was given for the amount of that item it would pay off all due by the defendant to plaintiff, and that plaintiff assented thereto.

It is urged by counsel for defendant that, because this testimony was not denied or contradicted by the direct and express words of the plaintiff in his testimony, the uncontroverted evidence shows that this payment was applied upon the account of defendant. The plaintiff testified in the case before the manager of defendant, and he was not questioned relative to these statements afterwards testified to by said manager; and he was not called in rebuttal. But the plaintiff had a right to rely upon all the facts and circumstances adduced in evidence; and if those facts and circumstances and the effect of his own testimony tended to contradict the testimony of said manager of defendant in regard to the matters referred to in these statements, it was not necessary for the plaintiff to specifically deny them. An issue can be established by all the facts and circumstances proved in a cause, and the falsity of testimony may be established by the same character of evidence.

According to the evidence adduced on the part of the plaintiff, the draft for $1,400 was given in payment upon both accounts; $800 of it upon the account of the plaintiff with the defendant, which was specifically named in the draft as the switch account, and $600 of it upon the account of the Decatur Egg Case Company, which was named in the account and known as the timber account. At the time this draft was given the plaintiff had cleared 180 stations of the right of way for defendant; for that amount of work under the contract defendant was due to plaintiff $1,800. Defendant had prior to that time paid to plaintiff two drafts amounting to $1,000; so that at the time of giving this third draft it owed plaintiff $800; and by this draft it paid to plaintiff that sum. At that time plaintiff had not made any ties; so that when this third draft was given and accepted it owed nothing to plaintiff. The plaintiff testified that accord-

ing to their custom of doing the business the defendant never paid him in advance. Three days after the draft for $1,400 was paid to plaintiff, the draft for $352.80 was given. When this last draft was given, the plaintiff had an account with the Decatur Egg Case Company, which was unsettled; and the account between that corporation and plaintiff is still unsettled; and the plaintiff testified that this latter corporation is now indebted to him in a large amount after the account with it is credited with this $352.80. When this draft for $352.80 was given, the manager of the Decatur Egg Case Company, who executed it, wrote in it that it was for feed and "charge to timber." The contract and account which plaintiff had relative to timber, and which was known and called by the parties as the timber account, was solely with the Decatur Egg Case Company; and this draft, the application of which is in dispute, specifically stated that it should be charged to the timber account, which was the account of the Decatur Egg Case Company with plaintiff.

When there are two separate accounts between parties, and a payment is made which could be applied to either, the application of such payment is determined by the intention of the parties. Without going further into the details of the testimony of the case, we think it sufficient to say that we are of the opinion that there was some substantial evidence showing that the Decatur Egg Case Company and plaintiff intended that this draft for $352.80 should be applied upon the timber account of the plaintiff with the Decatur Egg Case Company.

The judgment is affirmed.

STATE v. CLAY COUNTY.

Opinion delivered January 17, 1910.

1. CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTION.—A constitution must be considered as a whole, and sections relating to the same subject must be read in connection with each other. (Page 232.)

2. QUO WARRANTO—JURISDICTION OF SUPREME COURT.—Section 4, art. 7, Const. 1874, providing that the Supreme Court, in aid of its appellate and supervisory jurisdiction, shall have power to issue the writ of quo warranto, contemplates that such writ shall be issued either in

aid of its appellate jurisdiction upon the merits of a cause or of its supervisory control over inferior courts to compel them to perform their proper functions. (Page 232.)

3. SAME—ORIGINAL JURISDICTION OF SUPREME COURT.—Under section 5, art. 7, Const. 1874, providing that "in the exercise of original jurisdiction the Supreme Court shall have power to issue writs of quo warranto to the circuit judges and chancellors, and to officers of political corporations when the question involved is the legal existence of such corporations," the original jurisdiction of the Supreme Court to issue the writ of quo warranto is confined to the two classes of cases named therein. (Page 233.)

4. SAME—EXISTENCE OF POLITICAL CORPORATION.—An action of quo warranto which seeks to question the authority of the officers of one county to exercise authority over certain territory alleged to belong to an adjoining county is not an action involving the existence of the former county within Const. 1874, art. 7, § 5, authorizing the Supreme Court to issue the writ of quo warranto "to officers of political corporations when the question involved is the legal existence of such corporations." (Page 233.)

Quo warranto; petition dismissed.

Hal L. Norwood, Attorney General, and *Huddleston & Taylor,* for petitioner.

1. Power to issue, hear and determine the writ of quo warranto in the exercise of original jurisdiction is conferred upon this court by sec. 4, art. 7 of the Constitution. If it was the intention to confer upon the Supreme Court power to issue the writs enumerated in this section only in aid of its *appellate* jurisdiction, then the writ of quo warranto should not have been mentioned in said section, it being "in no sense a writ of correction or revision." 59 S. W. 118; 2 Spelling on Injunctions (2 Ed.), § 1773. The circuit court is the proper tribunal in which to apply for the non-prerogative writ of quo warranto, to be used in litigating private rights (secs. 7981-7989, Kirby's Dig.; 27 Ark. 13; 28 *Id.* 451; 81 *Id.* 29); but this does not deprive this court of its original jurisdiction in matters affecting the public. 66 N. W. 239; 35 Wis. 521. The weight of authority is to the effect that the mentioning of the writ of quo warranto in connection with other writs (error, supersedeas, certiorari, etc.) negatives the idea that such writs are only to serve as auxiliaries in the exercise of appellate jurisdiction. 1 Morris (Ia.) 42; 1 Wis. 317; 9 Colo. 248; 66 N. W. 234.

The provisions of the Constitutions of 1861 and of 1874 with regard to the jurisdiction of this court are almost identical; and under the former Coustitution the Confederate Supreme Court had precisely this question squarely presented in the case of *State ex rel.* v. *Williams.* It was there held that the court had jurisdiction of the prerogative writ of quo warranto. That opinion should be of controlling weight here. See also 26 Ark. 282.

2. The Supreme Court has jurisdiction to issue the writ of quo warranto in the case at bar in the exercise of its "supervisory jurisdiction." 12 Ark. 112; 44 *Id.* 221; 13 L. R. A. (N. S.) 768; 63 Pac. 400; 72 Pac. 512; 1 Cranch 371.

3. Original jurisdiction is conferred upon this court by sec. 5, art. 7, of the Constitution. A county is a political corporation (2 Cyc. 341); and the question here involved is the legal existence, in part, of such a corporation. 8 Cyc. 741; Lieber's Hermeneutics, 170; 35 L. R. A. 745; 97 N. W. 385; 28 Ark. 456.

R. H. Dudley and *G. B. Oliver*, for respondents.

1. Under the Constitution of 1836, beginning with the case of Ex parte *Allis,* 12 Ark. 101, and continuing as long as that Constitution was in force, it was repeatedly held that this court had no original jurisdiction except in aid of its supervisory power, and that the terms "appellate jurisdiction" and "supervisory control" are descriptive of two separate and distinct powers, and are not interchangeable. 44 Ark. 221. This was overruled by the decision in *State ex rel.* v. *Williams* (unreported) and in 26 Ark. 282. The framers of the Constitution of 1874 then settled the question by expressly providing (sec. 5, art. 7) the extent to which the Supreme Court shall have original jurisdiction.

2. Power to issue the writ in the exercise of its "supervisory jurisdiction" does not authorize its issuance in the present case, for the reason that this court's supervisory jurisdiction does not extend to courts below the circuit and chancery, from the judgments and decrees of which latter courts alone the right of direct appeal to this court lies. 9 U. S. (3 L. Ed.) 70; 3 Pet. 193; 31 N. W. 434; 52 Pac. 568; 66 Mo. 192; 20 S. W. 21; 18 Ala. 521; 51 *Id.* 42; 55 *Id.* 42; 10 Wheat. 192; 23 So. 524; 37 Ark. 318; 37 *Id.* 386; 39 *Id.* 82; 42 *Id.* 117; 44 *Id.* 221; 50 *Id.* 266; 60 *Id.* 124; 68 *Id.* 555.

3. This court has no inherent jurisdiction. 39 Ark. 82; 11 Cyc. 661b; § 11, art. 7, Const. And, the legal existence of Clay County not being involved, this court has no jurisdiction in the present case under section 5 of article 7. Nor is the writ of *quo warranto* petitioner's proper remedy. 3 Ark. 485; High, Extr. Leg. Rem. 618; 55 Ill. 172; 65 Ind. 492; 69 Ala. 261; 22 Ga. 506; 31 Ia. 432; 55 Tex. 450; 91 Mich. 459; 104 Ind. 344; 55 Ind. 576; Kirby's Dig., § § 7981-7989.

HART, J. This case invokes the original jurisdiction of this court. It is an application by the Attorney General in the nature of an information by the State against the officers of Clay County to test their right to exercise jurisdiction over certain described territory. The petition alleges that said officers and their predecessors in office since April 30, 1895, have unlawfully and wrongfully assumed jurisdiction over said territory, which it is alleged lies without the limits of Clay County, Arkansas, and within the limits of Greene County, Arkansas.

The defendants demurred to the petition.

It is contended by the counsel for the State that the power to issue, hear and determine the writ of *quo warranto* in the exercise of original jurisdiction is conferred upon this court by section 4, article 7, of our present Constitution. They chiefly rely on the case of *State* v. *Williams,* an unreported decision of this court, construing section 2, article 6, of the Constitution of 1861, to sustain their contention.

Section 2 reads as follows: "The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations as may, from time to time, be prescribed by law. It shall have a general superintending control over all inferior and other courts of law and equity. It shall have power to issue writ of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto and other remedial writs in aid of its appellate jurisdiction, and to hear and determine the same."

The court held that the phrase "in aid of its appellate jurisdiction" limited only the words "other remedial writs," and that the Supreme Court had original jurisdiction to issue the writ of quo warranto under the section of the Constitution quoted.

"in aid of its appellate jurisdiction," added thereto the words "and supervisory," and placed them before the clause which gives the court the power to issue certain writs. The section referred to is section 4 of article 7 of the Constitution of 1874, and it reads as follows: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs."

The only other section of the Constitution of 1874, bearing on the question, is section 5, article 7, which reads as follows:

"In the exercise of the original jurisdiction the Supreme Court shall have power to issue writs of quo warranto to the circuit judges and chancellors when created, and to officers of political corporations when the question involved is the legal existence of such corporations."

It is a familiar rule of construction that a Constitution must be considered as a whole, and that sections relating to the same subject must be read in connection with each other. In construing the section in question, this court has uniformly held that appellate jurisdiction only is conferred by section 4, article 7, of the present Constitution, and that the power to issue certain enumerated writs, and to hear and determine the same, is given "in aid of either its appellate jurisdiction upon the merits of a cause, or its supervisory control over inferior courts to compel them to perform their proper functions." The original jurisdiction of the Supreme Court is conferred by section 5, article 7, and is confined strictly to writs of quo warranto in the two classes of cases named therein. This is the effect of our previous decisions construing sections 4 and 5 of article 7 of the Constitution of 1874. Ex parte *Snoddy,* 44 Ark. 211; Ex parte *Batesville & Brinkley Railroad Company,* 39 Ark. 82; *State* v. *Leatherman,* 38 Ark. 81; *Featherstone* v. *Folbre,* 75 Ark. 511; *Carr* v. *State, post* p. 585; *Payne* v. *McCabe,* 37 Ark. 318; *Massey-Herndon Co.* v. *Powell,* 64 Ark. 514.

Therefore, we are of the opinion that the jurisdiction of this court is plainly defined by the Constitution, and that it has no original jurisdiction to issue writs of quo warranto under section 4, article 7.

It is next insisted that such jurisdiction is conferred by section 5, article 7. By that section, original jurisdiction to issue writs of quo warranto is expressly limited to officers of political corporations when the question involved is the legal existence of such corporations.

Does the information state a case within the terms of this clause of the section? We think not. The petition only states that the defendants, as officers of Clay County, have assumed jurisdiction over certain designated territory, which, it is alleged, lies without the limits of Clay County and within the limits of Greene County. It does not question the legal existence of either county. It only questions the right of the officers to exercise the functions of their office in certain designated territory, which, it is alleged, they and their predecessors in office have done since 1895. Hence it may be said that the petition shows affirmatively that the legal existence of the county is not involved.

Section 5, article 7, of the present Constitution, gives this court jurisdiction to issue writs of quo warranto, but prescribes its limits, and we can not extend them beyond the plain and express terms of the Constitution.

We base our opinion on the language of the Constitution itself, which is the source of our jurisdiction, and on former opinions construing the sections under consideration, but we cite the following authorities, which may be read with profit, on the remedies available under the facts as alleged in the petition. High's Extraordinary Legal Remedies (3d Ed.), p. 574, and notes 1 and 2; 2 Spelling on Injunctions and other Extraordinary Remedies (2d Ed.), § 1802, and note 6.

The demurrer to the petition will be sustained; and the application for the writ denied.

ST. LOUIS & NORTH ARKANSAS RAILROAD COMPANY v. BRATTON.

Opinion delivered January 17, 1910.

1. JUDGMENTS—AMENDMENTS AFTER TERM.—While a court may amend the record of a judgment after the term at which it was rendered, so as to cause it to speak the truth, it has no authority in such case to revise a judgment, to correct a judicial mistake or to adjudge a matter or grant relief which might have been, but was not, considered at the time of the trial. (Page 237.)

2. RAILROADS—ENFORCEMENT OF LIEN.—Under Kirby's Digest, § § 6661-3, providing that any person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law shall have a lien for said damage, but that said lien shall not be effectual unless suit shall be brought "within one year after said claim shall have accrued," and that "said lien shall be mentioned in the judgment rendered for the claimant," *held* that where the attention of the court, in rendering a judgment upon a claim against a railroad company for damages to the person, was not called to the matter of mentioning the lien, and the court did not in fact adjudge that plaintiff was entitled to such lien, the judgment for such damages could not at a subsequent term be amended so as to incorporate the lien therein. (Page 238.)

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

W. B. Smith and *J. Merrick Moore,* for appellant.

1. The remedy by *nunc pro tunc* proceeding to correct errors after the lapse of the term is available only to make the record speak the truth, so as to show what was actually done, or what judgment or order was actually rendered. It cannot be used to change or modify a judgment so as to recite something which was not done or ordered, even though it be something that ought to have been done. The court now has no power to vacate, modify or amend a judgment after the term has expired, except for the causes specified in the Civil Code. Kirby's Dig., § § 4431, 4432; 33 Ark. 454; *Id.* 161; 46 Ark. 552; 51 Ark. 231; 9 Ark. 185, 188; 17 Ark. 101-105; 33 Ark. 218; 34 Ark. 291; 55 Ark. 52; 78 Ark. 364; 87 Ark. 439. The only ground recognized by the Code upon which an amendment can be made is "for misprision of the clerk," which is defined to be "a mere omission to preserve of record correctly in all respects the actual decision of the court which in itself was free from error. 102 Wis. 387; Burrill's Law Dict.; Black's Law Dict.; 58 Pac. 940; 3 Cal. 255.

2. If appellee's contention is correct that he was entitled as a matter of right to have the lien mentioned in § 6661, Kirby's Digest mentioned in the judgment, then the failure to so mention it was an error of law which could be remedied by appeal only, and not by *nunc pro tunc* order. 28 So. 640, 641; Freeman on Judgments, 61, § 68; 1 Black on Judgments, § 132; 32 Ark. 154.

U. S. Bratton, for appellee.

The lien provided by the statute became a part of the judgment, just as much as if the judge had specially directed that it should be incorporated therein. Kirby's Dig. § § 6661, 6662, 6663; 77 Ky. 414. The failure to incorporate mention of the lien in the judgment was properly corrected by *nunc pro tunc* order. It was not necessary for the judge to think of, or have in mind, the lien at the time the judgment was entered, since it was a part of the judgment by force of the statute. Moreover, the record was properly amended, under the long recognized right of courts to correct judgments "in order to forward the justice of the case." 9 Ark. 188; 59 Am. Dec. 51, 52; 107 S. W. 736; 1 Col. 454; 15 Enc. Pl. & Pr. 214; 7 Cush. 282; 35 Ark. 278; 136 Fed. 27; 5 S. E. 70; 23 S. W. 1103; 9 Pac. 580. Since by virtue of the statute the judgment became a lien upon the property of appellant, whether recited in the judgment or not, the order changing the record entry does not affect the substantial rights of appellant. Kirby's Dig., § 6148.

FRAUENTHAL, J. This is an appeal from a judgment of the Searcy Circuit Court correcting or amending by *nunc pro tunc* order a former judgment of that court entered at a former term. At the February, 1909, term of the Searcy Circuit Court, the plaintiff below, Benjamin Bratton, administrator, filed his motion for a *nunc pro tunc* order, in which he stated that on January 10, 1906, he filed a complaint against the defendant to recover damages for the wrongful killing of one Benjamin Bratton, Sr., and that on March 16, 1907, said cause was tried in said court, and a verdict returned by the jury in favor of the plaintiff for $2,500. That a judgment was entered upon said verdict at that term of said court, but that by oversight it failed to mention the lien which goes with such a judgment. He asked that the judgment, as entered at said former term of court, "be corrected by a *nunc pro tunc* order, so as to mention the fact that a lien goes with the

judgment as against the property of the defendant which it owned at the time the cause of action accrued." Upon the trial of the original action the jury returned the following verdict: "We, the jury, find for the plaintiff, Benjamin Bratton, administrator of the estate of Benjamin Bratton, Sr., deceased, the sum of twenty-five hundred dollars;" and the following judgment was entered thereon: "It is therefore considered, ordered and adjudged by the court that the plaintiff, Benjamin Bratton, Jr., as the administrator of the estate of Benjamin Bratton, Sr., deceased, have and recover of and from said defendant said sum of twenty-five hundred dollars and all his costs in this suit laid out and expended, and in default of payment let execution go therefor."

The motion for the *nunc pro tunc* order was submitted to the court upon an agreed statement of facts. This statement includes the complaint and answer in the original suit, the verdict of the jury upon the trial of the action, and the former judgment entered therein, and also the following:

"2. That from the record of the case it does not appear that the plaintiff made any request to have granted it the lien mentioned in sections 6661 and 6663 of Kirby's Digest.

"3. It is further agreed that the judge of the circuit court, in accordance with his custom, left the form of the judgment to be drawn by the clerk of the court, intending that said judgment would be drawn to conform with the law and the facts; that his attention was never called to the lien mentioned in the above sections of Kirby's Digest, and that his mind never passed upon it."

The circuit court granted said motion, and entered in full a judgment *nunc pro tunc,* in which it stated in substance that "the judgment being a lien" on the property of the defendant which belonged to it at the time the cause of action upon which the verdict was rendered accrued. From this judgment, thus correcting or amending the judgment entered at the former term of the Searcy Circuit Court, the defendant prosecutes this appeal.

The plaintiff bases his right to the above lien by virtue of section 6661 of Kirby's Digest, which, in substance, provides that every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law shall have a lien for said damage on said railroad and its prop-

erty. And he contends that he is entitled to have said lien mentioned as a matter of right and of course in the judgment for the recovery of the damages by virtue of section 6663 of Kirby's Digest, which provides that "said lien shall be mentioned in the judgment rendered for the claimant in the ordinary suit for the claim, * * * and may be enforced by ordinary levy and sale under final or other process of law or equity." The plaintiff urges that he is entitled to have the former judgment of the court which failed to mention said lien amended in that regard, either because of the clerical misprision of the clerk in entering the judgment, or because the mention of the lien is necessarily and properly a part of the judgment by reason of the fact that he was entitled to it as a matter of course.

The question that is thus presented for determination by this appeal is in what regard and to what extent can a court amend or correct its judgment after the expiration of the term at which the judgment was rendered and entered.

In order to give to the record of a court the utmost sanctity and an absolute verity, the common law declared that no judgment could be amended after the term at which it was rendered. But where the entry through some plain error fails to correspond with the judgment that was actually rendered, the principles of justice obviously require that it should be corrected; and therefore this rule of the common law has been modified in modern practice to that end. The record should speak the truth; and, as was said by Chief Justice COCKRILL in the case of *Hershy* v. *Baer,* 45 Ark. 240, "the power of a circuit court to amend its record so as to cause it to speak the truth is one inherent in the idea of justice." The entry in the record should correspond with the judgment which was actually pronounced, and the court has the power, and it is its duty, even at a subsequent term, to make such changes in the entry as to make it conform to the truth. But where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority, after the expiration of the term, to enlarge or to diminish it in matter of substance or in any matter affecting the merits. Under the guise of an amendment, there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of the trial, or to grant an additional relief which was

not in the contemplation of the court at the time the judgment was rendered. "The authority of a court to amend its record 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." *Malpas* v. *Lowenstine,* 46 Ark. 552; *Cox* v. *Gress,* 51 Ark. 224; *Gregory* v. *Bartlett,* 55 Ark. 30; *Tucker* v. *Hawkins,* 72 Ark. 21; *Liddell* v. *Landau,* 87 Ark. 438; *Bouldin* v. *Jennings,* 92 Ark. 299.

If there was some issue on which the court should have passed and pronounced judgment, but did not actually do so, such omission cannot be supplied by an amendment at a subsequent term of the court. The entry should correspond only with the judgment actually intended and pronounced by the court; and if the entry does not do this because of any clerical mistake, or because some matter actually adjudicated has been inadvertently omitted, then it can be corrected so as to conform to what was actually done. "In regard to the power of amending judgments by supplying omissions, it is necessary not to lose sight of the principle that amendments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. Hence, if anything has been omitted from the judgment which is necessarily or properly a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then the omission may be supplied by an amendment after the term. If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment." 1 Black on Judgments (2 Ed.), § 156; 23 Cyc. 873.

In the case at bar the plaintiff was entitled, upon a recovery of the damages for which he sued, to have a lien upon the property of the defendant, and under certain circumstances of the case to have that lien mentioned in the judgment. But he was not entitled to such lien under any and all circumstances of the case; he was not entitled to the lien in event the suit had not been brought within one year after the claim had accrued. He was therefore not entitled to the lien necessarily and as a matter of course. Section 6662 of Kirby's Digest provides: "The lien mentioned in the preceeding section shall not be ef-

fectual unless suit shall be brought upon the claim * * * within one year after said claim shall have accrued." Before, therefore, a judgment could have been declared for said lien, it must first have been found that the suit was brought within the time specified in the above section. In order to declare and mention said lien in the judgment, it was necessary that the court itself should make a finding and then an adjudication; and if no such finding and adjudication was actually made by the court, the omission can not now be supplied by an amendment of the judgment. For such amendment would not speak the truth, but would speak what should have been done, but was not. Under the agreed testimony in the case, neither before nor at the time of the rendition of the original judgment was the attention of the court called to this lien, and his mind never passed on it. The matter was therefore never actually adjudicated by the court. To make the adjudication and pronounce judgment thereon, it was necessary for the court to judicially investigate the matter. It may be that, from the evidence or the admissions of the parties, the court would have found that the suit was brought within the prescribed time. But the testimony might have supported a different finding; in which event the lien should not have been mentioned in the judgment. It was not within the province of the clerk to determine whether the suit had been brought within the required time. That was a matter for the judicial determination of the court. The court did not make that determination, and therefore did not pronounce the judgment which is now entered in the *nunc pro tunc* order. The mention of the lien was therefore not necessarily and properly a part of said judgment as originally rendered; and after the expiration of the term at which the judgment was pronounced it could not be amended so as to incorporate this matter therein.

We do not intend to decide by this opinion that the right of plaintiff to a lien on the defendant's property is in any manner affected or impaired by the failure to mention it in the judgment. Upon that question we express no opinion. We only decide that under the evidence in this case it was error to sustain the motion of the plaintiff herein to correct by a *nunc pro tunc* order the original judgment in this case as asked for by him.

The judgment is reversed, and the cause is remanded with directions to deny the motion for a *nunc pro tunc* order.

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

Opinion delivered December 20, 1909.

1. CARRIERS—INJURY BY RUNNING OF TRAIN.—Where the evidence tended to prove that plaintiff, a passenger on defendant's train, was injured by a jerk or sudden motion of the train, while it was rounding a curve, the question was properly submitted to the jury whether plaintiff's injury was caused by the running of the train. (Page 242.)
2. SAME—CONTRIBUTORY NEGLIGENCE.—It is not negligence as matter of law for a passenger, in the absence of any rule of the carrier prohibiting it, to pass from one car to another while the train is in motion, but whether he is negligent depends upon the facts and circumstances of each particular case. (Page 242.)
3. SAME—NEGLIGENCE—LIABILITY.—Where a passenger is injured by the negligence of the carrier, without concurring negligence on his part, he is entitled to recover. (Page 243.)
4. SAME—NEGLIGENCE.—Where the evidence tended to prove that a passenger, passing from one car to another while the train was in motion, was injured by a sudden jerk which caused him to fall across a stool negligently left in the aisle of the platform, and to be injured, a finding of negligence on the part of the carrier will not be disturbed. (Page 243.)

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

STATEMENT BY THE COURT.

Appellee was a passenger on appellant's train. He was passing between the coach and smoking car. On the platform between the cars and in the direct line of the passage way there was a little step box or stool about seven or eight inches high. Appellee stepped over this box in passing from one car to the other, and as he did so the train gave a sudden jerk. It was a jerk as if the train was rounding a curve, and appellee's heel struck the box, and he fell backward, hitting his back against the stool, and was injured. Appellee could have moved

the stool out of his way, but, instead of doing so, he stepped over it, when the train jerked, causing him to fall. The train was vestibuled, and the box was a stool used by the train men in assisting the passengers to get on and off the cars.

Appellee sued appellant, predicating his cause of action upon the above facts, and alleging that appellant negligently placed and permitted the stool to remain in the aisle of the platform, and negligently permitted the train to give a violent jerk, throwing and injuring appellee as indicated above.

Appellant denied the material allegations. Appellant's evidence tended to prove that the train was running smoothly, that appellee made complaint to the conductor of a step being across the pathway, that the conductor went and found the step or stool in front of the door about five inches. He moved it back of the door of the vestibule where it should have been placed by the porter. The appellee did not tell the conductor that he was hurt. The Hot Springs special train on which appellee was riding was a solid train all vestibuled. The cars all go together. One car can not roll one way and then the other. They go in a bend, and can't possibly jerk one car and not jerk altogether. The motion of the cars in turning a curve is a swaying motion, but not a sudden lunge. It might cause a person to stagger and lose his balance if unfamiliar with its motion.

The instructions of which appellant complains are as follows:

"3½. If the plaintiff has shown by the preponderance of the evidence that he was injured by the running of defendant's train, then he has made a *prima facie* case of negligence against the defendant. But, if it appears from the evidence introduced by plaintiff that the injury did not result from the negligence of defendant, the *prima facie* case is rebutted.

"2. If you believe from the evidence that the plaintiff, H. B. Pollock, was a passenger on one of defendant's trains between Little Rock and Benton, Arkansas, and, while riding as such passenger and while the train was running, undertook to pass from one car to another, and found a step box or stool in the passageway between said cars, which said step box or stool he attempted to step over, and in doing so he failed to use ordinary care, that is, such care as an ordinarily prudent person would exercise under the circumstances, and was caused to fall

by reason of the motion of the car, and was injured by falling on the step box or stool, then your verdict should be for the defendant, unless you further find from the evidence that the movement of the car which caused him to fall was sudden, unusual and unnecessary in the ordinary operation of the train."

The modification to appellant's prayer number 2 above is shown in capital letters. To this modification appellant objected, and duly excepted to the rulings of the court. The verdict and judgment were for $500.

Appellant duly prosecutes this appeal.

Kinsworthy & Rhoton, and *Chas. Jacobson,* for appellant.

Section 6607, Kirby's Dig., must be strictly construed, and should not be extended beyond the cases where it obviously applies. 70 Ark. 481; 88 Ark. 12; 73 Ark. 548. A passenger who passes from one car to another while train is in motion is guilty of contributory negligence. 47 La. Ann. 1671; 111 Ala. 447; 146 Mass. 205; 81 Me. 84; 151 Mass. 220; 146 Mass. 605.

Wood & Henderson, for appellee.

Instruction No. 3½ was in accordance with section 6773 of Kirby's Dig., and was proper. 65 Ark. 235; 73 Ark. 548; 80 Ark. 19; 81 Ark. 579; 83 Ark. 217; 87 Ark. 308; *Id.* 581; 88 Ark. 204. Appellee was not guilty of contributory negligence in trying to step over the stool. 79 Ark. 137; 78 Ark. 55; 85 Ark. 326.

WOOD, J., (after stating the facts.) There was evidence tending to show that appellee's injury was caused by a sudden jerk, or the swaying motion of appellant's train while it was running and rounding a curve, causing him to strike the stool with his heel and to fall. This warranted submitting the question to the jury as to whether appellee's injury was caused by the running of the train. The instruction was applicable to the facts under section 6773, Kirby's Digest, and repeated decisions of this court. *St. Louis, I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 204, and cases there cited.

It is not negligence as matter of law for a passenger, in the absence of any rule of the carrier prohibiting it, to pass from one car to another while the train is running. *McAfee* v. *Huidekoper,* 34 L. R. A. 720; 3 Thompson on Neg., § 2969. Whether or not a passenger is guilty of negligence in so doing

depends upon the facts and circumstances of each particular case. A passenger who undertakes to pass from one car to another, however, while the train is running, assumes the risk of injury caused by the ordinary movements of the train of good construction and in good repair over a track that is in good condition. In other words, if the company is not negligent in the running of its train, the passenger who undertakes for his own convenience or pleasure to pass from one car to another assumes the ordinary risks incident to so doing. He does not assume any risks of the carrier's negligence; and, if himself free from contributory negligence, he may recover where his injury is caused by the negligence of the carrier. 3 Thompson, Neg., § 2969; *Stewart* v. *Boston & Providence Rd. Co.*, 146 Mass. 605.

Prayer number 2 was correctly modified, so as to submit to the jury the question whether appellee was guilty of contributory negligence under the circumstances detailed in evidence, instead of declaring as matter of law that his conduct was negligence. *Missouri & N. A. R. Co.* v. *Bratton*, 85 Ark. 326; *Scott* v. *St. Louis, I. M. & S. Ry. Co.*, 79 Ark. 137; *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.*, 78 Ark. 55.

There was evidence to warrant the finding that appellant was negligent in leaving the stool or box step in the passage way on the platform between the cars, and that this negligence was the proximate cause of appellee's injury. The evidence was hardly sufficient to show that the appellant was negligent in causing a sudden jerk; but that was not essential to appellee's right to recover, since the evidence was sufficient to sustain the other allegations of negligence, and that the injury was the direct result of such negligence. The motion of the train, whether negligent or not, concurred and co-operated with the negligence in leaving the step in the aisle, which was the efficient and proximate cause of the injury and damage to appellee. At least, the jury have so found on correct instructions and upon sufficient evidence.

The judgment is affirmed.

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

Opinion delivered January 10, 1910.

1. CARRIERS—SEPARATE COACH LAW—CONSTRUCTION.—Kirby's Digest, § § 6622-32, requiring railway companies to provide "equal but separate and sufficient accommodations for the white and African races," does not prohibit a railroad company, after a passenger has been assigned a seat in a car set apart for his race, from subsequently making a new assignment of cars and causing such passenger to move to another car assigned to his race. (Page 249.)
2. SAME—SEPARATE COACH—RIGHT TO EJECT PASSENGER.—A white passenger who, on being ordered to move from a coach assigned to members of the colored race, refuses to obey the directions of the conductor may be forcibly removed therefrom. (Page 249.)
3. SAME—REGULATIONS AS TO SEPARATE COACHES.—Railroad companies may, in the absence of a statute, make reasonable regulations for the separation of the two races, observing the condition of equality of accommodations. (Page 250.)

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

STATEMENT BY THE COURT.

October 30, 1908, appellant filed complaint in the Lonoke Circuit Court against the St. Louis, Iron Mountain & Southern Railway Company, charging that, while he was a passenger on the defendant's train, the conductor "recklessly, maliciously and unlawfully struck and choked said plaintiff," and that the conductor and the porter and the brakeman again assaulted him, beat him upon the head, cursed, choked and threatened to kill him. Damages were asked in the sum of $1,900 actual damages, and $500 punitive damage.

The answer of the defendant denied that the conductor or other employee recklessly, wilfully and maliciously assaulted appellant, and denied that any of them cursed him; alleged that defendant seated himself in a coach designated for colored passengers, and that the conductor requested him to enter a coach for white passengers; that appellant refused to do so, and asserted the intention of remaining in the coach assigned to the colored passengers; that the conductor removed him, using only such force as was necessary. It also claimed that appellant was

drunk and disorderly, and denied that plaintiff was entitled to any damages.

John Bradford took passage on appellee's train at Argenta for Jacksonville, another station not far distant. He took his seat in the "smoker," a car with two compartments. One of these where appellant seated himself was designated for "white" people. Bradford appeared to be under the influence of liquor. Twenty-five or thirty colored passengers boarded the train at Argenta. There was not room in the colored compartment for them, and in a few minutes after the train pulled out from Argenta they went into the compartment of the smoker where appellant and other white passengers were. Immediately thereafter the conductor also went into the compartment where appellant and others were and told the white passengers that he needed the "smoker" for the accommodation of the negroes, and requested the white passengers to go back into the rear car. There was a "deadhead" pullman car where all the white passengers could be seated. All "seemed to go" except appellant. He said he would not give up his seat to a negro, called upon his friends to stand by him, and refused to comply with the request of the conductor. The conductor tried to persuade him to go, but he refused with an oath, telling the conductor that if he wanted him out of there he would have to put him out. The conductor, whose version of the matter the jury accepted, testified as to the manner of appellant's expulsion as follows: "I took my coat off, and took him back to the sleeper. Mr. Bradford ran his hand in his hip pocket, and I grabbed his throat with my left hand and choked him, and he commenced to nod like that, and I took him and led him back like a little man. I laid my hands on his shoulders, and walked behind him. I went back to see that he had a seat; and I seated him in the Pullman, on the right hand side of the car, facing north. I did not strike him with my fist, or kick him. I took him by the throat to protect myself, when he put his hand in his pocket. I thought he was going for a knife or a gun. When I saw him do that, I did take him by the throat; and I did it to resist whatever assault he might make on me. The porter did not kick Bradford. He didn't have his hands on him. The brakeman did not strike him, or beat him, or kick him. He wasn't even in the car."

The conductor further testified as follows: "It is the rule

of the company to seat the colored passengers in the front and to use the rear end for the white passengers. If it becomes necessary in order to accommodate passengers, we go and request the white people to vacate that partition car and take seats in other parts of the train. The rule of the company gives the conductor the right to force white people to go out and let negroes in there while the train is going, if it becomes necessary, even though when they had taken their seats in there it was assigned and designated for white people. We have no rule which requires us to see that no one goes from one car to another, while the same is in motion. We are supposed to keep them from riding on the platform; but it is not particularly dangerous to pass from one car to the other because you are in motion. Under our rule we have a right to move passengers from one car to another, in order to give all passengers a seat, and we can do that while the train is going along. In order to comply with the laws of the State as to separate cars for white and black passengers, we have a right to move the white passengers from a car where they have taken their seats, if it becomes necessary to use that car to seat black passengers. And if they refuse to leave it we have a right to eject them from the coach. There was no sign in this car, but it was usually used as a smoking car for white passengers. At the time I asked the gentlemen to vacate, the auditor had not been around and taken up fare. I don't think he had. I acted under rule 338 and seated the passengers in the sleeper. We can take any one back out of the train and seat them in the Pullman car during the day without extra charge. The train conductor is superior to the Pullman conductor, and has that right. I had control over that car that day. I wasn't authorized to use that car, except when cases arise to use it. It was a deadhead car, and belonged to the Pullman Company."

The rule 338 was read and is as follows: "Should there not be sufficient sitting room in the coaches during the day to accommodate all of the passengers, and should there be a sleeping car attached to the train in which there are vacant seats, the conductor may seat some of the passengers in the sleeping car, noting on his report the number of passengers placed in such car and the stations to and from which they travel. This should not be done when passengers in the sleeping car have retired or

to such an extent as to discommode regular sleeping car passengers."

The conductor continued his testimony as follows: "My understanding of the rule is that whenever it becomes necessary I can change the assignment of passengers from one coach to the other in order to comply with the law. As I understand it, we must provide seats for all passengers; and if I haven't enough room in the colored car for all colored passengers, I can request the other people to vacate that car." There was other testimony tending to corroborate the testimony of the conductor. The above testimony was introduced over appellant's objection. The grounds of his objections are:

1st. That there was error in permitting witness Hunter to testify that it was his duty to eject the white passengers from the smoking compartment of the car assigned and set apart to white passengers while the train was in motion. 2d. That he had the power and right to use the white smoker for colored passengers when the compartment set apart to them was not sufficient to seat them; and, 3d, that he had the right to eject a white passenger from the smoking compartment for white passengers while the train was in motion and after the passenger had paid his fare.

The testimony of appellant tended to show that, on his refusing to leave the car where he was seated, he was violently assaulted and choked by the conductor into insensibility and was severely injured; that the conductor used abusive and profane language towards appellant; that the porter and brakeman also assaulted him. Appellant's testimony was corroborated by other witnesses.

The appellant presented the following prayer:

"7. If you find from the evidence that the plaintiff, John Bradford, took passage on defendant's train, and had a ticket to the place of destination, it was the duty of the conductor to furnish him with a seat, and, when assigned a seat, the conductor would not have a right to eject him from said seat to give it to another passenger; and if you believe from the evidence he was forcibly removed from said seat for the purpose of giving it to another, you are instructed that said ejectment was unlawful, and you should find for the plaintiff."

The court refused to grant the prayer, and appellant duly

excepted. The court gave, among others, the following instructions:

"20. You are instructed that it is the duty of the conductor in charge of a passenger train to assign the passenger to a coach or compartment of the coach to which they belong by virtue of the race to which they belong; and if the passenger refuses to occupy the coach or compartment to which he belongs because of his race, and occupies and insists and persists in occupying a coach or compartment to which he does not belong, because of his race, the conductor has the right to use such force as it is necessary to eject such a passenger from such a coach to which such a passenger does not belong."

The appellant objected to the instructions, and excepted to the ruling of the court in giving them. The verdict and judgment were for appellees. This appeal is duly prosecuted.

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

Appellant being rightfuly in the car, the conductor had no right to eject him by force. 36 Wis. 465. The passenger may resist any attempt to remove him. 66 N. Y. 454; 143 U. S. 73; 67 Fed. 662; 95 Ia. 98. Plaintiff had the right to a seat, and it was the carrier's duty to furnish him one. Ray on Neg., 232-234; 53 Pa. St. 512. It is improper to ask a witness if he used due care, that question being for the jury. 101 Ill. App. 95; 200 Ill. 9; 20 O. Cir. 368. Witnesses should testify to facts, and not conclusions of law or fact. 24 Ark. 251; 13 Ark. 461; 66 Ark. 418; 70 Ark. 423. A brakeman cannot be asked whether certain acts are within the line of his duty. 84 Mo. App. 358; 146 Ind. 430; 13 Neb. 344; 94 Ala. 236; 74 Hun 202; 77 Hun 360; 4 La. Ann. 301.

Kinsworthy & Rhoton, and *Jas. H. Stevenson,* for appellee.

The verdict is sustained by the evidence. 74 Ark. 478. The conductor had the power to change the designation of coaches for the races. Kirby's Dig., § § 6622, 6624, 6627, 6628, 6629; 110 Ga. 771; 104 Ky. 431; 47 S. W. 344; 88 N. C. 542; 55 Pa. St. 205; 5 Mich. 520; 95 U. S. 485; 55 Ill. 187; 85 Tenn. 615; 38 Fed. 226.

WOOD, J., (after stating the facts.) 1. The court in correct instructions presented to the jury the issues of fact as to

whether it became necessary for the conductor in the discharge of his duty to eject appellant from the smoker, and, if so, whether he performed his duty in a lawful manner, *i. e.*, without any unnecessary force, and without any insult or uncalled for humiliation to appellant. The verdict of the jury settles the disputed questions of fact in favor of appellee.

2. The controverted questions of law are presented in the refusal of the court to give appellant's prayer number 7 and in giving appellee's prayer number 20.

Prayer number 7 is predicated upon the theory that when once separate coaches or compartments are assigned respectively to the white and African races, and the passenger has been furnished a seat in the car or compartment set apart for the use of the race to which he belongs, thereafter the officers of the train could not make a new and different assignment of cars for the use of the separate races, and cause the passengers belonging to those races to adjust themselves accordingly. No warrant for such construction can be found in the provisions of the "separate coach law." Secs. 6622 to 6632 inclusive of Kirby's Digest. The purpose of the law was to require railway companies to provide "equal but separate and sufficient accommodations for the white and African races," for their mutual comfort and convenience. The law should be so construed to conserve the welfare of the public, white and colored, who use this mode of travel. If the rigid and narrow construction obtained as set forth in prayer seven, the inevitable consequence would be at times to greatly inconvenience and annoy both races. The case at bar aptly illustrates what might result constantly if the conductor, having supervision of the train and entrusted with the duty of securing as far as practicable the comfort of all the passengers, were not allowed, if the emergency demanded it, to reassign coaches for the different races, and to compel the passengers to take the coaches or compartments thus set apart for their use. Here, for instance, there was ample room for the comfortable seating of both races by the arrangement which the conductor ordered. But if appellant under the law could have retained his seat in the compartment first assigned to white people, and could have compelled the conductor to allow such assignment to stand, it would have resulted in great discomfort to a considerable number of the pas-

sengers of both races. The lawmakers, having required equal but separate and sufficient accommodations for the white and African races, wisely left the matter of when and how the coaches and compartment should be designated and set apart to the good judgment of the companies, the only exaction being that provision should be made for the equal, separate and sufficient accommodation of the races named, and that the companies should compel the passengers to obey the requirements of the law by accepting and using the separate accommodations furnished them. The company has the right to make reasonable rules and regulations as to the times and manner of the designation and assignments of the separate compartments furnished under the law. To these the passengers must conform. It will be observed that the railway companies and the passengers have reciprocal duties and obligations looking to the due enforcement of the provisions of the "separate coach law." Railway companies have the power, independently of any statute, to make reasonable rules for the separation of passengers belonging to different races, observing the conditions of equality of accommodations. Where the statute prescribes all the rules and regulations to be observed, of course, if these are reasonable, they must be observed. But where the statute is silent as to particular rules and regulations, the common-law right of the carrier to make them and have them obeyed remains unimpaired. 9 Current Law, p. 512, § 27; *Ohio Valley Ry. Co.* v. *Lander,* 104 Ky. 431, and authorities cited in brief of counsel in that case for appellant; 2 Hutchinson on Car., § 972, note 28. The court therefore did not err in refusing prayer number 7 and in giving prayer number 20. There were no reversible errors in the rulings of the court upon the admission of evidence. The judgment is therefore affirmed.

FRANKS v. HOLLY GROVE.

Opinion delivered January 10, 1910.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.—Municipal corporations are not liable for the wrongful acts of their officers in enforcing void ordinances.

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

Manning & Emerson, for appellant.

The ordinance was void because in conflict. Sec. 1553, Kirby's Dig. A town cannot pass an ordinance in conflict with the general law of the State. Art. 12, sec. 4, Const. 1874. The city is unquestionably liable for negligence of its officers and agents which results in injury to persons. 90 Minn. 158; 95 N. W. 908; 91 U. S. 540; L. R. 1 H. L. Cas. (N. S.) 93; 2 Cl. & F. 331; L. R. 1 Eng. & Ir. App. 93; 1 Hurl. & N. 439; 11 Ad. & Ell. 223; 37 Eng. L. & Eq. 495; 1 Black, 39; 66 U. S. 52; 2 Black, 590; 4 Wall. 658; 37 N. Y. 568; 45 N. Y. 129; 3 N. Y. 463; 16 N. Y. 158; 36 N. Y. 54; 17 Ill. 143; 25 Ill. 535; 49 Ill. 476; 34 Conn. 1; 9 Ired. 73; 20 Md. 468; 22 Pa. St. 54; *Id.* 388; 24 Wis. 270 and 342; 17 Gratt. 241 and 375; 15 O. St. 476; 12 *Id.* 377; 51 Ala. 139; 202 Ill. 545; 67 N. E. 386; 9 Ia. 461; 1 Kan. 544; 27 La. Ann. 162; 71 Me. 267; 36 Am. R. 308; 50 Md. 138; 131 Mass. 23; 41 Am. R. 185; 5 N. Y. 369; 55 Am. Dec. 347; 41 O. St. 149; 9 Hump. 756; 20 Ga. 635; 19 N. W. 114; 14 Fed. 567; 2 Pac. 685; 16 Kan. 358; 9 S. W. 884; 86 N. E. 757; 106 Minn. 94; 118 N. W. 259; 132 Mo. 287; 111 S. W. 878; 35 Mont. 161; 88 Pac. 789; 81 N. E. 268.

Thomas & Lee, for appellee.

Towns and cities are not liable for the acts or omissions of their officers or agents while acting in their public or governmental capacity. 73 Ark. 447; 34 Ark. 105; 73 Ark. 519; 78 Vt. 104; 56 Vt. 228; 70 Vt. 308; 40 Atl. 829; 61 Ark. 494; 115 Mich. 275; 72 Wis. 289; 61 Wis. 31; 96 N. C. 293; 65 Vt. 247; 27 Ark. 572; 49 Ark. 139; 52 Ark. 84. No such action lies unless given by statute. 9 Mass. 250; 17 Johns. 439; 12 La. 858; 1 Gill. 567; 8 Barb. 645; 21 Cal. 426; 11 N. Y. 392.

WOOD, J. This appeal is to determine whether an incorporated town is liable in damages for the acts of its mayor and marshal in enforcing by unlawful imprisonment a void ordinance of the town making it a misdemeanor for persons fifteen years of age and under to get on or off any moving trains within the corporate limits such persons not being passengers. What these officers did in connection with the arrest, conviction and imprisonment of appellant was in their capacity as public offi-

cers. They acted without malice toward appellant. Although the ordinance was illegal and void as to minors under the age of twelve years, still the appellee is not liable for the acts of its officers in seeking to enforce it, for the reason that the officers were acting in a public and governmental capacity. The functions they performed were of a public, not private, nature. 28 Cyc. 1257. As early as the case of *Trammell* v. *Russellville,* 34 Ark. 105, we held: "For acts done by them in their public capacity, and in discharge of their duties to the public, cities and towns incur no liability to persons who may be injured by them. Neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant of arrest for the violation, nor for that of the marshal in arresting the offender under it, is a town liable to him." And as late as *Collier* v. *Fort Smith,* 73 Ark. 447, we said: "Towns and cities are not answerable for the acts or omissions of their officers or agents while acting for the State or sovereign in public or governmental capacity." See also *Gray* v. *Batesville,* 74 Ark. 519. Whatever may be the rule in other jurisdictions, the above is the established doctrine of this court. It has good reason and authority to sustain it, and we therefore adhere to it. See other authorities cited in appellee's brief.

The judgment therefore is affirmed.

BLUTHENTHAL v. ATKINSON.

Opinion delivered January 10, 1910.

1. LANDLORD AND TENANT—FORFEITURE OF RIGHT TO RENEW LEASE.—Where a contract of lease stipulated that the lessee should have the privilege of renewing the lease upon giving notice for a certain length of time before termination of the lease, the giving of such notice was a condition precedent, upon whose nonperformance the right of renewal of the lease was forfeited. (Page 257.)
2. SAME—FAILURE TO GIVE NOTICE OF RENEWAL OF LEASE.—When a lease stipulated that the lessee might renew it by giving notice of his intention to do so, without designating how the notice should be given, a forfeiture of such right of renewal will not be relieved against in equity on the ground of accident or mistake where the notice was mailed in apt time, but was never delivered to the lessor. (Page 258.)

3. EVIDENCE—PRESUMPTION OF DELIVERY OF LETTER.—Where a letter has been properly mailed, there is a presumption that it was duly received by the person to whom it was addressed, but such presumption may be rebutted. (Page 259.)

4. ESTOPPEL—SILENCE.—Where a lessor in apt time mailed a letter to his lessee, notifying her that he desired to renew his lease, but she never received such letter, the fact that he subsequently met the lessee and, without mentioning the letter, spoke to her about making certain improvements on the property after the original lease should expire, and that she did not mention that she had not received his letter, did not estop her from denying that she had received the letter. (Page 259.)

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

STATEMENT BY THE COURT.

Appellant entered into a lease contract with appellee's intestate on August 1, 1903, for a certain brick store building on Main Street in Pine Bluff, Arkansas, to continue for five years, ending September 1, 1908. This contract provided that the lessee might renew the lease for five years upon the same terms and conditions, "but the said lessee shall give the said lessor sixty days' notice if he so desires to occupy said building."

The provision of sixty days' notice required the lessee to give notice not later than July 1, 1908, in order to be in time. The term of the lease expired. The lessee failed to give the notice, and the appellees demanded possession of the premises, which was refused, and appellees brought this suit to recover same and damages in the sum of $1,050.

Appellant answered, admitting possession, but denying that he held without right. He set up the lease contract between himself and appellee's intestate, and alleged that he had faithfully paid the rent and complied with every requirement of the contract save as to the payment of rent not then due, which he tendered in court.

Appellant also for equitable defense set up "that on June 26, 1908, he wrote a letter to appellee, Mrs. J. C. Atkinson, stamped same with 2-cent postage, and deposited it in the United States mails at Pine Bluff; that in due course of mail the same would have reached and been delivered to appellee on the same afternoon or the morning following, and appellant in writing and mailing said letter honestly believed that same would

be duly delivered; that thereafter appellant met the same appellee on the street, and, under the firm impression that said notice had been received, he advised with appellee concerning certain improvements to be made by him on said building which were not to be begun until after October, 1908, and the appellee at that time did not advise appellant that he had never notified her of his intention to retain possession after September 1, and consequently would have no right to make improvements after that date.

"Appellant paid rent promptly and continued in possession of the property after September 1, 1908, with the intention to retain said property during the additional term, nor was he advised that appellee claimed the contract at an end until after she had refused to accept the rent for the month of September, at which time she first stated that appellant had failed to avail himself of the extension option. Appellant immediately advised appellee that he had given notice of his intention to remain in possession of said property at the time above referred to, and at the same time gave additional notice to her that he would remain in posession under the lease contract, tendering her the moneys due for rentals of the property under said contract, which she declined.

"Appellant states that he honestly intended to remain in possession of said building during said additional term, and intended to give notice of such intention, and that, if said letter so mailed by him to appellant was not received by her in the usual course of mail, it was an unavoidable accident and a surprise to him.

"Appellant further states that he was unable to discover the fact that said letter had not been received by appellee by the use of reasonable diligence, because he says that the envelope in which said notice was mailed bore on its left hand corner a request that the same be returned to appellant, if not delivered within five days, and appellant charges that, notwithstanding said request, the envelope and notice were never returned to him, and, but for unavoidable accident, if the letter had not been delivered, the same should have been returned to appellant; that the appellees, believing that appellant intended to remain in said building for said additional term, did not attempt to lease nor have they leased the same to any other person, and they

have in no wise been damaged on account of a failure to receive such notice, but that, if it be determined that appellees were damaged by failure to receive such notice, he offers and tenders into court all moneys that may be due them for damages as a result of the unavoidable accidents as aforesaid. He prays that the lease be by the court declared to be in force for five years from September 1, 1908, and that, upon the payment of the rental specified therein, he be permitted to occupy said building, under the terms of said lease, and that, inasmuch as this answer raises issues strictly cognizable in a court of equity, he prays that the cause be transferred to the Jefferson Chancery Court for final determination."

The court refused over appellant's objection to transfer the cause to the chancery court. The court instructed the jury that the notice required by the contract must have been actually received by the lessor, that the burden was on appellant to show that he had given the notice, that no particular form of notice was required, nor was it necessary to have same served by an officer; that any communication, verbal or written, actually delivered to plaintiff in due time, would be sufficient.

The court submitted to the jury on the evidence adduced the question as to whether appellees received the notice in due time, and on this subject instructed the jury as follows:

"If you find from a preponderance of the evidence that on the 25th day of June, 1908, the plaintiff was residing in Pine Bluff, Arkansas, and that on that day the defendant wrote a letter to plaintiff notifying her of his intention and desire to claim the benefit of his option and renew the lease for another term of five years, enclosed the same in an envelope, addressed it to plaintiff at the city of Pine Bluff, Arkansas, placed thereon the necessary postage stamps and mailed it to her in said city, then the law presumes that it was delivered to her in due course of time, and the burden is on the plaintiff to show by a preponderance of evidence that she did not receive it."

The court further instructed the jury that: "By the terms of the contract the option was with the defendant to renew the lease or not as he might elect. If he elected to renew it, he was bound to give notice of such intention within the time specified. The plaintiff was not required to do anything in the

matter, and had a right to remain silent regarding it, if she chose."

The court refused prayers by appellant telling the jury in effect that if appellant mailed a letter notifying appellees that he would avail himself of his option to extend the lease under the contract, and that such letter in due course of mail would have reached the lessors before July 1, 1908, this would be sufficient to constitute the giving of the notice required, notwithstanding any testimony on the part of appellees to the effect that such letter and notice were not received.

The court also rejected prayers of appellant seeking to have questions of estoppel and waiver, under the evidence, submitted to the jury. Objections were made and exceptions reserved to the rulings of the court on the declarations of law. There was a verdict in favor of appellees for $1,040.50. Judgment was entered for that sum, and this appeal seeks to reverse the judgment. Other facts stated in opinion.

White & Alexander and *Ben J. Altheimer,* for appellant.

To relieve against mistakes and accidents is one of the principal objects and most important duties of courts of equity. 25 Ark. 373. A letter properly directed and mailed will be presumed to have reached its destination. 111 U. S. 193; 2 H. Blk. 509; 16 M. & W. 124; 1 H. L. Cas. 381; 3 Watts 321; 2 Zabr. 190; 53 Pa. St. 289; 61 N. Y. 362; 105 Mass. 391. Equity will relieve against accidents and mistakes. 59 Am. Rep. 742; 10 Wis. 123; 42 Ind. 212; 69 L. R. A. 833; 29 Vt. 378. Failure to comply with conditions requiring notice of an intention to renew will be relieved against in equity if the party has acted fairly, and no injury was done to the other by failure to give the notice within the time limited. 42 Ind. 212; 12 Abb. Cas. 50; 26 O. Cir. 16. Posting notice in due time, properly directed, is sufficient. 1 Pick. 401; 10 Pet. 574.

Crawford & Hooker, for appellees.

If a lease expressly requires a notice of lessee's intention to renew, such notice must be given. 18 A. & Eng. Ency. Law, p. 692; Story on Eq. Jur., § 105. The notice required was a condition precedent. Bish. Eq., § 175; Jones on Landlord and Tenant, § 342. Notice is knowledge or information. 43 Conn. 53; 81 Ala. 140; 1 So. 773; 131 Cal. 582; 63 Pac. 915; 1 Dak.

387. The lessee must give the notice provided for by the contract. 106 Cal. 220.

WOOD, J., (after stating the facts:) 1. Appellant, lessee, under the contract had a lease of the building as follows:

"For the term of five years from and after the first day of September, 1903, with the privilege on the part of the said lessee to occupy the said building for five years longer upon the same terms and conditions as herein described, but the said lessee shall give the said lessor sixty days' notice if he so desires to occupy said building."

When the five years expired, the lease for that term was at an end. But appellant had the privilege of occupying the building on the same terms and conditions, provided he complied with the condition to give notice. As we construe the contract, this condition as to notice was a condition precedent to another lease upon the same terms and conditions for a period of five years. The language of the stipulation as to the sixty days' notice was such as to make time of the essence of the contract, so far as obtaining a further term of lease for five years is concerned. Until this condition precedent as to notice was complied with, no rights vested in appellant to occupy the premises for another five years under the same terms and conditions that he was then occupying them. A court of equity can not make contracts for parties, and cannot be invoked to compel parties to make contracts. Here there was no contract for an additional term of five years until the notice was given. The forfeiture here, if it be proper to call it such, was not of rights under a contract entered into for another term of five years, and because of a breach of some condition subsequent, but the forfeiture was of the right to continue to occupy the premises for another term of five years because of a failure to comply with a condition precedent. The appellant had no leasehold estate in the premises for a new term of five years, nor the right to have such created, until he had given the notice required by the lease contract. Where the condition must be performed before the estate can commence, it is called a condition precedent; but where the effect of it is either to enlarge or defeat an estate already commenced, it is called a condition subsequent. The former avoids the estate by not permitting it

to vest until literally performed. Taylor on Landlord & Tenant, § 27.

The appellant had the option or privilege, upon complying with the terms of the lease contract as to notice, of a further term of five years. The covenant bound the lessor to grant the lessee the further term upon notice given, but it did not bind the lessee to give the notice. In such case, "if notice is stipulated for, it must be given." "From the nature of a condition," says Mr. Taylor, "it is obvious that equity cannot relieve from the forfeiture of an estate which arises upon a condition precedent unperformed." Taylor, Landlord & Tenant, § 277; 1 Pom., Eq. Jur., § 455.

There is no analogy in the case at bar to cases where equity, for sufficient cause, intervenes to prevent a forfeiture of existing contract for breach of its terms.

The answer contained no allegation that called for the interposition of a court of equity. The chancellor therefore did not err in overruling the motion to transfer. Furthermore, the contract did not require the notice to be given through the mails. Any other method of giving the notice to the lessor would have been sufficient. The accident, so called, of a failure to get the notice to the lessee by letter was not unavoidable. Appellant voluntarily selected this method. He could have avoided the miscarriage of the letter through the mails by not using the mails and by giving the notice some other way.

The attempt to give the notice by letter was not a mistake on the part of appellant. He intended to give it this way, but he knew he could give it orally or by sending notice through a messenger, or officer. He chose the mails. This was not a mistake at all, or, if so, certainly not one that a court of chancery will correct. It was the duty of appellant under the contract to give the lessor notice. Nothing short of the information which the contract specified, communicated in some manner to the lessor, would fulfill the requirements of the law. Appellant, having choice of a number of agencies to make the communication, is responsible if through the agency chosen he fails to make it. The failure in such case is but the failure at last of the one making the selection of methods, and equity can not relieve from the consequences of such failure on the ground of accident or mistake.

The answer, from any viewpoint, did not call for the interposition of a court of chancery.

2. The circuit court having refused to transfer the cause to the chancery court, it stood for trial on the issues presented by the complaint and the answer first filed. These were submitted to the jury upon correct instructions. The evidence on behalf of appellant tended to prove that he attempted to give the notice in the manner set up in the answer that was made the basis of the motion to transfer. After the letter containing the notice was written, it was sealed, stamped with a two-cent postage stamp, directed to Mrs. J. C. Atkinson, and given to appellant's agent to mail. Appellant "paid no further attention to it until he received notice to quit."

The evidence on behalf of the appellees was to the effect that no letter containing notice of appellant's intention to take the premises for the further period of five years was received.

Where a letter has been properly mailed, the law raises a presumption that it was duly received by the person to whom it was addressed, but, as was said by the Supreme Court of the United States in *Rosenthal* v. *Walker*, 111 U. S. 193, "the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty." As was declared by our court in *Planters Ins. Co.* v. *Green*, 72 Ark. 305, "the presumption, in the absence of evidence to the contrary, is that it was received, but this presumption may be rebutted."

The evidence showed conclusively that the letter was not received, but nevertheless the court submitted the question to the jury to determine from all the evidence, instructing them properly as to the presumption of delivery that arises in the usual course of business connected with the proper mailing of a letter and the handling of the same by the officers of the government, and charged the jury that the burden was on the appellees to overcome this presumption by a preponderance of the evidence. The court thus gave appellant the benefit of this presumption of delivery as evidence in the case, and conformed its charge in this respect to the rule announced in the above cases.

There was evidence on behalf of appellant tending to show that some time in July, after he thought the notice had been received by appellees of his intention to occupy for another term

of five years, he met Mrs. Atkinson on the street and "mentioned to her about putting in the front the same as the Grand Leader front" to the store. It would have taken some time to put in this front, and appellant intended to put the improvements in some time in September or October, 1908. He did not say anything about the lease because he thought his letter had reached Mrs. Atkinson. She "did not at that time mention that she had not received the letter."

Upon this evidence appellant predicates error in the refusal of the court to grant his prayers seeking to have the question of waiver and estoppel submitted to the jury. There was nothing in the above testimony to constitute an estoppel against appellees, nor to show that the notice required by the contract was waived. On the contrary, the court correctly instructed the jury that Mrs. Atkinson, under the evidence, was not required to do anything in the matter, and had a right to remain silent regarding it if she chose. If she had done or said anything prior to the time for giving the notice, or after it should have been given, showing that she waived it, the case would have been different. She did not receive any rents after the lease expired, nor did she do or say anything whatever at any time that would show an intention to waive her rights under the lease, nor to estop her from maintaining this suit for the possession of the premises and damages for the unlawful detention thereof.

The judgment is affirmed.

ADAMS v. STATE.

Opinion delivered January 10, 1910.

1. SEDUCTION—IMPEACHMENT OF PROSECUTRIX.—Where the prosecuting witness in a prosecution for seduction testified in her examination in chief that she had never had sexual intercouse with any man except defendant, she may be impeached by proof that she had had intercourse with another since the date of the alleged seduction. (Page 261.)
2. SAME—EVIDENCE—PUTATIVE CHILD.—Where, in a prosecution for seduction, the prosecuting witness claims to have a child by the defendant, it was not error to permit her to testify that the child resembled him. (Page 263.)

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

Ben Cravens, for appellant.

The court erred in refusing to allow appellant to prove acts of sexual intercourse on the part of prosecutrix with witness Abels since the date of seduction, for the purpose of impeaching her credibility. 40 Ark. 487. It was also error to permit the prosecutrix and her mother to testify as to the resemblance of the child to appellant.

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

Proof of acts of unchastity subsequent to the alleged seduction was inadmissible. Wigmore, Ev. (vols. 1 and 5, art. 205); 11 Ala. 68; 34 Ga. 1; 48 Ia. 671; 51 Ia. 467; 55 N. Y. 644. The testimony as to the likeness of the child to its alleged father was proper. 1 Wigmore, Ev., 166; 3 *Id.* 1974-1977. Moreover, appellant is in no position to complain, as he made no effort to get the child before the jury.

BATTLE, J. Will Adams was indicted for seducing Rowena Hamblin, and convicted. He prosecutes an appeal to this court from this conviction.

Rowena Hamblin testified in the trial of the defendant that he, in the month of October, 1908, obtained carnal knowledge of her by virtue of a false promise of marriage made to her by him; and of this intercourse a child was born. In her examination in chief she testified that she never had sexual intercourse with any other man at any time or any where. Defendant offered to prove that Charles Abels had sexual intercourse with her since the last day of November, 1908, which is since the day of seduction, at different times, for the purpose of contradicting her and thereby impeaching her credibility; and the court refused to allow him to do so.

The prosecuting witness was allowed to testify, over the objection of the defendant, that the child resembled him.

In *Butler* v. *State,* 34 Ark. 485, it is said: "In order to avoid an interminable multiplication of issues, it is a settled rule of practice that when a witness is cross-examined on a matter collateral to the issue, he can not, as to his answer, be subsequently contradicted by the party putting the question.

The test of whether a fact inquired of in cross-examination is collateral is this, would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea? This limitation, however, only applies to answers on cross examination. It does not affect answers to the examination in chief. 1 Wharton, Evidence, § 559."

In *McArthur* v. *State,* 59 Ark. 431, "the indictment, in substance, charges that appellant slandered one Pearl Jones by falsely uttering and publishing about her words which in their common acceptation amounted to charge the said Pearl Jones with having committed fornication and adultery with the sons of appellant. On the trial of the case, Pearl Jones was introduced as a witness for the State, and testified that she had never had sexual intercourse with either of defendant's sons or any one else. On cross-examination she was asked if she had not had sexual intercourse with Joe Darr, and concerning other circumstances having no connection with the charge in the indictment. To contradict the prosecutrix, and to show that she was a woman of lax morals, the appellant was allowed to introduce proof to show that she had committed fornication with Joe Darr, and had been guilty of other criminating acts." Mr. Justice RIDDICK, speaking for the court, said: "The general rule is that, when a witness is cross examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question; but this limitation only applies to answers on the cross-examination. It does not affect answers to the examination in chief. Wharton's Crim. Ev. (8th Ed.), § 484; *State* v. *Sargent,* 32 Me. 429. When a party, in his examination in chief, is allowed to inquire about collateral acts, the opposing side will usually be allowed to contradict the witness by evidence showing to the contrary. The prosecuting attorney, after having asked Pearl Jones whether she had had sexual intercourse with either of the sons of defendant, elected to proceed further and to ask her if she ever had sexual intercourse with any man. It was therefore proper to allow defendant to contradict her by evidence to show that she had been guilty of such acts of illicit intercourse, though such evidence could not go in justification of the crime, but at most only to contradict and impeach the witness." *Polk* v. *State,* 40 Ark. 482, 485.

The testimony of Charles Abels, offered to show that he had illicit intercourse with Rowena Hamblin, should have been admitted to contradict or impeach the prosecuting witness.

In *Land* v. *State,* 84 Ark. 199, it was held that in a case of bastardy the child may be exhibited in the trial to show its resemblance to the putative father; and in *State* v. *Horton* (N. C.), 6 Am. State Reports, 613, 617, in a case of seduction, it was held that such a child may be exhibited for the same purpose. This evidence, it seems, should be admissible in both classes of cases for the same reason. The admissibility of the testimony of the witnesses to prove the resemblance of the features of the child to those of the putative father is doubtful. Professor Wigmore discussed this subject in a satisfactory manner, and concluded as follows: "The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is, in the opinion of the trial court, old enough to possess settled features or other corporal indications. It is to be noted that the evidence is relevant, not merely in bastardy proceedings, but also in trying the legitimacy of a child born during marriage, whenever the presumption of legitimacy allows the issue to be raised, as well as occasionally in other proceedings." 1 Wigmore on Evidence, § 166, and notes; 3 *Ib.* § § 1974-1977. We think that such evidence is admissible in cases of seduction. *Wright* v. *Hicks,* 15 Georgia 160, s. c. 60 Am. Dec. 687; *Paulk* v. *State,* 52 Ala. 427. The weight of the evidence should be left to the jury, uninfluenced by any opinion of the court as to the child being old enough to possess settled features or other corporal indications.

Reversed and remanded for new trial.

THARP *v.* BARNETT.

Opinion delivered January 24, 1910.

1. CIRCUIT COURT—APPEAL FROM PROBATE COURT—PROCEDURE.—Kirby's Digest, § 1348, providing that appeals from the probate to the circuit court may be taken by the party aggrieved filing an affidavit and prayer for appeal, the filing of the affidavit is a prerequisite to the granting of an appeal by the probate court. (Page 265.)

2. SAME—DISMISSAL OF APPEAL—COSTS.—Where the circuit court dismissed an appeal from the probate court for want of jurisdiction, it was error to render judgment for costs of the proceeding. (Page 266.)

Appeal from Independence Circuit Court; *Charles Coffin,* Judge; affirmed, except as to costs.

STATEMENT BY THE COURT.

On the 8th of January, 1909, appellee as one of the heirs at law of Mrs. Eliza Deckard, deceased, filed a petition in the probate court of Independence County, alleging certain facts as causes for the removal of appellant as administrator of the estate of Mrs. Deckard, and praying the court to remove him. The court granted the prayer of the petition, making the following record entry of January 8, 1909, towit:

"It is therefore considered, ordered and adjudged by the court that said John T. Tharp be and he is hereby removed as administrator of said estate, and the letters of administration heretofore granted him on said estate be and the same are hereby revoked, set aside and held for naught. It is further ordered that all court costs be adjudged against the estate, and that a certified copy of this order be served upon the said John T. Tharp forthwith. Thereupon the administrator saves his exceptions to the ruling and decision of the court, and asks that the same be noted of record, which is accordingly done, and said administrator then prayed an appeal to the circuit court of Independence County, which is by the court granted upon the filing of the prayer for appeal and bond required by law."

The appellant on February 17, 1909, filed an affidavit which, after reciting certain proceedings of the probate court and its order removing appellant, concluded as follows: "That said John T. Tharp administrator of said estate of Mrs. Deckard, deceased, states on oath that said appeal is taken because he verily believes that he is aggrieved, and is not taken for the purpose of delay or vexation, but that justice may be done." This was signed by appellant and sworn to on the 11th day of February, 1909.

A transcript of the record containing the above recitals was filed in the office of the clerk of the circuit court March 18, 1909. The appellee moved the circuit court to dismiss the appeal, alleging that the court was without jurisdiction to hear

the cause. The court granted the motion, and entered a judgment dismissing the appeal and adjudging costs in the proceedings against the defendant, and the appellants seeks here to reverse that judgment.

Samuel A. Moore, for appellant.

The Constitution and the statutes gave appellant the right to appeal to the circuit court, and that court should have tried the case *de novo*. Const. 1874, art. 7, § § 14, 35; Kirby's Dig., § § 1348, 1351; 27 Ark. 10; 63 Ark. 145; 90 Ark. 219. He has also the right to be heard upon the question of *res judicata*—whether the same subject-matter between the same parties had been heard and decided by the probate court prior to appellee's petition. 74 Ark. 320; 37 Ark. 155; 64 Ark. 1, 6; 75 Ark. 146; 76 Ark. 423.

Oldfield & Cole, for appellee.

An affidavit and prayer for appeal must have been filed before the court could grant an appeal. Kirby's Dig., § 1348. The circuit court acquired no jurisdiction unless a regular and proper order granting an appeal to it had been made. In this case the order, made prior to the filing of affidavit and prayer for appeal, was void. 65 Ark. 419; 21 Ark. 94; 9 Ark. 128; 19 Ark. 647; 11 Ark. 665; 25 Ark. 275; 24 Ark. 282; 4 Ark. 444.

WOOD, J., (after stating the facts.) Appeals are taken from the probate court under the following statute:

"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." Sec. 1348, Kirby's Digest.

Under this statute, the circuit court was without jurisdiction; for the probate court made the order granting the appeal before any affidavit was filed. This was premature. The order recites that "the appeal is granted upon the filing of the prayer for appeal and bond required by law." There is no order of the court granting the appeal after the affidavit was filed. The filing of the affidavit is a prerequisite to the granting of the appeal by the probate court, and the affidavit must be filed before the

order granting the appeal is made. The statute contemplates that the court rendering the judgment shall pass upon the affidavit and make the order granting the appeal. The clerk of the court has no such power. The court could make no final order granting the appeal until the affidavit and prayer for appeal was filed. "The court shall order an appeal upon the filing of such affidavit."

The language of the statute indicates that the prayer for appeal shall be included in the affidavit. At any rate, the affidavit and prayer both must precede the order granting the appeal. The law is analogous to that governing the procedure in appeals from justice to circuit courts and from circuit courts to this court under similtr statutes. See the following cases: *Matthews* v. *Lane,* 65 Ark. 419; *Merrill* v. *Manees,* 19 Ark. 647; *Hanna* v. *Pitman,* 25 Ark. 275; *Crow* v. *Hardage,* 24 Ark. 282; *Bank of State* v. *Hinchcliffe,* 4 Ark. 444; *Moss* v. *Ashbrooks,* 15 Ark. 169; *Johnson* v. *Hodges,* 24 Ark. 597; *Johnson* v. *Duval,* 27 Ark. 599; *Walker* v. *Noll,* 92 Ark. 148.

These cases show that the judgment of the circuit court dismissing the appeal is correct. But, the circuit court being without jurisdiction, it was error to render judgment for costs of the proceeding. *Neal* v. *Peay,* 21 Ark. 94; *Derton* v. *Boyd,* 21 Ark. 265-8; *McKee* v. *Murphy,* 1 Ark. 55, 58; *Morrow* v. *Walker,* 10 Ark. 569.

The judgment is therefore affirmed as to dismissal of appeal and reversed as to the costs.

DALE v. BLAND.

Opinion delivered January 24, 1910.

1. JUDGMENT—RELIEF AGAINST FRAUD OR MISTAKE.—A judgment at law may be vacated or modified for fraud or mistake in its procurement in a proceeding instituted for that purpose in the court in which it was rendered. (Page 269.)
2. INJUNCTION—ADEQUACY OF REMEDY AT LAW.—A judgment at law will not be enjoined for fraud or mistake unless there is no full and adequate remedy at law, either by appeal, certiorari, application to the court which rendered the judgment, or in any other legal and adequate manner. (Page 269.)

Appeal from Prairie Chancery Court, Southern District; *John M. Elliott,* Chancellor; reversed.

STATEMENT BY THE COURT.

The appellee alleges that Ida R. Dale obtained judgment for twenty-five dollars against one Jas. P. Barrett in the justice of the peace court of Prairie County, and had garnishment issued against W. H. Bland & Company; that Barrett filed a schedule, claiming as exempt all indebtedness due him from Bland & Company; that same was allowed and supersedeas issued. That Dale then filed certified copy of that judgment with a justice of the peace in Pulaski County; that both members of the firm of Bland & Company were residents of Prairie County, and in business there; that W. H. Bland, a member of said firm, was served with summons as garnishee, issued by said justice of the peace in Pulaski County, while he was in that county temporarily and for medical attention; that judgment was rendered in said suit against W. H. Bland & Company for $83.44; that said summons and said judgment were obtained through the fraudulent representations of Dale and her agent to the justice of the peace as to the amount of the judgment and costs adjudged by the justice in Prairie County, and as to the residence of W. H. Bland; that, after judgment was obtained in said suit in Pulaski County, Dale sent to Bland & Company a statement showing that said judgment amounted to $68.45, and asking for that amount in full settlement, and that Bland & Company sent to said Ida R. Dale their check for that amount, and indorsed across the face of it, "Settlement in full of claim debt and cost of you against J. P. Barrett;" that said check was accepted and collected; and that Dale then waited until more than thirty days had elapsed since the date of said judgment in the justice court of Pulaski County, and then filed a transcript of said judgment in the circuit court of Pulaski County, and had execution issued and sent to Prairie County to be levied on the property of Bland & Company; that said execution showed the payment of the $68.45, but allowed it as a credit and not in full settlement, and showed a balance due of $14.99 and more costs. The complaint prayed that the temporary restraining order be made perpetual.

The demurrer was as follows:

"First. That the court has no jurisdiction of the subject of this action.

"Second. That the court has no jurisdiction because the amount involved is too small for the court to grant relief prayed.

"Third. That the plaintiff has a full, complete, adequate remedy at law.

"Fourth. That the plaintiff does not state facts sufficient to constitute a cause of action in equity."

The demurrer was overruled. Appellant refused to plead further. The court entered a decree, restraining the sheriff from proceeding under the execution and appellee Dale from collecting the balance claimed by her to be due on the judgment. Appellants seek by this appeal to reverse the decree.

W. T. Tucker, for appellant.

1. The court had no jurisdiction of the subject of the action. Kirby's Dig., § 3986; 48 Ark. 331; Mansfield's Dig., § 2988 *et seq.;* art. 7, § 14, Const. 1874; 34 Ark. 291; 35 Ark. 184; 1 High on Inj., 2d Ed., § § 228, 231; 48 Ark. 136; *Id.* 510; 63 Ark. 323; 82 Ark. 330; 81 Ark. 51; 79 Ark. 289; 58 Ark. 314.

2. The amount involved was too small for the court to grant the relief prayed for. Kirby's Dig., § 3985.

3. The plaintiff had a full, complete and adequate remedy at law. Kirby's Dig., § 3224; 81 Ark. 51; 82 Ark. 331; 58 Ark. 314; 79 Ark. 289. The complaint does not allege that plaintiff was without an adequate remedy at law, hence it does not state a cause of action in equity. 58 Ark. 314.

J. G. & C. B. Thweatt, for appellee.

The judgment in the justice court of Pulaski County was excessive and procured by fraudulent representations of plaintiff. Plaintiff was defeated of his legal remedy of appeal by the fraudulent acts of Dale and her agent in representing a smaller sum as the amount due, and accepting check in full settlement of judgment and costs, thus deceiving him until the thirty days allowed for appeal from a justice to the circuit court had elapsed. The chancery court had jurisdiction. 75 Ark. 425; 33 Ark. 782.

WOOD, J., (after stating the facts.) The appellees do not allege, nor do the facts stated in the complaint show, that they did not have a complete and adequate remedy at law. As was said by us in *Wood* v. *Stewart,* 81 Ark. 51: "Appellee's remedy to vacate or modify the judgment for fraud or mistake in its procurement is complete at law by proceeding instituted for that purpose in the court in which it was rendered." Kirby's Digest, § § 4431, 3224; *Knight* v. *Creswell,* 82 Ark. 330; *Hunton* v. *Euper;* 63 Ark. 323; *Driggs' Bank* v. *Norwood,* 49 Ark. 136.

Unless appellee shows that he has not a full and adequate remedy at law, "either by appeal, certiorari, application to the court itself which rendered the judgment, or in any other legal and adequate manner," it is not entitled to relief by injunction. *Wingfield* v. *McLure,* 48 Ark. 510. See also *Shaul* v. *Duprey,* 48 Ark. 331.

The appellee having a complete and adequate remedy at law for the relief it seeks, the court erred in not sustaining the demurrer.

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

HART, J., dissents.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CVMPANY v. WEATHERLY.

Opinion delivered January 24, 1910.

VENUE—SUFFICIENCY OF PROOF.—Evidence that plaintiff's animals were injured by defendant's train within a few hundred yards of a certain village, which appears upon the map to be several miles distant from the boundaries of the county, is sufficient to justify a finding that the injury occurred within the county of the venue.

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

Kinsworthy & Rhoton, G. D. Henderson and *James H. Stevenson,* for appellant.

1. The presumption of negligence arising from the killing of the stock was clearly overcome by testimony which was in itself consistent and reasonable and not contradicted in any material point. The jury should have been instructed to find for the defendant. 67 Ark. 514; 78 Ark. 234; 89 Ark. 120; 80 Ark. 396.

2. The stock is not shown to have been killed in the county where suit was brought. Proof of the venue is jurisdictional. Kirby's Dig., § 6776; 70 Ark. 346; 72 Ark. 376; 67 Ark. 512.

Smith & Smith, for appellee.

1. There was ample evidence to support the verdict, and it was for the jury to pass upon all of the evidence and its consistency and reasonableness.

2. The complaint alleges that the animals were killed and injured in Crittenden County, near Blanton, and the answer does not deny it. The evidence proves it, and the court can take judicial knowledge of the fact that Blanton is in Crittenden County. 68 Ark. 289; 53 Ark. 48.

HART, J. This is an appeal from a judgment against the defendant for damages for killing two mules and injuring two others belonging to the plaintiff.

The occurrence happened on the 5th day of October, 1908, near Blanton at the first trestle east of it; and the train was running at the rate of 25 or 30 miles per hour. The engineer testified that the train was composed of about 38 freight cars, and that the air brakes were in good condition. The mules got on the track near the road crossing. When the engineer first saw them, they were coming up the dump 300 feet ahead of the engine. They ran east along the track towards a trestle about 800 feet from where they came on the track. When the engineer saw the mules, he immediately applied the emergency brakes and endeavored to stop the train. When the engine struck the mules, its speed had been reduced to three or four miles per hour. The first mule was struck before, and the others after, the trestle was reached. The pilot of the engine was about 60 feet from the west end of the trestle when the train stopped. One of the mules was left on the trestle with its legs down in it. The engineer says that he was keeping a lookout, and that the mules came on the track from his side. He did

not remember that he sounded the stock alarm, but says that he did blow for the crossing.

The fireman says that the mules were grazing when he first saw them. He was ringing the bell for the crossing. He thinks three of the mules came on the track from one side and two from the other. He says they came on the track between the crossing and the trestle, and he called the engineer's attention to the fact when they came on the track. The engineer did not apply the emergency brake until the engine was between the crossing and the trestle. The crossing was about one hundred yards from the trestle. The engine had to be backed off from one of the mules when it stopped.

Other witnesses testified that the stock alarm was not sounded, and that they examined the road bed and found the tracks of the mules on it west of the crossing. The tracks from there to the trestle indicated that the mules were running fast. One of the witnesses said that it was about one-fourth of a mile from where the mules went upon the track to the trestle.

The plaintiff said that the marks on the trestle showed that one of the mules was dragged nearly across it after being struck, and another one or may be two bents. The track was level, and the view of the right of way was unobstructed. Had the engineer sounded the stock alarm when he first saw the mules climbing the dump, he might have scared them off.

The testimony of the engineer and fireman is contradicted as to the place the mules came on the track. The engineer says that it was near the road crossing. The fireman says they got on between the crossing and the trestle, and other witnesses say that the tracks showed that the mules got on the track west of the crossing. The train was running east. The engineer says the mules came on the track three hundred feet ahead of him and ran toward the trestle eight hundred feet distant. Other evidence places the distance at one-fourth of a mile. These and the other circumstances adduced in evidence presented a conflict in the testimony, making the submission of the issue of fact proper, and the verdict of the jury is binding upon us.

It is earnestly insisted by counsel for appellant that there is nothing in the record to show that the injury occurred in the county where the suit was brought. The complaint alleges that

the injury occurred at the town of Blanton in Crittenden County, Arkansas. The answer of appellant does not deny that the mules were killed or injured at or near Blanton in Crittenden County, but only denies that it negligently ran its train of cars against the property of appellee while operating its train through the town of Blanton or elsewhere. This may be taken as an admission of the injury to the property in Crittenden County, and that Blanton was a town on appellant's line of road in that county; and only a denial of the negligence of appellant in injuring them. But, if we are mistaken in this, the plaintiff's witnesses all testified that they lived at Blanton. The map of the State of Arkansas, purporting to contain its counties, townships, sections, cities, towns and villages, distributed for use by appellant, shows that Blanton is a town or village on its line of railroad in Crittenden County, and that its location is several miles distant from the boundaries of the county. It is true that the official postal guide of the United States of December, 1908, being the official monthly supplement to the Postal Guide of July, 1908, shows that Blanton was discontinued as a postoffice, but the very fact that it was reported as discontinued in December is a recognition that it was a postoffice before that time. Hence the case does not come within the rule announced in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Cady*, 67 Ark. 512. The proof shows that the injury occurred within a few hundred yards of Blanton. This was sufficient to warrant the jury in finding that the injury occurred in Crittenden County. *Forehand* v. *State*, 53 Ark. 46; *St. Louis, I. M. & S. Ry. Co.* v. *Magness*, 68 Ark. 289; *Wilder* v. *State*, 29 Ark. 293.

The judgment is therefore affirmed.

HOLBROOK v. NEELY.

Opinion delivered January 24, 1910.

TRIAL—DIRECTING VERDICT.—It was error to direct a verdict for the plaintiff where his case was made out only by his own testimony, which was self-contradictory.

Appeal from Conway Circuit Court; *Hugh Basham*, Judge: reversed

Sellers & Sellers, for appellant.

The peremptory instruction was erroneous. The evidence presented a question for the jury. Brickwood's Sackett's Instructions, § 258; 47 Ill. 510; 37 Ark. 193; 47 *Id.* 567; 57 *Id.* 461; 66 *Id.* 366; 73 *Id.* 561; 76 *Id.* 520; 82 *Id.* 86. Especially in view of the fact that the burden was on the plaintiff, and he had no supporting witness. 88 Ind. 122; 82 Ark. 86; 88 *Id.* 550.

T. G. Malloy and *June P. Wooten,* for appellee.

Although the only evidence presented is that of an interested party, if such evidence is unimpeached, free from suspicion and not inaccurate, the trial judge may properly direct a verdict. 58 Hun. 121; 25 N. Y. 361; 99 N. Y. S. 37; 102 N .Y. 93; 109 N. Y. S. 574; 162 N. Y. 569; 75 Ark. 406; 82 *Id.* 365. This is the rule in replevin cases as in other civil cases. 6 N. D. 94; Cobbey on Replevin, § 1026; 102 Mich. 545; 90 Ind. 563; 53 Ind. 365; 64 Ind. 125; 70 Ind. 1.

HART, J. This is a suit in replevin begun in a justice's court by S. S. Neely against J. E. Holbrook to recover the possession of a black mare. Judgment was rendered in favor of the plaintiff, and the defendant appealed to the circuit court. From a judgment, rendered against him in the circuit court the defendant has duly prosecuted an appeal to this court. The only question raised by the appeal is, did the court err in directing a verdict for the plaintiff?

On the 23d day of July, 1906, G. F. Gilbert executed his note payable on or before October 1, 1906, to J. C. Duncan for $50 for the purchase price of one white mare. The title to the mare was retained until the note should be paid. The note also contained the following indorsement: "Lien note December 10, 1906. Trasferred to S. S. Neely. His property." Neely says that he paid the purchase price of the mare, and that the above described note, which he calls a mortgage, was transferred to him. Gilbert at the time was staying at Neely's house, and knew of the transfer of the note. He was an insurance agent, traveling most of the time, and Neely gave him permission to trade the mare. Gilbert exchanged the white mare for a black mare, and on the 24th day of December, 1906, he turned her over to Neely, who changed the word "white" to "black" in the above described note. Neely kept her in his possession until Gilbert started on his next trip

two or three weeks later. While in Conway County, he became ill, and died about the first of February, 1907. Dr. J. F. Holbrook took possession of the mare on his account for medical services to Gilbert in his last illness. Neely heard of that fact, and sent his son to demand possession of her, which was refused. On the 11th day of February, 1907, he wrote to Dr. Holbrook, in which he said in part: "Your letter of recent date received addressed to S. B. Neely. I wish to say that I have a lien on the mare you have in your possession, which I inclose a copy." Inclosed with the letter was a copy of the note of Gilbert to Duncan and the indorsement thereon above referred to, except that the word "black" was substituted for "white" in the description of the mare. Gilbert stayed at Neely's house except when he was traveling on his insurance business. Neely said he seemed like a father to him, and said that he lent him the horse on the last trip. The above was substantially the testimony of Neely, and was all the evidence adduced at the trial, except that Holbrook testified that he was the defendant and knew Gilbert in his lifetime. Neely was cross-examined at length, and made evasive and contradictory statements as to his title and subsequent possession.

It is now insisted by his counsel that this was due to his ignorance and to the fact that he did not understand the questions propounded to him, and that no fact or circumstance was developed that in any wise affected his credibility. We cannot agree with that contention. The plaintiff must recover on the strength of his own title. It will be remembered that he was his own witness, and that no other evidence was adduced in his behalf. He claimed at the trial that he gave Gilbert permission to trade the white mare for the black one, and that Gilbert turned over to him the black mare on December 24, 1906, in payment of the note for the purchase money of the white mare, which had been transferred to him on December 10, 1906. On February 11, 1907, he wrote the defendant, asserting that he had a lien on the mare. His counsel insist that he called it a lien because he did not understand the difference between having a lien on the mare for the unpaid purchase money and retaining title in the mare until the purchase price was paid. But, when he was questioned about this letter on cross examination, he said:

"Q. If you sent this (referring to the letter) for the pur-

pose of showing Dr. Holbrook what you claim you had, then this was the claim and all of the claim? A. No, sir; she (referring to the mare) had been turned over to me. Q. Why did you not give him a truthful statement in this, rather than send him a letter that would mislead him? A. I just overlooked it, and my brother-in-law prepared this."

His answers to these interrogatories tend to show that he understood at the time he was testifying the difference between having a lien on the mare and having the title to her. Hence the jury might have inferred that he understood the difference when he wrote the letter, and from the letter might have found that he did not have title to the mare; for under these circumstances it cannot be said that no inferences unfavorable to plaintiff's testimony might have been drawn by the jury; and under the rule announced in *Skillern* v. *Baker,* 82 Ark. 86, and *Merchants Fire Insurance Co.* v. *McAdams,* 88 Ark. 550, the cause should have been submitted to the jury.

For the error in directing a verdict for the plaintiff, the judgment is reversed, and the cause remanded for a new trial.

HUNTER v. STATE.

Opinion delivered January 24, 1910.

CRIMINAL LAW—INDICTMENT—ALLEGATION AS TO TIME.—Under Kirby's Digest, § 2234, providing that "the statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before finding the indictment," etc., an indictment is not invalid which charges the commission of the crime at an impossible date in the past.

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

Jones & Price, for appellant.

The allegation in the indictment as to the date of the commission of the crime shows affirmatively that it was not committed within the jurisdiction of the court. The indictment thus fails to meet the requirements of section 2228, Kirby's Dig., and

is therefore insufficient. 165 Ind. 443; 10 Mo. 291; 81 Me. 271; 30 W. Va. 386; 1 Tyler (Vt.) 295; 1 How. (Miss.) 260; 94 Pac. 553; 8 Col. 364.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

The indictment charges no date at all, and is sufficient. 32 Ark. 215; 33 *Id.* 129; 38 *Id.* 524; 45 *Id.* 333; 66 *Id.* 559; 75 *Id.* 574; 92 Ark. 413.

HART, J. Mandy Hunter was indicted in the Perry Circuit Court for the crime of murder in the first degree. He was granted a change of venue to Pulaski County, and was convicted before a jury of murder in the second degree; his punishment being assessed at a term of seven years in the State Penitentiary.

Hunter has duly prosecuted an appeal to this court. The only question raised by the appeal is as to the sufficiency of the indictment. The indictment was returned at the February term, 1905, of the Perry Circuit Court, and the body of it reads as follows:

"The grand jury of Perry County, in the name and by the authority of the State of Arkansas, accuse Mandy Hunter of the crime of murder in the first degree, committed as follows, to-wit: The *aid* Mandy Hunter, in the county and State aforesaid, on the 30th day of July, A. D. 14...., unlawfully, wilfully, feloniously, with malice aforethought, with deliberation and with *premeditation,* did kill and murder one Junior Gilla by then and there shooting him, the said Junior Gilla, with a pistol then and there loaded with gunpowder and leaden ball, and then and *thre* had and held in the hands of him, the said Mandy Hunter, against the peace and dignity of the State of Arkansas."

Section 2234 of Kirby's Digest provides that "the statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense."

In construing this statute, in the cases of *Conrand* v. *State,* 65 Ark. 559, and *Carothers* v. *State,* 75 Ark. 574, the court held that an indictment charging the offense in the past tense was not invalid because it alleged that the crime was committed on a future and impossible date.

In the Conrand case, at p. 563, the court said: "No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of having committed a crime before it was committed. To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant; and did not affect the validity or sufficiency of the indictment or the judgment against him."

In the case of *Grayson* v. *State*, 92 Ark. 413, for the same reason, the court held that the mentioning of no date did not render the indictment invalid. It is earnestly insisted by counsel for defendant that the rule should not obtain in the present case because the indictment accuses the defendant of committing the crime at a date when the court had no jurisdiction of the territory in which it was alleged to have been committed. The indictment uses language that shows that the offense is charged to have been committed before the finding of the indictment. The indictment, also, gives the name of the State and county in which the crime is charged to have been committed, and the court and term thereof at which the indictment was returned. This, when read in connection with our statutes on homicide, is a sufficient allegation that the offense was committed within the territorial jurisdiction of the court, after it became a crime and before the finding of the indictment. It follows, therefore, from the reasoning of the authorities *supra*, that the indictment was valid.

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

LEIFER MANUFACTURING COMPANY *v.* GROSS.

Opinion delivered January 24, 1910.

1. MECHANICS' LIEN—ORIGINAL CONTRACTOR.—Where the owner of land agreed to pay for materials to be furnished for the erection of a building, and such materials were furnished in reliance upon such promise, the material man is not a subcontractor, but is entitled to recover upon an original undertaking. (Page 279.)

2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts will be set aside where it is against the decided preponderance of the evidence. (Page 283.)

3. MECHANICS' LIEN—DELAY IN FURNISHING MATERIALS—DAMAGES.—The measure of damages for failure of a material man to furnish materials for completion of a building within a reasonable time is the rental value of the building during the time the owner was deprived of it by reason of such failure. (Page 284.)

4. SAME—COUNTERCLAIM FOR DEFECTIVE MATERIALS.—In a suit to enforce a mechanics' lien for materials furnished for the erection of a building, the defendant is entitled to recoup the difference between the value of the materials which were actually furnished and the value of the materials contracted for. (Page 284.)

5. SAME—COUNTERCLAIM—BURDEN OF PROOF.—Where the defendant in a suit to enforce a material man's lien seeks to counterclaim damages by reason of the defective quality of such materials, the burden is on him to prove such defects. (Page 285.)

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

Downie, Rouse & Streepey, for appellant.

1. The preponderance of the evidence is to the effect that Gross was a party to the contract, and appellant was not therefore within the statutory requirement as to the giving of ten days' notice as subcontractor. Kirby's Dig., § § 4976 and 4993. The statute should be liberally construed. 30 Ark. 29; 30 *Id.* 569; 49 *Id.* 475; 51 *Id.* 302; 58 *Id.* 7; 84 *Id.* 560.

2. The lien was filed in proper time. 56 Ark. 516.

3. The contract was not within the statute of frauds. 76 Ark. 292.

4. The chancellor's finding being against the preponderance of the evidence, the decree will be reversed. 31 Ark. 85; 41 *Id.* 292; 42 *Id.* 521; 55 *Id.* 112; 75 *Id.* 72.

5. Appellant complied with its contract; and there is no evidence upon which to base an award of damages for appellee. 77 Ark. 150.

Greaves & Martin, for appellees.

1. The evidence shows that appellant was a subcontractor, as defined in section 4993, Kirby's Dig., and that the notice required in § 4976 was not given. This requirement is mandatory. 2 Jones on Liens, § § 1389-1391; 30 Ark. 568; 51 *Id.* 102.

2. The evidence further shows that appellee has sustained damages in excess of the amount sued for.

FRAUENTHAL, J. The plaintiff below, Leifer Manufacturing Company, instituted this suit in the Garland Chancery Court against the defendant, B. Gross, upon an account for materials furnished in the construction of a building in the city of Hot Springs, Arkansas. The account consisted principally of concrete building material or blocks, and amounted in the aggregate to $1,016.20. It is credited with a payment of $200, thus leaving a balance of $816.20, for which amount judgment is sought. It is alleged in the complaint that the materials were furnished upon a contract made with the defendant, who is the owner of the building; and proper allegations are made therein for having a lien declared upon the building in cases where the materials are furnished by those having contracts therefor directly with the owner. The defendant denied that he entered into any contract with the plaintiff whereby the above materials were furnished. He alleged that he had entered into a contract with one L. W. Rose to construct the building for him, and that said Rose was the contractor for the erection thereof; that, if plaintiff furnished any materials for the construction of the building, he furnished them to Rose, the contractor, and not to plaintiff; and he alleged that no notice was served upon him prior to the filing of the alleged mechanics' lien. He also alleged that the plaintiff had unreasonably delayed the furnishing of the materials, and that the materials furnished were defective and of an inferior quality, and that thereby Rose or the defendant was damaged in a sum largely in excess of the amount sued for. He asked that the claim of plaintiff for a mechanics' lien be dismissed.

The chancery court entered a decree dismissing the complaint for want of equity; and the plaintiff prosecutes this appeal from that decree.

The defendant Gross was the owner of a lot in the city of Hot Springs, and had entered into a contract with L. W. Rose, by which said Rose agreed to construct a building for him thereon for the sum of $5,600. The building was constructed of concrete blocks, and the plaintiff furnished the concrete materials set out in its complaint, which were used in the construction of the building. The plaintiff contends that he furnished the materials under a contract made therefor directly with the defend-

ant. The defendant contends that the materials were furnished under a contract therefor made by plaintiff with said Rose, the original contractor, and that plaintiff was only a subcontractor. It is conceded by the plaintiff that he did not give the notice required by section 4976 of Kirby's Digest. That section provides that: "Every person except the original contractor, who may wish to avail himself of the benefit of the provisions of this act, shall give ten days' notice before the filing of the lien, as herein required, to the owner, owners or agents or either of them, that he holds a claim against such building or improvements setting forth the amount and from whom the same is due." Under this provision of the law, before a subcontractor can be entitled to a lien upon the building or improvement for the materials furnished by him in its construction, he must give this notice in the time and manner prescribed by this statute. 27 Cyc. 118; *Schubert* v. *Crowley,* 33 Mo. 564; *Hahn* v. *Dierkes,* 37 Mo. 574; *Faulkner* v. *Bridgett,* 86 S. W. 483.

Section 4993 of Kirby's Digest defines and determines who is an original contractor and who is a subcontractor within the meaning of the mechanics' lien law. That section provides: "All persons furnishing things or doing work provided for by this act shall be considered subcontractors except such persons as have contracts therefor directly with the owner, proprietor, his agent or trustee." If, therefore, the plaintiff furnished the materials to the contractor, Rose, and under a contract therefor made solely with him, then the defendant would not be liable for the materials; and, inasmuch as it is conceded that the above notice of the filing of the lien was not given by the plaintiff, he would not in such event be entitled to a lien on the building. But, on the other hand, if the plaintiff entered into a contract with the defendant to furnish the materials by which the defendant became liable therefor. then he would not be a subcontractor; and in such event would be entitled to recover judgment therefor against defendant, and also to a lien on the building. The question is one chiefly of fact.

The only persons who were present when the agreement was made under which the plaintiff furnished the materials were George Leifer, the president and manager of the plaintiff, and the defendant and said Rose. When the defendant first employed Rose to construct the building, he had determined to con-

struct it of brick. Later he decided to construct it of concrete. The plaintiff's place of business and plant were located at Little Rock, Arkansas, and the defendant Gross, in company with one Shank, in whose opinion as to concrete he seems to have had confidence, visited plaintiff's plant and secured a sample of the concrete, which he took to Hot Springs and had tested. Later, Rose saw the plaintiff's manager, and asked as to the prices of the concrete; and thereafter both Rose and defendant saw the plaintiff's manager, at which time the contract was made for furnishing the materials. The plaintiff understood that the defendant was the owner, and that Rose was the contractor for the construction, of the building.

George Leifer, the plaintiff's manager, testified as follows relative to the contract: "A. In the first place, Mr. Rose came down there and asked the prices on stuff, and then Mr. Gross came over with him and made a bargain for the stuff for the house at a certain price. Then there were some extras afterwards that were put on the list. So we shipped the stuff direct to Mr. Gross, just as we understood it was to be. * * * Q. Why was it you shipped them to Mr. Gross, and not to Mr. Rose? A. Because he did all the talking. When he came back, he said that we should ship the stuff over there to him, and he would see that it was paid. That's the reason we shipped to Mr. Gross. * * * A. Mr. Gross said for us to ship the stuff, and he would pay if Rose didn't. So I shipped the stuff direct to Gross, and looked to him for payment."

He further testified that he made the contract with defendant Gross, and furnished the materials solely upon his credit and his promise to pay therefor.

L. W. Rose testified as follows:

"Q. When you and Mr. Gross came over here, was there any contract made by either you or him for the materials? A. Nothing more than Mr. Gross told Mr. Leifer, when he selected the blocks, 'You send the blocks over.' I did not say a word while I was over here to Mr. Leifer later in regard to the business. Mr. Gross did the talking. Q. What contract was made at that time? A. He just told him to send the blocks to my order, and he said, 'If Rose don't pay for them, I will.' * * * A. He came over with me and selected the blocks. He said, 'If Rose don't pay for them, I will.' I never said a word to Mr. Leifer any more about the price."

The defendant Gross testified that he only selected the kind and color of concrete blocks which he wanted put in the building, and made no contract or agreement of any kind therefor with the plaintiff. He further testified as follows: "Q. Now, in regard to this contract, Mr. Gross, isn't it a fact that you directed the Leifer Manufacturing Company to ship those different blocks in a certain manner; to ship them at a certain time; and that you made a statement to Mr. Leifer that if Mr. Rose didn't pay the bill that you would pay it? A. It certainly is not a fact that I made any contract with Mr. Leifer for anything. Q. Now, that isn't the question. I asked you if you made that statement to Mr. Leifer that if Mr. Rose made a contract and failed to pay for those building blocks you would pay for them? A. I don't remember that I said that. Q. You don't remember that you didn't? A. I don't think that I did say it. Q. Well, you wouldn't swear to it, would you? A. I can swear to it to the best of my recollection that I didn't say it."

The plaintiff shipped the materials at different times by freight from Little Rock to Hot Springs; and in all the bills of lading the defendant, Gross, is named as the consignee. In its books the plaintiff entered the account for the materials against the defendant, Gross; and its manager testified that the materials were furnished upon the credit of defendant, and his promise to pay therefor. We do not think it necessary to further detail the facts and circumstances adduced in evidence in this case. We have carefully examined the testimony, and we are of the opinion that the decided preponderance of the evidence establishes the fact that the contract under which the plaintiff furnished the materials was made between the plaintiff and defendant, Gross, and that the plaintiff was induced to furnish the materials solely upon the agreement and promise of defendant to pay for them if Rose did not. According to the whole transaction, credit was actually given to defendant, and the indebtedness for the materials was against defendant; and, as to the plaintiff. Gross became originally and not collaterally obligated to pay therefor. The agreement did not fall within the statute of frauds. It was solely upon the agreement and promise made by the defendant that the plaintiff furnished the materials. It was not a promise to pay the debt of another, but a promise to pay for the

materials which were for the defendant's benefit, and which would not have been furnished had he not agreed to pay therefor; and thus the account became the defendant's own debt. Although Rose was the contractor to construct the building, nevertheless, if defendant made the promise to plaintiff to pay for the materials, and, relying solely on that promise, the plaintiff furnished thereafter the materials, the defendant would be liable therefor upon an original undertaking. 20 Cyc. 182; 20 Am. & Eng. Enc. Law (2 ed.) 448; *Brown* v. *Harrell,* 40 Ark. 429; *McTighe* v. *Herman,* 42 Ark. 285.

The facts in the case of *Long* v. *McDaniel,* 76 Ark. 292, are quite similar to the facts in this case. In that case the tenant of the owner of a building made certain repairs therein at his own expense. The owner told the material man to furnish the material, and if the tenant did not pay for it he would. Upon said promise the material man furnished the material. In that case this court held that the material man was induced to order and furnish the material by the promise of the owner that he would see him paid, and that the promise was an original undertaking on the part of the owner, making him liable for the material. In the case at bar we think that the facts equally, if not more fully, establish the liability of the defendant by virtue of the promise which we find by the decided weight of the evidence he made to the plaintiff. We are of the opinion therefore that the finding of the chancellor herein is against the decided preponderance of the evidence. In such event it has been uniformly held by this court that such finding 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; *George* v. *Norwood,* 77 Ark. 216; *Carr* v. *Fair,* 92 Ark. 359.

We are also of the opinion that it is established by the preponderance of the evidence that the plaintiff furnished all the materials set out in his account sued on and at the prices therein named; that the contract therefor was made with the defendant, and that the materials were shipped to defendant and used in the construction of his building; and that plaintiff filed its lien within the time provided by law.

It is contended by counsel for defendant that the plaintiff, by reason of its failure to perform its contract, is liable for dam-

ages far in excess of the amount for which it sues, and on this account its complaint should be dismissed for the want of equity. It is urged by defendant that the plaintiff delayed an unreasonable time after the execution of the contract to furnish the concrete blocks, or materials, and that on this account damages were incurred to the amount of $300 to $400. It was claimed that this damage arose from the idleness of laborers who had to be retained during the delay, and the damage to the work then done. But the witness making this statement of the damage on account of the delay in shipping the materials named the amount as about $300 or $400, and as a general estimate. He did not state the number of laborers that were detained thereby from labor, or any other fact from which it could be definitely said that any damage was actually incurred by the alleged delay. The statement of the witness as to this alleged damage was rather given in the nature of a guess than as definite and certain testimony as to the nature and amount of such damage. And this was the only witness who testified relative to this element of the damages. But, furthermore, this is not the true measure of the damages in event of such delay. "The measure of damages for failure of a material man to furnish material for completion of a building within a reasonable time is the rental value of the building during the time the owner was deprived of it by reason of such failure." *Long* v. *Chas. T. Abeles & Co.*, 77 Ark. 150; *Hooks Smelting Co.* v. *Planters' Compress Co.*, 72 Ark. 286.

In the case at bar there was no evidence relative to the rental value of the building or the length of the delay, and therefore no competent evidence upon which to sustain any damages for said alleged delay in furnishing the materials.

It is urged by the defendant that the concrete materials furnished by the plaintiff were defective, and were not of the quality that was agreed upon, and by reason thereof damages were incurred to the amount of from $800 to $900. But we do not think that the evidence as to these damages, growing out of the alleged defective materials, is sufficiently definite and certain to ascertain the amount thereof. In fact, there is no competent evidence in the record showing these damages and the amount thereof. There is no testimony showing the extent of this defective material, or the number of defective blocks, or the cost of

removing the alleged defective blocks of concrete and of replacing same. There is no testimony showing the difference between the value of the materials as actually furnished and the value of such materials which should have been furnished under the contract. There is no competent testimony adduced in the case by which the amount of this alleged damage can be measured and determined.

Where it is claimed that a building has been defectively constructed, evidence is admissible of the specific defects; and the cost of removing defective materials and replacing same may be shown. 2 Joyce on Damages, § 1390; *Healey* v. *Bulkley,* 10 N. Y. Supp. 702. And where the materials furnished are of a character defective or inferior to that contracted for, there may, as a general rule, be a recovery of damages of the difference between the value of the materials which are actually furnished and the value which such materials would have had if they had been of the character contracted for. 2 Joyce on Damages, § 1389; *Twitty* v. *McGuire,* 7 N. C. 501; *Laraway* v. *Perkins,* 10 N. Y. 371; 6 Cyc. 113.

In the case at bar the only witness who testified to the amount of these alleged damages was F. J. W. Hart; and he stated that his estimates were only approximations. He testified that he had not made a close examination of the house, and that he was unable to say what the damages were with any accuracy. He did not give any competent testimony as to the extent or amount of these alleged damages. And the proof of these damages is not made by any witness in the case.

On the other hand, it appears from the evidence of the contractor, Rose, that it was understood and agreed that the plaintiff should be notified if any of the materials was defective, and should have the right and opportunity to replace the same with proper material. This witness testified that whenever the plaintiff was notified that any of the materials was defective it promptly replaced same with proper material.

After a careful examination of the testimony in this case, we are of the opinion that there is no competent and satisfactory evidence to sustain any of the allegations of defendant as to the damages claimed by him; and the burden was on the defendant to prove such damages.

The plaintiff is therefore entitled to recover of defendant the amount sued for and to have a lien therefor declared on said building.

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

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

Opinion delivered January 24, 1910.

1. CARRIERS—DUTY AS TO STATION AND GROUNDS.—As a general rule, railroad companies are bound to keep in safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, including station grounds reasonably near to the platform where passengers about to enter or debark from the cars would be likely to go. (Page 289.)
2. SAME—DUTY OF LESSEE OF RAILROAD.—The duty of maintaining the station and grounds adjacent thereto in a safe condition rests upon the lessee of a railroad to the same extent that it devolved upon the lessor before the lease was made. (Page 289.)
3. SAME—DUTY TO PROTECT PASSENGERS.—The fact that a passage way on the right-of-way of a railroad company was constructed by town authorities does not absolve the railroad company from its duty to keep the approaches to its premises in a safe condition. (Page 289.)
4. EVIDENCE—WHEN SECONDARY EVIDENCE ADMISSIBLE.—The rule that secondary evidence is inadmissible until proof is made that the primary evidence is not obtainable does not apply where the secondary evidence relates to a collateral matter, and does not form the basis of the cause of action. (Page 290.)

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

W. F. Evans and *B. R. Davidson,* for appellant.

1. The copy of the deed from Kansas & Texas Coal Company to Little Rock & Texas Railway Company was inadmissible because (a) no foundation was laid for its introduction—no showing of effort to obtain the original deed, nor why the original was not produced. Kirby's Dig. § § 756-757; 76 Ark. 400; *Id.* 461; 77 Ark. 244. (b) The blue print attached to the original

deed showing the right-of-way conveyed, and an essential part of the description, was not copied. (c) It was error to permit appellee's attorney to state to the jury when he read the deed, himself not being under oath, that the section 13 referred to therein embraced the lands in controversy. 111 Mich. 663.

2. Appellant was operating the road under a lease. The coal pit was excavated and the embankment was erected by the Kansas & Texas Coal Company years before. The lessee is not responsible for the improper construction of a permanent structure of this character. 59 Ark. 312; 11 Am. & Eng. R. Cas., 458; 31 Atl. 637; 51 S. E. 699.

3. Appellant laid no claim to the land outside of the embankment, it was unnecessary for the operation of the road, and appellant was not required to go on lands owned by the lessor and fill pits that may have been dug by the lessor, even if the lands had been shown to belong to it. But for more than twenty years no ownership had been exercised over the land, either by the lessor or lessee. 70 Ark. 389; 69 Ark. 104; 77 Ark. 387; 90 Ark. 178.

4. If it be true that appellee was allowed as a licensee to walk near the railroad track, there was, nevertheless, a walk sufficiently wide and perfectly safe provided for that purpose. If he voluntarily wandered out into an unsafe place, the appellant is not liable for resultant injuries. 2 N. H. 392; 86 Fed. 297; 27 Atl. 464; 53 N. E. 799; 51 N. E. 521; 14 Am. Rep. 686; 5 *Id.* 295; 48 Am. Rep. 211; 56 Am. Rep. 241. As a licensee, appellant owed him no duty except not to wantonly injure him. 7 Fed. 78; 70 Ark. 389.

John W. Goolsby and *Mechem & Mechem,* for appellee.

1. As a rule, railroad companies are bound to keep in a safe condition all portions of their platforms and the approaches thereto, as also all portions of their station grounds reasonably near to the platform, where passengers or those who have purchased tickets with a view to take passage on the cars, or to debark therefrom, would naturally or ordinarily be likely to go. 46 Ark 182.

2. The copy of the deed was admitted to show the width of the right-of-way and not to show title. It was not necessary to lay a foundation for its introduction. 23 Am. Dec. 140; 4 Cranch, 398.

McCULLOCH, C. J. Appellee sues to recover damages resulting from personal injuries received by falling into an unprotected hole or pit in one of the approaches to the railroad station of appellant at the town of Huntington, Arkansas. He recovered a verdict for damages, and appellant has brought the case here for review.

It is alleged in the complaint that appellant, for several years prior to the time appellee was injured, negligently permitted a large and deep hole or excavation with perpendicular sides to remain open and unprotected on its right-of-way in close proximity to the principal approach to the station at Huntington; that said approach was along and over the right-of-way, and was then being used, and had for several years been used, by the traveling public, with the knowledge and consent of appellant, in going to and from the station; that appellee was unacquainted with the approach and hole, and that in debarking from a train and going from the station in the night time he followed the lead of other passengers along the approach and, without negligence, stepped or fell into the hole, and was injured. Appellant in its answer denied all the allegations of the complaint, and pleaded that appellee's injury resulted from his own negligence.

The evidence adduced by appellee was sufficient to establish the following state of facts: At Huntington, Arkansas, there is a passage way or approach along the railroad right-of-way parallel with the tracks, running from one of the principal streets to the railroad station. This was openly and generally used by passengers going to and from the station, and had been so used for many years. The tracks and approach were on a high dump. There had originally been a spur track built by a coal mining company from the main track of the railroad to a coal mine; but the mining company had many years before abandoned the track, and a part of it had been used by the railroad company as a spur track, running parallel with the main track. The approach runs along between the spur track and edge of the dump. The hole was made by the mining company, being called a strip pit, and is fifty to one hundred feet wide, and twelve to twenty feet deep, running parallel with the tracks. It is about seventy-five feet from the station and twelve feet from the edge of the track—the approach or passage way running between. The hole was un-

protected, and the side next to the approach was perpendicular. On the night in question, appellee debarked from the passenger train, and started, with other passengers, to go along the passage way to reach the street. It was dark, and he stepped to one side in order to let a man pass who was coming up behind him with a lantern, and in doing so he fell into the pit and sustained personal injury. The evidence was sufficient to warrant a verdict in appellee's favor.

This court has stated the law on this subject to be as follows: "As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on the cars, or to debark from them, would naturally or ordinarily be likely to go." *Texas & St. Louis Ry. Co.* v. *Orr,* 46 Ark. 182. See also *St. Louis, I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561.

Appellant was a lessee, operating a leased railroad, and the pit was dug during the holding of its lessor; but this does not affect the question of its liability for negligent failure to exercise care to protect its patrons and passengers and others who have a right to come upon its premises. Elliott on Railroads, § 471; 3 *Id.* § 1134. This duty rests upon the operating lessee of a railroad independent of any statute; but it is clearly the policy of our statutes to impose upon such a lessee all the duties imposed on the proprietor. *St. Louis & S. F. Rd. Co.* v. *Hale,* 82 Ark. 175.

Appellant relies on *Fordyce* v. *Russell,* 59 Ark. 312, and like cases, holding that, in order to hold a railroad corporation liable for damages to adjoining lands resulting from a nuisance created by its predecessor, it must be shown that the last company had done some affirmative act adopting the nuisance, and that the mere failure to remove the nuisance does not create liability. This doctrine cannot, however, be invoked to relieve a railroad company from its duty to protect the public, and particularly its patrons and passengers. Even if appellant had no right to fill the abandoned pit on the property of the mining company, it should have protected the passage way by a fence or railing at the place

where it abutted on the pit, so as to guard travelers from the danger. At least, if the exercise of care for the safety of travelers required it, then appellant should have done that, and the jury were warranted in finding that it was negligence not to do so.

There was some evidence to the effect that the town authorities constructed the passage way; but it was on the railroad right-of-way, and that did not absolve the railroad company from its duty to exercise ordinary care in freeing from danger the passage way which was an approach, on its own premises, to the station, and was habitually used by its patrons in passing to and from the station.

The question of contributory negligence was properly submitted to the jury, and the question was one of fact for the jury to decide whether or not appellee was guilty of negligence under the circumstances described.

Appellee was allowed, over appellant's objection, to introduce in evidence a certified copy of a certain deed to the Little Rock & Texas Railway Company, appellant's lessor. This was done to show the width of the right-of-way, and objection was made on the ground that no foundation was laid for the introduction of the record by first showing why the original deed could not be produced. The deed related to a collateral matter, and did not form the basis of the cause of action, and therefore its introduction did not fall within the rule that secondary evidence should be excluded unless proof is made that the primary evidence was not obtainable. 17 Cyc. 469.

The instructions of the court were in accord with the law as here announced, and we find no error in giving instructions or in the refusal of those requested by appellant.

Affirmed.

SHINN v. STATE.

Opinion delivered January 3, 1910.

1. CONTINUANCES—ABSENT WITNESS.—Error cannot be assigned in the overruling of a motion for continuance on account of the absence of a witness if the motion fails to state where the witness resides or what is expected to be proved by him. (Page 292.)

2. CRIMINAL LAW—RETURN OF INDICTMENT.—The objection that the record in a criminal case does not show that the indictment was returned into court by the grand jury cannot be raised on appeal for the first time. (Page 293.)

Appeal from Madison Circuit Court; *Joseph S. Maples,* Judge; affirmed.

J. P. Fancher, for appellant.

1. Appellant having had process issued for the attendance of his witnesses, and used due diligence to procure the same, it was error to overrule his motion for a continuance. 60 Ark. 564; 62 Ark. 286; 71 Ark. 180.

2. There is no evidence in the record to show that the indictment was returned in open court by the grand jury. The clerk's indorsement, "Filed in open court," etc., is not sufficient to establish that fact. 19 Ark. 178; 33 Ark. 815; 31 Ark. 427; 54 Ark. 489; 22 Cyc. 210, 212.

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

1. The motion for continuance was properly overruled. It names no witness who will testify to any given state of facts; does not show that Barnes was within the jurisdiction of the court, or would be at a succeeding term; and no diligence is shown. Mere allegation of diligence is not sufficient. It must be proved. 71 Ark. 62; 74 Ark. 444; 19 Ark. 590; 22 Ark. 164; 34 Ark. 720; 40 Ark. 114.

2. There is evidence in the record from which it may be determined that the indictment was returned in open court in the manner provided by law; but, if not, the record could have been corrected, or the indictment set aside, on motion in the lower court, and appellant will not be heard to complain for the first time here of that omission. Kirby's Dig. § § 2279, 1233; 19 Ark. 186; 54 Ark. 492; 28 Ark. 411; 33 Ark. 183; 40 Ark. 488; 52 Ark. 275; 73 Ark. 32; 12 Ark. 630; 13 Ark. 96; 29 Ark. 165; 42 Ark. 44; 84 Ark. 136; 68 Ark. 75.

WOOD, J. The appellant was convicted of the crime of libel. The indictment charged that appellant, being the publisher of a newspaper, "unlawfully, maliciously and falsely did publish as true the following false, libelous and defamatory article in words as follows:

"We notice that the boodler, Claude Fuller, of Eureka Springs, is bobbing up again as a prospective candidate for the Arkansas Legislature. No doubt, Claudie would like to work his graft on the people again, but the voters of Madison and Carroll counties are 'onto' his game, and will vote for him to remain at home and work his rabbit's foot on Eureka."

The allegations further were that "said article as published aforesaid by the said E. F. Shinn, publisher as aforesaid, of and concerning the said Claude Fuller, as aforesaid, calling him by the name "the boodler," and by stating that "no doubt, Claudie would like to work his graft on the people again," and thereby charging him with being a boodler and grafting, is false and defamatory and libelous on the said Claude Fuller, and impeaches the honesty, veracity and reputation of said Claude Fuller, and thereby exposes him to public hatred, contempt and ridicule, against the peace and dignity of the State of Arkansas."

The indictment was signed D. B. Horsley, prosecuting attorney, Fourth Judicial Circuit of Arkansas, and was indorsed: "No. 3, Libel, State of Arkansas v. E. F. Shinn, a true bill, R. E. L. Graham, foreman of the grand jury. Filed in open court this the 8th day of September, A. D. 1909. S. G. Parsley, Clerk."

Appellant in a motion for continuance sets up substantially that if the cause was continued he would be able to procure the attendance of witnesses at the next term of the court who would furnish evidence of the truth of some or all of the charges made by him against Fuller in his paper, but he names only one witness whose attendance he expected to procure, towit, one C. M. Barnes. The motion, however, does not set up the particular facts that he expected Barnes to establish. The motion states that "he can prove by Barnes the truthfulness of some of the charges." The motion states that appellant "thought that Barnes resided at Eureka Springs, Ark.," and that appellant had a subpoena issued directed to the sheriff of Carroll County, but that such subpoena had been returned not served, for the reason that Barnes was not to be found in Carroll County. The motion does not allege where Barnes resided, does not show that he was within the jurisdiction of the court. Appellant's motion was not sufficient to warrant a continuance on account of the absence of

the witness Barnes. He may have been a non-resident, for aught the motion reveals to the contrary. It was not enough for appellant to allege due diligence. He should have stated the facts, and have left the court to conclude whether he was diligent. He should have given the names of his witnesses, alleged the specific facts he expected to prove by them, and shown where they resided, so that the court might see whether their attendance was necessary, and whether it was possible to procure same by the next term. Error cannot be predicated upon the overruling of a motion that was so indefinite as the one under consideration. *Puckett* v. *State,* 71 Ark. 62; *Allison* v. *State,* 74 Ark. 444; *Clampett* v. *State,* 91 Ark. 567.

The court did not abuse its discretion in overruling the motion for continuance. *Golden* v. *State,* 19 Ark. 590; *Stillwell* v. *Badgett,* 22 Ark. 164; *Edmonds* v. *State,* 34 Ark. 720; *Watts* v. *Cohn,* 40 Ark. 114.

The record does not show, in specific terms, that the indictment was returned or brought into court by the grand jury. It is essential, of course, to the jurisdiction of the court that the grand jury should return the indictment into court, and the record is the only memorandum of that fact. Therefore, where the objection is seasonably made, if the fact does not exist, or if the record fails to show such fact, a conviction cannot be sustained; and the indorsement, "Filed in open court this the 8th day of September, A. D. 1909," is not sufficient to show the return into court by the grand jury. *Green* v. *State,* 19 Ark. 178; *McKenzie* v. *State,* 24 Ark. 637; *Chancellor* v. *State,* 33 Ark. 815; *Holcomb* v. *State,* 31 Ark. 427; *Felker* v. *State,* 54 Ark. 492.

But it must be remembered that it is the fact itself of the return of the indictment by the grand jury that gives the court jurisdiction, and not the recording of such fact by the clerk. If the grand jury presents the indictment, the court has jurisdiction, whether the clerk records the fact or not. Therefore where appellant's objection goes only to the failure of the clerk to preserve the memorial (and not to the failure of the grand jury to return the indictment), in order to avail himself of such objection he must first move the trial court to set aside the indictment because of the failure of the clerk to preserve the evidence of its return into court by the grand jury. The statute provides "that an in-

dictment, not found and presented as required by law, can be set aside on motion." Sec. 2279, Kirby's Digest. It also provides that: "A judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts until such motion has been made there and overruled." Sec. 1233, Kirby's Digest. "Defects of this kind," says the court in *State* v. *Brandon,* 28 Ark. 411, "can only be reached on a motion to set aside the indictment, which motion should be made before filing a demurrer." And in *Robinson* v. *State,* 33 Ark. 182, in passing upon a similar question, we said: "Had the attention of the court below been directed to the form of entry by a motion to set aside or quash the indictment, or by motion in arrest of judgment, no doubt the court would have ordered the informality to be cured by a *nunc pro tunc* entry." See also *Felker* v. *State,* 54 Ark. 492, where it is held that the proper practice in such cases by those who would question the genuineness of the indictment is to move the trial court to set it aside.

Appellant does not contend that the grand jury did not actually return the indictment against him into court. His only objection is that the record of the circuit court fails to register the fact. Had he made such objection to the trial court, doubtless such record would have been readily furnished. Having failed to make it there, he must be held to have waived it. He must not be permitted to raise it here for the first time. See *Fenalty* v. *State,* 12 Ark. 630; *Brown* v. *State,* 13 Ark. 96; *Dixon* v. *State,* 29 Ark. 165; *State* v. *Johnson,* 33 Ark. 174; *Wright* v. *State,* 42 Ark. 94; *State* v. *Agnew,* 52 Ark. 275; *McFall* v. *State,* 73 Ark. 327; *Carpenter* v. *State,* 62 Ark. 286; *Mears* v. *State,* 84 Ark. 136.

The facts set forth in a statement agreed upon by the State and the appellant, and in the other evidence, were sufficient here to sustain the verdict of the jury. No specific objection was saved at the trial to any of the court's declarations of law. The assignment of error in the motion for new trial as to the giving of instructions is general. We find no reversible error in the charge of the court. The judgment must therefore be affirmed.

OKOLONA MERCANTILE COMPANY v. GREESON.

Opinion delivered January 3, 1910.

1. SALES OF LAND—FORFEITURE.—Where a timber deed provides that if the purchase money notes are not paid when due the vendors shall have the power to take immediate possession of the land and timber "and to stop further cutting until all the past-due obligations are paid," the right of the vendors, upon default in payment of the purchase money, is not to have the sale of timber forfeited, but to take possession of the land and stop further cutting of timber until the past-due obligations are paid. (Page 297.)
2. CANCELLATION OF INSTRUMENTS—DEFENSE.—In a suit to cancel a timber deed one in possession of the timber claiming under such deed may show title either in himself or in some other person. (Page 298.)
3. SAME—BURDEN OF PROOF.—In an action by the grantors of growing timber to cancel their deed and to enjoin defendant from cutting the timber, the burden is on the plaintiffs to establish their right to possession of the timber. (Page 298.)

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

STATEMENT BY THE COURT.

On the 10th day of April, 1902, appellants and others sold to the Boyd-Hodson Lumber Company the timber on two thousand acres of land in the counties of Nevada and Pike. The sale was evidenced by a duly executed deed to the timber. The consideration was $5,500, part of which was to be paid in cash, and part in lumber, and a part, the balance, in money evidenced by promissory notes of $475 each, payable respectively in one, two, three and five years from date. There was a clause in the deed giving the vendors a lien on the timber sold for the purchase money and "power and authority to take immediate possession of said lands and timber, and to stop further cutting of same until the past-due obligations shall be paid and satisfied in full."

On the 16th of July, 1907, appellants brought this suit against M. W. Greeson and others, alleging that the purchase money notes had not been paid, and that the contract was forfeited because of a failure to comply with the conditions named therein on the part of the grantee, or its assignees, whom it was alleged the defendants claimed to represent. The prayer was for damages for cutting the timber, for cancellation of the contract of

sale and for an injunction against cutting and removing the timber, and for general relief and costs.

The defendant Greeson disclaimed any interest in the suit. The other defendants failed to answer. Ford Jones intervened, and claimed ownership of the contract of sale of the timber through mesne conveyance from the original grantee, the Boyd-Hodson Lumber Company, setting up the various transfers. In his intervention he conceded that there was a balance due on the purchase money, and alleged his willingness to pay same when the amount thereof was ascertained. He asked for no affirmative relief.

The appellants answered the intervention and controverted the intervener's title.

The court found "that by sundry mesne conveyances the intervener, Ford Jones, was the owner and entitled to all the rights and privileges of the Boyd-Hodson Lumber Company under the said contract, and that the restraining order herein should be continued until the payment of $425.69, interest and cost, for which judgment was rendered in favor of the plaintiffs."

The court also held that the right to cut the timber from five hundred acres of the land had lapsed because under the terms of the timber deed it had not been cut at the rate or within the time limited, and that the defendant Jones should elect the particular five hundred acres to which all rights should cease.

John H. Crawford, for appellants.

The legal status of Ford, the intervener, is that of a plaintiff complaining of the other parties to the action. As such, the burden of proof is upon him, and he must succeed, if at all, on the strength of his own title, and not upon the weakness of that of the original plaintiffs. The alleged transfer from the Boyd-Hodson Lumber Company, a corporation, to C. D. Brainard, was not sufficient as a transfer because it was not signed by its secretary, not attested by the seal of the corporation, and it was not shown that Wm. R. Boyd, who signed the transfer as president of that company, was vested with any power to execute the same. Kirby's Digest, § § 850, 841, 846; 2 Black 715; 3 Sawy. 88; 17 Ill. 154; 129 Ill. 403; 28 N. E. 64; 62 Ark. 33; 80 Ark. 67; 86 Ark. 288; 66 N. H. 581; 55 Ark. 473; 109 Cal. 29.

E. E. Moss and *M. W. Greeson,* for appellees.

The strength or weakness of Jones's title is not the issue here. He was in possession cutting the timber, and his prayer was, not that he recover anything, but that the plaintiff be prevented from recovering, or cutting and removing, the timber. He pleaded title in himself; but if it had been a plea of title in a third party, it would still have been a good defense against plaintiff's claim to the relief asked for; and if it had been found that the conveyance from Boyd-Hodson Lumber Company to Brainard was insufficient to convey title to the timber, it would not have reverted to appellant, but would have remained in the company, which would defeat appellant's claim. 65 Ark. 610. Only parties to a deed can question its intent or validity. 53 Am. Dec. 715; 60 Am. Dec. 81. Appellants instituted the suit, and they alone pray for affirmative relief. The burden is upon the plaintiffs to show that they are entitled to the relief asked for. 47 Ark. 217; 77 Ark. 347.

WOOD, J. (after stating the facts): There was no right of forfeiture for failure to pay the purchase money when due. The deed provides:

"It is further understood and agreed that a lien is reserved on the timber herein sold to secure the payment of the notes above set forth, and if the said notes are not paid when due the parties of the first part shall have the power and authority to take immediate possession of said lands and timber, and to stop further cutting of same until the past-due obligations shall be paid and satisfied in full."

The right of appellants, therefore, upon failure to pay the notes when due, was not to cancel the deed and have the contract forfeited entirely, but only "to take immediate possession," and "to stop further cutting of timber" *until the past-due obligations* "were paid and satisfied in full."

The above relief was granted appellants, and it was all they were entitled to under the express terms of the contract. It was wholly immaterial whether the intervener, Jones, had title by perfect deed from the Boyd-Hodson Lumber Company, the grantee, through sundry mesne conveyances. It is therefore unnecessary for us to pass upon that question. If the deed of the Boyd-Hodson Lumber Company to its immediate grantee did not con-

vey good title, then the title still remained in the Boyd-Hodson Lumber Company. Jones was in possession claiming title under the Boyd-Hodson Lumber Company, and it is not here complaining of his title. If the title was not in Jones, then, before appellants could have the title cancelled, they would have to bring the owners of the title before the court. Jones, being in possession claiming title through deed from the Boyd-Hodson Lumber Company, could have defeated appellants' claim for cancellation against him by showing title either in himself or some third person. See *Dickinson* v. *Thornton,* 65 Ark. 610.

As to appellants' right of possession and to injunction, the burden was on them. They do not allege or claim that Jones was a trespasser, holding without color of title. Jones is not asking for any affirmative relief.

We find nothing in the pleadings or the proof to take the case out of the operation of the general rule placing the burden of proof, in real actions, upon the plaintiff. *Dawson* v. *Parham,* 47 Ark. 215, 217, 18; *Dickinson* v. *Thornton, supra; Chapman & Dewey Land Company* v. *Bigelow,* 77 Ark. 338-347; *Carpenter* v. *Jones,* 76 Ark. 163; *Dowdle* v. *Wheeler,* 76 Ark. 529; *Mallory* v. *Brademyer,* 76 Ark. 538.

Jones being in the possession of the land for the purpose of cutting the timber under his claim of title through the Boyd-Hodson Lumber Company, he has the right to retain possession for that purpose after he has paid the purchase money. The contract so specified, and the court so decreed.

Affirmed.

BLANK v. HUDDLESTON.

Opinion delivered December 20, 1909.

1. EVIDENCE—SECONDARY EVIDENCE.—Certified copies of deeds are admissible in evidence upon proof of loss of the original instruments. (Page 300.)

2. LACHES—UNREASONABLE DELAY IN SUING.—Where plaintiffs waited 43 years before asserting any claim to wild and unoccupied land left by their ancestor, and until the land had become greatly enhanced in

value, and defendants claimed the land under deeds 25 years old, and had paid taxes for that period of time, it will be held that plaintiffs are barred by laches. (Page 300.)

3. APPEAL AND ERROR—REHEARING—MATTER OVERLOOKED.—Matter overlooked by the court on the original hearing cannot be brought up on petition for rehearing when attention was not called to it in the original abstract and brief. (Page 300.)

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

H. A. Parker and *W. N. Carpenter*, for appellants.

Proof that the deeds and papers were lost during the war was sufficient to introduce copies. 76 Ark. 400.

McCULLOCH, C. J. Plaintiffs (appellants) instituted this action in the chancery court of Arkansas County to quiet their title to two contiguous tracts of wild and unoccupied lands situated in said county, and to cancel as clouds on their title certain deeds of conveyance under which the defendant claims title. The original complaint, filed in 1904, included only one of the tracts, and the other tract was brought into the action by an amendment to the complaint filed in September, 1904. Plaintiffs claim as heirs at law of one Jacob S. Blank, who owned the land and died intestate in the year 1861. They allege that defendant is claiming title to the land under a deed from Chas. Blank and wife, dated April 8, 1899, and also under deeds from R. S. Russell, dated July 12, 1879, and from Jesse Russell dated..... 1883. They alleged that the defendant and his grantors have paid taxes on the land, and offered to refund same.

Defendant filed his answer, in which he denies that the plaintiffs are the owners of the land, and alleges that he, defendant, is the owner thereof under the conveyances set forth in the complaint. He alleges also that he and those under whom he claims title have paid taxes on the land since the year 1883, and he pleads, as a defense, laches on the part of plaintiffs in not earlier asserting title to the land. Proof was introduced establishing the fact that plaintiffs are the heirs at law of Jacob S. Blank, and that Chas. L. Blank is not an heir of Jacob S. Blank. The defendant proved that the land had no market value, practically, twenty years before this time, but that the value had materially increased within the past four or five years, and had risen to

$12 or $15 per acre, and that defendant paid $11.50 per acre for it.

When the case came on for trial, defendant asked for a continuance, in order to take further proof, which motion the court overruled. But the court excluded certified copies of the patent and deed under which the plaintiffs claim title, on the ground that the loss of the originals had not been established, and rendered a decree dismissing the complaint for want of equity. Plaintiffs appealed.

The evidence was, we think, sufficient to establish the loss of the original patent and deed, and the court erred in excluding the certified copies. *Carpenter* v. *Dressler,* 76 Ark. 400. But we are of the opinion that upon the pleadings and proof the decree is correct and should be affirmed, though the ground upon which the chancellor based it is erroneous. Plaintiffs' cause of action in equity is barred by their own laches. Their ancestor died in 1861, and they never asserted any claim to the land until the year 1904, when they commenced the present action. Meanwhile defendant and those under whom he held had claimed title under deeds running as far back as 1879, and had paid taxes on the land, and the same had become greatly enhanced in value. This is sufficient to bar plaintiff's claim. *Turner* v. *Burke,* 81 Ark. 352; *Osceola Land Co.* v. *Henderson,* 81 Ark. 432; *Craig* v. *Hedges,* 90 Ark. 430.

The only excuse they give for their failure to earlier assert their claim is that "through financial loss care of property was neglected." This excuse is not sufficient to relieve plaintiffs from the consequences of their negligent failure, under the circumstances in this case, to assert their claim to the land until after so great a lapse of time.

Decree affirmed.

ON REHEARING.

Opinion delivered January 31, 1910.

McCULLOCH, C. J. Appellants now insist that we erred in saying in the former opinion that appellee claimed title to both tracts of land under deeds running as far back as 1879 and 1883, and they urge that, according to the record in this case, appellee's

color of title to one tract runs back only to the deed from Chas. Blank to Ingram in 1899, which was about five years before the commencement of this action. If we made an error in this respect, it was because of appellants' failure to properly abstract the record, and it is too late now to correct it. The decree should have been affirmed on account of the omission to properly abstract the record. But we undertook to decide the case upon the merits, and understood from the undenied allegations of the amended complaint that appellants were attacking appellee's color of title to both tracts of land under deeds executed in 1879 and 1883, respectively, as well as the additional color of title to one of the same tracts under deed from Blank to Ingram in 1899. The pleadings are open to that construction; and if that be correct, the decision is right as to both tracts. If error has been made, the fault is with appellants in not properly abstracting the record.

The rules of this court do not allow matter overlooked by the court to be brought up on petition for rehearing when attention was not called to it in the original abstract and brief. Rehearing is therefore denied.

GERSHNER v. SCOTT-MAYER COMMISSION COMPANY.

Opinion delivered January 17, 1910.

1. PARTNERSHIP—HOLDING ONE'S SELF OUT AS PARTNER.—One who directly and affirmatively, either by word or act, holds himself out as a partner will be liable as a partner to those who act upon such representation until notice of some kind is given of the discontinuance of such partnership, and it is not necessary to show that the persons relying upon such representation exercised diligence to ascertain the true facts. (Page 305.)
2. SAME—ACTION AGAINST PARTNER—EVIDENCE.—In an action upon an account for goods sold to a firm, of which defendant is alleged to have held himself out as a partner, testimony was introduced as to how the firm business was operated, and that the firm gave plaintiff a check to cover the account before the firm's store was destroyed by fire, and afterwards withdrew all funds from the bank before it was paid. *Held,* that it was proper to refuse to strike out the testimony as to the withdrawal of the funds, as it was competent to show what became of the account up to its conclusion. (Page 305.)

3. JUROR—INTEREST AS DISQUALIFICATION.—While a juror's interest in the result of a suit is a disqualifying bias, yet, when objection is made for the first time after the verdict, if no fraud or collusion on the part of the successful party is shown, it is not reversible error for the trial court to refuse to set aside the verdict, in the absence of a showing of diligence on the part of the losing party to discover such disqualification. (Page 306.)

Appeal from Pulaski Circuit Court; *James H. Stevenson,* Judge; affirmed.

Harry H. Myers and *Wiley & Clayton,* for appellant.

1. There is no evidence that appellant was actually a member of the firm to whom the credit was extended; and unless it is shown that he held himself out to appellee as a member of such firm, he is not estopped to deny it. 22 Am. & Eng. Enc. of L. 59; 80 Ark. 23, 29; 18 Am. St. Rep. 282; 111 U. S. 529; 27 L. R. A. 126. There is no liability for after-extended credit where there has been no representation of membership in the firm to whom credit is extended, but merely an expression of intention or willingness to become such. 22 Am. & Eng. Enc. of L. (2 ed.) 57; 1 Bates on Partnership. § § 90, 99; Ewart on Estoppel 516; 1 Lindley on Part. 2d Em. Ed. 111, § 44; 111 U. S. 529, 540; 58 Conn. 413. The doctrine of estoppel applies only to representations as to facts alleged to be actually in existence, not to conditions arising *in futuro.* Bigelow on Estoppel, 5th Ed. 574; 2 Herman on Estoppel and Res. Jud. 902, § 778; 11 Am. & Eng. Enc. of L., 2d Ed. 425; 16 Cyc. 752; 96 U. S. 547; 47 Am. Rep. 599; 10 Allen (Mass.) 433; 64 Ark. 627.

2. Plaintiff was under the duty to exercise such diligence and make such inquiries as an ordinarily prudent business man would make to ascertain who composed the firm of Gershner & Rosenthal before extending the credit. The second instruction requested by appellant was therefore improperly refused. 47 N. H. 494, 500; 85 N. Y. 342; 80 Ark. 23, 30; 28 Conn. 413; 85 Ill. App. 653.

3. Evidence that Gershner & Rosenthal shortly before the fire gave a check for $400 to appellee and afterwards withdrew their deposit from the bank, etc., was immaterial and was improperly admitted.

4. A new trial should have been granted on account of the

disqualification of the juror Lincoln. 60 Ark. 221; 8 Cush. (Mass.) 69; 19 Ark. 156.

Morris M. Cohn and *L. E. Hinton,* for appellee.

1. Notwithstanding the evidence is conflicting, there was sufficient evidence to go to the jury on the question of appellant's liability, and their verdict should stand.

2. The court properly refused the second instruction requested by appellant. 80 Ark. 23, 30; Abbott's Trial Evidence, 206, 208, 209.

3. The evidence relating to the appropriation of funds by Gershner & Rosenthal after the fire came out in the testimony of appellant's witness, Nathan Gershner. No objection was made at the time, so that the court might rule on its admissibility. Appellant's conduct before and after the fire was admissible, as also the conduct of those associated with him. 42 Ark. 542. And there was no abuse of the privilege of cross examination. 53 Ark. 387; 61 Ark. 52; 75 Ark. 548.

4. There is no merit in the objection to the juror Lincoln. It does not appear that he remembered that the corporation with which he was connected was a creditor of Gershner & Rosenthal, and he stated that his verdict was in no wise influenced by the fact of such indebtedness. Moreover, the objection came too late. 40 Ark. 511; 35 Ark. 109; 29 Ark. 99; 19 Ark. 156; 37 Ark. 585; 23 Ark. 50.

McCULLOCH, C. J. This is an action instituted by the Scott-Mayer Commission Company against A. Gershner on a verified account for merchandise sold and delivered by plaintiff to the firm of Gershner & Rosenthal, of which defendant is alleged to be a member. Plaintiff also contends that, even if defendant was not a member of said firm, he held himself out to plaintiff as such. The issues were tried before a jury, and a verdict and judgment resulted in favor of plaintiff.

Defendant's first insistence is that there is not sufficient evidence to sustain the verdict. There is a sharp conflict in the testimony, and we are of the opinion that there is enough to sustain the verdict on both issues. No useful purpose is to be served by detailing the various circumstances and the conduct and statements of defendant which tend, in varying degree, to sustain the finding that he was, in fact, a member of said firm, and that

he held himself out to plaintiff as such. Defendant and his son, who was a member of said firm, and I. E. Rosenthal, another member, all testified positively that defendant was not a member; but the jury rejected their testimony, and found from the other facts and circumstances proved that he was a member, or that he held himself out to the plaintiff as a member, of the firm. We cannot say that there was no evidence to sustain the finding.

The case was submitted on the following instructions, the last being one requested by defendant:

"If the defendant Gershner held himself out by words or acts to the plaintiff or to its agent to be a member of the firm of Gershner & Rosenthal, or the owner of the business conducted in that name, and the plaintiff sold goods to said business, for which it is now indebted to the plaintiff, upon the faith of said acts of defendant, then the defendant is estopped to deny such matters, and you will find for the plaintiff."

"If you find for the plaintiff under the preceding instruction, you will find in its favor for the amount of its account which you may find was owing, together with interest thereon from date of maturity and demand at the rate of six per cent. per annum."

"Although the plaintiff sold goods and charged them on its books to Gershner & Rosenthal, it might, if it chose to do so, bring its suit against any one or all of the members of said firm; and if from the evidence you find that A. Gershner was the owner of the business done in the name of Gershner & Rosenthal, or was a member of said firm, then it was a legal right of the plaintiff to sue the said defendant."

"Before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that A. Gershner was actually a partner of the firm of Gershner & Rosenthal, or that he held himself out to plaintiff as a partner in that firm, and that plaintiff extended the credit to the firm on the strength of such holding out, if any is shown by a preponderance of the testimony; and the burden of proof is on plaintiff to show these facts, which are necessary to a recovery."

The court refused to give the following instruction requested by defendant, and this ruling of the court is assigned as error:

"You are instructed that it was the duty of the plaintiff, at the time he extended the credit to Gershner & Rosenthal, to use due diligence to ascertain who composed the firm, that is to say, such diligence and make such inquiries as an ordinarily prudent business men would make under similar circumstances; and if you believe from the testimony that defendant was not actually a partner in the firm of Gershner & Rosenthal, and that the use of such diligence by plaintiff would have ascertained that fact, then you will find for the defendant."

Counsel cite authorities holding that a person who relies on acts and conduct of another which amount to holding himself out as a member of a partnership must show that he extended credit on the faith of such reliance and exercised due diligence to ascertain the true facts before he can exact payment from the person so holding himself out as a partner. *Herman Kahn Co.* v. *Bowden,* 80 Ark. 23. But this doctrine is not applicable against one to whom a representation of partnership is directly made by act or word. When a person directly and affirmatively, either by word or deed, holds himself out to another as a partner, and thereby induces him to extend credit to the partnership on the faith of such representation, he cannot shield himself from liabilities behind the failure of the party to ascertain the true facts. And when a party puts out a report that he is a partner, he will be liable to all those selling goods to the firm on the faith of such report. *Herman Kahn Co.* v. *Bowden, supra,* and cases therein cited. When a person holds himself out as a co-partner, those who deal with the firm on the faith of such representation are entitled to act on the presumption that the relationship continues until notice of some kind is given of its discontinuance.

It is contended that prejudicial error was committed by the court in its refusal to strike out certain testimony in relation to withdrawal of funds from the bank by Gershner & Rosenthal after their store was destroyed by fire. They gave plaintiff a check for $400 shortly before the fire occurred, and after the fire they withdrew all the funds from the bank before the check was paid. No objection was made to the testimony when it was elicited on the cross examination of Nathan Gershner and Rosenthal, but afterwards defendant asked the court to exclude it. Both parties introduced testimony as to how the business was

operated, and defendant introduced testimony as to how the funds were deposited in bank and checked out. The above testimony came out on cross examination, as already stated, and was not objected to. We think it was competent to continue the examination as to the condition of the bank account up to its conclusion, and to show what became of the account after the fire, against which the unpaid check given to plaintiff had been drawn. We discover no prejudicial error.

Another ground set forth in the motion for new trial is that C. K. Lincoln, one of the trial jurors, was interested in the result of the trial, in that he was an officer and stockholder in a corporation which was a creditor of Gershner & Rosenthal at the time. Plaintiff filed a response, setting forth that it had no information until the motion for new trial was filed that the corporation named was a creditor of Gershner & Rosenthal; and also filed the affidavit of juror Lincoln stating that when he was selected as a juror, and during his service as such, he did not recall to mind the fact that his corporation was a creditor. No questions were asked the juror as to his interest in the outcome of the trial, and no diligence is shown to have been exercised by defendant in ascertaining whether or not the juror was interested. His son and son-in-law, Nathan Gershner and I. E. Rosenthal, the two confessed members of the firm, were present at the trial, and knew, not only that the corporation named was a creditor of the firm, but also that juror Lincoln was interested in the corporation.

Though a juror asserts that his direct interest in the result of the trial will not influence his judgment, the law presumes him to be under a disqualifying bias, and public policy forbids that he sit as a juror, notwithstanding his avowal. *Railway Company* v. *Smith,* 60 Ark. 221. But when objection is made to a juror after the verdict for the first time, due diligence to discover the disqualification must be shown by the objecting party. At that stage of the case it becomes to some extent a matter of discretion with the trial court as to whether or not the verdict shall be set aside; and when there is no fraud intended or wrong done or collusion on the part of the successful party, it is not reversible error for

the trial court to refuse to set aside the verdict. *Fain* v. *Goodwin,* 35 Ark. 109; *Shinn* v. *Tucker,* 37 Ark. 580.

We find no prejudicial error in the record, and the judgment is affirmed.

Ex parte GILBERT.

Opinion delivered January 17, 1910.

1. REVIVOR OF ACTION—PARTIES.—Where the defendant in an action of unlawful detainer dies, the action should be revived against his heirs and not against a special administrator; and, until such revivor, there can be no adjudication concerning the land. (Page 310.)
2. FORCIBLE ENTRY AND DETAINER—CONSTRUCTION OF STATUTE.—The provisions of the statute relative to unlawful detainer are in derogation of the common law, and should be strictly construed; and the plaintiff is entitled to no right or remedy not therein specifically given. (Page 311.)
3. SAME—RENTAL OF LAND.—Under the provisions of the statute relative to unlawful detainer, there is no provision giving authority to the court in such action to order that the land involved be rented during the pendency of the suit. (Page 311.)
4. CONTEMPT—JURISDICTION.—Where the circuit court had no jurisdiction to order a special administrator to rent the land involved in an action of unlawful detainer, orders made thereafter by the circuit judge directing that certain persons in possession of the land be punished for contempt for failing to pay rent therefor were without jurisdiction and void. (Page 311.)

Certiorari to Bradley Circuit Court; *Henry W. Wells,* Judge; judgment quashed.

Herring & Williams, for petitioners.

1. The circuit judge was without jurisdiction to issue a restraining order or injunction as an aid to a suit of unlawful detainer. Chancery courts alone have jurisdiction in such matters (sec. 3966 *et seq.,* Kirby's Dig,), except when the chancellor is absent from the county. Sec. 1294, Kirby's Dig.; 74 Ark. 423; 81 *Id.* 462; 84 *Id.* 341.

2. The unlawful detainer suit was not a proper action for the appointment of a special administrator. 69 Ark. 217.

3. The order of the circuit judge directing that the lands be leased was void, and the injunction therefore void. 22 Cyc. 1024, subdiv. 7; Cyc. 61; 90 Mich. 309; 51 N. W. 282; 42 Ark. 63; 23 *Id.* 71; 89 *Id.* 72.

4. The court had no authority to fine petitioners for contempt in vacation. Sec. 3989, Kirby's Dig.; 71 Ark. 226.

Poole & Whitehead, for respondents.

The circuit court had jurisdiction to hear and determine this cause, and to enforce its orders. Art. 7, § 14, Const.; sections 1319 and 1523, Kirby's Digest; 55 Ark. 457; 87 Pa. 953.

FRAUENTHAL, J. The petitioners, Julia Gilbert and Erwin Gilbert, procured from this court writs of certiorari by which they seek to review and quash the order of the judge of the Bradley Circuit Court adjudging them guilty of contempt in disobeying an injunction issued by said judge in vacation.

On March 20, 1908, J. T. and L. J. Daniel instituted in the Bradley Circuit Court a suit of unlawful detainer against one Bob Gilbert, by which the plaintiffs in that case sought to obtain the possession of certain land in Bradley County. It was alleged in the complaint in that case that the plaintiffs had sold the land to said Bob Gilbert, and had executed to him a bond for title therefor, in which they agreed to execute to him a deed upon the payment of the purchase money for which said Bob Gilbert had executed notes. Upon failing to pay the notes, they alleged that Gilbert thereafter agreed to pay to plaintiffs rent for said land, and that he also failed to do this. Before the return term of the court in which said suit was instituted, said Bob Gilbert died intestate, and left him surviving his widow, the petitioner, Julia Gilbert, and seventeen children, a great number of whom are minors, and one of whom is the petitioner, Erwin Gilbert. At the time of his death Bob Gilbert was residing on the land involved in the case, and his widow and children after his death continued to reside upon the land as their home. At the first term of the Bradley Circuit Court after the institution of said unlawful detainer suit the death of Bob Gilbert was suggested, and the cause was ordered revived in the name of J. E. Childs as special administrator of said Bob Gilbert, and the cause was continued with an order to the special administrator to collect rents for the pending year of 1908. It appears that in said unlawful detainer suit no bond was given by the plaintiffs for a writ of possession, and that no writ of possession for the land was executed by the sheriff. At the January term, 1909, of the Bradley Circuit Court, an order was made directing the special adminis-

trator to rent the land involved in the action for the year of 1909. The suit was never revived against the heirs of said Bob Gilbert, deceased, nor were they or his widow made parties thereto or served with any process therein. Under the above order the special administrator rented the land for the year of 1909 to L. J. Daniel and Left Preston.

On March 23, 1909, said L. J. Daniel presented to the judge of the Bradley Circuit Court in vacation his petition for an injunction, in which he set out that he had rented the land from the special administrator, and had attempted to prepare it for cultivation; but that the said Julia Gilbert and others acting in concert with her were intimidating and preventing the tenants of said Daniel from cultivating the land; and he prayed for an order enjoining and restraining the said Julia Gilbert and her advisers from committing the acts complained of. On March 24, 1909, the said judge in vacation made an order perpetually restraining Julia Gilbert and all persons acting in concert with her from in any manner interfering with said Daniel and Preston or their employees in cultivating said land.

The above order was served on the petitioner, Julia Gilbert, and this was the first notice or process served upon her in said suit or proceeding. Thereafter said L. J. Daniel applied to the said circuit judge in vacation for an order citing the said Julia Gilbert and Erwin Gilbert to appear before him and show cause why they should not be held in contempt by reason of a disobedience of said above order of injunction. The circuit judge issued such citation, and upon the day named therein for their appearance to answer they filed their response. The matter was heard by the circuit judge in vacation, and he found the respondents guilty of contempt. He entered fines of $50 and $25, respectively. against Julia and Erwin Gilbert; and ordered them to give bond for their appearance at the following term of the Bradley Circuit Court, and upon their failure to make such bond he ordered them confined in jail until the said term of said court. The circuit judge further ordered that said Julia Gilbert would be permitted to remain in possession of the land upon her giving a rent note therefor, and upon her failure so to do she "was perpetually enjoined from living on or cultivating said land."

We do not think that it is necessary to discuss or to decide

the question as to whether or not the judge of the Bradley Circuit Court would have had the power to make and issue the orders herein complained of in event the Bradley Circuit Court had jurisdiction to make the order renting out the land which he was endeavoring to enforce. For, if the court had no jurisdiction to make the order renting the land, the subsequent orders and writs were not issued in the exercise of a rightful jurisdiction, and were therefore of no effect. In the original suit the plaintiffs had instituted an action for the recovery of real property only, and before the return day of the summons issued thereon the defendant in the action died. At common law when a party to a suit for the recovery of land died pending the action, the suit abated. It then became necessary to institute a new suit against the surviving representatives of such deceased person, and after the death of the party nothing further could be done in the original suit. By the statutes of this State provision is made for making the representatives of the deceased party parties to the original action without abating the suit; but until such representatives of the deceased party to whom his right has passed are brought before the court by proper proceedings nothing further can be done in the action. 1 Cyc. 84.

This proceeding is called the revivor of the action; and after the death of a party and before the revivor thereof all proceedings in the action are suspended. *Brodie* v. *Watkins,* 31 Ark. 319.

By section 6311 of Kirby's Digest it is provided that "upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees." In the original suit herein, which was instituted against Bob Gilbert for the recovery of land, the proper parties against whom the action should have been revived were his heirs, and not a special administrator. *Ashley* v. *Cunningham,* 16 Ark. 168; *Haley* v. *Taylor,* 39 Ark. 104; *Evans* v. *Davies,* 39 Ark. 235; *Driver* v. *Hays,* 51 Ark. 82; *State Fair Assn.* v. *Townsend,* 69 Ark. 215.

After the death of Bob Gilbert the proper parties were not present in the suit by the appointment of a special administrator; and the proper parties to the suit would not be present until the cause was revived against the heirs of Bob Gilbert in manner pre-

scribed by the statute. Without the proper parties before it, the court did not have the power or jurisdiction to make any adjudication in the case concerning the subject-matter of the suit. *Rankin* v. *Schofield,* 81 Ark. 462. In this case all orders and adjudications relative to the land were made after the death of the defendant Bob Gilbert, and the action was not and never has been revived against his heirs. It follows that the order of the Bradley Circuit Court, taking charge of and directing the renting of the land involved in the suit, was made without jurisdiction, and is therefore void.

Furthermore, the suit that was instituted against Bob Gilbert for the recovery of the land was an action of unlawful detainer, and there is no provision in the statute giving authority to the court in such action to order that it be rented during the pendency of the suit. The provisions of the statute relative to unlawful detainer are in derogation of the common law, and they should be strictly construed; and the plaintiff is entitled to no right or remedy that is not therein specifically given. Under the provisions of the statute relative to the action of unlawful detainer, the plaintiff may obtain a writ of possession for the land by executing bond. If the defendant should give a retaining bond and hold possession of the land, such bond would cover any damages that the plaintiff might suffer. The possession by the defendant and those who claim under him cannot be disturbed unless their rights are protected by a bond, as provided for by the statute in event the plaintiff shall fail to recover in the suit.

From the above it results that the Bradley Circuit Court did not have the power or jurisdiction to order the special administrator to rent out the land involved in the action of unlawful detainer; and therefore all orders made thereafter by the circuit judge in the attempted enforcement of that order were without jurisdiction and of no effect.

The petitioners herein are entitled to the relief asked for by them from this court. Ex parte *Davies,* 73 Ark. 358; *York* v. *State,* 89 Ark. 72; *Pitcock* v. *State,* 91 Ark. 527.

There are a number of other questions involved herein which we think affect the power of the circuit judge to fine for contempt the petitioners under the proceedings brought before him. But we do not think that it is now necessary to pass upon those questions.

The order of the circuit judge of the Tenth Judicial Circuit made on May 25, 1909, finding that the petitioners were guilty of contempt, is quashed, and all proceedings against them are dismissed.

MILLER v. HAMMOCK.

Opinion delivered January 17, 1910.

INSTRUCTION—BURDEN OF PROOF IN CIVIL CASE.—Facts in civil cases are not required to be proved beyond a doubt, but only by the preponderance of the evidence.

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; reversed.

W. R. Donham, for appellant.

The sixth instruction given on behalf of appellee, in which the jury were instructed that the facts relied on by appellant "must be sufficiently distinct to leave no doubt" was erroneous. A preponderance of the evidence is all that is required in civil cases. 31 Cyc. 1667.

D. M. Cloud, for appellee.

Taking the instructions as a whole, the law of the case was properly given.

BATTLE, J. M. E. Hammock brought this action against A. J. Miller to recover the possession of a horse. A. J. Miller died during the pendency of the action, and it was revived against Adelia Miller, as executrix of his last will and testament.

J. W. Hammock was the husband of the plaintiff. He sold the horse, a mare, to one Spann, and he sold her to A. J. Miller. Evidence was adduced tending to prove that the husband exercised acts of ownership over the horse, selling her at one time and mortgaging her at another; and that he offered her for sale. The wife permitted him to use the mare. He claimed to be plaintiff's agent, but did not at all times deny his authority to sell, and acted as though he had such authority. To what extent plain-

tiff permitted him to hold himself out as her agent as to the horse is not certain.

At the instance of plaintiff the court instructed the jury, over the objection of the defendant, in part, as follows:

"In this case the defendant relies on circumstances to establish that the plaintiff's husband was and acted as her agent when the alleged trade was made with Spann. You are therefore instructed that the facts relied on to establish an agency by implication must be sufficiently distinct to leave no doubt about the intention of the plaintiff's appointing her husband as her agent; and unless you believe from the evidence that the plaintiff's husband acted as her agent in trading off the mare in controversy, defendant cannot recover unless you should further find that Mr. Hammock was the owner of the mare in controversy."

The jury returned a verdict in favor of the plaintiff. Judgment was rendered according to the verdict, and the defendant appealed.

The court erred in giving to the jury the instruction objected to. Facts in civil cases are not required to be proved beyond doubt, but by the preponderance of evidence.

Reversed and remanded for a new trial.

SELLERS v. STATE.

Opinion delivered January 17, 1910.

1. EVIDENCE—PHOTOGRAPH.—When the accuracy of a photograph is established by the testimony of witnesses, showing that it faithfully represents the objects and situations portrayed, it is admissible, subject to impeachment by other evidence. (Page 315.)
2. APPEAL AND ERROR—PREJUDICE.—Judgments in criminal cases are reversed only for errors substantially calculated to prejudice the rights of litigants. (Page 316.)
3. WITNESSES—IMPEACHMENT AS TO COLLATERAL MATTER.—A party cannot examine a witness as to collateral and immaterial matters, and then impeach him by proof of contradictory statements. (Page 316.)
4. INSTRUCTIONS—REPETITION.—It was not error to refuse instructions fully covered by other instructions which were given. (Page 316.)

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

W. R. Donham and *T. G. Malloy,* for appellant.

1. The verdict of the jury at the first trial was an acquittal of murder. 29 Ark. 31; 32 Ark. 221; art. 2, § 8, Const. Ark. It was therefore improper to arraign the defendant and again place him on trial for murder in the first degree.

2. The case should be reversed because of improper cross examination by the State's attorney of appellant's witnesses, couched in such form of questions as practically to accuse witnesses of falsifying, and indirectly to charge some of them with complicity in the crime, and other questions of a nature to bring the witnesses into disrepute before the jury. And the refusal of the court to instruct the jury not to consider prejudicial remarks made during the progress of such examination was prejudicial. 58 Ark. 473; 2 Enc. Pl. & Pr. 738; 150 U. S. 76; 72 Ark. 461.

3. The photographs were improperly admitted in evidence, especially to permit a witness to testify from them before proving their accuracy. 22 Am. & Eng. Enc. of L. 775, and cases cited.

Hal L. Norwood, Attorney General, for appellee.

1. There was no prejudice in arraigning appellant for murder in the first degree. Instructions requested authorizing a conviction for murder were refused, and the crime of manslaughter only was submitted to the jury.

2. The mode of examining witnesses is in the sound discretion of the trial court, and this court will not disturb a verdict unless there has been an abuse of that discretion. 18 Ark. 540; 61 Ark. 52; 36 Ark. 316; 75 Ark. 548. The question asked witnesses and the remarks of counsel complained of constitute no ground of reversal here. The court instructed the jury not to allow what was said by counsel on either side to influence their verdict, and reminded them that they were sworn to try the case according to the law and the evidence. 58 Ark. 353; 65 Ark. 475; 74 Ark. 256; 75 Ark. 347; *Id.* 246; 67 Ark. 365; 76 Ark. 39; 71 Ark. 62.

3. Objections to the photographs introduced in evidence are without merit. On this trial they were fully identified and proved to be true. They were therefore properly admitted.

Davis & Pace and *Hal L. Norwood,* Attorney General, filed supplemental brief for appellee.

McCULLOCH, C. J. Appellant was indicted for the crime of murder, and convicted of voluntary manslaughter. On the former appeal the judgment was reversed (91 Ark. 175), and appellant was again put on trial and convicted of the same degree of homicide. He again appeals, assigning numerous errors.

We reversed the case before on account of an error committed by the trial court in admitting in evidence, without its accuracy being verified by the testimony of any witness, a photograph purporting to show the situation of the parties and the circumstances and conditions connected with the fatal encounter between appellant and the deceased. We held, however, that when the accuracy of a photograph is verified by the testimony of witnesses, showing that it faithfully represents the objects and situations portrayed, it is admissible, subject to impeachment by other evidence.

In the second trial, the accuracy of the photograph was duly established. Mrs. Lawhorn, mother of the deceased, who was an eye-witness to the tragedy, testified that when the photograph was taken the surroundings were unchanged, and that she placed the persons before the camera so as to correctly represent the situation and attitude of the parties to the fatal rencounter. The photographer was introduced as a witness, and he testified that the photograph accurately portrayed the scene as it was pointed out to him by Mrs. Lawhorn, except that he retouched the picture so as to make the powder marks on the fence show plainer. The testimony of another witness tended to impeach the accuracy of the photograph by stating that he saw only one bullet hole in the fence at the place where two are shown in the photograph. The testimony as to these alleged inaccuracies went to the jury for what it was worth, and did not render the photograph inadmissible. The court properly permitted the jury to view and consider it in connection with all the other testimony in the case.

Various acts and statements of special prosecuting counsel, made during the progress of the trial, are assigned as misconduct constituting prejudicial error. We have considered each assignment, and, while we do not approve the remarks made by counsel, we fail to discover anything calculated to prejudice the rights of appellant. The alleged misconduct consisted mainly of

little side remarks made by counsel, in the presence of the jury, to appellant and other witnesses and to his counsel which were entirely inappropriate; yet we reverse judgments only for errors substantially calculated to prejudice the rights of litigants, and not merely for misconduct which could have had no influence on the jury in arriving at a verdict.

Error is assigned in the refusal of the court to permit appellant to impeach the testimony of witness Esco Lawhorn, a brother of deceased, by proving contradictory statements of the witness. It is conceded that Esco Lawhorn was not a witness to the fatal rencounter between his brother and appellant, but the latter called him as a witness and asked him the following question as to a statement alleged to have been made on a former occasion: "Did you not pull this pistol out of your pocket on that occasion and say, 'This is the pistol that my brother shot at Jim Sellers with, and if I could get a pop at him there wouldn't be any trial in this case?'" He replied that he did not make the statement, and appellant introduced another witness to impeach him by proving that he did make it. As the witness was not present at the killing, he could not have known whether or not his brother had a pistol on that occasion, or shot at appellant. So the statement was immaterial. A party cannot examine a witness as to collateral, immaterial matters, and then impeach him by proof of contradictory statements. *Plunkett* v. *State*, 72 Ark. 409.

Appellant complains of the refusal of the court to give instructions which he requested on the question of reasonable doubt and presumption of innocence. These subjects were covered by other full and accurate instructions given by the court. The instructions on each phase of the case were correct, and the evidence sustained the verdict.

Judgment affirmed.

HOGUE v. STATE.

Opinion delivered January 17, 1910.

1. HOMICIDE—INSTRUCTION—WEIGHT OF EVIDENCE.—An instruction in a murder case that if the jury "believe that the defendant was the last person ever seen with the deceased, and that he had never been seen

since that time, and that the defendant had failed to account for or explain his absence, *these are circumstances which tend to establish the defendant's guilt,* but are not alone sufficient to warrant a conviction," is not objectionable as a charge on the weight of the evidence, as to say that evidence tends to prove a charge is no more than to say that it is admissible for that purpose. (Page 320.)

2. INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—While it is not a commendable practice in a criminal case to say that certain circumstances tend to prove the charge, the giving of such a charge is not prejudicial where the jury are directed "to consider all the facts and circumstances proved in the case, and that they must be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence." (Page 322.)

3. SAME—ASSUMPTION OF FACTS.—An instruction in a criminal case that "if you find from the testimony that the defendant has made false, improbable, inconsistent or contradictory statements in attempting to explain suspicious circumstances or appearances, then you may consider these matters in determining the guilt or innocence of the defendants" is not objectionable as assuming that there were suspicious circumstances or appearances. (Page 323.)

4. HOMICIDE—ABSENCE OF MOTIVE—INSTRUCTION.—It was not error, in a murder case, to refuse to charge that the absence of proof of a motive was a circumstance in favor of accused's innocence, as the State is not bound to prove a motive in order to establish the guilt of the accused, though the absence of a motive is a circumstance to be considered with other facts and circumstances in determining his guilt or innocence. (Page 323.)

Appeal from Perry Circuit Court; *Guy Fulk,* Judge; affirmed.

Appellant, *pro se.*

1. The court's charge to the jury on the question of the presumption of innocence was not full enough in that it did not instruct them that this presumption continues throughout the trial or until his guilt is established to the satisfaction of the jury beyond a reasonable doubt. 164 U. S. 492; 116 Ala. 445; 29 Fla. 527; 95 Neb. 1038; 96 N. W. 266; 55 Neb. 777; 9 Enc. of Ev. 923; 106 Cal. 104; 101 Wis. 627; 127 Ind. 419.

2. The second instruction given over defendant's objection was in effect an expression of opinion on the weight of the evidence, and is clearly erroneous. 41 Ark. 343; 10 Ark. 138; 11 Ark. 830; 14 Ark. 63; 23 Ark. 32; 26 Ark. 362; 45 Ark. 165; 49 Ark. 439; 62 Ark. 543. The jury are the exclusive judges as to whether the facts adduced in evidence tend to establish defendant's guilt. 34 Ark. 449; 54 Ark. 287; 55 Ark. 184; 57 Ark. 578.

It is further erroneous in that it singles out a certain portion of the testimony and calls especial attention to it. 141 Ill. 210; 105 Ill. 417; 92 Ill. 602; 99 Ill. 371; 10 Bush (Ky.) 495; 41 Tex. Cr. App. 252; 52 S. W. 417; 33 Pac. 791; 27 N. E. 710; 11 So. 915; 5 So. 167; 65 N. W. 213; 61 Neb. 584.

3. The seventh instruction given by the court assumes that there were suspicious circumstances, which was a question of fact for the jury to determine from the evidence. 62 Ark. 558.

4. The court erred in refusing to give the nineteenth instruction requested by the defendant on the question of motive. 34 Ark. 761; 44 Pa. 386; 17 Ala. 825; 103 Ala. 31; 33 La. Ann. 782; 10 N. Y. 13. The State's theory was that the motive leading to the murder was robbery. Hence the motive was of great, if not controlling, importance. 156 N. Y. 253; 49 N. Y. 137; 148 N. Y. 648.

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

1. Appellant's rights were fully protected in the instructions given, when taken as a whole; hence there was no reversible error in the instruction given on the question of presumption of innocence. The jury as reasonable men necessarily understood that this presumption followed the defendant until his guilt was established by the evidence beyond a reasonable doubt. There is no error in refusing to give an instruction which is sufficiently embraced in other instructions given by the court. 87 Ark. 308; 86 Ark. 606; 74 Ark. 33; 72 Ark. 384; 53 Ark. 472; 54 Ark. 621; 52 Ark. 180; 37 Ark. 108; *Id.* 67; 34 Ark. 649; 15 Ark. 624.

The second instruction given is a correct declaration of law. 34 Ark. 754.

3. The jury were fully instructed that they were the exclusive judges of the evidence and of its weight and sufficiency. The seventh instruction is not open to the objection that it assumes that there were suspicious circumstances.

4. The court correctly refused to give the 19th instruction requested by appellant. 74 Ark. 418.

McCULLOCH, C. J. Defendant, Walter Hogue, was indicted by the grand jury of Perry County at the February term, 1909, for the crime of murder in the first degree, charging him with the

killing of Grover Misner in Perry County, on November 29, 1908. The case was tried at the August term, 1909, and he was convicted of murder in the first degree, as charged in the indictment. The testimony adduced by the State tended to establish the following state of facts:

Defendant lived in Scott County, Arkansas, and Misner lived in Crawford County with his mother, and he raised and gathered a crop of cotton that year. In the fall of the year defendant visited Crawford County, and while there he and Misner, who were both young men, planned to go on a hunting and trapping trip. They left home for that purpose early in November. Misner had just sold his crop, consisting of three bales of cotton, and had a considerable portion of the proceeds with him. Misner had a Winchester rifle, a watch and a suit case when they started on the trip.

The pair first went to Fort Smith, thence to Mansfield, where they remained a few days, thence to Ola, and from Ola they went down into the bottoms near a lake. Misner purchased a lot of traps and other supplies for the trip. They remained on this lake for a while, and then went to Aplin, in Perry County, and camped near a bridge on Fourche Bayou. On or about the 25th of November they moved their camp to a deserted cabin in the Fourche bottom, about two miles from Aplin. On Sunday, November 29, two of the witnesses, hearing gun or pistol shots down in the bottom, went to the cabin, and there found the defendant and Misner engaged in skinning a coon, which they claimed to have caught in a trap that morning. This was the last seen of Misner until his decomposed body was found in the cabin by two of the witnesses on January 21, 1909.

Very early on the morning of November 30, defendant was seen passing the house of a witness going toward Casa, Ark., and it was proved by another witness that he boarded a freight train at Casa that morning and paid his fare to Mansfield, exhibiting at the time a considerable roll of money. A witness who saw him at Mansfield about December 1 stated that he told him that he had got tired of trapping and had sold out to his partner, who had gone to Louisiana. He also stated to this witness that he had made about $80 trapping.

The body of Misner was discovered by Dr. Matthews and

a Mr. Wallace, who lived at Aplin, and, when passing the deserted cabin in the bottom, they were attracted by the odor which came from the inside, and on investigation found the decomposed body. The cabin door was fastened with a lock which Wallace had sold to defendant. The body was found in the corner of the cabin lying on some corn shucks, with a wagon sheet under and over it. The face was turned toward the wall, and there were three bullet holes in the back of the skull. There was a piece of cloth with Misner's name on it sewed on the inside of the hip pocket of the pantaloons, and there was a tablet lying near the body with Misner's name on it. His shoes were sitting near the body when found. Defendant had a white hat when he left on the trip, and Misner was wearing a black hat; but when defendant was seen going to Casa, he was wearing a black hat, and his own hat was in the cabin at the time Misner's body was found. A cuff button was found near defendant's cell in jail, which was identified as the property of Misner, and when arrested he had a watch which the testimony tended to identify as one owned by Misner. A number of contradictory statements made by defendant was proved, as to what became of Misner and where he left him, and, among other things, he stated to one witness that he had not been in Perry County. A fellow prisoner in jail testified that defendant confessed to him while in jail that he had killed Misner for his money. Taking all these facts and circumstances into consideration, there was abundant testimony to justify the finding of the jury that Misner came to his death at the hands of defendant, and that it was murder in the first degree.

The instructions given by the court were very full, and covered every phase of the case. Several were given at the instance of defendant's counsel, but many more requested by him were refused. Those refused related mainly to the question of reasonable doubt and presumption of innocence; but, as all of the refused instructions were substantially covered by others given, there was no error in refusing them. The instructions given and refused are too numerous to be copied here or discussed in detail.

The court gave, over defendant's objection, the following instruction, which is assigned as error: "2. You are instructed

that if you believe from the evidence in this case that the defendant was the last person ever seen with the deceased, and that he had never been seen since that time, and that the defendant had failed to account for or explain his absence, these are circumstances which tend to establish the defendant's guilt, but are not alone sufficient to warrant a conviction. It must also appear from the evidence that the deceased, Grover Misner, came to his death by the agency of the defendant."

The instruction is objected to on the ground that it is a charge on the weight of the evidence, and that it improperly singles out one circumstance and emphasizes it. This instruction is almost an exact copy of an instruction which was approved by this court in *Edmonds* v. *State,* 34 Ark. 720. The peculiar facts of the Edmonds case were such as to give greater force to the fact of the defendant having failed to account for or explain the disappearance of the deceased. But this difference relates merely to the weight to be given to the circumstance, and not to the correctness of the instruction. In that case the deceased was a woman whom defendant had brought from Kentucky, and with whom he was living in illicit relations when she disappeared. In the present case Misner was scarcely more than a mere boy, though only a few years younger than defendant, and they were both far from home, away from friends and acquaintances, living together in a deserted cabin in the woods. The peculiar circumstances surrounding their separation and the finding of the body of Misner in the deserted cabin after defendant had left it, if unexplained by defendant, tended with great force to establish his guilt.

It is insisted that the use of the words "circumstances which tend to establish the defendant's guilt" was an instruction on the weight of the evidence. We do not so construe the language. Trial judges should not admit proof of circumstances which do not tend to prove or disprove the charge, and the mere admission of the evidence is equivalent to a statement by the court that it tends in some degree to sustain the issue, though the weight to be given to it is left to the jury. Webster defines the word "tend" as "to move in a certain direction; to be directed, as to any end, object or purpose; to aim; to have or give leaning;

to exert activity; to influence; to serve as a means; to contribute." Now, to say that a thing tends or has a tendency to establish a certain state of facts is not a declaration as to the weight to be given to it, but is a mere statement that it is directed toward or moves in the direction of a certain result, the degree of its force not being mentioned. To say that a circumstance tends to prove the issue is no more than saying that it may be considered for the purpose of determining the issue.

This identical question has been passed on by the Supreme Court of Indiana in two cases, *Smith* v. *State,* 142 Ind. 288, and *White* v. *State,* 153 Ind. 689, and in both cases that court reached the same conclusion which we now announce.

In the last cited case the court said: "The statement that there has been evidence 'tending to show' a particular fact is equivalent to a statement that evidence has been offered relating to such fact. The force and effect of the evidence is in no sense suggested by the term. * * * The word 'tending' has not that elastic meaning attributed to it by the appellant's counsel, nor has it a signification in judicial proceedings different from its common and ordinary use. In its primary sense, it means direction or course towards any object, effect or result—drift. Webster's Int. Dict. 1484. And it must be presumed, in the absence of any showing to the contrary, that the jury understood the term in its usual and ordinary sense, and that it was not applied in any way harmful to appellant."

The other objection to the instruction is that it singles out this circumstance and unduly emphasizes it. The practice of framing separate instructions on distinct circumstances, and thus, as it is said, singling them out, is not commendable, and it has been held by this court in several decisions that it is not error to refuse such instructions. *Carpenter* v. *State,* 62 Ark. 286; *Ince* v. *State,* 77 Ark. 418. But the giving of such an instruction is not prejudicial error where the court in the whole charge directs the jury to consider all the facts and circumstances proved in the case, and especially where, as in this case, the court instructs that "the facts and circumstances in evidence shall be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence." As already stated, the charge of the court in this case was very full and com-

plete, and presented to the jury for their consideration every phase of the case; and when the charge is considered as a whole, it cannot be said that any single circumstance is emphasized.

Another instruction given by the court was objected to, on the alleged ground that it assumed that there were suspicious circumstances or appearances in the case for defendant to explain. This instruction is as follows:

"7. If you find from the testimony that the defendant has made false, improbable, inconsistent or contradictory statements in attempting to explain suspicious circumstances or appearances, then you may consider these matters in determining the guilt or innocence of the defendant."

We do not think that this instruction contains an assumption that there were suspicious circumstances or appearances. It leaves that question to be determined by the jury from the evidence.

Error is assigned in the refusal of the court to give the following instruction requested by defendant's counsel: "19. You are instructed if, upon a careful consideration of all the evidence in the case, you find that there is not shown a motive upon the part of the accused to commit the crime of which he is charged, this is a circumstance in favor of his innocence, which you consider together with all the other facts and circumstances in the case."

This instruction was properly refused. The State is not bound to prove a motive, in order to establish the guilt of the accused; and the fact that a motive is not shown is not a circumstance in favor of his innocence, though the absence of a motive is a circumstance to be considered with other facts and circumstances in determining his guilt or innocence.

After a careful consideration of the whole record, we are convinced that the defendant had a fair trial, and that the evidence abundantly establishes his guilt. The judgment is therefore affirmed.

BATTLE, J., (dissenting). The court erred in instructing the jury as follows:

"2. You are instructed that if you believe from the evidence in this case that the defendant was the last person ever seen with the deceased, and that he had never been seen since

that time, and that the defendant had failed to account for or explain his absence, these are circumstances which tend to establish the defendant's guilt, but are not alone sufficient to warrant a conviction. It must also appear from the evidence that the deceased, Grover Misner, came to his death by the agency of the defendant."

"5. If you find from the evidence that the defendant made any false statement as to the absence of Grover Misner, whom he is charged to have murdered, or what became of him, or any conflicting or unreasonable statements as to his whereabouts about the time the said Grover Misner was first missing, they may be considered by the jury as circumstances tending to establish his guilt."

The Constitution of this State provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law." Art. 7, sec. 23. The judge should abstain from intimating an opinion to the jury as to any fact in evidence before them. *Sharp* v. *State,* 51 Ark. 147; *Felker* v. *State,* 54 Ark. 489; *Haley* v. *State,* 49 Ark. 147; *Jenkins* v. *Tobin,* 31 Ark. 306; *Shinn* v. *Tucker,* 37 Ark. 580; *Polk* v. *State,* 45 Ark. 165; *Reed* v. *State,* 54 Ark. 621; *Blankenship* v. *State,* 55 Ark. 244; *Railway Co.* v. *Byars,* 58 Ark. 108; *Jones* v. *State,* 59 Ark. 417; *Little Rock & F. S. Ry. Co.* v. *Trotter,* 37 Ark. 593; *Carpenter* v. *State,* 62 Ark. 286; *Redd* v. *State,* 63 Ark. 457; *Sullivan* v. *State,* 66 Ark. 506; *Bishop* v. *State,* 73 Ark. 568.

In the instructions copied in this opinion the court intimated an opinion as to the probative force of facts stated therein, which was contrary to the Constitution and prejudicial.

ASHLEY v. ASHLEY.

Opinion delivered January 17, 1910.

GIFT CAUSA MORTIS—DELIVERY.—Deeds and bills of sale executed by one to his heirs in anticipation of death and delivered to one of the grantees to be placed in a chest of the grantor, to be delivered at the grantor's death, but subject to his dominion as long as he lived, were ineffective to pass title at his death.

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

Thornton & Thornton and *Powell & Taylor,* for appellant.

1. The instruments, executed in the form of deeds and bills of sale, are testamentary in character, the surrounding circumstances being taken into consideration in ascertaining the intention of the maker. 50 Ark. 367; 74 *Id.* 104; 30 A. & E. Enc. of L. 576; 101 S. W. 42; 66 S. W. 536; 17 N. W. 522; 76 N. W. 411; 15 N. E. 42; 69 N. E. 892; 80 N. E. 1086; 41 N. E. 1007; 84 N. E. 638; 75 S. W. 677; 58 S. W. 318; 86 Ill. 616; 153 Ill. 636.

2. If the instruments are deeds and bills of sale, they are void for want of delivery. 75 S. W. 677; 84 N. E. 638; 41 N. E. 1007; 76 N. E. 151; 30 N. E. 1041; 36 N. E. 958; 88 N. E. 231; 77 Ark. 89.

3. If testamentary in character, the instruments are inoperative for noncompliance with the statute of wills. 75 S. W. 677; 80 N. W. 1086; 88 N. E. 231.

Poole & Whitehead, for appellees.

1. The instruments were deeds absolute. 74 Ark. 115; 146 Ind. 379; 50 Ark. 367; 75 *Id.* 321.

2. The delivery of the instruments to Chas. Ashley, to be by him placed in a chest until the grantor's death and then delivered to the grantees, was sufficient to pass the title, acceptance being presumed. 9 A. & E. Enc. of L. 154; 2 Jones on Real Property and Conveyancing, § § 1217-1224; 5 A. & E. Enc. of L. 448; 51 Ark. 530; 77 *Id.* 92; 82 *Id.* 50; 14 Ohio 308; 38 Miss. 723; 48 Miss. 710; 199 Ill. 454; 161 Ind. 56; 89 N. W. 556.

BATTLE J. Upon an agreement in writing entered into by the parties to this action certain issues hereinafter appearing were submitted to and decided by the Calhoun Circuit Court. Kirby's Digest, § § 6280-6282.

The following instruments of writing were signed and acknowledged by Pink Ashley in his lifetime:

"Warranty Deed.

"Know All Men by These Presents:

"That I, Pink Ashley, for and in consideration of the sum of three hundred ($300.00) dollars, to me paid by Charlie and Will Ashley, receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Charlie and Will

Ashley, and unto their heirs and assigns forever, the following lands, lying in the county of Calhoun and State of Arkansas, towit: The S. E. ¼ of S. W. ¼ of the S. E. ¼ of section nineteen (19), all in township fourteen south, range fifteen (15) west, containing 10 acres. Also the south ¼ of the N. E. ¼ of the N. E. ¼, the S. E. ¼ of the N. E. ¼, E. ½ of the S. E. ¼, all in section fourteen (14) south of range fifteen (15) west, containing in all 140 acres, more or less, at my death. To have and to hold the same unto the said Charlie and Will Ashley, and unto their heirs and assigns forever, with all appurtenances thereunto belonging. I hereby covenant with the said Charlie and Will Ashley that I will forever warrant and defend the title to said lands against all lawful claims whatever.

"Witness our hands and seals on this 6th day of September, 1906.

(Seal) "Pink x Ashley." (his mark)

"Warranty Deed.

"Know All Men by These Presents:

"That I, Pink Ashley, for and in consideration of the sum of ($100.00) one hundred dollars, to me paid by Dora Strong, receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Dora Strong, and unto her heirs and assigns forever, the following lands, lying in the county of Calhoun and State of Arkansas, towit: the S. E. ¼ of the S. W. ¼ of section five, township fourteen (14) south, range fifteen (15) west, containing 40 acres, less one acre in the southeast corner so long as used for school purposes. Also less as much pine timber as Charlie or I may need, for building purposes, at my death. To have and to hold the same unto the said Dora Strong and unto her heirs and assigns forever, with all appurtenances thereunto belonging. And I hereby covenant with the said Dora Strong that I will forever warrant and defend the title to said lands against all lawful claims whatever.

"Witness our hands and seals on this 6th day of September, 1906.

(Seal) "Pink x Ashley." (his mark)

"Bill of Sale.

"9-6-06, Locust Bayou, Arkansas.

"For and in consideration of seventy-five dollars paid to

me by Will Ashley, receipt of which is hereby acknowledged, I do hereby grant, bargain and sell unto Will Ashley the following stock, towit: One claybank mare about six years of age, 14 hands high, one black cow and yearling, marked crop and split in each ear, branded with P on left shoulder and hip. The said Will Ashley is to have and to hold the above named stock for the amount named at my death.

his
"Pink x Ashley."
mark

"Witnesses:
"John Bush.
his
"H. x Bowie."
mark

"Bill of Sale.

"For and in consideration of ($20.00) twenty dollars to me in hand paid by Dora Strong, receipt of which is hereby acknowledged, I do hereby grant and sell to Dora Strong, one brown cow and calf, cow marked crop and split in each ear, also branded on left shoulder and hip with letter P, to have and to hold same for the above named at my death.

his
"Pink x Ashley.
mark

"Witnesses:
"John Bush
his
"H. x Bowie."
mark

Did these deeds and bills of sale ever become operative? The circuit court held that they did.

The issues in the case were submitted to the court upon the deeds, acknowledgments of the same, and the bills of sale, and an agreed statement in writing as to the testimony of D. R. Furr and Charles Ashley in a certain matter before the Calhoun Probate Court, which is as follows:

D. R. Furr, a justice of the peace, testified before said court as follows:

"Pink Ashley, some two weeks previous to his death, but while of sound mind and possessed of all his reasoning faculties,

sent for the said D. R. Furr to come to his home, and after arriving there the said Pink Ashley stated to the said D. R. Furr that he desired to make a disposition of his property between his respective heirs that there might not be any trouble or litigation after his death; that the said Furr advised him as to his real property it would be necessary to make and execute deeds to his respective heirs to that portion of the land that he desired them to have; that said Ashley made a division of his land between each of his heirs, and that the said Furr prepared deeds to the same land, and, after said deeds were signed, said Furr took the acknowledgment thereto, and that, as to the personal property, bills of sale were prepared by the said Furr, signed by the said Ashley and acknowledged by the said Furr, and that after said deeds and bills of sale had been signed and acknowledged and turned over to the said Ashley by the said Furr the said Pink Ashley, deceased, handed the same to Chas. Ashley, and said to him to place the deeds and bills of sale in his chest, and that immediately after his death said deeds and bills of sale be delivered to his respective heirs to whom they had been executed. That Chas. Ashley testified before the probate court at the same time and place that his father, Pink Ashley, handed him the deeds and bills of sale, and told him to place them in his chest, but that he never gave him any direction to deliver them to the heirs of said estate as testified to by Furr, and that he had never delivered them to any one until filed as evidence in this case with the clerk, and that immediately after the death of his father he took out letters of administration on said estate."

The deeds and bills of sale mentioned in the testimony set out above are the deeds and bills of sale copied in this opinion. In the first deed Charlie and Will Ashley are named as grantees, and in the second Dora Strong, and in the bills of sale Will Ashley and Dora Strong. They were executed by Pink Ashley about two weeks before his death, and were intended to be a division and conveyance of his property to and between his prospective heirs, but were not to operate as a will. *Bunch* v. *Nicks,* 50 Ark. 367. They were not delivered to any one for the heirs, but were handed to Charles Ashley, not to hold, but to be placed in a certain chest (whether of Charles or Pink Ash-

ley is not specified, but the presumption is of the latter), and there to remain until his death, when the instruments were to be delivered to those named therein as grantees. The instruments were executed in anticipation of his death, and were obviously not intended to become effective in the event he recovered. Charles Ashley was not authorized to possess or exercise any control over them in Pink Ashley's lifetime. They were to operate as a division of his estate, in the event he died, and were subject to his dominion so long as he lived. They were not delivered in his lifetime, and never took effect or became operative. *Russell* v. *May,* 77 Ark. 89; *LaCotts* v. *Quertermous,* 84 Ark. 610.

Judgment reversed and the cause remanded with directions to the court to enter a judgment in accordance with this opinion.

FARMERS' UNION GIN & MILLING COMPANY *v.* SEITZ.

Opinion delivered January 17, 1910.

EXEMPTIONS—PARTNERSHIP PROPERTY.—A debtor is entitled to claim his chattel exemptions in partnership property when his interest therein is ascertained and segregated.

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

Johnson & Burr, for appellant.

1. The court had no jurisdiction to hear and determine Seitz's right to schedule. This is an action to impound a certain fund, and such an action is not within the exemption statutes of this State. Kirby's Dig., § § 3904-3906; Const., art. 9, § § 1 and 2. These statutes contemplate the filing of a schedule only in cases where an execution or other process has been or will be issued; and in this case, the fund being already in court, no process was necessary, nor was any sought. This court has held that, unless the debtor's case be within these statutes, they will be strictly construed against him. 65 Ark. 40; 52 Ark. 547.

2. The interest of Seitz in the fund involved was an unsettled partnership interest, and as to such an interest the exemption statutes are not applicable. 65 Ark. 40.

3. The schedule is legally insufficient. Kirby's Dig., § 3906; 63 Ark. 540.

J. D. Block, for appellee.

BATTLE, J. Farmers' Union Gin & Milling Company, a corporation, brought suit against W. L. Seitz, A. D. Grayson, George W. Cox and St. Louis Southwestern Railway Company, in the Greene Chancery Court. It alleged that it commenced an action on the 20th day of December, 1907, before a justice of the peace, against the defendant, Seitz, to recover the sum of ninety-eight dollars, and recovered a judgment against him for that amount; and on the 14th day of January, 1908, sued out before said justice of the peace a writ of garnishment against the St. Louis Southwestern Railway Company, commanding the garnishee to appear before the justice of the peace on the 26th day of February, 1908, to answer what goods, chattels, moneys, credits or effects it had in its hands belonging to Seitz, to which it answered that on the 17th day of February, 1908, the defendants Grayson and Seitz, as partners, recovered a judgment in the Greene Circuit Court against it for $422.78. And plaintiff further alleged that the judgment now amounts to $472, and that Seitz is the owner of one-half thereof, and was on the 20th day of December, 1907, and has been continuously since that date to the present time, wholly and totally insolvent, and has no property whatsoever, either real or personal, out of which satisfaction of the above judgment could be made, except the interest of Seitz in the judgment recovered against the railway company. And it, plaintiff, asked for a judgment against Seitz for $98 and interest and costs of action, and a decree charging the interest of Seitz in the judgment for $472 against the railway company with the payment of the judgment "in favor of plaintiff so to be rendered;" and that the railway company be ordered and adjudged to pay plaintiff out of the judgment against it in favor of Seitz.

Grayson answered and said that the total amount of the judgment rendered against the railway company is $516.15, from which is to be deducted $211.05, leaving $305.10 to be divided equally between defendants, Grayson and Seitz, the latter's half being $152.55.

The railway company answered, and admitted the issuance of the writ of garnishment and its answer to the same.

The defendant, Seitz, after giving notice to plaintiff of his

intention to file a schedule claiming his exemptions, did so and stated that he was a resident of the State of Arkansas and a married man and the head of a family, and that he is the owner of the following described property, in addition to the wearing apparel of himself and family, towit: a one-half interest in a certain judgment recovered by himself and A. D. Grayson, as partners, against the St. Louis Southwestern Railway Company, the amount due him on account thereof, after paying costs and attorney's fees, being $152.55, and claimed the same as exempt from garnishment or order of court in this suit; and he appended to such schedule an affidavit, in which he swore that the schedule embraced all of his property of every kind, except wearing apparel of himself and family, and that the personal property claimed as exempt does not exceed in value the sum of $500, and that he is a married man and the head of a family and a resident of the State of Arkansas; and that the judgment in favor of plaintiff is for debt due upon contract.

Plaintiff demurred to the schedule (1) because the chancery court had no jurisdiction to hear and determine defendant's right to schedule his personal property in this suit; (2) because the schedule shows upon its face that it is an attempt to schedule his interest in an unsettled partnership fund; (3) because the affidavit attached to the schedule is insufficient in law.

The court upon final hearing overruled the demurrer, and found that the railway company had paid into court the amount of the judgment due from it to the defendants, A. D. Grayson and Will Seitz, and that the said Will Seitz is entitled to schedule and claim as exempt the part due him as against any claim or right of the plaintiff, and decreed that the railway company be discharged from any liability to the plaintiff or defendants, that the motion of plaintiff be dismissed, the schedule filed by Seitz be overruled, and that Seitz be permitted to schedule the fund paid into court against plaintiff's debt, and that such fund so paid be paid to Grayson and Seitz as their interests may appear, and dismissed plaintiff's complaint for want of equity. The plaintiff appealed.

Under the Constitution of this State, Seitz was and is entitled to hold specific articles of his property to be selected by him, not exceeding in value $500, in addition to the wearing ap-

parel of himself and family, exempt from seizure on attachment or sale on execution or other process from any court on debt by contract. Const. 1874, art 9, § 2. His selection of exemption is not confined to any particular property. If it be in partnership property, he is entitled to select it when it is ascertained and segregated. *Porch* v. *Arkansas Milling Company,* 65 Ark. 40. Appellant alleged in its complaint that one-half of the judgment for $472 is all the property owned by him. That is an admitted fact. Whatever amount that may be, it is certain that it is not equal to his exemption. He claims that as such and he is entitled to it. Without further investigation or proceedings, it is settled that appellant's complaint is withhout equity.

Decree affirmed.

TERRE NOIR DRAINAGE DISTRICT NO. 3 *v.* THORNTON.

Opinion delivered January 17, 1910.

1. DRAINS—SUFFICIENCY OF PETITION.—A petition for the formation of a drainage district is sufficient, under Kirby's Digest, § 1414, if it shows that the proposed ditch either will be "conducive to the public health, convenience or welfare" or "will be of public utility or benefit." (Page 335.)
2. SAME—SUFFICIENCY OF PETITION.—A petition for the formation of a drainage district which states that the proposed improvement is the "altering, widening and straightening" of a certain stream for the distance of 25 miles, that because the stream is crooked the land adjacent thereto is subject to frequent and violent overflows, and that the improvement is necessary to drain the adjacent lands, and to carry off the water during overflows, and which sets out the starting point, route and terminus of the proposed improvements, substantially complies with the statute. (Page 335.)
3. SAME—SUFFICIENCY OF JUDGMENT OF COUNTY COURT.—Where the judgment of the county court, in a proceeding to establish a public ditch set forth the petition, and found that it stated a necessity for the ditch and designated the starting point, route and terminus, and the viewers, appointed to make a preliminary survey, reported that the ditch was necessary, and the court so found and recited the facts in its judgment, a substantial compliance with the statute is shown. (Page 336.)

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; reversed.

Callaway & Huie, for appellant.

The requirements of sections 1414-1415, Kirby's Dig., were complied with. Though the petition does not follow the exact language of the statute, the allegations as to the length of the proposed improvement, the tortuousness of the watercourse, the frequency of overflows and the consequent impairment of the value of the lands to be drained, were sufficient to bring to the attention of the court the existing conditions. The court then appointed viewers, with instructions to report "whether the proposed improvement is necessary, practicable or will be conducive to public health, convenience or welfare." Their report was in the affirmative, and the court approved and confirmed same, thus finding that the conditions called for in section 1414 really exist, and that there is a "necessity" for the improvement. This was a substantial compliance, which was sufficient. 64 Ark. 108; 64 *Id.* 555.

W. E. Hemingway, E. B. Kinsworthy, Jno. E. Bradley, Jno. H. Crawford and *Jas. H. Stevenson,* for appellees.

1. The petition was fatally defective. The establishment of ditches is a matter of special jurisdiction conferred on county courts, to be invoked in a specified manner. The statute requires that the petition which gives the court jurisdiction shall "set forth the necessity" of the proposed improvement. 59 Ark. 483; 64 *Id.* 108. Under such statutes, it is the generally established rule that the petition must contain express allegations of the necessity of the proposed improvement. 14 Cyc. 1031; 160 Ind. 533; 109 *Id.* 340; 92 *Id.* 332; 72 *Id.* 435; 67 *Id.* 206; 64 *Id.* 209; 64 *Id.* 104; 58 *Id.* 88; 3 N. Y. St. 486. See, generally, 2 Farnham, Waters and Water Rights, 1013; 129 Ill. 651.

2. The defective petition was not cured by the finding of the viewers nor the orders and findings of the county court. Under the statute, the court's order establishing the district should affirmatively show that the improvement is not only "necessary," but that "same will be conducive to public health, convenience or welfare," or "will be of public utility or benefit." The court orders in question fail to contain such jurisdictional recitals, and are therefore void. 59 Ark. 483; 2 Farnham, 1013; 105 Ind. 517; 86 Wis. 140; 76 Ia. 528; 17 Ohio St. 1; 129 Ill. 651; 19 Hun 17; 72 Ind. 435.

HART, J. This is an appeal by the Terre Noir Drainage District No. 3 from a judgment of the Clark Circuit Court. The proceedings were commenced in the Clark County Court, where the judgment was in favor of appellant. Upon appeal to the circuit court, C. S. Thornton, St. Louis, Iron Mountain & Southern Railway Company and others filed a demurrer to the jurisdiction of the court.

The basis of the proceedings was a petition filed in the county court, which, omitting the style of the court and the signatures to it, is as follows: "We, the undersigned petitioners, respectfully state that Terre Noir Creek, running through Clark County, is a very tortuous stream, and by reason thereof the greater portion of the land lying thereon and adjacent thereto is subject to frequent and violent overflows, and especially that part between the points hereinafter mentioned; that we desire said stream altered, widened and straightened for the purpose of properly draining the lands lying thereon and between the points hereinafter mentioned. That said proposed altering, widening or straightening of said stream is to be done by ditch or ditches and excavations of necessary depth, size and dimensions to aid in promptly carrying off the waters of said stream during overflows. That said proposed work is to begin about the southeast corner of section 5, township 8 south, range 21 west, and running in a southeasterly direction with the general course of said stream through township 8 south, range 21 west, and townships 8 and 9 south, range 20 west, and townships 9 and 10 south, range 19 west, and township 10 south, range 18 west, to or near the point where said stream empties into the Little Missouri River, in section 35, township 10 south, range 18 west, as aforesaid; making said proposed improvement covering a distance of about twenty-five miles in length. That we are the owners of land liable to be affected by, or assessed, or re-assessed for the construction of same. That it is desired that bonds be issued for the purpose of making said improvement. Wherefore we pray the court that said stream be straightened, altered and improved as aforesaid; that all proper and necessary orders be made and entered by this court for the purpose of carrying out said proposed improvement, as provided by sections 1414, 1415, 1416 *et seq.*, and as amended, of Kirby's Digest of the Statutes of Arkansas."

Section 1414 of Kirby's Digest confers upon the county court power to cause to be constructed a ditch "when the same shall be conducive to the public health, convenience or welfare, or when the same will be of public utility or benefit."

Section 1415 provides that the court shall establish the ditch when a petition of a designated number of landowners, setting forth the necessity therefor, with a general description of the proposed ditch shall be filed with the county clerk.

In construing similar sections of a former drainage act the court, in the cases of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Dudgeon,* 64 Ark. 108, and *Cribbs* v. *Benedict,* 64 Ark. 555, held that the jurisdiction of the county court is special, and is to be exercised in a special manner, and for that reason that the petition must set out all the essential facts required by the statute. The necessity contemplated by section 1415 of the Digest is, as shown by section 1414, that the proposed ditch shall be conducive to the public health, convenience or welfare, or will be of public utility or benefit. It is true that the allegations of the petition do not follow the exact language of the statute; but the essential facts are stated, and it is from these facts that the court must find that the proposed ditch will be "conducive to the public health, convenience or welfare," or will be "of public utility or benefit."

The petition states that the proposed improvement is the "altering, widening or straightening" of a stream for the distance of twenty-five miles. That, because the stream is crooked, the land adjacent thereto is subject to frequent and violent overflows, and that the improvement is necessary to drain the adjacent lands, and to carry off the water during overflows. The starting point, route and terminus of the proposed improvement is set out in the petition. It is manifest that these frequent overflows will cause the low lands to be filled with water and thus become swamps and marshes; and that the proposed improvement will relieve these low lands of their stagnant water. The result will be to prevent disease and open up for use a large body of land, twenty-five miles in length. The length of the proposed improvement shows the extent of the area to be drained, and is indicative of its public character. In our judgment this was in substantial compliance with the statutory requirement,

and a substantial compliance with the statute is sufficient. *Cribbs* v. *Benedict, supra.*

The order or judgment of the county court sets forth *in extenso* the petition, and finds that it states the necessity of said proposed improvement, and it designates the starting point, route and terminus; and viewers were appointed to make a preliminary survey and ascertain whether it will be conducive to the public health, convenience or welfare. They reported that the proposed improvement was necessary, and that it would be conducive to the public health, convenience and welfare; and the court found from the report in favor of making said improvement, and these facts were recited in its judgment. This was a substantial compliance with the statute, and a substantial compliance, as we have seen, is all that is necessary. *Cribbs* v. *Benedict, supra; Chapman & Dewey Land Co.* v. *Wilson,* 91 Ark. 30.

Therefore the circuit court erred in sustaining the demurrer to the petition, and the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MERWIN v. FUSSELL.

Opinion delivered January 17, 1910.

1. TAXATION—ROAD TAX—SPECIAL ELECTION.—Under Const. 1874, Amdt. 5, providing that a county road tax may be levied and collected "if a majority of the qualified electors of such county shall have voted public road tax at the general election for State and county officers preceding such levy at each election," the road tax must be voted for by the electors at the general election preceding the levy; and the act of March 26, 1909, providing for a special election in St. Francis County to determine that question, was invalid, and the tax levied in pursuance thereof was illegal. (Page 339.)
2. SAME—INJUNCTION AGAINST ILLEGAL TAX.—Under Const. 1874, art. 16, § 13, providing that any citizen of any county may sue to protect the inhabitants thereof against illegal exactions, and Kirby's Digest, § 3966, providing that injunctions may be granted in cases of illegal or unauthorized taxes, a citizen and taxpayer is entitled to an injunction against the collection of an illegal or unauthorized tax. (Page 341.)

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

Hal L. Norwood, Attorney General, for appellant.

The act of 1909 does not require "a majority of the qualified electors of the county," as called for in the constitutional provision (Amendment No. 5, Const., and § § 7324 *et seq.* Kirby's Dig.), nor does the order of court state that the proposition received such a majority; but this does not raise a presumption that such a majority did not vote in favor of the road tax. The act is also in apparent conflict with the constitutional requirement that the road tax be voted on "at the general election for State and county officers," in that it provides for a special election. The object of the constitutional provision, however, was to permit the levying of a road tax whenever a majority of the qualified electors of the county should vote in favor of it, and we can see no reasonable objection to the holding of an election at some other time than that mentioned in the Constitution. The act should be upheld if possible. 69 Ark. 376; 77 *Id.* 250. The chancery court was without jurisdiction. Appellee's remedy is plainly provided in § 6896, Kirby' Dig. 7 Ark. 520; 13 *Id.* 630; 26 *Id.* 649; 26 *Id.* 680; 27 *Id.* 97; 27 *Id.* 157; 30 *Id.* 109; 48 *Id.* 331.

Walter Gorman, for appellees.

Plaintiff below had a right to sue in behalf of all property owners in the county subject to taxation. Sec. 13, art 16, Const. The chancery court had jurisdiction. Kirby's Dig. § 3966; 33 Ark. 441; 34 *Id.* 603; 39 *Id.* 412; 46 *Id.* 471. The act is in contravention of the constitutional provision, and is void.

FRAUENTHAL, J. The plaintiff below, James Fussell, on behalf of himself and all the owners of property in St. Francis County, instituted this suit in the chancery court of that county against T. C. Merwin, clerk of the county court, and W. E. Williams, sheriff and ex-officio collector of said county, seeking to enjoin the extension on the tax books and the collection of a certain tax, called the road tax, of three mills, levied on the property in said county for the year of 1909. In his complaint he alleged that he was the owner of real and personal property in said county subject to taxation, and that he brought the suit in behalf of himself and all owners of property subject to taxation in said county. That the qualified electors of St. Francis County failed to vote for a public road tax in said county at the general election for State and county officers next preceding the first Monday in

October, 1909. "That the Legislature of 1909 passed an act, which was approved March 26, 1909, and entitled 'An act to provide for special elections in Mississippi and St. Francis counties for levying a tax for road purposes,' which said act, after naming the third Monday in May, 1909, as the time for holding said special election, and prescribing the manner in which said election should be held, proceeds as follows:

"'Sec. 5. That, if a majority of the votes cast in said election shall be for road tax, that the quorum court for said counties, at their regular annual meeting, in the month of October, 1909, shall fix the rate as by law provided, and shall levy same on and against all real and personal property in the counties made subject to taxation by law for the year 1910, and the clerks of said counties shall extend the taxes thus levied by said quorum courts against all said property on the tax books of said counties for the year 1910, and the sheriffs and collectors of said counties shall collect the taxes so levied and extended, the same as any other taxes levied and collected for said counties.'

"That the quorum court of St. Francis County, at its regular annual meeting held in said county on the first Monday in October (October 4), 1909, acting under the supposed authority conferred by said special act of the Legislature made and caused to be made, entered of record an order purporting to levy a road and bridge fund tax of three mills on each dollar of real and personal property in St. Francis County, as shown by the assessment of said property for the year 1909. * * * That the defendant, T. C. Merwin, clerk as aforesaid, is now engaged in making up the tax books for the year 1909, for said county of St. Francis, and extending thereon the said road and bridge fund tax of three mills on each dollar, of the value of all real and personal property in said county, as shown by the assessment rolls for 1909. That the defendant, W. E. Williams, sheriff and ex-officio collector of taxes for said county as aforesaid, if not previously enjoined by this court, will, on the first Monday in January, 1910, proceed to collect from all the owners of property in said county the total amount of taxes extended against said property, including the said tax of three mills for road and bridge fund; and if the plaintiff and other owners of said property should refuse to pay said taxes as extended against said

property the said collector will sell the same for the payment thereof, thereby clouding the title to said property and giving rise to a multiplicity of law suits."

The defendants filed a demurrer to the complaint and then an answer. In their answer they admitted the allegations of the complaint. They alleged that at a special election held in May, 1909, in said county 800 votes were cast for road tax and 44 votes against road tax, and that the authority under which said road tax was levied by the quorum court of said county was competent and lawful. They further alleged that there was no equity in the complaint, and that plaintiff had no right to maintain the action. The chancery court sustained a demurrer to this answer; and, the defendants having refused to plead further, a decree was entered enjoining said sheriff and ex-officio collector from collecting the said tax of three mills for road and bridge fund so levied on the property in St. Francis County for the year of 1909. From that decree the defendants prosecute this appeal.

The only authority by which the county court of St. Francis County could levy a road tax is derived from the Constitution of the State. The Constitution provides: "The county courts of the State in their respective counties, together with a majority of the justices of the peace of such county, in addition to the amount of county tax allowed to be levied, shall have the power to levy not exceeding three mills on the dollar on all taxable property of their respective counties, which shall be known as the county road tax, and, when collected, shall be used in the respective counties for the purpose of making and repairing public roads and bridges of the respective counties, and for no other purpose, and shall be collected in United States currency or county warrants legally drawn on such road tax fund if a majority of the qualified electors of such county shall have voted public road tax at the general election for State and county officers preceding such levy at each election." (Amendment No. 5, Const. 1874).

It is axiomatic, under our form of government, that the Constitution is the paramount law to which all other laws must yield, and that it is obligatory on all departments and the citizens. It is the measure of the rights and powers of the legislative department; and an act passed by that body which contravenes any express mandatory provision of the Constitution is invalid. It

is provided by the Constitution that the county court shall have the power to levy a road tax "if a majority of the qualified electors of such county shall have voted public road tax at the general election for State and county officers preceding such levy at each election." By this provision the Constitution has fixed the conditions which must be complied with before a valid levy of this road tax can be made. It must be first voted by the electors, and the time of holding that election is fixed by the Constitution. It is said by Mr. McCrary in his work on Elections that "it must be conceded by all that time and place are the substance of every election," and that "it is, of course, essential to the validity of an election that it be held at the time and in the place provided by law." McCrary on Elections, § § 176, 153.

The authority to hold an election at one time will not warrant an election at another time, and an election held at a time not fixed by the law itself will be void. In his work on Constitutional Limitations Mr. Cooley says: "Where the time and place of an election are prescribed by law, every voter has a right to take notice of the law and to deposit his ballot at the time and place appointed." Cooley on Constitutional Limitations, 909.

The time of holding an election is therefore one of its essential ingredients, and the provision designating such time cannot be deemed to be directory merely. It is a mandatory requirement, and is exclusive. In 10 Am. & Eng. Ency. Law, 681, it is said: "If the Constitution of a State fixes the time for holding an election, the Legislature cannot without constitutional authority make any change in the time." In Paine on Elections, § 306, it is said that the designation in a State Constitution of the "annual town meeting" as the time for the election of justices of the peace is equivalent to a prohibition against electing them at any other time.

In the case of *State* v. *Johnson,* 26 Ark. 281, it is said: "Where the Constitution designates in express and explicit terms the precise time when a fundamental act shall be done and is utterly silent as to the performance at any other time, it cannot be done at any other time." Few of the provisions in a State Constitution should be considered directory; they are the expressions of the highest will of the people, and should be followed. *State* v. *Askew,* 48 Ark. 82; 8 Cyc. 762.

The Constitution has prescribed that the election at which the electors shall vote on the question of a road tax shall be held at the general election for State and county officers. It may have been thought that at an election held at that time a larger vote would be cast and a better and more extended expression of the electors would be obtained. The case at bar is an illustration of the fact that ordinarily at the general election held for State and county officers a larger number of votes is cast than at a special election. In this case there were cast at the general election held for State and county officers in September, 1908, more than 2,000 votes, while at the special election in May, 1909, only 844 votes were cast. But, whatever the reason may have been, the Constitution has in express terms designated the time of holding this election. This provision of the Constitution is therefore mandatory, and must be followed. The act of the General Assembly approved March 26, 1909, which authorized a special election to be held in May, 1909, in St. Francis County for the purpose of voting upon the question of "road tax" (Acts 1909, p. 246), contravened this provision of the Constitution, and is therefore invalid. The majority of the electors of St. Francis County did not vote a public road tax at the general election for State and county officers preceding the levy of that tax made by the county court of that county in October, 1909. That tax, so levied by the county court, was unauthorized, and it was therefore illegal and void. *Worthen* v. *Badgett,* 32 Ark. 496; *Cairo & Fulton R. Co.* v. *Parks,* 32 Ark. 131; *Hodgkin* v. *Fry,* 33 Ark. 716; *Cole* v. *Blackwell,* 38 Ark. 271.

It is urged by counsel for defendants that the plaintiff was not entitled to the equitable remedy of injunction, because by virtue of section 6896 of Kirby's Digest he had a right to appear before the county court and object to the levy of any specific tax for illegality, and through that procedure he had a full and adequate remedy. But by section 13 of article 16 of the Constitution of 1874 it is provided: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." And by section 3966 of Kirby's Digest it is provided that injunctions and restraining orders may be granted in all cases of illegal or unauthorized taxes and assessments by

county, city or other local tribunals or officers. And under these provisions of the Constitution and the statute a citizen and taxpayer has the right to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax. *Vaughan* v. *Bowie,* 30 Ark. 278; *Brodie* v. *McCabe,* 33 Ark. 690; *Cole* v. *Blackwell,* 38 Ark. 271; *St. Louis Southwestern Ry. Co.* v. *Kavanaugh,* 78 Ark. 468; *Little Rock* v. *Barton,* 33 Ark. 441; *Dreyfus* v. *Boone,* 88 Ark. 353.

The decree of the St. Francis Chancery Court is affirmed.

CULLIN-MCCURDY CONSTRUCTION COMPANY *v.* VULCAN IRON WORKS.

Opinion delivered January 24, 1910.

1. SALES—RESERVATION OF TITLE—EFFECT.—Under a contract reserving title to a chattel until paid for, no title passes until the conditions of the contract are performed; and a subsequent purchaser, even for value and without notice of the reservation, can acquire no greater rights than the conditional vendee had under the contract. (Page 345.)
2. ATTORNEY AND CLIENT—AUTHORITY TO COMPROMISE.—It is not within the implied authority of an attorney to compromise his client's cause of action, or to release defendant from liability, or to shift that liability by accepting the liability of another for that of the defendant. (Page 345.)

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

Rachels & Johnston and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. Even though appellees retained title to the shovel, yet, unless they were entitled to the immediate possession of it at the time suit was brought in replevin, they cannot recover. 11 Ark. 249; *Id.* 475; 17 Ark. 449; 16 Ark. 90; 37 Ark. 64. And the burden was upon them to establish their right to such immediate possession. 42 Ark. 313.

2. The contract between J. H. Whalen and appellant was erroneously excluded, the same being material as showing appellant's right to possession of the property under him.

3. If attorneys for appellees made a stipulation with reference to the use of the shovel, it was binding upon appellees, proof thereof was admissible, and it was error to exclude it. 3 Am. & Eng. Enc. of L. 374; 11 Fed. Cases. 147; 20 Me. 83; 24 Me. 250; 115 Mass. 37.

S. Brundidge, and *H. Neelly* for appellee.

1. The complaint states that appellee is the owner and entitled to the immediate possession of the property in controversy. This allegation is not denied in the answer. The question was therefore not in issue, as no proof on that point was required of plaintiff. 73 Ark. 589. The evidence, nevertheless, fully sustains appellee's right to immediate possession.

2. The contention that proof of the contract between Whalen and appellant was admissible is based upon the theory that appellee was not entitled to immediate possession. Such theory is not tenable, unless appellee knew of, and acquiesced in, the contract between Whalen and appellant.

3. There is no allegation in the answer that the attorney for appellee made a contract with reference to the use of the shovel; but if he had done so it would not have bound appellee unless it had specially authorized him to make the contract. 33 Pac. 660, 663; 21 N. W. 441; 69 Ala. 543.

MCCULLOCH, C. J. This is an action instituted by the Vulcan Iron Works, of Toledo, Ohio, against appellant, Cullin-McCurdy Construction Company, to recover possession of a steam shovel and damages for its detention. In the construction of the Missouri & North Arkansas Railroad through this State, Burke & Joseph were contractors, and appellant was a subcontractor under them. J. H. Whalen was a subcontractor under appellant, and procured the steam shovel from appellee to use in removing dirt and rock in the construction of the railroad.

The contract between appellee and Whalen concerning the steam shovel was in the form of a lease, dated May 4, 1907, and stipulated that appellee leased the shovel to Whalen for a term of three months from the date of delivery for the sum of $6,000, of which $2,000 was paid in cash and the balance was payable in three monthly installments; and that, on payment of the additional sum of $10 within ten days after the expiration of the lease and all bills for repairs and extra parts ordered, appellee would

convey to him the absolute title to the shovel. The effect of the contract was a lease of the shovel by appellee to Whalen on condition that the latter pay the amounts named within a specified time. Under this contract, no title could pass to Whalen before the performance by him of the specified conditions. The contract between Whalen and appellant provided that, in the event the former should fail to complete the work which he contracted to do, then appellant could use the shovel in completing the work.

Whalen failed to make the payments stipulated in his contract with appellee for the shovel, and failed to fully perform his contract with appellant, and on October 15, 1907, appellee instituted this action against appellant to recover the shovel, which was then in appellant's possession. An order of delivery was issued at the commencement of the action and served on appellant, and the latter elected to retain possession, and gave bond in accordance with the statute to perform the judgment of the court in the action.

Appellant filed its answer, stating that it laid no claim to the shovel except the right to use the same under its contract with Whalen, and that it had taken possession by replevin against Whalen for the purpose of completing the work specified in the Whalen contract; that since it took possession from Whalen the principal contractors, Burke & Joseph, "took absolute control by force of said steam shovel, and have ever since continuously used and operated same independently and against the will and wishes of the defendant." It is further alleged in the answer that, since appellant took possession of the shovel, a contract had been entered into between appellee and Burke & Joseph by which the latter were to become responsible for the rental value of the shovel. There was a trial before a jury, and a verdict was returned in favor of appellee for the recovery of the shovel and $1,650 damages, which was divided in the verdict as $400 for damages to the shovel and $1,250 rental value during detention. Judgment was rendered accordingly, and an appeal was taken to this court.

The evidence adduced by appellee was sufficient to establish injury to the shovel to the extent of one thousand dollars, and that the rental value was $15 per day. So the amount of the verdict was not excessive.

The evidence was sufficient to establish the allegations that Whalen had failed to perform the terms of the lease contract with appellee and forfeited his right to possession of the shovel, and that appellee was entitled to possession. The reservation of title in the form of a lease contract was valid, and no title passed to the vendee until the conditions of the contract were performed. A subsequent purchaser, even for value and without notice of the reservation, could acquire no greater rights than the conditional vendee had under the contract. *Triplett* v. *Mansur-Tebbetts Imp. Co.,* 68 Ark. 230, and cases cited.

The ruling of the court in refusing to allow appellant to introduce in evidence its contract with Whalen for the use of the shovel was not prejudicial, as the jury found upon sufficient evidence that Whalen had forfeited his right to possession under his contract with appellee.

Error of the court is assigned in the exclusion of testimony offered by appellant to the effect that one of appellee's attorneys in the case, Mr. Denman, of Toledo, Ohio, had entered into an agreement with appellant for the return of the shovel as soon as it completed its work, and had employed a man to take charge of the shovel as soon as it was through with it. The offered testimony was not directed to the issues involved in the case, and for that reason was properly excluded. The only issue, aside from the question of Whalen's forfeiture by failing to perform the conditions of the contract, was upon the allegation of appellant's answer that appellee had entered into a contract with Burke & Joseph for the latter to become liable for the rental value of the shovel after the commencement of the suit. No testimony was directed to this issue, and certainly it cannot be said that the excluded testimony tended to sustain the allegation. There was no testimony offered to show that Denman had any authority to act for appellee, further than to prosecute the suit as an attorney, and it was not within the scope of his authority as attorney to compromise with appellant, or to release the latter from liability, or to shift that liability by making a new contract with another to assume it. *Pickett* v. *Merchants Nat. Bank of Memphis,* 32 Ark. 346; *Moore* v. *Murrell,* 56 Ark. 375.

No error is found in the record, and the judgment is affirmed.

SPEAR MINING COMPANY *v.* SHINN.

Opinion delivered January 10, 1910.

1. CONTINUANCES—DISCRETION OF COURT.—Questions as to the trial or continuance of causes rest so much in the discretion of the trial court that it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct. Thus a continuance asked to enable appellants to take the deposition of a witness was properly refused where they made no showing as to why they had not taken the testimony previously. (Page 350.)
2. PARTIES—WHEN DEFECT OF, WAIVED.—The objection that there was a defect of parties plaintiff is waived by failure to raise it in the court below, either by demurrer or answer, and cannot be raised on appeal for the first time. (Page 351.)
3. SAME—CREDITORS' BILL.—Creditors of an insolvent corporation may, on behalf of themselves and all other creditors who may join with them, bring suit to discover assets of such corporation and to obtain an accounting from other corporations who had assumed to pay, to the extent of such assets, the liabilities of the debtor corporation, where the total indebtedness of the debtor corporation exceeded its assets. (Page 351.)
4. SAME.—One may maintain an action upon a promise made to another for his benefit, if such promise was founded on a consideration; and especially where the promisor received property and in consideration thereof agreed to discharge the debt of another. (Page 352.)
5. CORPORATIONS—ASSUMPTION OF ANOTHER'S DEBT.—A corporation may become liable for the debts of another corporation where it has expressly or impliedly assumed them. (Page 352.)

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

Pace & Pace, Davis & Pace, and *Hamlin & Seawel,* for appellant.

The Spear Mining Company and the Spear Realty Company were not responsible for the debts of the Flynn Mining Company. 37 Ark. 23; 25 Ill. 353; 42 Ia. 563. The corporations were separate and distinct, and one would not be liable for the debts of the other without an express agreement to that effect. 48 S. W. 806; 33 L. R. A. 800; 61 Wis. 20; 70 U. S. 234; Angell & Ames, Corp., § § 40, 46, 100, 591, 595. There was a misjoinder of parties plaintiff. 30 Cyc. 114.

G. J. Crump, for appellee.

Where the transcript fails to show all the evidence upon which a cause was heard, the presumption is that the decree is

correct. 77 Ark. 187; 58 Ark. 135; 45 Ark. 312; 88 Ark. 318, 322. A misjoinder of plaintiffs is waived unless taken advantage of in the trial court. Kirby's Dig., § § 6093, 6096; 75 Ark. 288; 66 Ark. 560; 88 Ark. 589; 71 Ark. 47.

FRAUENTHAL, J. The plaintiffs below, T. J. Shinn & Company, the Boone County Hardware Company, and Charles Hill, were creditors of the Flynn Mining Company, a domestic corporation; and they instituted this suit in the Boone Chancery Court on behalf of themselves and all other creditors of said corporation who might join with them in the action, seeking to recover judgments for their several debts against all the defendants below. These defendants are the said Flynn Mining Company and the Spear Mining Company, which is a domestic corporation, and the Spear Realty Company, which is also a domestic corporation, and certain individuals who were officers of the Flynn Mining Company. In their complaint the plaintiffs set out the several debts due by the Flynn Mining Company to each of them; and they alleged that the stockholders and officers of the three corporations were the same, and that each corporation was succeeded by and merged into the other; that the Flynn Mining Company became largely indebted to various creditors, and turned over all its properties and assets to the two other corporations, and in effect went out of existence. They alleged that the two latter corporations, upon taking and receiving said property and assets, agreed to pay the liabilities of the Flynn Mining Company, and that these two corporations had failed to pay said liabilities or to account for said property and assets so received by them. They sought to discover these assets and to enforce the agreement made by the two latter corporations to pay the indebtedness of the Flynn Mining Company by recovering judgments for their debts against these two latter corporations, as well as against the Flynn Mining Company. They also alleged that the individual defendants had, by legal contract entered into by them, bound themselves and had become liable for said indebtedness of the Flynn Mining Company.

No other creditors of the Flynn Mining Company joined in this suit, and the total amount of the indebtedness due by the Flynn Mining Company to all the plaintiffs was $823.71.

The individuals who were made defendants herein filed no answer or other pleading; and judgment by default was rendered against them.

The three corporations filed separate answers, which were substantially the same in their denials and allegations. They admitted that the Flynn Mining Company was indebted to the plaintiffs as alleged in the complaint; but denied that the stockholders and officers of the three corporations were the same, or that the Flynn Mining Company was merged in the two latter corporations. They alleged that the Spear Mining Company had purchased from the Flynn Mining Company all its properties at the price of $1,100, and had assumed and agreed to pay that amount only of the indebtedness of the Flynn Mining Company; that it had paid out a portion of said purchase price, and that it was willing and ready to pay into court the balance of said purchase money. They denied that the two latter corporations had assumed all the liabilities of the Flynn Mining Company, or that they were responsible therefor; and they alleged that the three corporations were distinct and separate organizations.

The testimony of the plaintiffs was taken by depositions; and they finished taking their testimony on May 22, 1908. After this the defendants notified the plaintiffs that they would take the depositions of their witnesses on June 6, 1908, but they did not do so. About September 5, 1908, the attorney of the defendants sent by mail to the attorney of the plaintiffs certain interrogatories to which he requested him to append cross-interrogatories, in order that the testimony of the witnesses of the defendants could be taken thereon. The attorney of the defendants claimed that these were not returned to him in time to take the depositions of the defendants' witnesses before the day upon which the court in which the case was pending convened. That court convened on September 21, 1908, and the case was called for trial in that court on September 23, 1908. On that day the defendants moved the court to continue the trial of the case upon the ground that they had not taken any testimony, and in order that they might do so. In this motion they set out the names of the witnesses whose depositions they desired to take and what they expected to prove by them. The court overruled the motion to continue the case.

The plaintiffs took the testimony of John A. Bunch, who was the treasurer of the Flynn Mining Company, and of J. C. Bunch, who was a member of the Spear Mining Company, and the secretary of the Spear Realty Company; and these two persons had been actively engaged in the management of these respective corporations.

From their testimony it appears that with a few exceptions the three corporations were formed and composed of the same individuals, and were in effect under the management of the same persons; and that the place of business of each corporation was at Yardell, Arkansas. The Spear Mining Company was the owner of certain mining property, consisting of land, buildings and machinery, which was used in mining zinc, lead and other minerals. On January 20, 1904, it leased the land and fixtures to the Flynn Mining Company for a term of ten years in consideration of certain royalties which should be paid to it from the operation of the mine. The Flynn Mining Company acquired certain personal property, and conducted its mining operations until August 4, 1904, when it turned over to said Spear Mining Company all its properties and assets and said lease. On that date the Flynn Mining Company was indebted to various creditors in sums aggregating $2,000. The personal property of the Flynn Mining Company was estimated on that date to be of the value of $1,100; and all this property was turned over to the Spear Mining Company upon the agreement made by the latter corporation that it would assume and pay off that amount of the indebtedness of the Flynn Mining Company. The Spear Realty Company was incorporated on October 6, 1904, and took over all the assets of the Spear Mining Company and the property which had been received by the latter corporation from the Flynn Mining Company; and it took said property with the understanding and agreement that "the Spear Realty Company was to settle the indebtedness of the Flynn Mining Company to the extent of $1,100."

John A. Bunch, the treasurer of the Flynn Mining Company, testified that the said corporations had not paid said $1,100 in liquidation of the indebtedness of the Flynn Mining Company, and had not accounted therefor.

The chancery court rendered a decree in favor of the plain-

tiffs for their said debts and against the three corporations; and from that decree said defendants prosecute this appeal.

1. It is urged by the defendants that the chancery court erred in refusing to continue the case. It has been uniformly held by this court that a motion for a continuance is addressed to the sound discretion of the trial court; and that this court will not attempt to control that discretion unless it has been manifestly abused.

In the case of *Watts* v. *Cohn,* 40 Ark. 114, it is said: "Questions as to the trial or continuance of causes rest so much in the sound discretion of the trial court that it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct."

In the case of *Puckett* v. *State,* 71 Ark. 62, this court said: "Continuances are largely in the discretion of the court, and that discretion will not be controlled unless there is a manifest abuse of it." And in that case the court held that the continuance was correctly refused because proper diligence had not been shown to obtain the testimony desired. *Magruder* v. *Snapp,* 9 Ark. 108; *Hunter* v. *Gaines,* 19 Ark. 92; *Stillwell* v. *Badgett,* 22 Ark. 164; *Wilde* v. *Hart,* 24 Ark. 599.

In the case at bar the plaintiffs completed taking their testimony on May 22, 1908. The only witnesses whom they introduced, by whom they proved the connection and agreements between the three corporations and what became of the properties of the Flynn Mining Company and the insolvency and retirement from business operation of that corporation, were the active members and officials of these corporations, who resided at the place of business of the corporations. The defendants in their motion for continuance stated that they desired to take testimony relative to these same matters and of a contradictory nature of certain persons who were members of the corporations, and who resided at Little Rock, Arkansas, a great distance from the place of business of these corporations. After the plaintiffs had finished taking their depositions, the defendants gave notice to plaintiffs that they would take the depositions of these persons at Little Rock on June 6, 1908. The attorney of plaintiffs went to Little Rock on that day to take these depositions, but the defendants did not take the depositions, and no reason is assigned

why same were not taken. They had from that date further until September 21, 1908, the time of the meeting of the court, in which to take their testimony and prepare for trial, and they do not show any good reason why this was not done. They waited until September 5, 1908, before making any effort to take the depositions, and they did not then act with due diligence. The defendants have not shown reasonable diligence in taking the depositions of their witnesses. Furthermore, the testimony of members and officials of these corporations was taken in the case. Under the circumstances, therefore, of the case, we do not think that there was any manifest abuse of discretion on the part of the chancery court in refusing the continuance.

2. It is urged by defendants that there was a defect in the parties plaintiffs; that this suit was instituted by parties whose claims are separate and distinct, and on this account that there is a misjoinder of parties plaintiffs. The defendants did not in the court below raise the question of defect of parties, either by demurrer or answer; and it cannot therefore be raised for the first time in this court. *Eagle* v. *Beard,* 33 Ark. 497; *Chrisman* v. *Jones,* 34 Ark. 73; *Less* v. *English,* 75 Ark. 288.

Furthermore, this was a bill by several creditors of an insolvent corporation whose properties had been turned over to other corporations upon an agreement, and in effect in trust, that these latter corporations would pay to the creditors of said insolvent corporation a certain amount of its indebtedness. The total indebtedness of the insolvent corporation was greater than the amount assumed by the latter corporations, and therefore all the creditors, had they joined in this suit, could only have been paid proportionate amounts of their debts out of this fund. One of the objects of the bill was to discover the assets of the debtor corporation and to obtain an accounting from the corporations who had assumed to pay to the extent of said assets the liabilities of the debtor corporation. It was in the nature of a creditors' bill, seeking to obtain a relief that could not effectively be had at law. All the creditors of said debtor corporation had a community of interest in the subject of this action and in the relief demanded, and they could be joined, under such circumstances, as plaintiffs. 30 Cyc. 115.

In such a suit all creditors may unite, or any number of

creditors may bring the action on behalf of themselves and all such creditors who may join in the suit. 5 Enc. Plead. & Prac. 391; 4 Pomeroy's Equity Jurisprudence, § 1415; 12 Cyc. 36; *Jackson* v. *McNab,* 39 Ark. 111; *Senter* v. *Williams,* 61 Ark. 189.

3. It is contended that the three corporations were distinct and separate entities, and were not liable therefore for the indebtedness of each other. The mere transfer of the assets of one corporation to another does not constitute a legal identity between them; and if one corporation becomes the *bona fide* owner in a lawful mode of the assets or of any property of another corporation, it does not thereby become liable for the debts of the latter corporation. *Memphis Water Co.* v. *Magens & Co.,* 15 Lea 37; *Tawas, etc., Rd. Co.* v. *Circuit Judge,* 44 Mich. 479; *Bruffet* v. *Great Western Rd. Co.,* 25 Ill. 353; 10 Cyc. 287; *Worthen* v. *Griffith,* 59 Ark. 562.

But in the case at bar the property of the debtor corporation was conveyed successively to the two latter corporations, and in consideration thereof these two latter corporations agreed to discharge a certain amount of the liabilities of the debtor corporation. The weight of modern authority holds that one may maintain an action on a promise made to another for his benefit, if such promise is founded upon consideration. 3 Page on Contracts, § 1307; *Hendrick* v. *Lindsay,* 93 U. S. 143.

And especially is this true where the one who makes the promise receives property and in consideration thereof agrees to discharge a debt in favor of another. 3 Page on Contracts, § 1314. And so one corporation may become liable for the debts of another corporation where it has in express terms or by reasonable implication assumed the payment of the liabilities of the debtor corporation. 10 Cyc. 287.

In the case at bar there is sufficient evidence to sustain the finding that the Spear Mining Company and the Spear Realty Company successively obtained all the property of the Flynn Mining Company, and at the time knew that it was largely indebted to various creditors, and in consideration of said property they agreed to pay the indebtedness of the Flynn Mining Company to the extent of $1,100; and there is sufficient testimony to support the finding that these two corporations have not done this. All the property of the Flynn Mining Company was trans-

ferred to the two corporations successively in effect in trust for the payment of $1,100 of the indebtedness of the former corporation; and to that extent the two latter corporations are indebted to the creditors of the former corporation. The total amount of the debts of the creditors in this suit who are seeking to obtain the satisfaction of their claims is less than the amount which these two corporations assumed to pay. The plaintiffs are therefore entitled to recover from all three corporations the amounts of their debts.

The decree is affirmed.

NASHVILLE LUMBER COMPANY v. BAREFIELD.

Opinion delivered January 10, 1910.

1. GUARDIAN AND WARD—POWER OF GUARDIAN TO MAKE COMPROMISE.—Both at common law and under Kirby's Digest, § 3823, a guardian is authorized to compromise a claim for personal property, provided the compromise is made in good faith and not in fraud of the minor's rights. (Page 356.)
2. INFANCY—AUTHORITY OF COURT TO REMOVE NEXT FRIEND.—As it is the duty of the circuit court to protect an infant plaintiff in the progress of a cause, it has the discretion to revoke the authority of a next friend and to substitute another person as next friend. (Page 359.)
3. DOWER—WASTE.—A widow has no right to cut trees growing upon the dower land or to allow them to be cut, except in so far as it might be necessary to the proper enjoyment of the life estate in conformity with good husbandry. (Page 359.)
4. REPLEVIN—DAMAGES.—Where, in replevin for property wilfully or wrongfully taken or detained, the wrongdoer has, since the taking or detention, expended money or labor in increasing the value of the property, he is not entitled to have any deduction for the money or labor so expended, in assessing the value of the property for the purpose of the alternative judgment; but if the possessor of the property acted in good faith in obtaining same and in expending money or labor on it, so that the value of the property as compared to the value of the labor expended on it in its converted form is insignificant, the owner can recover only the value of the property less the increased value put upon it by the labor and expenditure. (Page 360.)
5. SAME—CONFUSION OF GOODS.—Where the identity of a specific article is lost by the wrongful act of another in commingling the property

with his own of the same nature and character, the owner can recover by replevin from the mass a quantity equal to the amount which he owned, without identifying each particular item as his original property. (Page 361.)

6. SAME—CONFUSION OF GOODS—EVIDENCE.—The plaintiff in a replevin suit may show by circumstances that the defendant has taken his property and so commingled it with the property of the defendant in the mass of the same nature and character, and also trace the possession thereof to the defendant. (Page 361.)

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

Sain & Sain, for appellant.

It is error for the court to substitute for the statutory guardian some other person as next friend to represent a minor. 31 Ark. 58; *Id.* 229. It is the duty of the statutory guardian to represent his ward in all suits. Kirby's Dig., § 6023; 42 Ark. 222. The record showing the minor's disabilities had been removed by the court was conclusive on collateral attack. Both the Phoenix Lumber Company and M. E. Johnson were necessary parties to the proper determination of this controversy. Kirby's Dig., § 6006; 37 Ark. 517; 35 Ark. 363; 39 Ark. 70; 38 Ark. 584; 61 Ark. 189.

W. P. Feazel, for appellee.

The court has the power to substitute for the guardian of a minor a next friend to bring suit or to represent a minor in a suit. Kirby's Dig., § 6021. The guardian had no authority to compromise the suit with the concurring sanction of the court. Rogers on Dom. Rel., § 859; 70 Ark. 87. The court had no authority to remove the disabilities of the minor, because the minor resided in another county. 54 Ark. 627. A life tenant has no right to cut trees growing upon land, except so far as may be necessary to the proper enjoyment of her life estate in conformity to good husbandry. 63 Ark. 10; 43 W. Va. 562; 64 Am. St. R. 891.

Sain & Sain and *T. D. Crawford,* in reply.

In the absence of statutory restraint or bad faith, a guardian may compromise, settle, or release claims due to his ward, and the ward is bound thereby. 99 Ky. 504; 152 U. S. 303; 112 U. S. 475; 111 Ga. 743; 44 N. J. L. 67; 35 S. W. 1039. And courts will enforce such settlement. 34 N. Y. 578; 58 N. Y. 185.

FRAUENTHAL, J. This was an action in replevin to recover the possession of a lot of lumber and logs or their value. The plaintiffs below were C. H. Barefield, Kate E. Barefield and Ed Barefield, a minor, who sued by his next friend, C. H. Barefield. They alleged that they were the owners of certain lands in Howard County, Arkansas, and that the defendant, the Nashville Lumber Company, had wilfully entered upon said land, and, knowing that the land was owned by plaintiffs, had cut and removed the timber therefrom and converted same into said lumber and logs. The land had been owned by the father of the plaintiffs, who had died intestate a number of years before the institution of this suit. He left surviving him the plaintiffs as his only heirs, and his widow, who was the mother of plaintiffs. The land had been assigned to the widow, M. E. Barefield, as dower by the probate court, and she had sold and conveyed the timber thereon; and the defendant had by mesne conveyances obtained the same from her grantee. After the institution of this suit, and before the trial thereof, the defendant made a settlement and compromise of the said claim of the plaintiffs upon which the action was founded and of said suit by paying to the adult plaintiffs and to M. E. Barefield as the statutory guardian of said minor plaintiff the sum of $325; and the adult plaintiffs and said guardian of said minor executed to defendant a receipt in which they accepted said sum in full and final payment of all the said claims of all the plaintiffs against defendant and of said suit. The defendant filed a motion, asking that the action be dismissed upon the ground that the matters therein involved had been settled, and that the plaintiffs did not desire to prosecute the same further. Upon the hearing of this motion the circuit court sustained the same as to the adult plaintiffs, but overruled it as to the minor plaintiff. It thereupon discharged said C. H. Barefield as the next friend of said minor plaintiff, and appointed one T. H. Kent in his stead; and the cause then proceeded with said minor as the sole plaintiff. The defendant then filed its answer, in which it denied the material allegations of the complaint. It alleged that it had obtained the timber through said M. E. Barefield, and that it had removed same under the honest belief that it was the owner thereof. It also alleged as a

defense the compromise and settlement of the claim and cause of action by the guardian of the minor plaintiff.

Upon the trial of the case the defendant offered to prove by M. E. Barefield that she was the statutory guardian of the plaintiff, Ed Barefield, and that as such guardian she had made a settlement with the defendant by which she had compromised the claim and suit of said minor plaintiff against the defendant and had received full payment thereof.

The court refused to permit the introduction of said testimony, and also refused to permit the introduction of the testimony of other witnesses to show said alleged compromise and settlement of the claim and suit by the guardian of said minor plaintiff. Amongst other instructions on behalf of the plaintiff it gave the following:

"No. 6. Under the laws of this State, a guardian cannot agree to any compromise or settlement by which the property interests of his ward are affected without concurring sanction of the court, to which he must look for authority to bind his ward; so in this case, there being no evidence that the attempted compromise or settlement was made under authority of the court, you will disregard the compromise entirely in the consideration of the case."

The jury returned a verdict in favor of the plaintiff Ed Barefield for his proportionate amount of the lumber and logs, stating the amount in feet, and assessing the value thereof at the increased value of lumber and logs respectively. A judgment was then entered in favor of the plaintiff for a recovery of the lumber and logs or their respective values as fixed by the jury.

1. The first question to be determined upon this appeal is whether or not a guardian has the authority to agree to a compromise and settlement of a disputed claim of a minor, such as is involved in this case, without the order or concurring sanction of the court from which he received his appointment. The claim that is involved in this case is for the recovery of personal property, and in this State there is no statute restricting the power of a guardian over the control and disposition of the personal property or choses in action belonging to the minor. At common law the guardian had large authority over the personal assets of his ward, and he had the power to sell and transfer them

to persons who dealt with him honestly and in good faith. To make such sale binding and effective, it was not necessary to obtain the order or sanction of the court where he acted fairly and justly; and he had the power, with respect to choses in action coming into his hands, to make such settlements thereof as the circumstances might render proper, and which within his sound discretion he deemed best, if he acted honestly and in good faith in making such settlements. *Field* v. *Schieffelin,* 7 Johns. Ch. 150; *Bank of Virginia* v. *Craig,* 6 Leigh 428; *Mason* v. *Buchanan,* 62 Ala. 110.

According to common law, Mr. Schouler, in his work on Domestic Relations, says, a guardian "may compromise a claim of his ward, when acting in good faith and with sound discretion." Schouler on Domestic Relations, § 343; 21 Cyc. 74.

In the case of *Maclay* v. *Equitable Life Assurance Society,* 152 U. S. 498, Mr. Justice Gray, speaking for the court, says: "A guardian, unless his powers in this regard are restricted by statute, is authorized, by virtue of his office, and without any order of court, to sell his ward's personal property and reinvest the proceeds and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest."

In the case of *Ordinary* v. *Dean,* 44 N. J. L. 64, in speaking of the power of a guardian in this respect, it is said: "He stands in the same position as any other trustee, who may generally, acting in good faith, compound and release a debt due the trust estate; and such composition or release for a valuable consideration is *prima facie* valid and effective." If the compromise or release is made without sufficient justification or fraudulently or upon a grossly inadequate consideration, the guardian will be answerable for it in his accounts; and such compromise can be impeached upon the trial of the action in which it is presented as a defense by showing that it was not made in good faith, but in fraud of his rights. *Torry* v. *Black,* 58 N. Y. 185; *Weston* v. *Stuart,* 11 Me. 326; *Manion Ry. etc.* v. *Ohio Valley Rd. Co.,* 99 Ky. 504.

In the case of *Mason* v. *Buchanan,* 62 Ala. 110, it is said that a guardian has the same powers as an executor or adminis-

trator with respect to choses in action coming into his hands, and that his authority to deal with the personal assets of the ward is equally as large as those of an executor or administrator. And in this State, where there is no statutory restriction, he has equally that power. In the case of *Wilks* v. *Slaughter,* 49 Ark. 235, Chief Justice COCKRILL, speaking for the court, says: "Administrators had authority to compromise a claim or compound a debt before the statute was enacted. The common law recognized the power. * * * In the absence of collusion between the administrator and the debtor or of fraud of the latter such as would vitiate the contract, the compromise or compounding was binding upon each of the parties to it if executed upon a sufficient consideration, just as if it would be if neither party was administrator." And in that case it was held that the right of the administrator to compromise the debt due to the estate, which existed prior to the statute which provides that an administrator may in certain cases obtain authority from the probate court to compromise debts due to the estate (Mansf. Dig. § 74), was not taken away.

The case of *Rankin* v. *Schofield,* 70 Ark. 83, is not in conflict with the holding that a guardian has the power to sell the personal property of his ward and to compromise and compound debts that are due to him without obtaining the order and authority from the court to do so. In that case the real property of the minor was involved, and the compromise affected the interest of the minor in real estate. The guardian is restricted by the statutes of this State from selling the lands of his ward, or from compromising his interests therein. The statutes of this State specifically provide that all such sales and actions must be had and done under the orders of the probate court. But there is no such restriction by the statutes of this State on the authority of the guardian relative to the personal property and choses in action of his ward. On the contrary, it is provided by section 3823 of Kirby's Digest: "Discharges, acquittances and receipts given by guardians and curators during the continuance of their respective offices for debts, rents or other money or property due to their wards shall be valid in favor of all persons who take them in good faith; but guardians and curators and their securities shall be liable to the party injured if such dis-

charges, acquittances and receipts shall be given illegally or fraudulently." It follows therefore that if the compromise of the claim of the ward involved in this case was made honestly and in good faith, and not for a grossly inadequate consideration or in fraud of the rights of the minor, it would be binding on him, and would protect the defendant. The court therefore erred in refusing to permit the introduction of testimony relative to said alleged compromise and settlement of said claim, and in giving said instruction number 6 on behalf of the plaintiff.

2. Inasmuch as this cause must be remanded for a new trial, we deem it proper to note the other questions that are presented upon this appeal. It is urged by the counsel for defendant that the court erred in removing the next friend by whom this suit was originally brought for the minor and in substituting another person as next friend. It is the duty of the court to protect the infant fully in the progress of the cause and to see that he is not prejudiced in the trial by any act or omission of the person by whom the suit is brought. The next friend of the minor is at all times subject to the control of the court, and the court may at its discretion revoke the authority of the next friend to represent him in the cause and to substitute another person as next friend whenever the court in its discretion may think that the infant might otherwise suffer. This is specifically provided for by section 6021 of Kirby's Digest. 14 Encyclopedia of Pleading & Prac., 1041.

In the trial of the case a number of instructions were given at the request of the plaintiff, and a number were refused which were asked for by the defendant. In its ruling upon these instructions we do not think that any error was committed by the lower court. The plaintiff claimed title to the land and the timber thereon, which was cut and removed by the defendant, by inheritance from his father; and the defendant claimed a right thereto through the widow of said decedent. The land upon which the timber stood had been assigned to the widow as dower. She was therefore only a life tenant of the land. It is the duty of the life tenant to protect the land from injury to the freehold, and not to commit waste. The "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 the life

estate in conformity with good husbandry, so as not to materially lessen the value of the inheritance." *McLeod* v. *Dial,* 63 Ark. 10.

The widow has no right to make a sale of the standing timber on the land set apart to her as dower when the same is not essential to the legitimate use of the property for the purposes of husbandry. *Parker* v. *Chambliss,* 12 Ga. 235; 1 Tiedeman on Real Property, § 75; 1 Washburn on Real Property, § 270; *Cherokee Const. Co.* v.. *Harris,* 92 Ark. 260.

In this case, therefore, the widow had no right to sell the standing timber on this land in which she had a life estate, and the defendant acquired no title thereto by reason of any conveyance from her. The evidence tended to prove that before the defendant purchased this timber it knew of the rights of the plaintiff thereto and the entire lack of right or authority of the widow to sell same. It further tended to prove that the defendant was not innocently and in good faith claiming to own the timber when it cut and removed it, but was a wilful trespasser in so doing. Where, in replevin for property wilfully and wrongfully taken or detained, the wrongdoer has since such taking or detention expended money or labor in increasing the value of the property, he is not entitled to have any deduction for the money or labor so expended, in assessing the value for the purpose of the alternative judgment. But if the possessor of the property did act innocently and in good faith in obtaining the same, and has expended money and labor upon it in good faith, so that the value of the property as compared to the value of the labor expended on it in its converted form is insignificant, the owner can recover only the value of the property less the increased value put upon it by the labor and expenditure. *McKinnis* v. *Little Rock, Mississippi River & Texas Ry.,* 44 Ark. 210; *Stotts* v. *Brookfield,* 55 Ark. 307; *Eaton* v. *Langley,* 65 Ark. 448; *Central Coal & Coke Co.* v. *John Henry Shoe Co.,* 69 Ark. 302; *United States* v. *Flint Lumber Co.,* 87 Ark. 80.

The instructions given by the court relative to assessing the value of the lumber and logs for the purpose of the alternative judgment, in effect, followed the above principles, and the defendant was not prejudiced by the giving of said instructions. A number of instructions relative to this same question were requested by defendant, but they were fully covered by the instructions on that point given by the court.

The evidence tended to prove that the defendant commingled the lumber and logs involved in this suit with other lumber and logs of its own of like grade and quality. Where the identity of the specific article is lost by the wrongful act of another in commingling the property with his own of the same nature and character, the owner can recover by replevin from the mass a quantity equal to the amount he owned, without identifying each particular item as his original property. *Rust Land & Lumber Co.* v. *Isom,* 70 Ark. 99.

And the plaintiff may show by facts and circumstances that the defendant has taken his property and so commingled it with the property of the defendant in the mass of the same nature and character, and by facts and circumstances trace the possession thereof to the defendant. The court substantially instructed the jury to this effect. We do not deem it necessary to refer to the other instructions or to set out any of them in detail. The plaintiff claimed to be the owner of the land and the timber thereon which is involved in this suit. The defendant cut and removed said timber from said land, and converted same into lumber and logs, and the plaintiff seeks to recover said lumber and logs or their value. The above principles sufficiently define their rights under the evidence adduced upon the trial, and will be a sufficient guide on the further trial of the case.

We have examined into the matters relative to the motion to strike out certain portions of the complaint, the demurrer thereto and the offer to introduce in evidence the alleged order removing the disabilities of the minor, and we do not find that the lower court committed any reversible error in its rulings thereon. We do not think that it would serve any useful purpose to discuss these questions in detail. The above principles sufficiently define the rights of the plaintiffs in this action and any meritorious defense that the defendant may have thereto.

The only reversible errors which we find in the case are the refusal of the court to permit the introduction of testimony relative to the alleged compromise of the suit and claim herein involved by the guardian of the minor, and the giving of said instruction number 6 on behalf of the plaintiff.

On account of said errors the judgment is reversed, and the cause remanded for a new trial.

SWAIM v. MORRIS.

Opinion delivered February 7, 1910.

1. MUNICIPAL CORPORATIONS—REGULATION OF BUILDINGS.—Under Kirby's Digest, § 5439, municipal corporations have the power to regulate the building of gin houses so as to guard against accidents by fire, but not to prohibit the erection of gin houses altogether. (Page 366.)
2. INJUNCTION—NUISANCE—ADEQUACY OF REMEDY AT LAW.—Where an ordinance provided that the erection of a steam cotton gin within certain territory of a town should be a nuisance, and for a fine for each day during which the ordinance was violated and for an abatement of the nuisance, the remedy at law for the maintenance of such nuisance is adequate, and resort to injunctive relief is unnecessary. (Page 366.)
3. NUISANCE PER SE—DEFINITION.—A nuisance *per se* is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. (Page 368.)
4. NUISANCE—COTTON GIN.—As a cotton gin is not a nuisance *per se*, a municipal ordinance prohibiting the erection of one as being a nuisance is too broad, and is invalid. (Page 368.)
5. INJUNCTION—NUISANCE.—Where an injunction is sought merely on the ground that a lawful erection will be put to a use that will constitute a nuisance, the court will ordinarily refuse to restrain the construction or completion of the erection, leaving the complainant free to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance. (Page 368.)

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

STATEMENT BY THE COURT.

The appellants, Swaim and Hicks, alleged that they were the owners of certain lots in the incorporated town of England, on which were situated business houses and residences. They allege that on one of the lots was a hotel in which appellant Hicks and family resided, and which was also occupied by other families and guests of the hotel, and that appellant Swaim had his residence on another lot adjoining the Hicks lots. They allege and show the location of their residences and business houses with reference to certain streets and sidewalks, and then allege, in part, as follows:

That the said defendant, George W. Morris, is preparing to erect and is erecting a steam cotton gin to be used for the public in ginning cotton; that, if said steam gin is permitted to be

erected and used for the purpose mentioned, it will expose plaintiff's property to great danger of fire from the operation of the engine attached to said gin and from the constant danger of fire taking the cotton while the same is in the course of being ginned therein; that the necessary waste in ginning said cotton and in loading and unloading of same will cause stock to congregate around said mill, and thereby produce a noxious odor, as also the decay of said waste matter, thereby rendering the enjoyment of the property of the said plaintiffs uncomfortable and inconvenient. That said gin will be a nuisance by reason of the unsightly appearances, unpleasant sounds and surroundings caused therefrom. That the erection and operation of said gin will endanger the lives and the property of the said plaintiffs and their families as well as the general public, and will greatly depreciate the value of plaintiff's property; that the health and comfort of the plaintiffs and their families, and the occupants and guests of said hotel, as well as the general public, will be greatly injured from the smoke and cinders from said engine and from the noise from the operation of said gin, and the wagons and people congregated around said gin at all hours of the day and night; that there is no place between where the said steam gin is being erected and the sidewalks in which to drive and unload said cotton and reload cotton and cotton seed and haul away from said gin, and that the access to plaintiff's property will be cut off by reason of the necessary obstruction by wagons, flowing water, grease and other objectionable matter that will escape from said engine and gin upon the sidewalks and into the streets, so that said sidewalks and streets will be made impassable, which has heretofore been done by the operation of a steam gin on said property. That the town of England is located in a great cotton country, and the cotton ginned within and near the said town of England during the cotton season will average from sixteen to twenty thousand bales, and during the cotton ginning season cotton will be brought to said gin in wagons, which will blockade the said streets and sidewalks as aforesaid, so as to prevent said plaintiffs, Swaim and Hicks, and their families, and the general public from access to and from their residences and places of business, and to the great injury, annoyance, and inconvenience of the general public.

The complaint then set up that there had formerly been a gin house on block 41, which had become a great private and public nuisance, but which had recently been destroyed by fire. After these allegations the complaint contains the following: That since the destruction of said gin an ordinance had been passed by the town council of the incorporated town of England prohibiting the building and construction of a steam cotton gin within certain limits of the said town embracing block 41, and which ordinance is in words and figures, as follows, towit:

"An ordinance prohibiting the building, erection or construction of gins, mills or other manufacturing plants on certain blocks in the town of England, Arkansas.

"Whereas the operation of manufacturing plants using steam as a motive power upon the property described below is detrimental to the health and comfort of the citizens of the town of England, and exposes the neighboring property to the danger of fire, and renders the enjoyment of dwelling houses and other houses materially uncomfortable by smoke, cinders, noise, offensive odors and otherwise; and

"Whereas the construction and operation of such plants upon said property would injuriously affect the neighbors and public at large, and would be a nuisance to the town of England and the inhabitants thereof."

Then follow sections of the ordinance making it unlawful to erect a gin operated by steam on certain blocks in the town of England, including block 41, and declaring the erection of such gin operated by steam to be "a public nuisance to the town of England and its inhabitants," and prescribing as a penalty for a violation of the ordinance a fine of not exceeding $200 and the abatement of the structure.

There was an amendment to the complaint, setting out in detail how the gin, if erected, would become a nuisance, and how it would be especially injurious to appellants Swaim and Hicks.

The prayer was for injunction restraining appellee from erecting the gin.

The appellee demurred to the complaint as follows:

Because the town of England has no authority to pass the ordinance relied upon by it, and the passage of said ordinance

was *ultra vires;* that said ordinance is unconstitutional, invalid and not binding; that said ordinance is class legislation, and in restraint of legitimate trade and business, and therefore void; that plaintiffs, Swaim and Hicks, have a complete and adequate remedy at law by bringing an action for damages against this defendant, who, if plaintiff recover a judgment against him, is financially able to respond thereto; and, further, that the town of England, if said ordinance is valid, is authorized to prosecute all parties criminally for its violation; because said complaint does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and dismissed the complaint for want of equity.

James B. Gray and *Trimble, Robinson & Trimble,* for appellant.

1. The ordinance is valid. 11 S. W. 456; 108 S. W. 838; 111 *Id.* 456; 234 Ill. 428; 84 N. E. 1043; 8 *Id.* 236; 29 Pa. 156; 108 N. W. 707; Kirby's Dig. § 5439; 35 Ark. 352.

2. Allegation of insolvency unnecessary. 10 N. W. 346.

3. Equity has jurisdiction to prevent repeated injuries and multiplicity of suits. 80 Ia. 218; 79 *Id.* 93; 1 Bush (Ky.) 463; 89 Am. Dec. 637; 51 Ia. 385; 67 *Id.* 207.

4. Equity has jurisdiction to restrain impending danger or injury, or prevent the creation or continuance of a private nuisance. 1 N. J. Eq. 518; 18 *Id.* 397; 40 Ark. 87. Nuisances *per se,* or where lawful occupations may necessarily be nuisances, may be enjoined. 3 Paige (N. Y.) 218; 10 Ga. 336; 76 Ill. 323; 21 A. & E. Enc. Law (2 Ed.) 704, note 4; *Ib.* 708, note 4; 116 Fed. 713; 35 Tex. 132; 116 Ky. 212; 87 Mo. App. 125; 107 Tenn. 224; 89 Am. St. 946. Livery stables are often enjoined. 107 S. W. 37; 129 Ind. 201; 28 N. E. 434; 13 L. R. A. 481; 28 Am. St. 185; 9 Ga. 425; 54 Am. Dec. 347; 10 Ga. 361; 104 Ill. App. 483; 7 R. I. 87; 80 Am. Dec. 636; 18 S. W. 529; 38 Md. 123; Wood on Nuisances, 594-6.

Joe W. Gates, F. T. Vaughan and *Palmer Danaher,* for appellees.

1. *Durfey* v. *Thalheimer,* 85 Ark. 544, answers all appellant's contentions. A mere prospect of future annoyance or injury from a structure which is not a nuisance *per se* is not

ground for injunction. 29 Cyc. 1222. This gin is not a nuisance *per se*. 29 Cyc. 1153-4, 1170, 1156, etc.; 10 Am. Rep. 669; 20 *Id.* 671-2; 21 L. R. A. 569; 87 Ark. 213 and many others.

2. Plaintiff's remedy at law is adequate—injunction will not lie. 29 Cyc. 1221; 31 Am. Dec. 712; 85 Ark. 544; 87 Ark. 213; 83 Ark. 330; 81 Ark. 117; 117 Am. St. 997-8; 66 Am. Dec. 790; 69 L. R. A. 820; 83 S. W. 695; 85 Ark. 554, and many others.

3. The ordinance is void. 52 Ark. 23; 31 Ark. 465; 27 Ark. 467; 1 Dillon, Mun. Corp., p. 409, § 308; 10 Wall (U. S.) 497; 18 L. R. A. 481; 109 Mass. 315-19; 41 Ark. 526; 28 Cyc. 722-3; 59 Am. Rep. 116; 28 Cyc. 711, note 11; *Ib.* 715, 735, 759, 765-6-8; 52 Ark. 23; 64 *Id.* 609; 70 *Id.* 14; 41 *Id.* 530; Const., sec. 2, art. 2 and § § 22-29, etc. The power of a town to pass such ordinances is limited. 28 Cyc. 258-B; *Ib.* 265 (3), 279, 364, 368, 369-371, and notes, etc.

4. Apprehension of an injury is not sufficient. 29 Cyc. 1223; 29 *Id.* 1222; 21 A. & E. Enc. Law (2 Ed.), 704, par. c and cases, note 1; 20 N. J. Eq. 201; 54 S. W. 723; 18 Barb. 255; 52 How. Pr. 255; 140 Pa. St. 111; 21 Atl. 253; 68 Ga. 668; 21 A. & E. Enc. L. (2 Ed.) 706-7; 27 Ark. 213.

WOOD, J., (after stating the facts.) Sec. 5439 of Kirby's Digest provides: "They (municipal corporations) shall have the power to regulate the building of houses; to make regulations for the purpose of guarding accidents by fire, and to prohibit the erection of any building or any addition to any building unless the outer walls thereof be made of brick or mortar or stone and mortar, and to provide for the removal of any building or addition erected contrary to such prohibition." Under this section the town of England had the power to regulate the building of gin houses so as to guard against accidents by fire. But it had no power under this statute to prohibit the erection of gin houses altogether. This statute therefore can not be invoked as authority to the town council to pass an ordinance to prohibit the erection of gin houses in the town of England.

But if the ordinance is valid under the above statute, then the remedy at law is adequate and complete. For the ordinance provides a fine of two hundred dollars for each day during which the ordinance was violated, and for an abatement of the

nuisance. So that resort to injunctive relief is entirely unnecessary and improper.

Likewise, if the ordinance was valid under the general police power of the town "to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive or unhealthy, and can cause any nuisance to be abated," the remedy at law by fine, or the abatement of the nuisance, provided for by the ordinance itself, was still a complete and adequate remedy, and it was wholly unnecessary for appellants to invoke the aid of a court of equity. The language of Judge Bleckley of the Supreme Court of Georgia in *Powell* v. *Foster,* 59 Ga. 790, is appropriate here. "What," says he, "is the obstacle to resorting to the mayor and council for protection, and obtaining it a once? The chancellor could see none, nor can a majority of this court. To anticipate the inefficiency of a statutory remedy exactly adapted to the case and apparently adequate and complete is warranted neither by precedent nor any general principle. Should the remedy be tried, and obstacles to its speedy success actually arise, it may then be in order to invoke the interposition of chancery by injunction." See authorities there cited.

But a majority of the court are of the opinion that the building of a gin in an incorporated town is not *per se* a nuisance, any more than the building of a livery stable.

Speaking of the latter in *Durfey* v. *Thalheimer,* 85 Ark. 544, 552, this court, through Judge BATTLE, said: "A livery stable, even in a city or town is not necessarily or *prima facie* a nuisance. It may become so by the manner in which it is constructed or conducted." So we say of a gin. It could be erected and operated at a place and in a manner to become a nuisance, but it might also be erected and operated at a place and in a manner so as not to be a nuisance. It is therefore clearly not a nuisance in itself or *per se.* As we said in the recent case of *Lonoke* v. *Chicago, R. I. & P. Ry. Co.,* 92 Ark. 546: "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." The ordinance, therefore, as an exercise of the general

police power of the town, was "too broad, and is invalid." *Arkadelphia* v. *Clark*, 52 Ark. 23. Hence appellants could not avail themselves of the ordinance to obtain injunctive relief. If, however, the erection of a gin would be a nuisance *per se*, appellants could have it enjoined without any ordinance. But, as we have already shown, the erection of a gin would not be *per se* a nuisance. "A nuisance at law or a nuisance *per se* is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." 29 Cyc. 1153. See other authorities cited in appellee's brief.

In note to *West* v. *Ponca City Milling Co.*, 2 A. & E. Ann. Cases, 249, 254, it is said: "Where an injunction is sought merely on the ground that a lawful erection will be put to a use that will constitute a nuisance, the court will ordinarily refuse to restrain the construction or completion of the erection, leaving the complainant free, however, to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance." See cases.

The judgment of the chancery court was correct, and it is affirmed.

McCULLOCH, Chief Justice, and BATTLE, J., dissent, holding that the ordinance passed by the town council of England is valid, and that plaintiffs have stated in the complaint facts sufficient to show a special injury to their property and entitle them to maintain this action to prevent a violation of the ordinance.

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

Opinion delivered January 17, 1910.

1. MASTER AND SERVANT—ASSUMED RISK.—A servant does not assume the risk of injury caused by the master's failure to comply with a statutory requirement for his protection, such as the requirement that railroad companies equip and maintain upon every locomotive a headlight of 1,500 candle power. (Page 370.)
2. SAME—NEGLIGENCE—FAILURE TO SUPPLY HEADLIGHT.—Where a trainman was injured in a collision with a cow on the track, evidence

that the railroad company used a coal oil headlight which enabled the engineer to see only from 300 to 500 feet ahead, when, if an electric light of 1,500 candle power had been used, as required by statute, he could have seen ahead a distance of from 1,700 to 2,000 feet, and that the engineer failed to see the cow before she was struck, justified a finding that the injury was due to the failure to equip the engine with a headlight of the required candle power. (Page 370.)

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

Lovick P. Miles, for appellant.

The court should have directed a verdict for appellant:

(1) Because the evidence failed to show that the absence of a 1,500 candle power headlight was the proximate cause of White's death. 56 Ark. 279; 29 Cyc. 631; 13 Cyc. 216; 76 La. 744; 83 Ark. 584; 86 Ark. 465; 77 Ark. 599.

(2) Because deceased plainly assumed the risk of the absence of such headlight. 54 Ark. 389; 56 *Id.* 31; 77 *Id.* 374; 82 *Id.* 11. The decision in 88 Ark. 243 is not applicable to the act in question. 207 U. S. 463.

Sam R. Chew, for appellee.

1. The failure of appellant to comply with the requirements of the act was negligence *per se,* which rendered it liable for all damages resulting therefrom. 1 Thompson on Negligence, § 10; 1 Shearman & Redfield on Negligence, § 13 (5 ed.); 152 U. S. 262; 111 *Id.* 228; 32 S. W. 460; 56 N. W. 914; 88 Ark. 243; 53 Ark. 201. The question as to whether or not White's death resulted from such failure was thus one for the jury, and the evidence sustains their finding. 75 Ill. 96; 27 Fla. 157; 20 N. W. 321; 66 Ark. 363; 81 *Id.* 267; 88 *Id.* 204.

2. Deceased did not assume the risk. 53 Ark. 201, and authorities on negligence *supra;* 88 Ark. 243.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railway Company from a judgment rendered against it in the Crawford Circuit Court in favor of Laura C. White.

John W. White was in the service of the defendant as brakeman, and was killed by the derailment of one of its trains at Menefee, Arkansas. The occurrence took place in the night time, and the train was running at the rate of 20 or 25 miles per

hour. White was on the engine, which was drawing about 23 loaded cars. When the train approached the switch at Menefee, the engine struck a cow. The pony trucks of the engine became derailed, and followed the main track until the train reached the switch, when the pony trucks followed the lead rails to the side track, and caused the engine to become derailed. It turned over and crushed the brakeman, White, to death.

Appellee, the mother of the deceased, sued appellant for damages on account of his death. John White died intestate. He was unmarried, and lived with his mother. The allegation of negligence upon which she recovered was the failure of appellant to have the engine equipped with a headlight of 1,500 candle power, in compliance with the act of the Arkansas Legislature, approved May 28, 1907.

Section one of the act provides that railroads over 50 miles in length, operated in whole or in part in this State, "shall be required to equip, maintain and use upon each and every locomotive being operated in road service in the State a headlight of power and brilliancy of 1,500 candle power.

Section two provides a penalty for the failure to comply with the terms of the act. Acts of 1907, p. 1019.

In the case of *Johnson* v. *Mammoth Vein Coal Company,* 88 Ark. 243, the court held that the servant does not assume the risk of injury caused by the master's failure to comply with a statutory requirement for his protection.

That statutory requirement that railroads shall keep a constant lookout for persons and property upon their tracks is also for the benefit of employees as well as others. *St. Louis Southwestern Ry. Co.* v. *Graham,* 83 Ark. 61, and cases cited.

"In an action against a railroad company by an employee to recover for damages received in an accident, negligence of the railroad company will not be presumed merely from the occurrence of the accident, but must be proved, and the burden is on the plaintiff to establish it." *St. Louis & San Francisco Rd. Co.* v. *Wells,* 82 Ark. 372; *Little Rock & Ft. Smith Ry. Co.* v. *Eubanks,* 48 Ark. 460.

Tested by these rules of law, was the defendant liable under the facts disclosed by the record? The engineer testified that he did not see the cow before she was struck. His engine was

equipped with a coal oil headlight. With it he could see "three or four or five hundred feet" ahead of him and as much as eight or ten feet on either side. His train was from 500 to 700 feet long. The right of way where the injury occurred was clear and unobstructed, and the track was practically level.

The appellee adduced evidence tending to show that an electric headlight of 1,500 candle power would enable the engineer to see ahead for a distance of 1,700 to 2,000 feet, and would throw light from one side of the right of way to the other; that the train, running on a practically level track at the rate of from twenty to twenty-five miles per hour, could have been brought to a stop at 1,100 feet, and could be reduced five or ten miles an hour in 600 feet; that cattle lay down on the track at night as well as in the day time.

Although the evidence is not very satisfactory, we think the jury was warranted in finding that, had the engine been equipped with a headlight of the candle power required by the statute, the engineer, if he had been keeping a lookout, could have seen the cow in time to have stopped the train, or at least could have checked the speed to such an extent before striking the cow that the derailment of the engine and the resulting injury could have been avoided; and that the company was guilty of negligence in using the oil headlight.

The judgment is therefore affirmed.

COX v. SMITH.

Opinion delivered February 7, 1910.

1. PLEADING—GENERAL DEMURRER.—If a cause of action can be reasonably inferred from the allegations of a complaint, it is not subject to a general demurrer. (Page 373.)
2. SALE OF LAND—DAMAGES—WHEN LIQUIDATED.—A provision in a sale of land that upon a breach by the vendee a certain sum should be paid will be regarded as liquidated damages where the actual damage caused by the breach would be uncertain and difficult of proof, and the sum stipulated appears to be reasonable compensation. (Page 374.)
3. SAME—VENDOR'S LIEN.—A vendor's lien will not arise to secure the performance of an act, the nonperformance of which would make a claim for unliquidated damages. (Page 375.)

4. SAME—VENDOR'S LIEN.—Under a contract for the sale of land for a definite sum of money, whereof the consideration was partly paid in cash, the balance to be paid in the construction of a wall, and in the event of his failure to do so by a certain date the vendee agreed to pay the vendor the remainder of the consideration in cash, upon failure of the vendee to complete the wall by the day named the vendor is entitled to enforce his lien for the unpaid purchase money. (Page 375.)

5. SAME—CONSTRUCTION OF INSTRUMENT.—An instrument, styled a "title bond," whereby a vendee of land acknowledges himself to be indebted to his vendor in a sum named, and agrees that the latter shall have a lien on the land for the payment of the debt, is in effect an equitable mortgage. (Page 375.)

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

A. G. Leming, for appellant.

The complaint states sufficient facts to constitute a cause of action, and the right at the time to maintain the action. The $300.00 was not a penalty, but an agreed amount to be paid by the erection of the wall by a certain date; and when appellee failed to deliver the wall as stipulated and at the time agreed upon, the $300.00 then became due in money and so recoverable. 14 Ark. 315-319; 54 Ark. 340; 14 Ark. 345-352; 57 Ark. 168-178. Making a deed to recite payment of the purchase money is no bar to a suit to recover it, if in fact the purchase money has not been paid. 18 Ark. 142; 21 Ark. 202. A promise to pay may be evidenced by a recital in a mortgage without a separate note or bond. 61 Ark. 115-120; *Id.* 27-29; 65 Ark. 489.

FRAUENTHAL, J. This is an appeal from a decree of the chancery court sustaining a demurrer to the complaint and dismissing same for the want of equity. The complaint in substance and effect alleged that the plaintiff, W. R. Cox, was the owner of a block of land in the town of Waldron, Ark., containing four lots, and that on the 21st day of February, 1907, he sold one of these lots, describing same, to the defendant, H. N. Smith, for the price and sum of $550; that the defendant paid $250 of said purchase money in cash, and he agreed to pay the balance of said purchase money, towit, $300, in the following manner: the plaintiff was the owner of the lot adjoining the lot sold to defendant, and the defendant agreed to build a partition brick wall of the height of a two-story building and from 60 to 80 feet long,

at the defendant's option, so that one-half of said partition wall should stand on the lot retained by the plaintiff, and the other half on the lot sold to defendant; and that plaintiff should own and use the said one-half of said wall for a building which he might construct on his lot; and defendant agreed to complete the wall by October 1, 1908. The plaintiff at the time of the sale executed a deed to the defendant for the lot, in which the consideration is named at $250, and as paid. At the same time the defendant executed to plaintiff an instrument which is styled a bond for title, but which plaintiff alleges is a mortgage, which was duly acknowledged and recorded. The writing is as follows:

"TITLE BOND.

"Know All Men by These Presents:

"I, H. N. Smith, of Waldron, Arkansas, am held and firmly bound unto W. R. Cox, of Waldron, Arkansas, in the sum of $300, in lawful money of the United States of America; conditioned, however, as follows:

"Whereas, The said H. N. Smith has this day purchased of the said W. R. Cox part of the lot 1, block 6, in the original donation of the town of Waldron, being 27½ feet by 100 feet on the south side of said block, and has agreed to build thereon a brick house two stories high, 60 or 80 feet long, the north wall of said house to be built on the line of said lot, nine inches on one side of said line and nine inches on the other side of said line, the said wall to be built on or before the 1st day of October, 1908. Now, if the said H. N. Smith shall build or cause to be built said wall by said date, this obligation shall be void; otherwise, to remain in force and effect. Said W. R. Cox shall have a lien on said lot for the payment of said sum of $300.

"Witness my hand this 21st day of February, 1907.

"H. N. Smith."

The plaintiff alleged that the defendant had wholly failed and refused to build said wall on or before October 1, 1908, or thereafter, and had failed to pay the said three hundred dollars, the balance of the said purchase money for said lot. He asked for a judgment for $300, and that same be declared a lien on said lot.

Did this complaint state a cause of action? If a cause of

action can be reasonably inferred from the allegations of the complaint, it is not subject to a general demurrer; if the facts stated, together with every reasonable inference therefrom, constitute a cause of action, then the demurrer should be overruled. *Murrell* v. *Henry,* 70 Ark. 161; 6 Enc. Plead. & Prac. 389; *Cazort & McGehee Co.* v. *Dunbar,* 91 Ark. 400.

By the allegations of this complaint, the plaintiff sold the lot to defendant for $550, of which a part was paid in cash, and for the balance of the purchase money the defendant was to do certain work and perform certain services for the plaintiff in the construction of a partition wall, and the value of that work and material in the construction of the wall was placed at $300, the said balance of the purchase money. It was agreed that the wall was to be completed by a specified time, and it is urged that this agreement is in the nature of a penalty or forfeiture, for which equity will not grant relief. But under the allegations of the complaint the lot was sold for a specific consideration in money, and it was only agreed that a certain and definite portion thereof might be paid in certain work to be done by a fixed time. If the work was not done or the service rendered, then the plaintiff could recover said balance in money. If the defendant failed to pay this balance, either in work or money by the day named, then it became a fixed debt due by him. *Young* v. *Harris,* 36 Ark. 162; *Nix* v. *Draughon,* 54 Ark. 340. But, if the contract should be considered to be of a nature that named a stipulated amount which defendant should pay upon its breach, it would not be a penalty but liquidated damages. The breach of the contract to build the wall would make uncertain and difficult of ascertainment the amount of damages which the plaintiff might suffer. The wall was to be a partition wall, and by the refusal of the defendant to build it or permit it to be built the plaintiff would be compelled to build a wall of the full thickness upon his own lot in order to construct a building thereon, and would thus narrow the width of his building. As is said in *Stillwell* v. *Paepcke-Leicht Lumber Co.,* 73 Ark. 432: "Usually, the surest test of liquidated damages is where the actual damages caused by the breach would be uncertain and difficult of proof, and the sum stipulated appears to be reasonable compensation." *Williams* v. *Green,* 14 Ark. 315; *Lincoln* v. *Little Rock*

Granite Co., 56 Ark. 405; *Nilson* v. *Jonesboro,* 57 Ark. 168; *Young* v. *Gaut,* 69 Ark. 114.

In this case the defendant agreed to build the wall by a certain date. In event he failed to do so he agreed that he would pay the plaintiff $300. The amount named for the building of the wall was not an unreasonable compensation therefor, and the defendant had actually received from the plaintiff in payment on the lot the full consideration for the work and material he agreed to do and furnish. If this sum stipulated to be paid in the event of the non-performance of the contract on his part shall be considered in the nature of damages, then it must be held to be liquidated damages for which he is liable. Upon the failure by defendant to complete the wall by the day named the defendant became therefore indebted to plaintiff in the stipulated sum of $300. This was part of the purchase money for said lot. Now, a vendor's lien will not arise "to secure the performance of an act, the non-performance of which would make a claim for unliquidated damages." *Harris* v. *Hanie,* 37 Ark. 348; *Bell* v. *Pelt,* 51 Ark. 433; *Salyers* v. *Smith,* 67 Ark. 526.

But this is not a claim for unliquidated damages; it is a debt for unpaid purchase money, the amount of which is definitely fixed. And where such debt for the purchase money may be paid in work or services, the vendor's lien therefor does exist, and may be enforced if such work is not done or the services rendered. *Young* v. *Harris, supra; Nix* v. *Draughon, supra.*

Furthermore, the above instrument, styled a title bond, is in effect an equitable mortgage. By its terms the defendant acknowledged himself indebted to the plaintiff in a certain sum. That sum was due upon his failure to do the work and things therein named by the day therein specified. It was not in the nature of a penalty or a forfeiture; but it was a liability founded on a valuable consideration. To secure that debt, the instrument stated that the plaintiff "shall have a lien on said lot for the payment of said sum of $300." The manifest intention of the instrument was to fix a charge upon the lot for the payment of said debt. As is said by Mr. Pomeroy, "the form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose, rather than at the form; and if the intent appear to give or

to charge or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows. * * * The form of the contract is immaterial; if the intent appears to make any identified property a security for the fulfillment of an obligation," it will constitute an equitable lien. 3 Pom. Eq. Jur., § 1237; *Turner* v. *Watkins,* 31 Ark. 429; *Taliaferro* v. *Barnett,* 37 Ark. 511; *Bell* v. *Pelt,* 51 Ark. 433; *Williams* v. *Cunningham,* 52 Ark. 439; *Martin* v. *Schichtl,* 60 Ark. 595; *Ward* v. *Stark Bros.,* 91 Ark. 268.

We are of the opinion that the allegations of the complaint, with every reasonable inference to be drawn therefrom, set forth an indebtedness due by the defendant to the plaintiff, and that such indebtedness has matured; and that for the payment thereof he has an equitable lien upon the lot described in the complaint.

The chancellor therefore erred in sustaining the demurrer to the complaint.

The decree of the chancery court is reversed, and this cause is remanded with directions to overrule the demurrer to the complaint, and for further proceedings.

FIRST NATIONAL BANK OF LAKE PROVIDENCE, LOUISIANA, *v.* REINMAN.

Opinion delivered February 7, 1910.

1. BILLS AND NOTES—INDORSEMENT—PAROL EVIDENCE TO EXPLAIN.—Parol evidence is admissible, as between an indorser and indorsee of a note, to show that the indorsement was made merely for the purpose of transferring title to the indorsee, who was the real owner of the note, and without any intention on the indorser's part to become liable for its payment. (Page 378.)
2. ACTIONS—WRONGFUL TRANSFER TO EQUITY.—Where timely objection was made to the transfer of a cause from the circuit to the chancery court, in a case where the action and defense were purely legal, it was error for the latter court to entertain jurisdiction. (Page 381.)

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

James A. Comer, for appellant.

It was error to transfer the cause to equity, over the objection of plaintiff. He was entitled to a trial by jury. Kirby's Digest, § 6170; 73 Ark. 462; 52 Ark. 411; 72 Ark. 115.

Baldy Vinson, for appellee.

Parol evidence was admissible to show that Reinman indorsed the note to pass the legal title, and that Walker was really the owner of the note and the real payee. 93 Pac. 366; 17 L. R. A. (N. S.) 1105; 1 Daniel on Neg. Instr., § 644a, 741; Randolph on Com. Paper, § 788.

FRAUENTHAL, J. This was a suit instituted originally in the Pulaski Circuit Court by the First National Bank of Lake Providence, La., the plaintiff below, against Louis Reinman, to recover against him as the indorser of a certain note. The note sued on was executed by B. F. Brown at Lake Providence, La., on March 15, 1905, for $600, and was payable to the order of Louis Reinman on or before November 15, 1905; and it is stated in the note that it was given for four mules, which should remain the property of the payee until paid for. Upon the note were the following indorsements: "C. S. Wyley (indorser), Louis Reinman." In its complaint the plaintiff alleged that the note was transferred and indorsed to it before maturity in the usual course of business, and that due demand for payment and notice of nonpayment had been made. The defendant denied that the note had been transferred and indorsed to plaintiff in the usual course of business, and denied that it had been duly protested or that notice of non-payment had been given to him. He alleged in substance and effect that he was the owner of the four mules set out in the note, and that said Brown desired to purchase them, but, not knowing his financial responsibility, he declined to sell to him. He mentioned the proposed purchase of the mules to one R. J. Walker, who was the cashier and business manager of the plaintiff, and it was agreed between him and said cashier of said plaintiff that defendant would sell the mules to the plaintiff or said cashier for $450, and that a note for $600 should be obtained from said Brown and indorsed by said C. S. Wyley, that the note should be made payable to defendant, and that he should then transfer the note to plaintiff; that as a matter of fact he actually sold

the mules to the plaintiff, or to Walker as its cashier, for $450, and, only to accommodate the plaintiff in obtaining the note of Brown for $600 on the actual sale of the mules by said plaintiff or its cashier to Brown, it was agreed between plaintiff and defendant that the note should be taken in the name of defendant as payee, who would then transfer it to plaintiff; and that he did not actually under said agreement sign the note as indorser, but only as agent of plaintiff to transfer to it the title to the note.

In his answer, which he also denominated a cross-complaint, he asked that the cause be transferred to the chancery court, which was done. The plaintiff at the time objected to the transfer of the case to the chancery court, and duly saved its exceptions to the order of transfer that was made. In the chancery court the plaintiff filed a motion asking that the case be transferred back to the circuit court, and this motion was overruled.

The defendant adduced evidence tending to sustain the allegations of his answer relative to the manner in which and the party to whom the mules were sold, the circumstances relative to execution of the note and the manner and object of his endorsement and transfer of the note. Upon a hearing of the case the chancellor rendered a decree dismissing the cause for the want of equity.

The defendant indorsed the note sued on in blank; and the question is whether oral testimony is admissible to explain and qualify this unrestricted indorsement. By an indorsement in blank of a note the law implies a contract made by the indorser which is of the same force as if it was reduced to writing. That contract is that, upon due demand of the maker and nonpayment, he will pay the note if due notice of such nonpayment is given to him. It is well settled that, as a general rule of law, oral evidence is not admissible to contradict or vary the terms of a written contract. And ordinarily the written contract that is entered into by an indorser when he makes an unrestricted indorsement cannot be contradicted or varied by parol evidence. In 1 Daniel on Negotiable Instruments, § 718, the author says: "For, in fact, though there be nothing but the indorser's signature, the indorser's contract is as fully expressed as that of the drawer of a bill payable to bearer. He is a new drawer on

the drawee, if it be a bill; a drawer on the maker, if it be a note; and the instrument itself, with his name signed as indorser, constituted his written contract, from which he can be absolved only by failure of demand or notice of other delinquency of the holder. The following general view may, therefore, be stated, towit: That in an action by immediate indorsee against an indorser no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer against him." *Martin* v. *Cole,* 104 U. S. 30.

But, as between the indorser and his immediate indorsee, this general rule precluding the introduction of parol evidence to explain or qualify the indorsement has its limitations and exceptions. As is said in 1 Daniel on Negotiable Instruments, § 720, "There are three classes of cases in which evidence for this purpose is admissible." Thus, it may be shown by this character of evidence that the indorsement was without consideration, or that it was made upon trust for some special purpose; or it is admissible where by reason of certain representations and the transaction at the time of the indorsement the note was taken by the indorsee in sole reliance on the responsibility of the maker, and it was indorsed in order only to transfer the title in pursuance of such transaction and agreement, and where the attempt to enforce the indorsement would be a fraud. 1 Daniel on Negotiable Instruments, § § 720a, 721, 722; 8 Cyc. 255; *Lovejoy* v. *Citizens' Bank,* 23 Kan. 331.

In 1 Daniel on Negotiable Instruments, § 722, the following case is stated: "In Pennsylvania, where defendant purchased coffee of plaintiff, upon an agreement that the latter should receive certain notes in payment, without defendant assuming any responsibility, the latter handed plaintiff the notes, when he said, 'Hill, you must indorse these notes.' Defendant replied, 'That is not our understanding.' The plaintiff rejoined: 'They are made payable to you. How will you convey them to me? You must indorse them in order that I may collect them.' Defendant then said: 'I indorse them; but, remember, I am not to be held responsible for their payment.' The court said: 'The evidence went to prove a direct fraud in obtaining the indorsements, or their perversion to a use never intended—a fraudulent purpose.' This case is distinguished from those in

which a mere agreement that the indorser shall not be responsible is offered to be shown, no circumstances which would otherwise render the transaction fraudulent or showing a secret trust appearing."

The above Pennsylvania case can only be based upon the principle that the indorsement was obtained bv false and fraudulent representations; for, if the indorsement was made only with the contemporaneous oral agreement that it was made without recourse or without assuming responsibility and with no facts or circumstances showing a false or fraudulent representation which induced the indorsement, then such contemporaneous oral agreement would be inadmissible to contradict or vary the written contract of responsibility implied by the unrestricted indorsement.

In the case of *Lovejoy* v. *Citizen's Bank,* 23 Kan. 331, a note was made payable to the president of a bank, and was by him indorsed in blank to the bank. In that case it was held that parol evidence was admissible showing that the note represented a debt of the maker to the bank, and that the indorsement was made merely for the purpose of transferring the title to the bank.

In the case of *Johnson* v. *Schnabaum,* 86 Ark. 82, in speaking relative to the admissibility of testimony explaining and qualifying a blank indorsement under the circumstances of that case, this court used the following language: "No rule of evidence is, we think, violated by admitting such explanation. While the law implies, from an unrestricted indorsement, a contract to guaranty payment of negotiable paper, still the fact may be shown that the purpose of the assignment was merely for collection, and not for the sale of the instrument; and when this is shown, no liability as guarantor of payment is implied."

In the case at bar the testimony on the part of the defendant tended to prove that he sold the mules to the plaintiff or its cashier, and for its convenience or accommodation took the note of the maker payable to him as payee, and then indorsed same to plaintiff under the agreement and understanding made at the time that this was done merely to pass the title to the plaintiff, and not as a sale of the note and a guaranty of its payment. The face of the note was the amount of the purchase money

which Brown then agreed to pay for the mules, and that amount was really payable to the plaintiff, and not to defendant; and the note was in truth and in fact, under that testimony, the property of the plaintiff. The defendant was in effect only the agent of the plaintiff in permitting the note to be made payable to him, and in indorsing it he was merely transferring it for the purpose of placing the title to the note in the name of the plaintiff, who was the real owner. Under these circumstances, instead of selling the note, he sold the mules to the plaintiff or its cashier, and by his indorsement of the note he did not become liable as a guarantor of its payment. Parol evidence was admissible under these circumstances to show the nature of the transaction and the purpose of the indorsement, and such evidence would be a complete defense to an action against the defendant seeking to hold him liable as a guarantor of the note.

The defense, however, could be made, and this evidence was admissible, in a court of law equally as in a court of equity. The defense involved no equitable right or remedy, but only the admissibility of evidence. This court has held that where none of the parties objected to the transfer of a cause triable at law from the law court to the chancery court, and did not object to the chancery court entertaining and trying the action, the chancery court would have jurisdiction to determine the cause. *Collins* v. *Paepcke-Leicht Lumber Co.*, 74 Ark. 81; *Blake* v. *Scott*, 92 Ark. 46. But where such objection was made to the transfer of a case, in which the action and defense were purely legal, from the law court to the chancery court, it would be error to make such transfer, and error for the chancery court to entertain jurisdiction thereof. *Weaver* v. *Arkansas Nat. Bank*, 73 Ark. 462; *Johnson* v. *Gillenwater*, 75 Ark. 115. In the case at bar the plaintiff duly objected to the transfer of the action from the law to the chancery court. The evidence in the case was conflicting, and the plaintiff had the right to have the issue tried by a jury and the action determined by a law court.

The circuit court therefore erred in transferring the cause to the chancery court, and the chancery court erred in entertaining jurisdiction thereof.

For this error the decree is reversed, and this cause is remanded with directions to transfer the case to the Pulaski Circuit Court, and for further proceedings.

INDEPENDENCE COUNTY v. TOMLINSON.

Opinion delivered February 7, 1910.

1. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—A motion for new trial is as necessary in trials by the court as in trials by jury, even though the case is tried upon an agreed statement of facts, unless the errors complained of appear from the record itself, without a bill of exceptions. (Page 382.)
2. SAME—WAIVER OF MOTION FOR NEW TRIAL.—Where the errors complained of do not appear upon the judgment record, the necessity of a motion for new trial can not be waived by the appellees. (Page 383.)

Appeal from Independence Circuit Court; *Charles Cottin,* Judge; affirmed.

Oldfield & Cole, for appellant.

Samuel M. Casey, for appellee.

No motion for new trial was filed, nor was there any bill of exceptions. There is nothing before this court for review. 27 Ark. 37; 26 *Id.* 537; *Ib.* 464; 46 *Id.* 17; 64 *Id.* 483; 70 *Id.* 418.

HART, J. The only question involved in this appeal is the liability of Independence County for fees and costs in a case before a justice of the peace. Appellee Tomlinson was a justice of the peace. He and the other appellees presented to the county court a claim for fees and costs in a criminal case in his court. The claim was disallowed, and an appeal was taken to the circuit court, where the case was tried upon an agreed statement of facts. The circuit court found for the claimants, and the appellant, Independence County, has appealed to this court. No motion for a new trial was made in the court below.

"A motion for a new trial is as necessary in trials by the court as in those by a jury, and as well where the facts are agreed on as where they are proved by witnesses; but it is not necessary at all when the errors complained of do not grow out of the evidence or instructions, but appear from the record itself, without the intervention of a bill of exceptions." *Smith* v. *Hollis,* 46 Ark. 17, and cases cited.

In the present case the errors complained of do not appear from the record itself. Hence there is nothing presented by the record for our review. This is conceded by counsel for both sides; and they attempt to overcome it by entering into a stipulation waiving a motion for a new trial and a bill of exceptions and joining in a request for us to decide certain questions which they have agreed were involved in the trial of the cause in the court below. We regret that we can not accede to their request. As early as 1853, in the case of *State Bank* v. *Conway,* 13 Ark. 344, this court said:

"But it is to be understood that if a party merely excepts to the finding of the court or jury setting out the testimony, without any motion for new trial and without any exception whereby he shall put his finger upon the alleged error of law as to any ruling or decision of the court below, there is no case presented for the consideration of this court. Such a practice, if allowed to extend itself, would break down the efficiency and dignity of the circuit courts, and they would become in effect so many commissioners to certify evidence up to this court in any given cause for revision." This rule has been steadily adhered to ever since.

The judgment will therefore be affirmed.

CACHE VALLEY LUMBER COMPANY *v.* CULVER COMPANY.

Opinion delivered February 7, 1910.

1. RECEIPT—CONCLUSIVENESS.—A receipt in full of all demands is conclusive, in the absence of any showing that it was obtained by fraud or mistake. (Page 388.)
2. SAME—IMPEACHMENT.—Evidence that a certain demand was not intended to be included in a receipt in full is inadmissible as varying its terms, where there is no claim that the receipt was obtained by fraud or mistake. (Page 389.)

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

Beloate & Lomax, for appellant.

1. Appellee has no right to go behind the execution of the deed, having acepted it. The acceptance of a deed by the vendee

is a final consummation of all prior negotiations. It was error to admit letters written prior to the making of the deed—the completion of the contract.

2. The deed, receipt and exhibits were filed with the answer —part thereof—and not denied under oath, and hence must be taken as genuine. Kirby's Digest, § 3108. A receipt unimpeached for fraud or mistake is valid and binding. 88 Ark. 363.

3. The description of the land was too indefinite and uncertain for the basis of contract. 68 Ark. 154; 85 *Id.* 1; 30 *Id.* 657. There was no warranty as to the number of acres, and none is ever imputed to deeds of this limitation. 19 Ark. 102.

4. Appellee cannot maintain its action before it fulfills its contract by compliance therewith. 65 Ark. 320.

Smith & Blackford, Davis & Pace, Hamlin & Seawel, for appellee.

1. The question of shortage in the acreage was submitted to the jury upon proper instructions. Their finding is conclusive. A verbal agreement as to the quantity of land, made before the execution of a deed, can be shown, and is not within the statute of frauds. 63 Mo. 461; 16 Wend. 460. 29 Am. & Eng. Enc. Law, 896.

2. The letter containing the offer and the telegram and letter accepting same was a binding contract. 9 Cyc. 293 (7).

3. The description was sufficiently definite. 68 Ark. 150; 30 Ark. 657; 20 Cyc. 270; 45 *Id.* 17; 91 Ark. 153; 68 Ark. 326; 65 *Id.* 51; 75 *Id.* 55; 2 Parsons on Contracts, p. 665 (8 ed.); 17 Cyc. 719.

4. Appellee was not estopped by acceptance of the deed. 12 Ark. 699; 85 Ark. 289; 47 Ark. 148; 53 Ark. 158.

5. Appellee is not prevented from recovering by the fact that he retained part of the consideration. 53 Ark. 158; 47 Ark. 148; 85 Ark. 289.

6. The receipt is not conclusive. Receipts are only *prima facie* evidence of payments. 39 Ark. 580; 5 Ark. 61; 46 Ark. 217; 5 *Id.* 558; 56 Ark. 37; 18 *Id.* 65. They are open to explanation and contradiction.

7. Appellee did not insist on delivery of the stock at the time of the transaction, and when this is not done the purchaser is not at liberty to refuse payment on the ground that he has not

received a transfer of title. 10 Cyc. 600; 9 Cyc. 689; 76 Mo. App. 96. No demand necessary. 9 Cyc. 726.

HART, J. This suit was instituted in the Lawrence Circuit Court, Eastern District, by the Culver Company against the Cache Valley Lumber Company to recover damages for an alleged breach of a contract to convey certain lands.

The defendant company answered, denying liability. The defendant has appealed from a judgment rendered against it.

The facts material to a determination of the issues raised by the appeal are substantially as follows: Both parties to the suit are corporations, organized under the laws of the State of Arkansas. H. A. Culver was vice-president of the Cache Valley Lumber Company, appellant, and president of the Culver Company, appellee. On the 15th day of September, 1907, he had a conversation with C. F. Ferguson, president of the former company, in regard to a settlement of the accounts and differences between the two companies. This was followed by a letter from Ferguson to Culver, which is not in evidence, and by a letter of Culver to Ferguson, dated October 4, 1907, which is as follows:

"Answering your favor of the 28th of September, will say that, in order to wind affairs, I will submit to you the following proposition: Assigning our account and stock in the C. V. L. Co.; my equity in the home I have here subject to a mortgage; note due 1 year from the 1st of September, 1907, carrying 8 per cent. interest, dated September 1, 1906, amount $575, for your T. W. Co. lands near Minturn, 720 acres, and a release of the mtge. the C. V. L. Co. hold against the Culver Company on lands they own in section 16, Greene County, about $750. It is my intention to leave here about the 15th to the 18th of the month; and, if we can't get together before then, I shall return from my trip so as to be here on the 15th of November, when the semi-annual meeting is held; otherwise I would stay on the coast till the first of the year."

On October 10, 1907, Ferguson replied, accepting the proposition. On the 12th day of October, 1907, Ferguson sent to Culver the following letter: "The writer has returned home this morning, and, upon a close investigation in regard to the Minturn tract, finds that there is deeded to us 659.03 acres. In having this up before the Turnbull Wagon Company directors the whole

matter was viewed from their standpoint in the light of our investment for this land. The statement that there was about 720 acres, as far as they were concerned, was not considered. I do not know how I got the impression that this amount of land was there, unless it was on account of there being some in section 15, and I considered that we had all of another section besides. I believe, however, in talking with you in regard to this matter, that I was not positive that there were 720 acres, but I notice in my last letter I spoke of the Minturn tract as 720 acres. From the long talk given our Turnbull directors in regard to making exchange with you, and the hesitancy in regard to it, I would not feel warranted in taking up the question again with them, and of course I do not know how you feel on this question. As stated, the Turnbull Wagon Company can give deed for only 650.03 acres, which is their entire tract of land near Minturn. I regret that this question should come up, as it placed the whole proposition where it was at first. If you care to accept deed from the Wagon Company for the Minturn tract of land as per this letter, the balance of proposition to hold, the matter can be fixed at once. I have nothing further to suggest."

On October 14, 1907, Culver replied as follows: "I have your favor of the 12th inst. before me, and in reply to the same I note that you are not in a position to deed to us as the owners of 659.03 and not 720 acres, as you represented owning near Minturn. The facts in the transaction are as follows: You represented to us having this acreage, and fixed a valuation on the lands as being worth $12 per acre. I immediately took up the proposition with other members of my company, and agreed to accept your conditional offer, and on October 4 I addressed a *bona fide* offer, setting out plainly what my company would do, and on October 7, from Toledo, O., you wired me that you would accept our offer and confirmed the same by letter. You certainly must take into consideration that we based all our figures on your representation, and that there be no misunderstanding I outlined our proposition in detail. Acting upon the acceptance of our proposition, I immediately negotiated the sale of my house furnishings, have turned the property over to your agent our account to your credit on the books, resigned as vice-president, placed the same in the hands of Mr. White, cashier of the Bank

& Trust Company, subject to the delivery of same to you on receipt of a warranty deed released of a mortgage on lands in section 16-16-3-E., in Greene County, Arkansas. Now, it will be satisfactory for my company to accept your check for $720 in payment for the 60.79 acres of land that you failed to own in this tract near Minturn, and I have instructed Mr. White to accept such a settlement from you. I trust that it will not be necessary for me to have to return here and create expense to get this matter adjusted, but you certainly can not lay any of your errors in this deal on us. Supposing I had addressed you a letter upon receipt of your acceptance to my proposition, saying that I was in error, that there were two notes of $575 against the home place, instead of one, as represented to you, what would you say? 'Well, Culver, just pay that note off that you overlooked, and it will be O. K.' "

On December 31, 1907, Ferguson wrote to Culver as follows:

"To consummate the deed in exchange of credits and properties between your company and the Cache Valley Lumber Company, I am handing you herewith, through Mr. Beloate, attorney, deed from the Turnbull Wagon Company for the tract of land near Minturn, Lawrence County, Ark., covering sec. 18 and the west half N. W. ¼ of sec. 17, as shown by deed, also the mortgage note given by your company to the Cache Valley Lumber Company on your lands in Greene County, and as full satisfaction to us for this deed and mortgage note you are to assign to the Cache Valley Lumber Company all your credits in said company of whatever nature, as shown by the books as ledger credits and capital stock certificate, also to deliver a warranty deed to the Cache Valley Lumber Company for lots Nos. 20 and 19, in block 3, Orto's addition, subject to mortgage of $575 due September 1, 1908, said assignment of credits, capital stock certificates and deed to be delivered to W. E. Beloate, attorney. It is further understood between us that, in completion of this exchange, the contract between your company under date May 15, 1906, and Cache Valley Lumber Company for the logs and delivery of same is to be cancelled."

On the same day he wrote W. E. Beloate a letter to represent him, giving him specific directions in the matter.

Culver and Beloate met on January 3, 1908. Beloate delivered to Culver the deed to the Minturn tract and also the mortgage note of appellee to appellant, and Culver delivered to Beloate the following receipt and release:

"Walnut Ridge, Ark., January 3, 1908.

"For value received, we hereby assign and release to the Cache Valley Lumber Company all rights, choses in action, credits and demands against said Cache Valley Lumber Company which may be due by the said Cache Valley Lumber Company to the Culver Company or to H. A. Culver.

(Signed) "Culver Company,
"By H. A. Culver, Pres.
"H. A. Culver."

The deed to the Minturn tract recited that it contained 659.03 acres. Culver testified that it was orally agreed and understood that the receipt or release did not cover the deficiency in the quantity of the Minturn tract of land, and that the settlement of this matter was left open to be adjusted at a future date between him and Ferguson. Beloate denies this. When Culver read the deed to the Minturn tract of land, he discovered that it did not contain a correct description of the land intended to be conveyed, and the deed was sent back for correction. A new deed containing the correct description of the land by numbers was executed and returned to Culver on the 17th day of January, 1908, and the same was filed by him for record on that day. This deed also recited that the land conveyed contained 659.03 acres. Conceding appellee's right to recover for the alleged deficiency in the quantity of land agreed to be conveyed by the contract, it is precluded by the receipt of the date of January 3, 1908. Counsel for appellee seek to overcome the language of this receipt and release by the testimony of Culver to the effect that the alleged deficiency of the quantity of land in the Minturn tract was agreed to be left open for future adjustment between him and Ferguson, and was not intended to be embraced within the terms of the receipt or release; but the language of that instrument covers all demands against appellant, and it is not claimed that it was obtained by fraud or given under a mistake. The effect of Culver's testimony was to vary its terms, and this in the teeth of the well known rule on the subject. The rule is clearly stated in the case of

Burton v. *Merrick,* 21 Ark. 357, as follows: "A receipt expressed to be in full of all demands is only *prima facie* evidence of what it purports to be, and, upon satisfactory proof being made that it was obtained by fraud, or given under a mistake, it may be inquired into and corrected in a court of law as well as in equity. But where the receipt is introduced by the party relying on it, and there is no attempt from the other side to prove that it was obtained by fraud, or given by mistake, it must necessarily operate in the particular case as conclusive evidence of what it purports to be on its face." This statement of the law was approved in the recent case of *Kahn* v. *Metz,* 88 Ark. 363.

The testimony of Culver to the effect that the alleged deficiency in the quantity of the land of the Minturn tract was to be left open for further negotiations was not in explanation of the terms of the written receipt or release, but tended to vary its terms, and thus contravened the well-known rule which excludes parol evidence. *Tillar* v. *Wilson,* 79 Ark. 256. Therefore the court should have directed a verdict for appellant, as requested by its counsel, and for the error in that respect the judgment will be reversed, and the cause dismissed.

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

Opinion delivered February 7, 1910.

LIQUORS—AUTHORITY OF CHANCELLOR TO SUPPRESS ILLEGAL SALES.—Under act of February 13, 1899, authorizing chancellors and certain other judges to issue search warrants to discover liquors shipped into prohibition districts to be sold contrary to law, a chancellor is not authorized to issue an order forbidding a common carrier to deliver liquor within his chancery district at night except to an officer of the law and to no one except the officer of the law until six hours after written notice is given to the sheriff, and to deliver to no one except to the party to whom the liquor was consigned or to the officers.

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

W. F. Evans and *B. R. Davidson,* for appellant.

1. The chancery court was without jurisdiction to make the

order appealed from. Art. 7, § 15, Const.; § 5137, Kirby's Dig.; 5 Ark. 303; 6 *Id.* 318; 11 *Id.* 598; 20 *Id.* 136; 27 *Id.* 675; 34 *Id.* 188; 56 *Id.* 391; 80 *Id.* 145; 36 Pac. 807; 65 Ark. 410; 81 *Id.* 330; 149 U. S. 157.

Hal L. Norwood, Attorney General; *Wm. H. Rector,* Assistant, and *D. B. Horsley,* Prosecuting Attorney, for appellee.

A court of equity has authority to abate nuisances. Fletcher, Eq. Pl. & Pr., § 49; 43 Am. Dec. 773; 1 Pomeroy Eq. Jur., § 257; 2 Redfield, Law of Railways, § § 215, 216; 1 Abbott, Mun. Corp., § 130; Wood, Law of Nuisances (2 ed.), § 777; 123 U. S. 623; 134 U. S. 33; 144 U. S. 548; Black, Intox. Liquors, § § 54, 343, 344; 89 Ark. 175; 85 Ark. 544. Also to restrain existing or threatening public nuisance. 4 Pomeroy Eq. (3 ed.), § 1349; 10 Ill. 351; 143 Ind. 98; 16 Gray (Mass.) 245; 149 Mass. 550; 29 L. R. A. 732; 24 N. J. Eq. 89; 18 L. R. A. 646; 46 L. R. A. 552; 45 Wis. 425; 87 Ill. 450; 2 Green (N. J. Eq.) 136; 28 Kans. 726; 158 U. S. 564.

The act of February 13, 1899 (Kirby's Dig., § 5137), in effect declares the shipping of intoxicating liquors into a prohibited district for the purpose of unlawful sale to be a public nuisance. The chancery court therefore had jurisdiction. 72 Ark. 171.

BATTLE, J. On March 11, an affidavit was filed before the chancellor, alleging that there were some ardent, vinous, malt or fermented liquors in the depot at Johnson, in Washington County, Arkansas, shipped into a prohibited district for the purpose of sale. A writ was issued by the chancellor on said date, commanding the sheriff to search for and seize the liquors, on which a return was made showing that he had seized two boxes of intoxicating liquors.

On March 12, the chancery court made an order reciting that the chancellor had issued the writ on March 11, that the sheriff had seized two cases of liquors in the possession of the St. Louis & San Francisco Railroad Company and the Wells Fargo & Company Express, billed to Tom Dott, which the court found to be a fictitious name. Whereupon the court ordered that the St. Louis & San Francisco Railroad Company and the Wells Fargo & Company Express be made parties defendant, and they were ordered to appear at nine o'clock, March 13, to disclose to the court the true consignee of the intoxicating liquors, and, if they failed, they would be treated as in contempt and fined in the sum of $500 each,

and would be declared to be the real owners of the liquors. A citation was issued on this order and served March 12. At the appointed hour on March 13, the State appeared by her attorney and the defendants by attorney. The cause proceeded to a hearing. Whereupon the court made a finding of facts as follows:

"That the defendant railroad and express companies had been bringing alcoholic spirits, ardent, vinous, malt and fermented liquors into a prohibition district of the Eleventh Chancery District, and delivering same in large quantities in the night time, and to parties other than the real consignee, whom the court found in many instances to be fictitious parties, and that the companies delivered the liquors to any one who might happen to call for the same, without investigation, and in each instance in this case failed to disclose the real parties getting said liquors, and in other and divers ways did assist the violators of the law in carrying on the illegal sale of intoxicating liquors in such prohibited district, and to evade detection, and such conduct on part of defendant corporations is hindering and preventing the officers of the law in their efforts to seize such contraband goods and to detect the real consignees of the same. That the two cases of liquors seized had been brought into Washington County to be sold contrary to law, and that no claimant appears to claim same."

The defendant made no claim to the whisky, and made no objection to its destruction, and the court on its own motion made a "crime preventing regulative order." The defendants were ordered not to deliver any liquors within the Eleventh Chancery District in the night time to any one except to an officer of the law, and to no one except the officer of the law until six hours after written notice was given to the sheriff or deputy, disclosing the amount, weight of package and to whom consigned, and to deliver to none except the party to whom consigned or the officers.

The defendants appealed from this order. But it was "further ordered by the court that the two cases of liquors seized and held as aforesaid be by the sheriff of the county immediately destroyed, together with the boxes, barrels, jugs, kegs and vessels containing the same." No appeal was taken from this order.

The order for the seizure and sale of liquors in this case was based upon the act entitled, "An act to suppress the illegal sale of liquor and to destroy the same when found in prohibited districts,"

approved February 13, 1899. It is in part as follows: "It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous, ardent, vinous, malt or fermented liquors, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a warrant, directed to some peace officer, directing in such warrant a search for such intoxicating liquors, specifying in such warrant the place to be searched, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs, or kegs containing such liquors. * * * Provided, that any person on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed."

The act prohibits the keeping or shipping liquors into a prohibited district for sale, and provides the remedies for a violation thereof. No other is necessary or authorized, and no authority is given to any officer to substitute one for the one provided. Any substituted would be without the authority of law.

So much of the order appealed from is reversed.

CROWDER v. FORDYCE LUMBER COMPANY.

Opinion delivered February 7, 1910.

1. PLEADING—FORMS OF ACTION.—As the Code of Practice has abolished all forms of action, all that is necessary in a complaint is a statement of facts sufficient to constitute a cause of action within the court's jurisdiction. (Page 394.)
2. WASTE—RIGHT OF REVERSIONER TO SUE.—A reversioner may sue for waste to the reversionary estate while the life estate of a widow therein is outstanding. (Page 394.)

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

Paul G. Matlock and *Jno. H. Crawford,* for appellants.

The complaint states a cause of action, and the demurrer should have been overruled. Appellants own a revisionary interest, and are entitled to maintain an action for damages to the inheritance. Under the common law the action of trespass on the case would lie. 18 S. C. 551; 1 Hill (S. C.) 260; 42 W. Va. 312; 17 Fed. 216; 43 N. H. 320; 6 Conn. 328; 4 Har. 181; 64 Mass. (10 Cush.) 232; 82 Mass. (16 Gray), 583; 25 N. J. L. (1 Dutch.) 97; 50 Barb. 612; 25 N. J. L. (1 Dutch.) 255; 43 W. Va. 562; 4 Jones L. (N. C.) 387; 2 Hill, Ch. (S. C.) 277; 14 Am. St. Rep. 626. The Code has, however, abolished all forms of actions, and disputed questions are determined on the merits. Kirby's Dig., § 5980.

Gaughan & Sifford and *T. B. Morton,* for appellee.

The complaint states an action *quare clausum fregit,* which appellants were not entitled to maintain; and the demurrer was therefore properly sustained. 11 Ark. 294; 18 *Id.* 284; 31 *Id.* 301; 44 *Id.* 74; 26 *Id.* 496; 76 *Id.* 426; 65 *Id.* 600; 85 *Id.* 208; 23 Pick. 88; 43 N. H. 420; 4 Am. St. Rep. 204; 2 Greenleaf, Ev. § 613.

McCULLOCH, C. J. Plaintiffs, W. P. Crowder and others, instituted this action at law against defendant Fordyce Lumber Company to recover damages to a tract of land in cutting and removing timber therefrom. Plaintiffs are alleged to be the owners of the land in reversion, after the expiration of a widow's life estate, same having been assigned to the widow as her dower. After the cause had been transferred to the chancery court on defendant's motion, the court sustained a demurrer to the complaint. A decree was entered dismissing the complaint, and plaintiffs appealed.

The chancellor sustained the demurrer on the ground that this is an action of trespass, and that plaintiffs cannot maintain such an action for the reason that the complaint shows on its face that they are out of possession of the land. In support of the court's ruling, it is insisted by counsel for appellee that the action is in the old form of *trespass quare clausum fregit,* which is to recover for an injury to the possession of land, and that plaintiffs cannot maintain it because they do not allege that they are in possession, but, on the contrary, allege that there is an outstanding life estate in the widow.

This was the rule under the common law practice, and is yet, under our Civil Code of Practice, in actions to recover damages for injuries to the possession of land. *McKinney* v. *Demby,* 44 Ark. 74. But the present action is not one to recover damages for injury to the possession of the land, for plaintiffs do not claim to be in possession. They set forth a permanent injury done to the freehold, and seek to recover the damages sustained by reason of the injury to their reversionary interest.

They are not without a remedy for such an injury. At common law, the action of trespass on the case would have been the appropriate remedy. *Shattuck* v. *Gragg,* 23 Pick. 88; *Putney* v. *Lapham,* 64 Mass. 232; *Cannon* v. *Hatcher,* 1 Hill (S. C.) 260; *Jordan* v. *Benwood,* 42 W. Va. 312; *Lane* v. *Thompson,* 43 N. H. 320; *Tinsman* v. *Belvidere Delaware Rd. Co.,* 25 N. J. L. 255; But, under our Civil Code of Practice, forms of actions are abolished, and all that is necessary is to state facts sufficient to constitute a cause of action within the jurisdiction of the court.

The complaint in this case states facts sufficient to constitute a cause of action, and the demurrer should not have been sustained. Reversed and remanded with directions to overrule the demurrer, and for further proceedings.

REMMEL v. COLLIER.

Opinion delivered February 7, 1910.

1. APPEAL AND ERROR—HARMLESS ERROR.—Where a chancery cause was tried upon the merits, an error of the chancellor in ruling as to the sufficiency of the pleadings will not be ground for reversal if upon the merits of the case the decree was correct. (Page 396.)
2. SAME—RECORD IN CHANCERY CASES.—The depositions of witnesses and oral testimony taken in open court and reduced to writing and filed are a part of the record in chancery cases. (Page 396.)
3. SAME—FAILURE TO BRING UP EVIDENCE.—Where a chancery cause was tried upon the merits, an error of the chancellor in overruling a demurrer to the complaint filed by appellant will not be considered if appellant failed to bring up the evidence upon which the decree was based. (Page 396.)

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

U. S. Bratton, for appellant.

1. Liability under the bond was not limited by the terms of the first contract of employment, but was fixed by the bond itself. 89 Ark. 382; 91 Ark. 43. And the general rule is that contracts of suretyship should receive the same liberal interpretation accorded to any other contract. Child, Suretyship and Guaranty, 114; 117 N. Y. 196; 148 N. Y. 241; 27 La. Ann. 653; 99 Ill. App. 132; 81 Md. 155; 2 How. 476; 17 L. R. A. 652; 20 Cyc. 1425; 35 U. S. 482; 41 U. S. 582; 42 U. S. (1 How.) 169; 1 Brandt. Suretyship (3 ed.), § 1; 107 N. Y. 560. See also 7 La. Ann. 387; 12 N. E. 227; 25 U. S. (12 Wheat.) 515.

2. The contract of indemnity was a continuing one. 20 Cyc. 1440; 10 Conn. 95. The right to recall the guaranty was expressly reserved. 92 N. W. 862; 44 N. Y. L. 493; 15 App. Div. 181; 55 N. E. 483; 43 U. S. (2 How.) 426; 1 Met. (Mass.) 24; 34 Conn. 27; Brandt, Sureties, 187; 2 Harr. & J. (Md.) 186; 57 Conn. 224; 56 L. R. A. 924; 76 Ark. 410; 183 U. S. 642; 28 Vt. 200; 79 Tex. 516; 53 Wis. 333.

3. Notice of acceptance was unnecessary. 25 Am. Dig. (Cent. Ed.) 26; 43 Miss. 486; 86 Ill. App. 216; 160 Mass. 63; 27 Vt. 529.

Bullock & Davis and *Jno. M. Parker,* for appellee.

The record is incomplete, and decree should be affirmed. 38 Ark. 477; 61 *Id.* 157; 85 *Id.* 101; 121 S. W. 920.

McCULLOCH, C. J. The transcript of the record in this case discloses the following proceedings: Appellant Remmel instituted an action at law against one J. S. Thompson and appellee Collier to recover from Thompson the amount of an alleged indebtedness to appellant as insurance agent, and to recover from appellee Collier the sum of $500 alleged to be due according to the terms of his bond executed to appellant, whereby he undertook to pay indebtedness which might become due and payable by Thompson to appellant. On motion of the defendants in the action, the cause was transferred to the chancery court, and there appellee filed a demurrer to the complaint. He and Thompson both filed answers to the complaint. It does not appear from the record that the court made any ruling on the demurrer until the case was submitted for final hearing on the complaint and exhibits thereto, the separate answers of the two defendants, the

depositions of witnesses and the oral testimony heard in open court. Upon such final hearing, the court then sustained appellee's demurrer to the complaint, and dismissed the complaint as to him, but rendered a decree in favor of appellant against Thompson for the recovery of the sum of $3,067.30, found by the court to be due appellant from Thompson. Appellant took an appeal from that part of the decree which was against him. The transcript does not contain the answer of either of the defendants nor any of the testimony in the case. All that it contains is the complaint and exhibits thereto, the demurrer of appellee Collier and the final decree.

As the whole case was presented to the chancellor upon the merits of the case, as well as the sufficiency of the pleadings, if we should reach the conclusion that he erred in sustaining the demurrer but that upon the merits of the case the decree was correct, it would be our duty to affirm the case, notwithstanding the error of the court in sustaining the demurrer. In *Greenlee* v. *Rowland,* 85 Ark. 101, we said: "It is the duty of this court to try chancery cases *de novo,* and in doing so the court gives much weight to the finding of the chancellor upon conflicting evidence; and where the testimony is evenly poised, or nearly so, the finding of the chancellor is accepted as conclusive. In cases where the chancellor has disposed of a case upon the pleadings and left undecided a close question of fact, this court might well remand it for his decision upon the facts, after disposing of the questions of law, and then his decision would be practically final; but ordinarily it is the duty of this court to determine the whole case, irrespective of how the chancellor reached his conclusion. Although the chancellor may have erred in his ruling upon the demurrer, yet, if the facts show that the same decision should be reached upon the merits, then it is the duty of this court to affirm it.

It is the duty of the appellant in a chancery case to bring the whole record here so that we may review the same and determine whether the decree is right or wrong, as we do not reverse cases correctly decided, even though an error has been made in some ruling. The depositions of witnesses and oral testimony taken in open court and reduced to writing and filed (which the decree recites was done in this case) become a part of the record

in chancery cases. It was the duty of appellant to bring this part of the record here, so that we can pass on the merits of the case, and it is his fault that we are unable to do so. For this reason, the judgment should be affirmed, and it is so ordered.

BATTLE, J., (dissenting). This cause was submitted to this court upon the record here, and this court accepted the submission. The appellee did not undertake to bring here the remainder of the record, which he had the right to do. The only question submitted by the record here is, was the demurrer to the complaint properly sustained? It was not. This court tacitly so holds, but affirms the judgment of the court.

In *Greenlee* v. *Rowland,* 85 Ark. 101, the whole record, including the evidence taken in the case, was brought here, so that when it appeared that the demurrer was improperly sustained in that case it also appeared that appellant was entitled to judgment upon the merits—upon the evidence. To avoid a useless delay, as it appeared in that case, the court rendered judgment in favor of apellant upon the evidence.

There is no basis for the judgment of this court in this case, as there was in the Greenlee case. The demurrer to appellant's complaint was improperly sustained, and there was no evidence in the record here that appellee was entitled to judgment. By way of penalty for the failure of appellant to bring here the whole record in the case, this court affirmed the judgment of the lower court, which is erroneous. If any penalty ought to have been imposed, the dismissal of the appeal would have been more appropriate. But the equity and justice of the case demanded that the demurrer be overruled, and the cause be remanded to be disposed of upon its merits.

SWEEDEN v. ATKINSON IMPROVEMENT CO.

Opinion delivered February 7, 1910.

1. ELEVATORS—LIABILITY OF OWNER.—While the owner and manager of an elevator operated in a business building for the purpose of carrying the persons having business therein up and down is not bound to serve the public like a common carrier of passengers, yet he is bound to exercise the highest degree of skill and care that is con-

sistent with the practical operation of such elevators to guard against accidents and injuries resulting therefrom to passengers, while such elevators are being operated. (Page 401.)

2. SAME—NEGLIGENCE OF SERVANT.—The owner and manager of a passenger elevator is liable for an injury to a passenger caused by the negligence of a servant while acting as such and within the scope of his employment. (Page 402.)

3. MASTER AND SERVANT—LIABILITY OF MASTER FOR SERVANT'S ACTS.—A master is civilly liable for an injury caused by the negligent act of his servant when done within the scope of his employment, even though the master did not authorize or know of such acts or may have disapproved of or forbidden them. (Page 402.)

4. SAME—LIABILITY FOR SERVANT'S INDEPENDENT ACT.—A master is not liable for an independent, negligent or wrongful act of a servant done outside of the scope of his employment. (Page 402.)

5. SAME—LIABILITY OF MASTER FOR SERVANT'S ACTS.—The act of a servant for which his master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of the master. (Page 402.)

6. SAME—INDEPENDENT NEGLIGENCE OF SERVANT.—Where a servant in charge of a passenger elevator invites a child to ride therein as his guest, and the child is injured by the servant's negligence, the master is not liable. (Page 405.)

7. SAME—DANGEROUS INSTRUMENTALITY.—A master is not liable to one injured by the negligence of an employee operating a passenger elevator, who was acting outside the scope of his employment in letting another ride therein, upon the theory that a master is responsible for the acts of its servant in whose charge it placed such dangerous agency, where the injury resulted from the negligence of the employee, and not from the dangerous character of the elevator. (Page 405.)

8. NEGLIGENCE—DANGEROUS MACHINERY.—Where a child was injured in a passenger elevator, the owner will not be liable to the child on the theory that the elevator was a dangerous temptation to the thoughtlessness of a child. (Page 405.)

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

J. H. Carmichael, for appellant.

For the law governing owners and operators of passenger elevators, and their duty to third parties, see 10 Am. & Eng. Enc. of L. (1 ed.), 946-7; 25 L. R. A. 33; 81 S. W. 367; 97 Tenn. 367; 25 S. W. 1126; 76 S. W. 1040. Negligence of a parent or other person having a child's custody will not be imputed to the child in a suit brought by a next friend for it, and the jury are

the sole judges as to whether the child's contributory negligence was the cause of its injuries. 2 Am. & Eng. Enc. of L. (Old Ed.) 750; 63 Ark. 185; 59 Ark. 185; 55 Ark. 254; 88 Ark. 484; 77 Ark. 398. It is also a question for the jury whether or not a servant is acting within the "course of his employment." 48 Ark. 181; Hale on Torts, 160. See also *Id.* 147; Words and Phrases, 6357. As to the liability of the master for negligent acts of the servant in charge of dangerous machinery, see 15 Ark. 127; 40 Ark. 324; 107 Mass. 108; 14 How. 468; 132 U. S. 518; 60 Ark. 557; 52 Ark. 524; 90 N. Y. 477.

Hill, Brizzolara & Fitzhugh, for appellee.

1. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. 5 Supp. Am. & Eng. Enc. of L. 1279; 114 N. Y. 902. The master is not responsible for either the act or omission of the servant where the latter acts without reference to the service for which he was employed, but to effect some independent purpose of his own, and not for the purpose of performing the work of his master. 2 Cooley on Torts, 1031; 93 Cal. 558; Wood on Master & Servant, 562; 162 Mass. 319; 127 Mich. 496; 59 Ark. 395; 75 Ark. 579; 144 Fed. 806; 20 Am. & Eng. Enc. of L. 168; 156 N. Y. 75; 111 N. Y. Supp. 1057. In this case the appellee is not liable, for the reason that the servant had for the time being ceased to be appellee's servant; the negligent act, if any, was committed by the servant while not in the prosecution of appellee's business, but in the course of a private undertaking of his own. 71 Atl. 296; 26 Cyc. 1536. He was acting without the course of his employment; and if he had no authority to perform the act, the master is not liable, regardless of whether his instructions were followed. Cases cited by appellant, which are in point, support this contention. 14 How. 468; 132 U. S. 518; 40 Ark. 298; 69 Pa. St. 209; 59 Ark. 395; 48 Ark. 177; 89 Ark. 92. There was no conflict in the evidence. Nothing remained to be settled but a question of law. The case was properly taken from the jury.

2. Appellant was a trespasser, or at most a licensee, and defendant discharged all duty it owed her. 98 Pac. 312; 144 N. Y. 301; 62 S. E. 387; 69 Ark. 468; 81 Ark. 368; 137 Ind. 15; 37 Ill. App. 601; 97 Minn. 305; 103 N. Y. App. Div. 577; 107 *Id.*

120; 211 Pa. St. 107; 127 Ia. 601; 152 Fed. 481; 218 Pa. St. 339.

FRAUENTHAL, J. This was an action instituted by Goldie Sweeden, an infant about ten years old, by her next friend, against the defendants below, the Atkinson Improvement Company and the Nelson Investment Company, for damages on account of personal injuries sustained by her. The Atkinson Improvement Company was the owner of a six-story building in the city of Fort Smith, Ark., in which it had a number of tenants. In this building this defendant owned and operated an elevator for carrying passengers up and down, and it maintained and used the same for its tenants and those having business in the building. The Nelson Investment Company was employed in renting the various rooms and apartments in the building to the tenants and in collecting the rents. On the day of the injury complained of the elevator was operated by one Tom Elliott, who was in the employ of the owner of the building, and the plaintiff was injured while entering the elevator at the fifth floor of the building. The evidence adduced upon the trial of the case was introduced entirely by the plaintiff, the defendant offering no testimony. There is no conflict in the testimony of the various witnesses, and this evidence establishes the following facts: On October 21, 1908, there was a show at Fort Smith, and on that day the wife of the elevator man, Tom Elliott, in company with his two small children and the plaintiff, went to Fort Smith in order to see the parade. Tom Elliott took them as his guests up to a vacant room in the fifth story of the building in order that they might there rest and see the parade. He did this without any permission of the owner or of any one in control of the building. Neither the wife or children of Elliott or the plaintiff had any business with any tenant in the building, but were in the building solely as the guests of Elliott; and he had been cautioned by the owner and controller of the building not to let children get in or ride on the elevator. The room in which Elliott had placed his wife and plaintiff was about six feet from the entrance of the elevator; and while he was running it the plaintiff asked him a number of times to let her ride. It was about the noon hour, when, according to the custom, the patrons of the elevator ceased using it during that time; and Elliott said to the plaintiff: "Wait till the white folks quit riding. The parade is nearly ready to start, and I will take you all for a

little ride." When the patrons of the elevator ceased using it, during the latter part of the noon hour, Elliott stopped the elevator in front of the room at the fifth floor, and said to plaintiff and his little boy, who was three years old, that "the white folks have quit riding now," and to come, and he would take them for a ride. Elliott was standing just outside of the door of the elevator, which he had opened, and the little boy ran by him into the elevator and grasped the controller. Elliott jumped in and quickly took his hand from the controller. But the elevator was running down and the plaintiff, following on the heels of the boy and Elliott, attempted to step into the elevator, and was precipitated down and caught between the elevator and the portion of the wall below the fifth floor as the elevator stopped on being reversed by Elliott; and she was severely injured.

Before all the testimony had been introduced, the plaintiff took a nonsuit as to the defendant Nelson Investment Company. Upon the conclusion of the testimony, the circuit court peremptorily directed the jury to return a verdict in favor of the defendant the Atkinson Improvement Company, which was done. And from the judgment entered on that verdict the plaintiff prosecutes this appeal.

The liability of the defendant to respond for the damages sustained by the plaintiff depends upon the duty which it owed to her, if any, under the facts and circumstances of this case. The plaintiff was injured while attempting to enter a passenger elevator that was owned by the defendant, and which it operated for the benefit of its tenants located in its building. It is well settled that, while the owner and manager of an elevator operated in a business building for the purpose of carrying the persons having business therein up and down is not bound to serve the public like a common carrier of passengers, nevertheless the law has imposed upon such owner the same duty to protect the passengers in the elevator from injury that it has exacted of carriers of passengers by railroad or other means. With regard to the safety of their passengers, the same rules of law that are applicable to other carriers of passengers are applicable to those operating passenger elevators. They are bound to exercise the highest degree of skill and care and foresight that is consistent with the practicable operation of such elevators to guard against

accidents and injuries resulting therefrom to passengers, while they are operating such elevators themselves or by their servants. 1 Hutchinson on Carriers, § 100; 6 Cyc. 596; *Springer* v. *Ford,* 189 Ill. 430; *Treadwell* v. *Whittier,* 80 Cal. 575; *Phillips* v. *Pruitt,* 26 Ky. Law Rep. 831; *Luckel* v. *Century Bldg. Co.,* 177 Mo. 608; *Fox* v. *Philadelphia,* 208 Pa. St. 127.

The owner and manager of a passenger elevator is therefore liable for the injury to a passenger which results from the negligent act of a servant while acting as such and within the scope of his employment. It is contended by the defendant that it is not liable for the injury sustained by the plaintiff in this case for the reason that at the time she was injured Tom Elliott was not acting within the scope of his employment, but solely to effect some independent purpose of his own. It is well settled that the master is civilly liable for an injury caused by the negligent act of his servant, when done within the scope of his employment, "even though the master did not authorize or know of such acts or may have disapproved of or forbidden them." Wharton on Negligence, § 344; *Little Rock & Ft. S. Ry. Co.* v. *Miles,* 40 Ark. 298.

But it is also well settled that the master is not liable for an independent, negligent or wrongful act of a servant done outside of the scope of his employment. 2 Cooley on Torts, 1030; 26 Cyc. 1526.

There is no definite and fixed rule by which it can be said whether the acts of the servant are within or outside the scope of his employment. Each case must be determined by its own particular facts and circumstances. But there are certain well settled that, while the owner and manager of an elevator operated the facts and circumstances of the particular case, the servant was acting within the scope of his employment at the time the act complained of was done. The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of the master. It is therefore necessary to see in each particular case what was the object, purpose and end of the employment and what was the object and purpose of the servant in doing the act complained of. The mere fact that he was in the service generally of the

master or that the servant was in possession of facilities afforded by the master in the use of which the injury was done would not make the act attributable to the master. The act must have been done in the execution of the service for which he was engaged. And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended; and the servant, while thus acting for a purpose exclusively his own, is a stranger to his master for whose acts he is not liable. In 2 Cooley on Torts, 1032, it is said: "When a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible for either the act or omission of the servant." In 26 Cyc. 1536 it is said: "The act of a servant done to effect some independent purpose of his own, and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is ordinarily held not to be within the scope of his employment as to render his master liable therefor. If the injury occurs at such a time, it is immaterial that the facilities afforded to the servant by his relation to the master were used in committing the injury, if such facilities were not used with the authority or consent of the master." Wood on Master & Servant, 562.

Thus, where a servant, without the knowledge of his master, took the latter's horses and carriage for his purposes, and injured one by his negligence during such time, the master was held not liable. *Clark* v. *Buckmobile Co.,* 107 App. Div. (N. Y.) 120; *Quigley* v. *Thompson,* 211 Pa. St. 107.

Where a yard foreman, without authority to do so, took an engine and car, and gave himself and fellow servants a free ride to a meeting, and one of the company was injured by its negligent management, it was held the master was not liable. *Chicago, St. Paul, M. & O. Ry. Co.* v. *Bryant,* 65 Fed. 969.

A section boss loaned, without authority, a hand car to children to play with, and thereby one was injured. It was held that this was not the act of the master. *Robinson* v. *McNeil,* 18 Wash. 163.

It has been held that a servant is not acting in the line of his employment when he invites a boy to ride with him in his master's vehicle. *Driscoll* v. *Scanlan,* 165 Mass. 348; *Schulwitz* v. *Delta Lumber Co.,* 126 Mich. 559.

In *Bowler* v. *O'Connell,* 162 Mass. 319, the servant invited a boy six years of age to ride on a horse that the servant was leading to water. The boy was thrown and injured. The court said: "The true test of liability on the part of the defendant is this: Was the invitation given in the course of doing their work or for the purpose of accomplishing it? Was the act done for the purpose or as a means of doing what Frank was employed to do? If not, then, in respect to that act, he was not in the course of the defendant's business. An act done by a servant, while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master." See also *Formall* v. *Standard Oil Co.,* 127 Mich. 496.

In the case of *Snyder* v. *Han. & St. Joe R. Co.,* 60 Mo. 413, a parent claimed damages for injuries received by an infant child while attempting to get upon one of the defendant's cars. The petition alleged an invitation from the defendant's servant in charge of the car to the child, but showed no authority in the servant to permit persons to ride on the car, and no connection between such invitation and the service which the servant was employed to render. The petition was held to be fatally defective.

In the case of *Railway Co.* v. *Bolling,* 59 Ark. 395, this court held that a section foreman was not acting within the scope of his employment in taking a child for a ride upon a hand car; and that the master was not liable for the negligence of the section crew in carelessly injuring the child. *St. Louis S. W. R. Co.* v. *Bryant,* 81 Ark. 368; *St. Louis, I. M. & S. Ry. Co.* v. *Pell,* 89 Ark. 92.

It will thus be seen that the test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was done while carrying out the object and purpose of the master's business; for if the act was done without authority and solely for purposes exclusively the servant's, then the master is not liable during such

time that such act was done. During such time he stepped aside from his master's business and his master's employment, and for his act the master was not liable.

In the case at bar the uncontroverted evidence showed that without authority from the master the servant had invited the plaintiff into the building as his own guest and had invited her into the elevator as his own guest for the purpose of taking her for a ride. He did this not for the purpose of furthering the interest of his employer, nor was the act incident to the business of the defendant in which he was engaged. It was wholly and exclusively a purpose of his own. It was the same as if he had taken the carriage and horses of his employer without permission and taken his little friend for a ride in that. He simply used the elevator in which to take the plaintiff for a ride; and when he did this, he stepped aside from the defendant's business, even though it was for a short time, to do an act not connected with that business, nor for the benefit of his employer. The act done was not within the scope of his employment, and was not done by authority or permission of the defendant. During the time that this independent act and exclusive purpose of the servant was being carried out, the relation of master and servant between the defendant and Elliott was suspended. The defendant was therefore not liable for the injury which was then sustained by the plaintiff, although it might have been caused by the negligence of Elliott.

It is urged by counsel for appellant that the elevator was a dangerous agency, and that the defendant is responsible for the acts of its servant in whose charge it placed such dangerous agency. But that rule cannot be applicable to the facts of this case. The injury to the plaintiff was not caused by the dangerous character of the elevator; but the injury was due to the negligence of Elliott, who had it in charge, and the defendant was not liable under the circumstances of this case for his negligence. *Foster Herbert Cut Stone Co.* v. *Pugh,* 115 Tenn. 688; *Daugherty* v. *Chicago, M. & St. P. R. Co.,* 114 N. W. 902.

Nor can the defendant be held liable for the injury of plaintiff on the ground that the elevator was attractive and dangerously tempting to the thoughtlessness of a child. The doctrine of liability evolved in what is known as the "turntable

cases" is predicated on the fact that the dangerous machine is so situated that its owner might reasonably expect that children too young to appreciate the danger would resort to and amuse themselves by using it, and on the theory that the owner was negligent in failing to take reasonable precaution to prevent such use. *Railroad Company* v. *Stout,* 17 Wall. 657; *Chicago, B. & Q. R. Co.* v. *Krayenbuhl,* 59 L. R. A. 920. But in the case at bar the plaintiff did not go to the elevator because she was attracted thereto by it, but she went at the invitation of her host, Tom Elliott. She was not injured by reason of the dangerous machine, but on account of the alleged negligence of Elliott, who was in charge of it at the time.

In this case all the witnesses introduced at the trial were called by the plaintiff. There is no conflict in the testimony of these witnesses. The evidence in the case is therefore undisputed. That evidence establishes a state of case showing that the plaintiff sustained an injury by reason of an act not committed by the defendant, nor by the act of one who at the time was acting for it or in the scope of his employment, but by the act of one who was acting at the time independently for himself and without permission or authority of defendant, and for which the defendant is not responsible.

The lower court did not, therefore, err in directing a verdict for the defendant.

The judgment is affirmed.

STATE v. PEYTON.

Opinion delivered February 7, 1910.

RAPE—SUFFICIENCY OF INDICTMENT.—An indictment for rape which charges that the accused did "unlawfully" and "forcibly ravish and carnally know" a certain female is sufficient on demurrer, though it fails to allege that the act was done against her will.

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

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellant.

1. 79 Ark. 293, settles this case. The indictment was good before or after verdict, and the demurrer should have been overruled. The words "forcibly" and "ravish" include "against her will." Webster, Dict.; 17 Tex. App., 574; 1 *Id.* 90; 11 *Id.* 301; 39 Tex. Cr. App. 488; 47 Tex. 226; 7 Tex. App. 625; 44 Ala. 110; 12 Pa. (S. & R.) 69; 6 Minn. 279; 85 Wis. 203; 70 Conn. 104; 50 Barb. 128; 2 Wh. Cr. Law, § 1134; 3 Chitty, Cr. Law, 812.

2. The omission of the words "against her will" did not tend to the prejudice of any substantial right of defendants. Kirby's Dig. § § 2228-9, 2243; 5 Ark. 444; 19 *Id.* 613; 63 *Id.* 613; 1 Bish. Cr. Pr. 505; Wharton, Cr. Pl. & Pr. 261.

3. The question may be raised the first time on appeal. 12 Cyc. 811-12.

4. When the offense is stated with such certainty that the accused knows what he is called upon to answer and an acquittal thereon may be pleaded in bar, it is sufficient. 84 Ark. 487; 88 *Id.* 311.

McCULLOCH, C. J. The State appeals from a decision of the circuit court of Jefferson County sustaining a demurrer to the following indictment (omitting caption): "The grand jury of Jefferson County, in the name and by the authority of the State of Arkansas, accuse Arthur Peyton of the crime of rape, committed as follows, to-wit: The said Arthur Peyton, in the county and State aforesaid, on the seventh day of August, A. D. 1909, did then and there wilfully, unlawfully, forcibly and feloniously make an assault on Laura Jones, and her, the said Laura Jones, did then and there feloniously and forcibly ravish and carnally know, against the peace and dignity of the State of Arkansas."

The objection urged against the indictment is that it does not contain an allegation that the act was committed against the will of the female. The crime of rape is defined by statute as "the carnal knowledge of a female forcibly and against her will." Kirby's Dig. § 2005.

In *Beard* v. *State,* 79 Ark. 293, the indictment was in about the same language, omitting an express allegation that the act was committed against the will of the female; and we held that it was a good indictment when questioned for the first time on appeal, as the words in the indictment necessarily involved a

charge that the act was committed against the will of the female. We declined to decide whether or not the indictment would be good on demurrer, though two of the judges, in a separate opinion, expressed the view that it was good. We now have to decide that question.

Of course, it must be alleged in an indictment for rape that the act was committed "against the will" of the female, for that is an essential element of the crime. But the facts constituting the crime need not be charged in the precise words of the statute. If words are used which convey the same meaning, so as to charge all the essential elements of the crime, it is sufficient. The Criminal Code of Practice provides that "the words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used;" and that "the words used in an indictment must be construed according to their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning." Kirby's Dig. § § 2241, 2242. The Code also contains the following provisions: "The indictment must contain: * * * a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." Kirby's Dig. § 2243. "The indictment is sufficient if it can be understood therefrom * * * that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case." Section 2228. "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." Section 2229.

In the Beard case we said that an allegation of an unlawful assault necessarily implied an allegation that the act was done against the will of the assaulted female. In addition to this, we have in the indictment the word "ravish," which means "to seize" or "to snatch by force" (Webster), and the allegation that the act was done forcibly. The words "against her will" have the same meaning in the definition of the crime of rape as the words "without her consent," and proof that the act of sexual

intercourse was committed without the consent of the female, as when she was unconscious and could not consent, is sufficient to sustain an allegation that it was done against her will. *Harvey* v. *State,* 53 Ark. 425; 1 Wharton, Crim. Law, § 556; *Com.* v. *Burke,* 105 Mass. 376.

Now, when we consider, in the ordinary acceptation of those words, the charge that the accused did "unlawfully" and "forcibly ravish and carnally know" the female, there is no escape from the conclusion that the act is alleged to have been done "against the will" of the female, or without her consent, which has the same meaning. Any other interpretation of those words would do violence to their plain meaning. *Jackson* v. *State,* 114 Ga. 861.

The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings under the indictment.

WHEATLEY v. STATE.

Opinion delivered February 7, 1910.

1. HOMICIDE—SELF-DEFENSE.—No one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, is justified or excused in taking the life of the assailant unless it appears to him, acting in good faith and without carelessness, that he is so endangered by such assault as to make it necessary to kill the assailant to save his own life or to prevent his receiving a great bodily injury, and unless he employed all means in his power, consistent with his safety, to avoid the danger and avert the necessity of the killing. (Page 414.)
2. SAME—SELF-DEFENSE—ACTING ON APPEARANCES.—To be justified in acting on appearances and killing an assailant, one must honestly believe, without carelessness, that the danger is so urgent that it is necessary to kill in order to save one's life or to prevent great bodily danger. (Page 414.)
3. SAME—OPPROBRIOUS WORDS.—Mere opprobrious words do not reduce a homicide from murder to manslaughter. (Page 414.)
4. SAME—SELF-DEFENSE.—One speaking opprobrious words is not precluded from acting in self-defense unless he uses them for the purpose of bringing on an attack and an opportunity of killing the person thereby provoked or to do him great bodily injury. (Page 414.)

5. SAME—PROVOCATION OF ASSAULT.—One who intentionally provokes a combat and then slays his assailant cannot claim that the killing was in self-defense unless, after provoking the combat, he withdraws therefrom as far as he can and does all in his power to avoid the danger and avert the necessity of the killing. (Page 414.)

6. SAME—DEFENSE OF RELATIVE.—One can lawfully do for his brother, when threatened with death or great bodily injury, what he can lawfully do for himself under the same circumstances. (Page 415.)

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

C. V. Teague, for appellant.

1. All the instructions given at the request of the State are erroneous. The first section of instruction 1 tells the jury that, in order to justify the killing on the ground of self-defense, it must be shown "that there was a necessity to kill by the defendant to save his own life or to prevent great bodily harm," etc. This leaves out the defense of apparent necessity, and also denies to defendant the right to protect his brother from apparently impending death or injury. Wharton on Homicide (3 ed.), § 340.

2. Under the second section, appellant would be cut off from all right of self-defense if he unintentionally provoked an assault by the use of words alone. When one "uses to another opprobrious words, that other cannot assault him * * * and deny him the right of self-defense." 95 Tenn. 711, 45 L. R. A. 687; 59 L. R. A. 756; 21 Cyc. 809; 2 Bishop's New Crim. Law (6 ed.), § 621; Wharton, Homicide (3 ed.), § § 323, 326; Kerr, Homicide, 202; 14 Tex. Crim. App. 486; 51 S. W. 214; 89 S. W. 1029; 79 Pac. 435; 31 Miss. 504; 19 S. E. 51; 18 N. W. 385; 16 L. R. A. (N. S.) 660; 35 S. W. 378; 17 Tex. Crim. App. 50.

3. The third section is not in harmony with the rest of the instruction, and is abstract.

4. The same is true of section four. It was not appellant's duty to retreat, under the circumstances, deceased being the aggressor. Kirby's Dig., § 1798; Wharton, § § 440, 442; Bishop, § 850; 62 Ark. 286; 64 Ark. 144; 19 Tex. Crim. App. 547; 8 Mich. 150; 47 N. W. 827; 36 S. E. 682; 50 N. W. 784; 30 L. R. A. 403; 67 L. R. A. 329.

5. The third instruction requires actual danger to appellant and omits his right and duty to protect his brother from real or apparent danger.

6. The fourth instruction, in the use of the words "or committed any act," is abstract and misleading. 71 Ark. 38; 73 *Id.* 568; 74 *Id.* 563; 70 *Id.* 319. Moreover, the proposition of law announced is incorrect. 28 N. W. 542; 18 S. W. 466; 52 S. E. 18; 19 S. E. 891; 15 S. W. 838; 25 S. W. 772; 44 Pac. 314; 11 So. 121; 7 S. W. 634; 15 S. E. 21; 10 La. 261; 114 S. W. 635; 22 L. R. A. (N. S.) 513.

7. The instructions, taken as a whole, are in hopeless conflict. 55 Ark. 393; 65 Ark. 98; 65 *Id.* 651; 74 *Id.* 437; 74 *Id.* 585; 76 *Id.* 69; 76 *Id.* 224; 77 *Id.* 201; 83 *Id.* 18; 83 *Id.* 202; 89 *Id.* 58.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. In instructions 3 and 10, given at appellant's instance, the jury were instructed that words alone would not preclude the right of self-defense. There was therefore no error in refusing to repeat the statement in other instructions. 15 Ark. 624; 34 *Id.* 649; 37 *Id.* 67; 37 *Id.* 108; 52 *Id.* 180; 54 *Id.* 621; 53 *Id.* 472; 72 *Id.* 384; 74 *Id.* 33; 86 *Id.* 606; 87 *Id.* 308.

2. The defense of apparent necessity was presented in instructions 4 and 5, and in others given at appellant's request. Instruction 4 also preserves to appellant the right to protect his brother.

3. The court would have erred if it had ignored the testimony tending to show that the words of appellant invited the attack or had refused to instruct the jury as to appellant's duty to retreat before he could plead self-defense. Kirby's Dig., § 1765; 62 Ark. 309; 69 *Id.* 558; 73 *Id.* 399; 73 *Id.* 568; 120 Ala. 269; 129 Ala. 16; 141 Ind. 24; 87 S. W. 346; 82 Ala. 13; 98 Ala. 1; 95 Mo. 155; 107 Mo. 543; 109 Cal. 451; 10 Col. 566; 15 Oh. St. 47; 104 Tenn. 132; Wharton, pp. 504, 511; 117 Mo. 380; 47 Ill. 376; 86 Ky. 642; 24 Tex. App. 667; 40 Tex. Crim. Rep. 549; 30 Miss. 673; 105 Tenn. 305; 20 Ia. 108; 97 Mo. 105; 41 Minn. 365; 112 Ala. 30; 67 Cal. 346; 24 Tex. 454; 40 Tex. Crim. Rep. 395; 81 Ala. 33; 18 App. D. C. 152; 91 Ark. 576.

4. The third instruction is sustained by the above authorities. See also 29 Ark. 225; 29 *Id.* 228; 32 *Id.* 585; 49 *Id.* 543; 84 *Id.* 121.

5. The fourth instruction simply tells the jury that if appellant went to the pool room for the purpose of raising a diffi-

culty, and did provoke the difficulty, he could not afterwards plead self-defense. This is in accord with the authorities *supra*.

6. The instructions as a whole were correct.

BATTLE, J. On an indictment for murder in the first degree R. A. Wheatley was convicted of manslaughter, committed by killing Bud Robbins. His punishment was assessed at two years' imprisonment in the penitentiary. He has appealed to this court.

On or about the 23d day of January, 1909, the defendant having learned that his son had been mistreated by one Wacasey, he and his brother, N. T. Wheatley, went to Robbins's pool room in Hot Springs, in this State, to investigate the wrong done his son. When he was making the investigation, Bud Robbins, without being questioned, denied that his son had been mistreated. Defendant responded by saying that he was a "damned liar." Thereupon Robbins struck him and his brother with a pistol, inflicting a severe wound upon the head of each of them. During the combat defendant killed Robbins.

Over the objection of the defendant the court instructed the jury, in part, as follows:

"1. The court instructs you that, to maintain that the killing was justifiable on the grounds of self-defense, it is necessary to show:

"First. That there was a necessity to kill by the defendant to save his own life, or to prevent great bodily harm, and that he was not at fault in bringing about that necessity.

"Second. That the defendant did not provoke the attack and bring on the combat; if he did, he cannot claim self-defense and justification in killing the deceased.

"Third. You are instructed that the defendant could not invite or voluntarily bring upon himself an attack with the view of resisting it, and, if he did so, then slay his assailant, and claim that it was necessary for him to do so, and that it was done in self-defense.

"Fourth. The defendant cannot take advantage of a necessity to kill produced by his own unlawful or wrongful act, and if, having provoked or invited the attack, or brought on the combat, he kills his adversary, then he cannot be excused or justified in such killing unless he has withdrawn in good faith from the combat as far as he can consistent with his own safety and done all in his power to avoid the danger and avert the necessity of killing.

"3. You are instructed that, although you may believe from the evidence in this case that the defendant and his brother, Nick, went out to the place of business of deceased, Robbins, for the purpose of peaceably adjusting a difference between the son of defendant and Wacasey, yet if you believe from the evidence that after defendant got out to said place of business a sudden quarrel or difficulty arose between defendant and Robbins, and that Robbins made an assault upon defendant, and that defendant shot and killed said Robbins, defendant would not be justified on the plea of self-defense unless he was so endangered by said assault as to make it necessary to kill Robbins to save his own life or to prevent great bodily injury, and unless defendant had used all the means in his power consistent with his safety to avoid the danger and avert the necessity of killing.

"4. If you find from the evidence that the defendant had ill feelings toward Wacasey, and went to his place of business for the purpose of raising a difficulty with said Wacasey, and while in conversation with said Wacasey as to his treatment of his son, and while so denying said mistreatment, the deceased Robbins in a peaceful manner stated to defendant, or his brother, Nick Wheatley, in the presence and hearing of defendant, that they had not mistreated defendant's son, and thereupon defendant called deceased a damn liar, or a God-damned liar, or committed any other act for the purpose of provoking a difficulty, which words aroused deceased to anger, and he struck defendant over the head a violent blow with a pistol, and then turned and struck or was in the act of striking defendant's brother, and defendant shot and killed deceased, then defendant was not justifiable in said killing, although it might have appeared to him necessary to shoot and kill the deceased to protect himself or his brother from being killed or from receiving great bodily harm."

Defendant asked for many instructions, a part of which was given, and part refused. So much of those refused as were correct and proper were included in those given.

Without pointing out the defects and errors in the instructions in this case, we shall state the law by which the court should have been governed in giving the same.

"No one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden rencounter, or in a combat on a sudden quarrel or from anger suddenly aroused at the time it is made, is justified or excused in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of the killing." *Duncan* v. *State,* 49 Ark. 543, 547; *Black* v. *State,* 84 Ark. 121.

"But to whom must it appear that the danger was urgent and pressing? According to reason and the weight of authority, it must so appear to the defendant. To be justified, however, in acting upon the facts as they appear to him, he must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his own life or to prevent his receiving a great bodily injury. He must act with due circumspection. If there was no danger, and his belief of the existence thereof be imputable to negligence, he is not excused, however honest the belief may be." *Smith* v. *State,* 59 Ark. 132, 137; *Magness* v. *State,* 67 Ark. 594; *Elder* v. *State,* 69 Ark. 649; *Pratt* v. *State,* 75 Ark. 350, 352, 353.

Mere words, however opprobious they may be, will not justify an assault, or reduce homicide from the grade of murder to manslaughter (*Vance* v. *State,* 70 Ark. 272, 277; *Scott* v. *State,* 75 Ark. 142, 144); and will not preclude the one speaking them from acting in self-defense, unless he used them for the purpose of bringing on an attack and an opportunity of killing the party thereby provoked or to do him great bodily injury. *State* v. *McDaniel,* 94 Mo. 301; 21 Cyc. 809, and cases cited.

No one can wilfully and intentionally provoke an attack and bring on a combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. Before he can do so, after having provoked the attack or brought on the combat, he must in good faith withdraw from the combat, as far as he can, and do all in his power to avoid the danger and avert the necessity of the killing. If he does so, and the assailant pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, and he kills

the assailant, he is excusable. *Carpenter* v. *State,* 62 Ark. 286, 307.

A man can lawfully do for his brother, when threatened with death or great bodily injury, what he can lawfully do for himself under the same circumstances. If the brother is in fault in provoking the assault, he must retreat as far as he safely can before his brother would be justified in taking the life of his assailant in his defense. *State* v. *Greer,* 22 W. Va. 800, 819; 1 Bishop's New Criminal Law (8 ed.), § 877; 21 Cyc., pp. 826, 827.

The instructions copied in this opinion are inconsistent with the law as we have stated it, and should not have been given in the form they were; and other instructions defective for the same reason, if there be any, should not have been given.

Other questions as to the competency and misconduct of jurors were raised in the trial in the case, and are discussed in the briefs of counsel. But, as they are not likely to arise in another trial, and are sufficiently settled by the decisions of this court, we will not notice them in this opinion.

Reverse and remand for a new trial.

WESTERN UNION TELEGRAPH COMPANY *v.* CRENSHAW.

Opinion delivered February 7, 1910.

1. TELEGRAPHS AND TELEPHONES—DAMAGES FOR MENTAL ANGUISH.—There can be no recovery of damages for mental anguish against a telegraph company under Kirby's Digest, § 7947, unless there has been negligence in "receiving, transmitting or delivering messages." (Page 419.)

2. SAME—NEGLIGENCE IN TRANSMISSION OF MESSAGES.—Where a night message, sent from a town in Oklahoma to an office in this State, had to be transmitted by way of a Missouri office, and that office was not kept open before 8 o'clock A. M., it was not negligence on the part of the telegraph company to fail to transmit the message in time to enable the addressee at Fayetteville, Ark., to take an 8:40 A. M. train on the following morning. (Page 420.)

3. SAME—WHERE CAUSE OF ACTION AROSE.—No recovery of damages for mental anguish on account of negligence in the receipt, transmission or delivery of telegraphic messages can be had in this State unless the cause of action arose in this State or in a State where damages for mental anguish could be recovered. (Page 420.)

Appeal from Washington Circuit Court; *J. S. Maples,* Judge reversed.

STATEMENT BY THE COURT.

On July 30, 1907, about 4 o'clock A. M. of that day, the father of appellee delivered to appellant at Okmulgee, I. T., the following telegram: "Edith Crenshaw, Fayetteville, Ark. Walter very low. Come at once," signed W. N. Crenshaw.

Appellee's father, before delivering the message to the agent of appellant for transmission, asked him if appellee would have plenty of time to catch the train leaving Fayetteville at 8:40 that morning, provided she received the telegram on time, and the agent answered in the affirmative. The father of appellee told the agent that it was important for appellee to take the 8:40 train from Fayetteville; that they were expecting her brother Walter to die at any time. And, after the agent informed the father of appellee that she would have plenty of time to take the 8:40 A. M. train, the latter delivered the telegram to the agent and paid him for sending same. The sender of the message knew nothing of appellant's office hours. Appellee had made arrangements to go to her brother in case he grew worse. The train left Fayetteville that morning at 8:40. The telegram was not received by appellee till 2:30 P. M. Her brother died that day at 5 o'clock P. M. There was no other way for appellee to go except by the train. She left the next morning and reached her home at 2:30 P. M. It would have taken appellee 15 minutes to get to the station after receiving the telegram. It was about one-third of a mile from telegraph company's office in Fayetteville to John Crenshaw's house, where appellee was staying. The operator who receives a telegram puts down the message as it is sent, then copies it, and, if the sendee has a 'phone, the message is usually 'phoned; if the sendee has no 'phone, the message is delivered by a messenger boy. There is no evidence showing that John Crenshaw had a telephone.

On July 30, 1907, there was a way wire between Okmulgee and Fayetteville, but no instrument was on it at Fayetteville, and the message could not have been sent from Okmulgee to Fayetteville over it. The proper route for the message in suit here was from Okmulgee to Oklahoma City; thence to St. Louis, Mo.; thence to Springfield, Mo., and thence to Fayetteville. That was

the regular and usual route selected because of the large and important relay offices at Oklahoma City, St. Louis and Springfield to handle telegrams filed at small towns like Okmulgee and destined to towns like Fayetteville, Ark., where only one man is engaged as manager and operator. The length of time for a message from Okmulgee to Fayetteville, Arkansas, if filed between 8 A. M. and 6 P. M., would be four hours. If between 6 P. M. and 8 A. M., it would be longer, because some of the offices close from 8 P. M. to 8 A. M.

The telegraph office at Springfield, Mo., does not open before 8 A. M. The message in evidence arrived at Springfield from St. Louis at 11:16 A. M. July 30, 1907, and was sent to Fayetteville at 1:25 P. M. the same day. It was shown that when a message was delivered to an operator for transmission he called the office to which he wanted to send the telegram. It was sometimes difficult to raise the agent at that office. As soon as he answered, the message was sent. It was shown that under the laws of Oklahoma Territory and the State of Missouri, in force July 30, 1907, damages for mental suffering alone could not be recovered.

The appellee alleged the delivery of the telegram as set out above for transmission from Okmulgee to Fayetteville, and avers that, "if defendant had promptly transmitted and delivered said message as it agreed and undertook to do, plaintiff would have arrived at her home in Okmulgee, and would have had the privilege of being with her brother, Walter, before his death; but defendant negligently failed to transmit and deliver said message, whereby plaintiff was prevented from reaching Okmulgee until after the death of her said brother, thereby causing her to suffer great mental pain and anguish."

She asked for damages in the sum of $1,500.

The appellant denied all the material allegations. The above facts were developed in evidence. Appellant asked the court to instruct the jury to return a verdict in its favor. The court refused the request. The court at the request of appellant told the jury that "the defendant cannot be charged with negligence for not handling the message in question at Springfield and Fayetteville, Ark., prior to 8 o'clock A. M.

Other instructions given by the court were as follows: "1.

If the jury find the issues for the plaintiff, they may award to her such damages as they believe resulted from the alleged negligence of the defendant, and, in estimating such damages, have a right to consider the mental anguish and pain suffered by plaintiff by reason of such negligence if shown by the evidence.

"2. If the jury find that the plaintiff's father about 4 A. M. July 30, 1907, delivered to defendant's agent at Okmulgee the message to plaintiff set forth in the complaint, and further find that, before delivering said message to defendant for transmission, he inquired of defendant's said agent whether said message could be transmitted and delivered to plaintiff in time for her to take the train leaving Fayetteville for Okmulgee between 8 and 9 o'clock A. M. of said day, and was assured by defendant's said agent that said message would be transmitted to Fayetteville in time for plaintiff to take said train to Okmulgee, the defendant would not be excused from failure to deliver the message because received out of office hours fixed by the defendant for transacting business at Fayetteville or other points along its line, if plaintiff's father had at the time no knowledge of such office hours of defendant.

"3. The burden is upon the plaintiff to show that defendant by the exercise of ordinary diligence could have transmitted this message from Okmulgee to Fayetteville and delivered it to her in time for her to take the train leaving Fayetteville for Okmulgee at 8:40 A. M. July 30; and if the evidence does not show that fact, you will find for the defendant, unless you find that defendant especially agreed to deliver the message in time for plaintiff to take 8:40 train.

"4. The sender of a message is bound by the reasonable rules and regulations of the telegraph company under which it will be sent."

The jury returned a verdict in favor of appellee for $400. Judgment was entered for that sum, and appellant seeks to reverse the judgment by this appeal.

Mechem & Mechem and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. (a) The evidence failed to show that defendant was negligent in not delivering the message by the time when its delivery would have enabled plaintiff to reach her brother before

death. (b) The negligence, if shown, occurred outside Arkansas, where no recovery can be had for mental anguish. 85 Ark. 268; 50 Ark. 156; 67 Ark. 295; 77 Ark. 531; 79 Ark. 451; 91 Am. St. 706; 31 So. 222; 37 S. W. 942; 49 S. E. 938; 80 S. W. 561. The law of the place governs.

2. There was no evidence of a contract to deliver in time for the 8:40 train. 97 Pac. 434. No damage was shown.

3. The court erred in refusing and giving as modified defendant's third prayer, as there was no evidence to sustain the instruction as given.

McDaniel & Dinsmore, for appellee.

1. There is no error in the instructions—they were too favorable to appellant. Reasonable regulation of office hours of any particular office must depend, largely, upon the character of the locality of that office and is, therefore, a mixed question of law and fact. 27 Am. & Eng. Enc. Law, p. 1037; 24 Fed. 119.

2. The receiving agent at Okmulgee was, for the purposes of the message, the company, and it was bound for the failure to deliver, since the agent failed to inform the sender of the probable and almost certain delay. *W. U. Tel. Co.* v. *Harris*, 91 Ark. 602; 40 Am. St. 847; 12 Am. St. 583; 47 *Id.* 799.

2. This is an action *ex delicto,* and is governed by the law of *the place where the injury is done.* 57 Ark. 301; 50 Ark. 155; 53 Ark. 386; 197 Ala. 126; 38 Am. St. 170.

WOOD, J., (after stating the facts). In some of its instructions the court bottomed appellee's right to recover solely upon the existence of the contract with appellant to send the message and its failure to do so. The court in these instructions permitted appellee to recover, regardless of whether appellant had been negligent in "receiving, transmitting or delivering" the message. This was error. Under our statute there can be no recovery of damages for mental anguish unless there has been negligence in "receiving, transmitting or delivering messages."

The purpose of our statute was to allow recovery for mental anguish only in such cases. *Arkansas & La. Ry. Co.* v. *Stroude,* 77 Ark. 109; act of March 7, 1903, Kirby's Dig. § 7947. Under the law of Oklahoma Territory, where the contract was made, and at the time it was made, there could be no recovery for mental anguish in such cases. But, even if it were otherwise, there

was no allegation that appellant was negligent in receiving the message without informing appellee's father of the rules and conditions under which it would have to be sent, so as to bring the case within the doctrine of the recent case of *Western Union Tel. Co.* v. *Harris,* 91 Ark. 602.

Nor was there any evidence that appellee suffered any damage by reason of any negligence on the part of appellant in receiving the telegram for transmission.

The court having instructed the jury that appellant could not be charged with negligence for not handling the message in question before 8 o'clock A. M. at Springfield, Mo., and Fayetteville, Arkansas, appellant had only 25 minutes in which to send the message from St. Louis to Fayetteville by way of Springfield, Mo., in order to get it to appellee in time to enable her to take the 8:40 A. M. train from Fayetteville to Okmulgee. For appellee says it would have required fifteen minutes for her to have reached the train after receiving the message. Under the method of transmitting messages shown by the evidence, we are of the opinion that negligence could not be predicated upon a failure of appellant to have delivered the message in controversy from St. Louis to Fayetteville to appellee in 25 minutes. Appellee's counsel say it was possible to do so. It may have been possible to have delivered the message to appellee in that time. But that is far from showing that appellant was negligent in not delivering it in that time. That burden, under the instructions, was on appellee. We are of the opinion that, according to the methods required for sending such messages, no negligence has been established in this case.

But, if negligence was shown, then the negligence occurred in Missouri, and no recovery could be had in Missouri for mental anguish alone. The contract itself was not made in this State, nor in a place where there could be a recovery for mental anguish, unaccompanied by physical injury. The negligence, if any, which gave a cause of action, under the statute, for mental anguish did not occur in this State or in any State where damages for mental anguish alone could be recovered.

We conclude therefore that in no possible view of the case was appellee entitled to recover. She does not come within the doctrine of any of the cases in which we have been called upon to

construe and apply our statute *supra*. See *Western Union Tel. Co.* v. *Griffin*, 92 Ark. 219, and cases there cited.

The judgment is reversed, and the cause is dismissed.

GRAMMER *v.* BLANSETT.

Opinion delivered January 24, 1910.

FORCIBLE ENTRY AND DETAINER—OBJECT OF REMEDY.—Forcible entry and detainer is a remedy for protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace and to forbid any person from righting himself by his own hand and by violence.

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

Rice & Dickson and *J. A. Rice*, for appellant.

In this kind of action neither the title nor the right to possession is in controversy. 79 S. W. 988. It is purely a tort, and can only be resorted to to protect actual possession; and the plaintiff's possession must be actual, and the defendant's entry and subsequent holding must be forcible. 41 Ark. 535. Force is the gist of the action, and it must be actual and hostile. 38 Ark. 257. See also 69 Ark. 34; 49 Cal. 74; 19 Cyc. 1132. Acts which constitute a mere trespass will not support the action. To render an entry forcible, it must be attended either by actual violence or by circumstances calculated to excite terror in a reasonable person. 27 Ark. 46; 13 Ark. 448; 63 S. W. 53; 91 Am. Dec. 989. To support the action, plaintiff must show, not only that he was in actual possession of the land, but also that such possession was peaceable at the time of the alleged forcible entry. 18 Ark. 304; *Id.* 284; 64 S. W. 673; 9 S. W. 290; 11 S. W. 257; 19 S. W. 432; 54 S. W. 818; 46 N. E. 287; 35 N. E. 587; 19 Cyc. 1128-9.

E. P. Watson and *McGill & Lindsey*, for appellee.

1. Appellee was in actual possession of the land at the time of the forcible entry. Part of it had been cleared and fenced by him, and he was preparing it for cultivation. The clerk's deed

to E. S. Grammer was void for uncertainty of description, and did not convey color of title within the meaning of § 3629, Kirby's Digest. 56 Ark. 172; 59 Ark. 460; 64 Ark. 433; 69 Ark. 357; 77 Ark. 570; 83 Ark. 196. Since this deed did not constitute color of title, possession of a small part of the land by a tenant at will gave him possession of only such part as was in actual possession of the tenant. On the other hand, appellee's possession of a part of the land under color of title gave him possession of the whole tract except that portion actually in possession of appellant's tenant at will. 19 Cyc. 1129. Appellant having entered upon the land thus in the actual exclusive possession of appellee and without right or claim of title, he was guilty of forcible entry and detainer. Kirby's Dig. § 3629; 69 Ark. 39.

2. The facts here do not sustain appellant's contention that this was a "scrambling" possession. On the contrary, appellee was in the open, notorious and continuous possession of the land until he was driven away by the acts and conduct of appellant. Moreover, actual *residence* upon the land was not required. Clearing and fencing a part of it was sufficient. 13 Am. & Eng. Enc. of L. 749, 750; 19 Cyc. 1129-1130. It is true that this court has repeatedly held that force is the gist of the action. The question of intimidation, and of the amount and kind of force required, however, does not appear to have been presented in the cases relied on by appellant. Clearly, the acts, language and conduct of appellant in this case were sufficient to cause appellee, as a reasonable man, to believe that appellant intended to take possession of the land by force, and, such acts also tending to cause a breach of the peace, appellant's entry must be deemed forcible. 13 Am. & Eng. Enc. of L. 762; 19 Cyc. 1116, 1134-6 and notes; 123 N. C. 740; 119 U. S. 608.

BATTLE, J. This is an action of forcible entry and detainer, which was instituted by John H. Blansett against John C. Grammer in the Benton Circuit Court to recover possession of certain land. Plaintiff alleges substantially as follows: On the 12th day of January, 1909, he leased from Clementine Boles a certain tract of land, and immediately took possession of it, and thereafter fenced with a substantial fence fifteen acres thereof, and was clearing the same preparatory to cultivating crops thereon for the year 1909, and was in the open, actual and ex-

clusive possession of the fifteen acres and in constructive possession of the remainder by lease, when the defendant, John Grammer, forcibly took possession thereof by threatening to beat him if he did not deliver it to him, and by abusive language and by entering upon the land and tearing down plaintiff's fences, all of which was done by force consisting of the defendant and four or five other men, who by their numbers and threats intimidated and drove him from the possession, and built a fence around the land, and defendant has since retained possession by force, and damaged plaintiff in the sum of $250. Plaintiff asked for judgment for possession of the land, and for damages.

The defendant answered, and denied the allegations in the complaint, and pleaded that E. S. Grammer was the owner of the land.

The jury in the case, after hearing the evidence adduced by the parties and the instructions of the court, returned a verdict in favor of the plaintiff for the land and twenty dollars damages. Judgment was rendered accordingly, and the defendant appealed.

Plaintiff read as evidence in the trial a deed executed by the Commissioner of State Lands of the State of Arkansas, by which the land was conveyed to E. P. Watson, and in which it was shown that the land was sold (under a decree of the Benton Chancery Court in accordance with an act entitled "An act to enforce the payment of overdue taxes," approved March 12, 1881. and an act, approved March 22, 1881, entitled "An act to amend section 1 of an act entitled 'An act to enforce the payment of overdue taxes,' approved March 12, 1881") to the State of Arkansas; and read as evidence the deed of E. P. Watson conveying the land to Clementine Boles, and her lease of the land to plaintiff.

The evidence which supported the verdict of the jury tended to prove the following facts: About the 10th day of February, 1909, plaintiff took possession of the land under his lease, and cleared and fenced a part of it, and while he was doing so the defendant put up notices on the land stating that the land belonged to E. S. Grammer, and that all trespassers would be arrested and prosecuted. He came upon the land when plaintiff was at work fencing, and asked him what he was going to do about it. Plaintiff told him that he thought his lease was good, and he was going to hold the land and go ahead. Defendant appeared to be

angry, and said that any man who would come between a neighbor and a stranger was a cur, or no better than a cur pup, or words to that effect, and said he intended to have plaintiff arrested. As he started away, he repeated that a man who would come between a neighbor and a stranger was no better than a cur dog. Shortly after that, while plaintiff was still clearing the land, the defendant and four or five other men entered upon the land and tore down plaintiff's fence, and inclosed it with a fence of his own. The plaintiff, believing that it was dangerous for him to remain and continue his work, went away, and brought this action. The fence constructed by plaintiff on the land and destroyed by the defendant was worth $20.

The defendant offered the deed of E. S. Grammer as evidence for the purpose of showing that the land belonged to him; but, the deed being void on account of the defective description of the land in the deed, the court refused to allow it to be read.

The defendant does not attack the instructions of the court on this appeal, but we copy one in this opinion to show how the facts were submitted to the jury. The court instructed the jury in part as follows:

"If you find from a preponderance of the evidence that plaintiff was in the actual possession of the land described in the complaint, and that the defendant entered upon said land, and by the use of threats and by removing the plaintiff's fence, or by such other words and actions as had a natural tendency to excite fear or apprehension of danger on the part of the plaintiff and to induce him to yield possession of said land, and that by the use of such means defendant did induce the plaintiff to yield up to him such possession, the defendant would be guilty of a forcible entry and detainer, and you will find for the plaintiff. It would not be necessary, to constitute such forcible entry and detainer, that the defendant should actually use force against the person of the plaintiff."

The statutes of this State provide: "If any person shall enter into or upon any lands, tenements or other possessions, and detain or hold the same without right or claim of title, * * * or by such words and actions as have a natural tendency to excite fear or apprehension of danger, * * * or frightening by threats or other circumstances of terror the party to yield

possession, in such cases every person so offending shall be deemed guilty of a forcible entry and detainer, within the meaning of this act." Kirby's Digest, § 3629.

"Generally speaking, forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace and to forbid any person righting himself by his own hand and by violence; and therefore ordinarily the only matters involved are the possession of plaintiff and the use of force by defendant." *McGuire* v. *Cook,* 13 Ark. 448; *Hall* v. *Trucks,* 38 Ark. 257; *Littell* v. *Grady,* 38 Ark. 584; *Anderson* v. *Mills,* 40 Ark. 192; 19 Cyc. 1124, and cases cited.

In *Iron Mountain & Helena Railroad Company* v. *Johnson,* 119 U. S. 608, it is said:

"The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained," etc.

And again: "If the law was otherwise, force, the exhibition and use of deadly weapons and threats of personal violence would speedily take the place of lawful and peaceable methods of gaining the possession of property."

The statutes of this State provide in actions like this "the title to the premises in question shall not be adjudicated upon or given in evidence, except to show the right to the possession and the extent thereof." Kirby's Digest, § 3648.

In this case the evidence shows that plaintiff was in the actual possession of the land in controversy, fencing and clearing the same, and at least *prima facie* entitled to the possession. While doing so, the defendant approached him in anger, and in effect

called him a cur. He posted upon the land notices against trespassers and threats of arrest; and then, calling to his assistance four or five other men, forcibly took possession of the land by tearing down plaintiff's fence and inclosing the same with a fence of his own. Under the most provoking circumstances he left to him the choice of two evils—to engage in an unequal combat to maintain his possession or yield possession under necessity and bring this action—the course prescribed by law in such cases. The evidence sustained the verdict.

Judgment affirmed.

POE v. POE.

Opinion delivered January 3, 1910.

1. DIVORCE—ALLOWANCE OF ALIMONY—RIGHT TO SET ASIDE.—Where a wife brought suit for divorce, a temporary order allowing her alimony, attorney's fees and cost money may be set aside at a subsequent term of the court. (Page 428.)
2. DIVORCE—ADULTERY—GENERAL REPUTATION.—Where a husband sues his wife for divorce upon the ground of adultery, the alleged adultery cannot be proved by evidence tending to show that she had a general reputation for unchastity. (Page 429.)
3. WITNESS—IMPEACHMENT.—A witness is not competent to prove the general reputation of the plaintiff when he does not live in the same neighborhood with the plaintiff and does not show that he knows what is generally said of plaintiff by those among whom he dwells or with whom he is chiefly conversant. (Page 430.)
4. APPEAL AND ERROR—ABSTRACT OF EVIDENCE—NECESSITY FOR.—Where, upon appeal, the evidence upon which the court rendered the decree dismissing appellant's complaint is not abstracted, the decree will be affirmed. (Page 430.)

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; reversed in part.

John H. Vaughan, for appellant.

1. In a divorce proceeding the reputation of neither party is in issue. A. B. Poe's testimony as to appellant's reputation was not admissible, and should have been excluded. 5 Am. & Eng. Enc. of L. (2 ed.), 862; 5 N. H. 195; 93 Ky. 510. General repu-

tation can be proved only by witnesses who know that reputation in the vicinity in which the party lives. I Greenleaf on Ev., (7 ed.), § 461.

2. Plaintiff's residence in this State for one year next before the commencement of the action is not proved. The statute contemplates actual residence, not constructive. 54 Ark. 172.

Ben Cravens, for appellee.

1. Mrs. Poe was seeking judgment against appellee for alimony, and was a witness in her own behalf. Her general reputation was a proper subject of inquiry. 72 Neb. 463.

2. The evidence supports a finding that appellee had been an actual resident for more than one year; but in this case it was unnecessary that he should have been such resident in order to give the court jurisdiction and grant him a divorce. 9 Am. & Eng. Ann. Cas, 1198; Kirby's Dig. § 6088; 31 Ark. 346; 9 Wash. 239; 37 Pac. 431; 135 Mass. 83; 24 Ind. 356; 108 Mich. 267; 66 N. W. 52.

WOOD, J. The action out of which the decree of divorce was rendered in behalf of appellee, O. S. Poe, and from which decree appellant appeals, was commenced by the appellant herein filing in chancery court of Sebastian County for the Fort Smith District on August 22, 1907, a bill in equity against O. S. Poe, alleging non-support and abandonment and asking judgment requiring appellee herein to maintain her, and for such alimony and attorney fee as the court deemed equitable.

Thereafter on the same day appellee herein filed a suit in said court against appellant for absolute divorce, and as grounds for such divorce set up desertion, habitual drunkenness, cruel treatment and adultery on the part of appellant; to which cause of action appellant filed answer on October 9, 1907, denying all the allegations alleged in the complaint.

Thereafter on October 16, 1907, appellee herein filed answer to the complaint of appellant for alimony, and asked that said answer be taken as a cross-complaint, and that he be given an absolute divorce from the appellant on the grounds of desertion, habitual drunkenness, cruel treatment and adultery, all of which he alleged in his said answer and cross-complaint.

Thereafter on October 25, 1907, the court on motion consolidated the two cases above set out, and the issues as thus made

were finally submitted to the court on June 8, 1908, and after a full hearing an absolute divorce was granted to O. S. Poe from Mrs. J. S. Poe, upon such grounds as were alleged in his cross-complaint.

The appellant, Mrs J. S. Poe, asks this court to reverse the judgment of the chancery court, and relies upon three grounds. First, because the court made an order on the 25th day of October, 1907, vacating an order made at a former term of the court (August 22, 1907), allowing appellant temporary alimony in the sum of twenty-five dollars per month, also twenty-five dollars attorney's fee and ten dollars for costs. And also in not allowing appellant to have further time to take depositions before setting aside the order for temporary alimony, attorney's fees and costs.

Second, because the court permitted the witness A. B. Poe to testify over the objection of appellant as follows: "I am a brother of O. S. Poe. I live in Little Rock. After O. S. Poe and Mrs. O. S. Poe commenced these lawsuits, I went to New Orleans to see if I could find evidence in relation to the case. I know Mrs. Poe's reputation in New Orleans, La. It is bad. I hired a detective in Little Rock to go to New Orleans to look up evidence for me. The detective was a friend of mine, and I only paid his expenses. I went to different places in New Orleans, and they told me that Mrs. Poe had a bad reputation. I went to one restaurant, and asked the head waiter if he knew where I could get some woman who would go out and have a good time. He told me that Mrs. Poe would go any time. I learned in different places where I went in New Orleans that Mrs. Poe had a very bad reputation, and was said to be a very fast woman."

Third, because the evidence does not show that the appellee was a resident of the State of Arkansas one year next before the commencement of the action. We will consider the grounds upon which reversal is urged in the order named above.

1. The order allowing alimony, attorney's fees and costs was a temporary order, and the court did not abuse its discretion in setting it aside after the appellee had filed his depositions to be read on the final hearing of the cause. Nor was there error in refusing to grant appellant further time to take testimony on the motion to vacate the order of a previous term allowing the alimony, attorney's fees and costs. The appellant had from

August 22, 1907, when the order was first made, until October 25, 1907, when it was set aside, to take her depositions on this as well as the divorce issue. Besides, the original order of allowance, as well as the order setting it aside, were both temporary orders, subject to final review by the court on the hearing in the proceedings for divorce with which the proceedings for alimony had by consent been consolidated. Kirby's Digest, § § 2679, 2681-3. The appellant still had from October 25, 1907, till June 8, 1908, to make her proof on the issues. The cause was not finally adjudicated until the latter date, and it appears that she had the opportunity to take and did take all the depositions she desired and besides presented testimony *ore tenus.*

2. Where a husband sues his wife for divorce on the alleged ground of adultery, the general character of the wife for unchastity is not in issue. Therefore any testimony as to her general reputation for unchastity should have been excluded, so far as the same may have been used to establish the alleged adultery of appellant. The testimony of A. B. Poe was not admissible. The alleged adultery of appellant could not be established by evidence tending to show that she had a general reputation for unchastity. That could only be proved by evidence of actual occurrences of adulterous intercourse, and not by presumption, *Evans* v. *Evans,* 93 Ky. 510; *Washburn* v. *Washburn,* 5 New Hampshire, 195. See also *Humphrey* v. *Humphrey,* 7 Conn. 116; *Berdell* v. *Berdell,* 80 Ill. 604. "The character of neither party to a divorce proceeding is in issue, and evidence as to it is therefore not admissible." 5 Am. & Eng. Enc. Law, p. 862, and cases cited.

Neither was the testimony of A. B. Poe admissible for the purpose of impeaching appellant as a witness. He "went to New Orleans to see if he could find evidence in relation to the case." He says, "I know her reputation in New Orleans, La. It is bad." But on cross-examination he shows that he only knew that her reputation was bad from what they told him in different places. A. B. Poe did not live, and had not lived, in the community where appellant resided. He only found out that her reputation was bad from what he had heard others say while he was in New Orleans "to find evidence." This testimony did not establish the "general reputation for truth or immorality" that

rendered appellant "unworthy of belief," and was not such testimony as the statute requires for the impeachment of a witness by the method there prescribed. Kirby's Digest, § 3138. Mr. Greenleaf, concerning the impeachment of a witness by the particular method under consideration, says: "It is not enough that the impeaching witness professes merely to state what he has heard others say, for those others may be but few. He must be able to state what is *generally* said of the person by those among whom he dwells or with whom he is chiefly conversant; for it is this only that constitutes his *general reputation or character.* And, ordinarily, the *witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries.*" 1 Gr. Ev. § 461.

No objection is made by counsel for appellee to the abstract of the evidence as presented by counsel for appellant, under rule ten of this court. We assume therefore that the abstract of appellant is correct.

The evidence as abstracted by counsel for appellant is not sufficient to warrant the decree of divorce in favor of the appellee. According to this evidence, appellee's complaint should be dismissed for want of equity.

Third. In view of what we have held above, it is unnecessary to consider the third ground urged by appellant for reversing the decree.

The decree is reversed with directions to the Sebastian Chancery Court to dismiss appellee's complaint for want of equity. The evidence upon which the court rendered the decree dismissing appellant's complaint is not abstracted, and the decree as to that is therefore affirmed.

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

Opinion delivered January 24, 1910.

1. CARRIERS—FAILURE TO GIVE NOTICE OF ARRIVAL OF FREIGHT.—Before a consignee can complain of the failure of the carrier to give notice

on the arrival of freight at a distant town, he must have put himself in position to receive such notice; and when he fails to do so, he will be held to have agreed impliedly that the carrier shall hold the goods until the bills of lading are presented by some one. (Page 433.)

2. SAME—DAMAGE TO FREIGHT BY DELAY—EVIDENCE.—Where a consignee sued the carrier to recover demurrage charges paid by him and damages to the freight on account of delay caused by failure of the carrier to notify him of the refusal of his vendee to receive the freight, a verdict for a lump sum will be set aside if the evidence fails to show the condition of the freight at the time it was shipped. (Page 434.)

3. APPEAL AND ERROR—OMISSION OF EVIDENCE FROM TRANSCRIPT—PRESUMPTION.—The presumption that the judgment of the trial court was correct will not be indulged, because some documents introduced at the trial were omitted by the clerk in making up the transcript, if it appears that they do not concern the points to be decided in disposing of the case. (Page 434.)

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; reversed.

Kinsworthy & Rhoton and *James H. Stevenson,* for apellant.

The cars were consigned to shipper's order, notify J. M. Townes, at Texarkana. Appellee was not at Texarkana during the period complained of, and had no agent there to receive notice. A direction to notify him at Texarkana would not require appellant to notify him at Little Rock. Hutchinson on Carr. § § 709, 723.

B. S. & J. V. Johnson, for appellee.

1. This court will not review and pass upon the correctness of a jury's verdict where a material part of the evidence heard by them is omitted from the transcript. The record is also fatally defective in that the trial judge's certificate does not show that the bill of exceptions contains all the evidence, instructions given and refused, and all of the proceedings had in court at the trial of the cause. 74 Ark. 553; 75 Ark. 82.

2. Appellant is liable for its delay in giving notice of the arrival of the cars at Texarkana. Acts 1907, p. 453, § § 3, 8, 14, 15 and 21. See also 77 Ark. 482; Hutchinson on Car. § § 328, 330, 359.

McCULLOCH, C. J. This is an action instituted by the plaintiff, J. M. Townes, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for alleged

breaches of contracts of carriage of numerous carloads of oats and a carload of bran. All except four carloads were shipments from points in Nebraska and Missouri to Texarkana, Arkansas, and the four were shipments from Texarkana to Arkadelphia, Ark. The consignments to Texarkana were purchases made by the plaintiff and shipped by his vendors to the shipper's own order, the bills of lading containing directions to "notify J. M. Townes, Texarkana, Ark." Plaintiff resided in Little Rock, and was engaged here in business. He had no place of business nor agent at Texarkana. The bills of lading were sent to a bank in Little Rock, attached to drafts of the several vendors on the plaintiff for the purchase price of the products sold. These purchases and consignments were not all made at the same time, but were scattered through the months of September and October, 1907.

As soon as the drafts reached Little Rock, which was usually a day or two after he received the invoices from his vendors, and before the consignments had time to reach Texarkana, plaintiff resold the produce to the Josey Grain Company of Texarkana, and at his request the bank at Little Rock forwarded to a bank at Texarkana his drafts on the Josey Grain Company for the purchase price, with the bills of lading attached. In the ordinary course of transportation, it usually required ten or eleven days for the cars to reach Texarkana after shipment, and there is no evidence that the cars were not promptly transported to said destination. When they reached there, the agent of the railway company promptly notified the Josey Grain Company of their arrival. Mr. Josey, of the Josey Grain Company, testified that he in turn notified the plaintiff. Plaintiff denied this, however, and the testimony on this point is conflicting. No notice was given directly by the railroad company to plaintiff. The Josey Grain Company declined to receive the shipment, on account of stringency of money matters and dullness of the grain market at that time. The cars remained in the railroad yards at Texarkana, and plaintiff testified that the first intimation he had of the arrival of the cars was on November 23, when he discovered the fact by accident from the company's claim agent at Little Rock. He made no inquiry for the cars, he says, and was not in Texarkana during that period, and neither gave directions to the company for the forwarding of notice to him of

the arrival of the cars, nor made any arrangements with any one in Texarkana to receive notice for him, further than to forward the bills of lading to the bank attached to the drafts on the Josey Grain Company, which authorized the latter to take up the draft and bills of lading and receive the cars.

Plaintiff claims the right to recover damages on account of the company's failure to notify him of the arrival of the cars, and he attempted to prove damages by reason of loss in weights and depreciation in prices during the delay.

It seems clear to us that on this state of facts the plaintiff is not entitled to recover. As the company was required by the terms of the contract to give him notice of the arrival of the cars at Texarkana, there was a corresponding duty devolving on him to put himself in position to receive the notice, so that the same would be available. Any attempt to give him notice at Texarkana would have proved fruitless, for he was not there to receive it; and before he can complain of the failure of the company to comply with the contract by giving him the notice, he must have first performed the contract impliedly imposed on him to put himself in position to receive the notice. He can not complain when he has failed to perform his part of the contract, for when he failed to make arrangements for the carrier to give him notice, he impliedly agreed for the latter to hold the goods until the bills of lading were presented by some one. This is what the law required the carrier to do, and he could expect nothing more.

"It is the duty of the consignee," says Mr. Hutchinson, "to be on hand and ready to receive the goods. He cannot absent himself, and thus put it out of the power of the carrier to make a delivery to him, and hold him during his absence to the extraordinary care of the goods required of the carrier. If, therefore, he be absent when the carrier is ready to deliver the goods, and has left no agent known to the carrier to whom delivery can be made for him, or to whom notice can be given of their arrival, the carrier becomes at once a mere warehouseman of the goods." 2 Hutchinson on Carriers, § 723.

The Supreme Court of Indiana, speaking on this subject, said: "The doctrine that the carrier's duty to deliver and the consignee's duty to receive are reciprocal, and that each must be

maintained, is approved by the plainest considerations of justice, and is necessary to prevent wrong and imposition." *Adams Exp. Co.* v. *Darnell,* 31 Ind. 20.

The above quotations are taken from discussions of the general question as to when liability as a carrier ceases and that of a warehouseman begins; but the principle is the same in determining the question of liability of the carrier for failing to give notice where damages are alleged to have resulted from such delay.

The four carloads of oats consigned to Arkadelphia were shipped by plaintiff to his own order with directions to notify Arkadelphia Roller Mills, to whom plaintiff had sold the oats; and that company was duly notified of the arrival of the cars, but refused to receive the oats on account of finding them to be in a damaged condition. Plaintiff was not promptly notified of the refusal of the Arkadelphia Roller Mills to accept these cars, and he sues to recover demurrage charges during the period of delay, which he was required to pay, and also alleged damage to the oats. The evidence on this branch of the case is not sufficient to show the condition the oats were in when they were shipped, so it was impossible for the jury to determine how much was the damage, if any, caused by the delay. We cannot determine from the verdict how much the jury allowed for this.

Counsel for plaintiff insist that the bill of exceptions does not contain all the evidence, and that for that reason we should indulge the presumption that the judgment is correct and affirm it. The trial judge certifies in the bill of exceptions that it contains all the evidence, but the clerk, in making up the transcript, omits some of the writings which were read in evidence and called for in the bill of exceptions. These omitted writings consisted of orders of the Railroad Commission and matters of correspondence after the alleged damage occurred, and during the period of attempted adjustment, and none of them affect the question of appellant's liability so far as concerns the points necessary to decide in disposing of the case here. The contents of those writings could not affect those questions, so we can not indulge the presumption that they contained evidence sufficient to establish liability of appellant. *North State Fire Ins. Co.* v.

Dillard, 88 Ark. 473; *Wadley* v. *Leggett,* 82 Ark. 262. Other questions raised in the case need not be decided.

Reversed and remanded for new trial.

BOWMAN *v.* TRAINOR.

Opinion delivered January 24, 1910.

1. CORPORATIONS—AUTHORITY TO ACQUIRE LAND.—Under Kirby's Digest, § 851, authorizing corporations to acquire such lands as shall be necessary for their purposes, the inquiry whether any particular real estate owned by a corporation is necessary for that business is a matter between the State and the corporation, which does not concern third parties. (Page 437.)
2. SAME—VALIDITY OF CONVEYANCES TO AND FROM.—The validity of conveyances of land between two corporations cannot be impeached by strangers. (Page 439.)

Appeal from Prairie Chancery Court, Southern District; *John M. Elliott,* Chancellor; affirmed.

J. H. Harrod and *J. G. & C. B. Thweatt,* for appellant.

1. There is no proof that the Little Rock Vehicle & Implement Company had legal title to the land. Its charter was not introduced to show its corporate authority to acquire land, neither is there any showing that it had the right to acquire the land from Livesay under its implied power, *i. e.,* the authority to hold land necessary to its business or to take it for the purpose of saving a debt. 1 Morawetz on Private Corporations, § 327; 5 Thompson on Corporations, § 5779.

2. The proof is insufficient that Trainor Company acquired all the rights of the Little Rock Vehicle & Implement Company. No showing that Wood Carriage Company ever legally succeeded it. No showing that the proceedings at the meeting at which the name was changed were taken by a majority of the stockholders, or that any notice of the meeting was given. The record does not show that any legal or proper notice was given of the meeting of the Wood Carriage Company, nor that a majority of the stockholders were present, wherein it was authorized to transfer assets to some one who would settle the debts. Same objections obtain as against the proceedings at the meeting wherein the sale to Trainor was made or authorized.

3. Trainor Company's charter is not exhibited, and there is no showing that it has a right to hold the land. It cannot claim to hold by implied authority, since it did not take the land for debt. Trainor Company must have title, equitable or legal, before it can be heard to point out defects in Bowman's title.

Wiley & Clayton, for appellee.

1. The defenses now urged by appellant were not urged in the lower court, either in pleadings or proof. He cannot raise new issues here. 75 Ark. 312. Even in the lower court it would have been necessary to specially plead want of authority in the officers or directors to bind the corporation, before appellant could avail himself of such defense. 80 Ark. 67. "None but the corporation and its stockholders or creditors can impeach a transfer of property by the corporation for want of previous action by the board of directors; and then only by a direct action brought for that purpose." 78 N. Y. 131; Cook on Corporations, (4 ed.), 1479, note 2. A party taking a transfer of property from a corporation, as in this case, is not bound to inquire whether notice was given of a directors' meeting; and when the vendee relies upon such transfer, it cannot be attacked collaterally by a third party. Cook on Corporations (4 ed.), § 713, p. 1481, § 713a, p 1488.

2. It is provided by our laws that every corporation has power to hold such land as shall be necessary for the purposes of the corporation. Kirby's Dig. § 851. And where a corporation has such power, the question "whether any particular real estate is necessary for that business is a matter between the State and the corporation, which does not concern third parties. 100 U. S. 55, 60-61; 98 U. S. 621; Cook, Corporations, § 604

BATTLE, J. On the 13th day of October, 1906, the J. H. Trainor Company filed a complaint in the Prairie Chancery Court against W. P. Bowman and the Little Rock Vehicle & Implement Company, alleging that plaintiff was the owner of one undivided half of a certain tract of land, deraigning title through mesne conveyances from the United States. It then alleged that the one-half of the land was sold on the 8th of June, 1903, for taxes of 1902, and purchased by Bank of Grand Prairie, which assigned its certificate of purchase to the defendant, W. P. Bowman, who received a deed on the 9th day of June, 1905; and that the tax sale

was void. Prayer of complaint was that the plaintiff's title be quieted, and Bowman's tax deed be canceled.

The defendant, Bowman, answered and denied that plaintiff acquired title to one-half of the tract of land, or is the owner thereof, and claimed title to the same by his tax deed and deed executed to him by Mrs. Mollie Roper; and asked that his title be quieted. The defendant Little Rock Vehicle & Implement Company and G. G. Wood, who was made defendant during the pendency of the suit, answered, alleging that the Little Rock Vehicle & Implement Company was a corporation, and that, after it bought the land in controversy, it changed its name to Wood Carriage Company, and that in January, 1905, the Wood Carriage Company went out of business and transferred all of its assets to the plaintiff; and that the defendant G. G. Wood was its last president. They disclaimed all interest in the land, and joined in the prayer of the complaint.

Upon final hearing the court ordered, adjudged and decreed that the equitable title to the land in controversy is in the plaintiff, and that the legal title is in the Little Rock Vehicle & Implement Company, and that it be divested out of such company and vested and quieted in plaintiff; and that the tax sale of the land on the 8th of June, 1903, for the taxes of 1902, and the deed made in pursuance thereof to W. P. Bowman, be set aside and held for naught, and as a cloud upon the plaintiff's title, and that plaintiff's title be quieted as against all the parties to this suit. From this decree Bowman appealed.

Appellant says he "makes no point on the decree of the court holding that the tax sale was irregular;" and further says: "Our contention is that the Trainor Company is in no position to come into a court of equity and attack anything relating to the title of the land in this case, and the only point we desire to discuss on this appeal is that plaintiff has wholly failed to show any equitable title to the land in controversy. Not having shown an equitable title, it of course can not maintain a complaint to cancel a cloud or to quiet its title."

It is clearly alleged in effect in the complaint, and not denied in the answer, that the Little Rock Vehicle & Implement Company is a corporation. But appellant says it is not shown that it had the right to acquire the land in controversy. But the statutes

of this State provide that corporations, by their corporate name, shall "have power to acquire and hold such lands, tenements and hereditaments and such property of every kind as shall be necessary for the purposes of such corporations; and such other lands, tenements and hereditaments as shall be taken in payment of or as security for debts due such corporations, and to manage and dispose of the same at pleasure." Kirby's Digest, § 851. "The inquiry whether any particular real property is necessary for that business is a matter between the State and the corporation, which does not concern third parties." That is a matter which is not subject to investigation, and cannot be called in question in this suit. *Cowell* v. *Springs Co.*, 10 U. S. 55, 60, 61; Cook, Corporations (6 ed.), § 694.

Both parties trace title to Mollie Roper. On the 4th day of March, 1899, she conveyed the land in controversy to D. M. Livesay. This deed was filed for record on the 21st day of September, 1906. On the 21st day of October, 1902, Livesay and wife conveyed the same to the Little Rock Vehicle & Implement Company, and their deed was recorded on the 31st day of October, 1902. On the 26th day of September, 1904, she conveyed to the defendant, W. P. Bowman, and he had constructive notice, by record, of the title of the Little Rock Vehicle & Implement Company to the land at the time she conveyed to him.

The name of the Little Rock Vehicle & Implement Company was changed at a meeting of its stockholders on the 3d day of February, 1903, by a resolution, to Wood Carriage Company. This appears on the minutes or record of the company. Whether the resolution was adopted in conformity to the statute in such cases made and provided is immaterial; the corporation was not changed. The corporation became embarrassed financially. Its record shows that its stockholders in pursuance to a notice given to them met on January 5, 1905, and authorized its board of directors to sell all its property of every description to any person or corporation who could and would take its property and pay its debts or otherwise satisfy its creditors, and hold it harmless against its debts, and to report such sale to them (stockholders) at a subsequent meeting for ratification. Its record further shows that its board of directors, in pursuance of notice to all of them, met on the 9th day of March, 1905, and sold all of its property

to J. H. Trainor, trustee, in consideration of satisfaction by him of all its indebtedness and the holding of it harmless by him against all claims; and that the stockholders, upon notice to each of them, met on the 9th day of March, 1905, and by unanimous vote ratified the sale made by the board of directors. All the property was sold and transferred to J. H. Trainor, trustee, and he took possession of it and sold and transferred it to J. H. Trainor Company, a corporation organized under the laws of Arkansas. The claims against the Wood Carriage Company and its creditors were satisfied. But through inadvertence the lands in controversy were not conveyed by deed. The plaintiff, J. H. Trainor Company, however, acquired the equitable title to the property. To these transactions Bowman was a stranger, and he cannot impeach them. *Castle* v. *Lewis,* 78 N. Y. 131, 135. They do not affect him.

Decree affirmed.

GIBSON v. LITTLE ROCK & HOT SPRINGS WESTERN RAILWAY COMPANY.

Opinion delivered January 24, 1910.

1. CARRIERS—PERISHABLE GOODS—NEGLIGENCE.—Where a carrier undertook to ship perishable goods in a refrigerator car, it cannot shield itself by proving that an independent contractor which it employed to care for the goods in transit was negligent in failing to keep open the drain holes in the car so as to let out the ice water. (Page 441.)
2. SAME—INTERSTATE COMMERCE—LIABILITY OF INITIAL CARRIER.—Under the Hepburn act of Congress, the initial carrier in an interstate shipment is liable to the shipper for all damages in transit. (Page 443.)
3. SAME—CONNECTING CARRIERS—LIABILITY.—At common law, in the absence of proof, there is a presumption, where freight is injured in transit that the last carrier caused the injury. (Page 443.)

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

S. W. Leslie, for appellant.

1. That appellees are liable in a case of this kind is well settled, and, as between them, the presumption is that the damage to the goods was caused by the negligence of the last connect-

ing carrier. 73 Ark. 112; 72 Ark. 502; 82 Ark. 150. It was appellee's duty to furnish a car suitable for this class of goods, and it is not relieved of liability because of its contract with a refrigerator company to furnish a car properly iced. 82 Ark. 143.

2. When there is any evidence introduced in the trial of a case upon which the minds and judgment of men might differ, it is error to take the case from the jury.

W. L. Hemingway, E. B. Kinsworthy and *James H. Stevenson,* for appellees.

The case was correctly taken from the jury. It is apparent from the evidence that the goods were delivered primarily to the A. R. T. Company at St. Louis; that one of the appellants, who from experience was competent to judge whether they were properly packed for shipment, personally attended to the loading of the goods into the car; that thereafter the bill of lading was issued, and the car was promptly handled. It does not appear that the damage to the goods was due to any delay or other negligence on the part of appellees. The facts in this case are wholly dissimilar to those in the Renfroe case. 82 Ark. 143. See also 2 Hutchinson on Carriers, 3505; *Id.,* § 508; 101 N. W. 223; 72 S. W. 610.

McCULLOCH, C. J. Plaintiffs, Gibson & Draughn, instituted this action against the Little Rock & Hot Springs Western Railway Company and the St. Louis, Iron Mountain & Southern Railway Company to recover damages by reason of alleged negligence of said defendants in the transportation of a carload of perishable goods, consisting of oranges and other fruits and vegetables from St. Louis, Mo., to Hot Springs, Ark., over the two roads as connecting carriers. The goods were shipped in a refrigerator car, and negligence of the two defendant railroad companies is alleged in failing to properly ice the car or to care for it in other respects while in transit. The undisputed facts in the case are that the plaintiffs purchased the goods from a produce dealer in St. Louis, and the goods were loaded in a refrigerator car owned by the American Refrigerator & Transit Company, situated on the tracks of defendant St. Louis, Iron Mountain & Southern Railway Company, and that company issued to plaintiffs through bill of lading to Hot Springs. No other contract with reference to the transportation and care of the goods is shown in evidence except this bill of lading.

The car was transported by the Iron Mountain road over its line and delivered to the connecting carrier, its co-defendant, and by the latter transported to Hot Springs. On arrival there it was found that the holes in one of the bumpers of the car, used in draining the car of water from melted ice, had become clogged up by trash, so that the water would not run through, and on account of this obstacle the water had risen a considerable distance up on the sacks of produce in the car, and it appears that the motion of the car had jolted the water all over the produce, causing same to mold. The goods were badly damaged, and were sold at greatly reduced price. There is no evidence as to the quantity of ice in the car or its temperature, so the proof does not sustain the allegation that the car was not properly iced. The evidence was abundant, however, that the damage was caused by allowing the drain holes in the bumpers to become obstructed. Upon this state of the case, the court gave a peremptory instruction to the jury to return a verdict in favor of defendants, which was done, and the plaintiffs have appealed to this court.

The duty of a carrier of freight with respect to the transportation and handling of perishable goods was fully discussed by this court in the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Renfroe,* 82 Ark. 143, and the principles which control this case are there announced. After stating in general terms the duty of a carrier with respect to such goods, the opinion reads: "It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in *New York, Phil. & N. Ry. Co.* v. *Cromwell,* 49 L. R. A. 462. * * * It matters not in the case at bar that the refrigerator car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict, that appellant not only undertook to furnish the car, but also to ice the same."

In the present case, appellees rely upon an alleged distinction between the two cases in that the evidence in the present one shows that the goods were delivered to the refrigerator company. They rely upon the doctrine announced in some cases that while it is the duty of the carrier to furnish suitable facilities, yet, where the shipper selects his own vehicle for the shipment of perishable goods, and undertakes to see that the same is properly iced, the carrier has a right to assume that this is properly done. There is no question, however, in this case as to the selection of the vehicle or as to any negligence in the furnishing of suitable facilities. It is not contended that there was any defect in the car, nor does the proof show that plaintiffs entered into any contract with the refrigerator company with reference to icing the car and to caring therefor, or entered into any contract except that expressed in the bill of lading. The case of *New York, Phil. & N. Ry. Co.* v. *Cromwell,* 49 L. R. A. 462, which is a decision of the Virginia Supreme Court of Appeals, and is cited with approval by this court in the Renfroe case, is almost identical with the present one, so far as the question of the carrier's duty to see that the car was properly iced. There the shipper had loaded his fruits into a refrigerator car owned by the refrigerator company, situated on the tracks of the carrier, and the bill of lading was issued by the railway company. The court held that the railway company was liable for damages resulting from the failure to properly ice the car, and in the opinion it is said: "The undertaking of the plaintiff in error (railway company) was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have had the refrigerator cars belonged to it."

We need not go further than the doctrine here announced to find that the railway company is liable under the proof adduced. While there is no evidence that there was a failure to properly

ice the car, as already stated, the evidence abundantly shows that there was negligence in failing to keep the drain holes open.

This was an interstate shipment, and falls within the provision of the act of Congress (Hepburn Amendment) making the initial carrier liable. *Kansas City So. Ry. Co.* v. *Carl,* 91 Ark. 97. The connecting carrier is also liable if the damage resulted from its negligence; and, in the absence of proof on the subject, there is a presumption that the last carrier caused the injury. *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 114; *Kansas City S. Ry. Co.* v. *Embry,* 76 Ark. 589; *St. Louis, I. M. & S. Ry. Co.* v. *Renfroe, supra.*

The court erred in taking the case from the jury by peremptory instruction.

Reversed and remanded for new trial.

WALKER v. FAYETTEVILLE.

Opinion delivered January 31, 1910.

1. MUNICIPAL CORPORATIONS—JURISDICTION OF COURTS.—Under Kirby's Digest, § 2083, conferring on city and police courts concurrent jurisdiction with courts of justices of the peace in prosecutions for misdemeanors committed within the city, a mayor of a city of the second class has jurisdiction over all misdemeanors committed within the city, even where they involve imprisonment in the county jail. (Page 444.)
2. TRIAL—IMPROPER REMARKS OF COUNSEL.—Improper remarks made by counsel for the State in the argument of a criminal case will not be reversible error where the court promptly reprimanded counsel and admonished the jury not to consider them. (Page 446.)

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

W. L. Stuckey, for appellant.

1. The evidence does not support the verdict.

2. Where public offenses are punishable by both fine and imprisonment, the statute does not confer jurisdiction upon police courts concurrent with justices of the peace. Dillon on Mun. Corp. (2 ed.), § § 358, 359; Kirby's Dig. § 5626; *Id.* § § 2081, 2082, 2086, 2110, 2476, 5471, 5464, 5465; art. 2, § § 7, 8 Const. Ark.; art. 8, § 49, *Id.*

HART, J. On the 7th day of August, 1909, George Walker was arrested by the chief of police of the city of Fayetteville, Arkansas, for disturbing the peace. He was tried and convicted before the police court, his punishment being fixed at a fine of $200 and six months' imprisonment in the county jail. Walker appealed to the circuit court, where he was tried before a jury, and again convicted, his punishment being assessed at a fine of $300 and six months imprisonment in the county jail. From the judgment rendered upon the verdict he has appealed to this court.

The affidavit for a warrant of arrest charged that George Walker was guilty of disturbing the peace within the corporate limits of the city of Fayetteville in violation of the statutes of the State of Arkansas.

Under section 2083 of Kirby's Digest, conferring on city and police courts concurrent jurisdiction with justice's courts of prosecutions for misdemeanors committed in the city, the mayor of a city has jurisdiction over offenses within the city in violation of the State statutes. *Searcy* v. *Turner,* 88 Ark. 210; *McCall* v. *Helena,* 86 Ark. 442; *Barnett* v. *Malvern,* 92 Ark. 483; *Marianna* v. *Vincent,* 68 Ark. 247.

In the case of *McCall* v. *Helena, supra,* the court held that under section 5634 of Kirby's Digest the police court shall have concurrent jurisdiction with the justices of the peace over all misdemeanors committed in violation of the laws of the State within the corporate limits of the city.

It is claimed by counsel for appellant that these cases are not authority in the present case because a part of the punishment in the present case was imprisonment in the county jail. We can not see how this affects the question of jurisdiction. The crime charged is a misdemeanor, and the statute expressly confers upon police courts the same jurisdiction to hear and determine such case as has a justice of the peace.

Next, it is strongly insisted by counsel for appellant that the evidence is not sufficient to support the verdict. It is proved that some one on the 7th day of August, 1909, about 15 or 20 minutes after 11 o'clock in the night threw rocks against the doors and sides of the dwelling houses of some of the citizens of the city of Fayetteville, Arkansas, residing on Ralston Street.

This is conceded by counsel for appellant, but they contend that the proof does not show that appellant committed the offense. The chief reliance for a conviction was upon the testimony of George Raedels and Arch Wright. Raedels testified that the first rocks were thrown by a man across the street from his house. That the man had on a black suit of clothes, was not in his shirt sleeves and was going north. The next rocks were thrown in a few minutes. Raedels said he saw the second man come down the street. Just as he got even with McLendon's, he threw a rock through his door. He was on the sidewalk, and when he got in front of Raedel's house he threw a rock through his transom, and Raedel shot. The man who threw the rocks ran south towards Dixon Street on which Mr. Scott's house faces. Raedels ran at once through Scott's back yard to the front of his house. Scott asked who threw the rocks. Just then a man turned the corner of Ralston Street into Dickson Street. Mr. Arch Wright, who was present, said that the man looked like George Walker. Raedels then said he was the man who threw the rocks, and that for the first time after Wright called his name, he recognized him as George Walker. Wright says that Raedels said to him and Scott: "There is the fellow that was throwing the rocks," and he replied: "Well, that looks like George Walker." He said the man had on a light hat, and was in his shirt sleeves. Wright said that he "would not swear that the man pointed out was George Walker." He further said: "To the best of my knowledge and belief, the man who Raedels said was the man who threw the rocks and whom I saw pass our house was the defendant, George Walker." Both Raedels and Wright knew George Walker well, and had known him for ten or twelve years. When arrested, Walker had on a light hat and pants. Several other witnesses who saw him that night also testified to this fact.

On cross-examination Raedels testified that he would not swear that George Walker was the man who threw the rocks, but, after saying this several times and also making the statement that the man who threw the rocks had on a black hat and dark pants, the record shows that he concluded his testimony with the following: "The man's general appearance, size, form and build was the same of George Walker. I have known George

Walker for more than twelve years. To the best of my knowledge and belief, the man who threw the rocks was George Walker. His actions and conduct disturbed me and disturbed the peace and quiet of the town of Fayetteville, Ark."

George Walker testified in his own behalf. He said that he had on light colored pants and a white hat on the night in question, and denied having thrown the rocks. Other evidence was adduced by him showing that his testimony in regard to the color of his clothes was true; and also to the effect that the man who threw the rocks had on dark colored clothes. All this, however, presented a conflict in the testimony to be passed upon by the jury. It must be remembered that, however great was the doubt and uncertainty first expressed by Raedels as to the identity of the appellant as being the man who threw the rocks, he closed his testimony by saying that he had known George Walker for more than twelve years, and that to the best of his knowledge and belief he was the man who threw the rocks. The jury have shown by their verdict that they believed this statement, and their determination is binding upon us.

Counsel for appellant also rely for a reversal upon the following language used by the attorney for the city in his closing argument to the jury: "The police judge fined him $200, and sentenced him to six months in jail, because he knew this man, and I want you gentlemen to affirm the decision of the lower court, place on him the highest penalty of the law, put him in jail where he can't run over people rough shod and destroy their property." Counsel for appellant objected to the statement. "Whereupon the court reprimanded the city attorney, Mr. Tillman, and told the jury they should not consider said statement of the city atorney; that the same was improper, and that they should try the case on the evidence and law before them, and not consider any action of the police court in this cause."

We think the action of the trial judge removed whatever prejudice might have resulted to appellant from the remarks of the city attorney. His prompt reprimand of the city attorney and his admonition to the jury, as shown by the record quoted, were calculated to carry greater weight than the remarks of the city attorney, and doubtless overcame whatever advantage might have been obtained by making the remarks. Hence no reversi-

ble error was committed. *Kansas City Southern Ry. Co.* v. *Murphy,* 74 Ark. 256.

We find no prejudicial error in the record, and the judgment will be affirmed.

INGHAM LUMBER COMPANY v. INGERSOLL.

Opinion delivered January 31, 1910.

1. PARTIES—PARTNERSHIP CONTRACT.—In a suit upon a contract made by a firm, all of the partners have an interest in the subject-matter and are necessary parties. (Page 450.)
2. PARTNERSHIP—RIGHT OF PARTNER TO DISMISS ACTION.—Where the members of a partnership joined in a suit upon a partnership claim, it is not an abuse of discretion to refuse to dismiss the action at the instance of one of the partners and against the objection of the other partner, unless it is shown that the prosecution of the suit would result injuriously to the former; and, in the event that it might do so, the suit will be allowed to proceed, upon indemnity being furnished if demanded. (Page 450.)
3. SAME—REDUCTION OF CLAIM.—In an action by a partnership to enforce a claim in favor of the firm, the debtor cannot have the amount of the debt reduced by the amount of the share of one of the partners who was willing to dismiss the action. (Page 451.)
4. CONTRACTS—BREACH—DEFENSE.—A party to a contract may not excuse his failure to perform it by showing the stringency of the money market where the contract did not provide for a release in such a contingency. (Page 452.)
5. CONTRACTS—ENFORCEMENT.—Under a contract whereby defendant employed plaintiffs to cut and manufacture timber to be paid for as manufactured, no definite time being fixed, the plaintiffs had a right to proceed with the cutting and manufacture of the timber into lumber continuously and to complete it within a reasonable time. (Page 452.)
6. SAME—RESCISSION.—Where, within the life of a contract and through no fault of the plaintiffs, the defendant stopped them from work and declared that it would not perform its part of the contract, the plaintiffs were released from any further performance of the contract, and entitled to recover all damages sustained by the breach. (Page 453.)
7. DAMAGES—BREACH OF CONTRACT.—The measure of damages caused by defendant's failure to perform its agreement to pay for timber to be manufactured by plaintiffs is the difference between the contract price and the cost of doing the work. (Page 453.)

8. EVIDENCE—DAMAGES FOR BREACH OF CONTRACT.—Where plaintiffs were sued for damages caused by defendant's refusal to perform its agreement to pay for timber to be cut and manufactured by plaintiffs, it was not error to permit a witness to prove what it cost to cut timber and manufacture it into lumber. (Page 453.)

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

J. I. Alley, for appellant.

1. One partner may sue in the name of himself and co-partners without their consent; but if he does against their consent, he must indemnify them against costs. Lindley on Partnership, p. 473; 30 Cyc. 565 and cases cited.

2. If there was no fraud, Cobb had the right to dismiss the cause, as much so as Ingersoll had to bring it. Lindley on Part. p. 473.

3. Instruction 4 should have been given. The judgment represents the profits, and the profits belong equally to the two partners.

4. Instruction 2 should have been given, for the burden was on plaintiff to show that defendant rescinded the contract, or rendered its performance impossible.

5. A financial crisis is not the act of God, which always excuses, but it was inevitable and irresistible, and it did not excuse defendant from living up to its contract, still it was a good and sufficient excuse. Defendant acted in good faith and not for the purpose of cancelling the contract, and should not be held liable. 7 A. & E. Enc. Law (2 ed.), p. 147 and cases cited; 30 L. R. A. 33; 7 A. & E. Enc. Law (2 ed.), pp. 147-8-9-150-1-2, etc.

Pole McPhetrige and *J. S. Lake,* for appellees.

1. As a general rule, one partner, acting within the scope of the partnership business, will bind his co-partners, but there are exceptions. 66 Ark. 448; 30 Cyc. p. 501, note 61; 1 Bates on Part. § 383.

2. Where one party makes a breach of contract, the other party may consider the contract rescinded and sue for the breach. No error in instructions 3 and 4. 80 Ark. 228.

3. If the obligee shall do anything to obstruct or prevent the obligor from performing a contract, the obligor is discharged, the contract is legally performed, and he may demand

performance. 27 Ark. 65; 67 Ark. 156; 64 Ark. 228; 38 Ark. 174. Mere difficulties do not excuse. 61 Ark. 315; 2 Pars. on Cont. (2 ed.), p. 672.

4. Partners have an equitable lien upon partnership assets for the liquidation of the firm's liabilities. We find no error in the court's charge.

5. If the admission of Stevenson's evidence was error, it was invited. 87 Ark. 17.

FRAUENTHAL, J. This was an action instituted by Ingersoll & Company, the plaintiffs below, against the Ingham Lumber Company, to recover damages for an alleged breach of contract. On September 16, 1907, the parties entered into a written contract whereby the defendant employed the plaintiffs to cut and manufacture into lumber all the timber on about 880 acres of land owned by the defendant, and agreed to pay certain named prices for the different grades of lumber so manufactured by the plaintiffs. The defendant furnished the mill for sawing the timber, and the plaintiffs made all their preparations for performing the contract on their part, and at once began the work thereunder. They continued actively to cut the timber and manufacture the lumber until November 1, 1907, when they had manufactured lumber to an amount variously estimated from 400,000 to 800,000 feet. On November 1, 1907, the manager of defendant notified the plaintiffs to stop cutting the timber and manufacturing the lumber on account of the stringency of the money market, due to what was called a financial panic. The plaintiffs claimed that they had been at great expense in making preparations in beginning the work, and objected to stopping the work under the contract. About the 8th of November, 1907, the manager of defendant demanded of the plaintiffs that they stop the work, and declared that, if they did not do so, the defendant would stop them with the aid of officers. The plaintiff then stopped the work, and proceeded no further under the contract. At that time there was timber standing on the land which was variously estimated to be of the amount of from 400,000 to 1,200,000 feet. The plaintiffs were a partnership, composed of J. W. Ingersoll and J. H. Cobb, and the firm business was actively managed by said Ingersoll. On February 21, 1908, the plaintiffs instituted this suit, and on April 8, 1908, the said J. H.

Cobb appeared before the clerk of the court in vacation and filed a written statement dismissing the suit at the plaintiff's cost. Thereafter, at the April term of the court, the said J. W. Ingersoll filed a motion to reinstate the suit. In this motion he stated that he had the entire management of the partnership business, and that Cobb had only a nominal interest therein, and had advised and consented to the institution of the suit, that thereafter he had conspired and colluded with the defendant to defraud the said Ingersoll by dismissing the action. The motion was supported by affidavits, and resisted by the defendant. After hearing the motion, the court reinstated the suit. To this action of the court the said J. H. Cobb made no objection, and saved no exception, and does not in this court enter any complaint. The lower court was not asked to require the said Ingersoll to indemnify said Cobb against any cost, or to permit the said Cobb to withdraw from the suit as a party plaintiff or to be made a party defendant. Thereupon the defendant filed its answer; and upon a trial of the cause a verdict was returned in favor of plaintiffs for $290 damages. The defendant prosecutes this appeal.

It is urged by the defendant that the court erred in not permitting the plaintiff J. H. Cobb to dismiss the suit and in ordering the action to be reinstated on the motion of the plaintiff J. W. Ingersoll. The claim herein sued on grew out of a contract made with the partnership, and therefore was a partnership asset. All the partners had an interest in the subject-matter of the suit, and accordingly were proper and necessary parties to the action. Kirby's Digest, § 6005; 5 Ency. Pleading & Practice, 854; 30 Cyc. 561; *Summers* v. *Heard,* 66 Ark. 550; *Hot Springs Rd. Co.* v. *Tyler,* 36 Ark. 205; *Matthews* v. *Paine,* 47 Ark. 54; *Coleman* v. *Fisher,* 67 Ark. 27.

The partnership contract was a joint contract, and therefore all partners at the time the contract was made were jointly interested therein. According to the common law procedure, where one of the several owners of a joint interest refused to join as plaintiff, the other owners were permitted to use his name as a co-plaintiff. *Gray* v. *Wilson,* Meigs (Tenn.), 394; *Sweigart* v. *Berk,* 8 Serg. & R. (Pa.) 308. One of two or more co-plaintiffs has no right to dismiss an action against the objection of

the others unless it can be shown that the prosecution of the suit would result injuriously to him. In the event he might be injured by the prosecution of the suit, upon his being indemnified against loss, the court will permit the action to proceed. Where one partner is unwilling to join in a suit to enforce a partnership claim, the other co-partners have a right to use his name upon indemnifying him against loss, if indemnity is demanded. 5 Ency. Plead. & Prac. 856. And in its sound discretion the court has a right to prevent the dismissial of a suit by one partner where it appears that the dismissal will result in an injury to the other partners. 1 Bates on Partnership, § 383; 14 Cyc. 399; *Cunningham* v. *Carpenter,* 10 Ala. 109; *Loring* v. *Brackett,* 3 Pick. (Mass.) 403; *Daniel* v *Daniel,* 9 B. Mon. 195.

By our Code (Kirby's Digest, § 6007) it is provided that: "Of the parties to the action, those who are united in interest must be joined as plaintiffs; but when, for any cause, it may be necessary for the purpose of justice, a person who should have been joined as plaintiff may be made defendant, the reason therefor being stated in the complaint." Under this provision, where a partner refuses to join in an action to recover a claim of the firm, he may be made a party defendant. 5 Ency. Plead. & Prac. 856.

In the case at bar the claim sued on was founded upon a contract made with the partnership, and all the partners joined in the institution of the suit. Thereafter, one of the partners sought to dismiss the suit to the injury of the other partner. It was claimed by the other partner that he conspired wrongfully with the defendant to defeat him of his rights. Upon the hearing the court refused to dismiss the action. The unwilling partner did not except to the ruling of the court. He did not ask to be indemnified against cost or loss. The defendant now is the only party who complains of this action of the court. We do not think that the court abused its discretion or erred in reinstating the cause.

It is urged by the defendant that because one of the partners made no claim for damages the amount of the recovery should be reduced by the amount of the interest of said partner in the firm. But the claim sued on was an asset of the partnership, and the interest of one of the partners therein could only be ascer-

tained after an adjustment of the partnership business. No partner has a certain and definite interest therein; and neither partner had the right to recover separately his share of the claim or to have his share deducted therefrom. As is said in the case of *Vinal* v. *West Va. Oil & Oil Land Co.*, 110 U. S. 215: "One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted in his own name alone against the debtor." And likewise in an action by the partnership the debtor cannot have the amount of the debt reduced by the amount of the share of any of the partners. *Summers* v. *Heard*, 66 Ark. 559.

It is urged by the defendant that if it stopped the plaintiffs from continuing the work because the defendant "could not get money into the country with which to pay for the work," this would not be a breach of the contract. But the written contract did not provide for a release of the defendant from liability upon such a contingency. The rights of the parties must be measured by the contract which they themselves made. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. A valid contract cannot be abrogated or modified unless both parties assent thereto; and if one of the parties manifests in unequivocal language his intention not to perform the contract unless it is modified, he breaches the contract. He may not be compelled to perform the undertaking, but he cannot, on account of the hardship of the undertaking, relieve himself from the liability incurred by the contract. As is said in the case of *Johnson* v. *Bryant*, 61 Ark. 315: "Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqaulified undertaking to do a thing that is possible and lawful. Parties *sui juris* bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship." *Cassady* v. *Clark*, 7 Ark. 123; *Jones* v. *Anderson*, 82 Ala. 302; 3 Paige on Contracts, § 1440. The defendant on account of the stringency of financial affairs had no right, against the objection of the plaintiffs, to renounce or to modify the contract. Under the contract the plaintiffs had a right to proceed with the cutting and manufacture of the timber into lumber; and they had a right, where no definite time was fixed in the con-

tract, to proceed with the work continuously and to complete it within a reasonable time. *Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 116.

When, within the life of the contract and through no fault of plaintiffs, the defendant stopped them from work, and thus declared that it would not perform its part of the contract, it then renounced the contract and released the plaintiffs from any further offer to perform on their part. The defendant by this action and words breached the contract and thereby became liable for all damages which the plaintiffs sustained by such breach. 3 Paige on Contracts, § 1431; 9 Cyc. 641; *Lewis* v. *Boskins,* 27 Ark. 65; *Eastern Ark. Hedge Fence Co.* v. *Tanner,* 67 Ark. 156; *Ward* v. *Kadel,* 38 Ark. 174; *Wiegel* v. *Boone,* 64 Ark. 228.

The rulings of the lower court in giving and refusing to give instructions were in conformity with the above principles. We do not deem it necessary to set out these instructions in detail; and we do not find that the court committed any error in its rulings thereon.

Objection was made to certain testimony given by the witness W. W. Stevenson relative to the amount which it cost him to cut timber and manufacture it into lumber; and it is now urged that it was error to admit the introduction of that testimony. This witness had done this kind of work at the same place and under circumstances similar to those which surrounded the plaintiffs in doing the same work. The measure of the damages which plaintiffs were entitled to recover was the difference between the contract price and the cost of doing this work. This testimony tended to prove the cost of doing this work, and it was therefore not error to admit its introduction.

The defendant does not claim that the amount of the recovery is excessive. We have examined carefully the evidence and the instructions in this case, and we do not find that any reversible error was committed by the lower court in the trial of the cause.

The judgment is affirmed.

GAY OIL COMPANY v. ROACH.

Opinion delivered January 31, 1910.

SALES OF CHATTELS—BREACH OF WARRANTY—REMEDY OF VENDEE.—Where a vendor of oil warranted against leakage, the vendee is not authorized to refuse to receive the oil because some of it has leaked out of the barrels in which it was shipped.

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

Moore, Smith & Moore and *H. M. Trieber,* for appellant,

1. For distinction between a warranty and a condition, see 81 Ark. 549; 108 N. Y. 232; 1 Cush. (Mass) 271. In this case the engagement as to quantity, as presented by the guaranty against leakage, is an agreement collateral to the main purposes of the contract, and can not be construed as a condition, the breach of which permits the vendee to rescind.

2. Even if a breach of warranty of quantity gives the vendee a right to refuse acceptance, the vendee could, at most, refuse to accept only those articles which did not satisfy the warranty. The contract was severable. 81 Ark. 549; 78 Ark. 177; 76 Ark. 74.

FRAUENTHAL, J. This was an action instituted by the Gay Oil Company, the plaintiff below, against N. M. Roach to recover the purchase price of 64 barrels of oil, which it alleged it sold to the defendant. The defendant alleged that he purchased the oil under a contract by which the plaintiff "guaranteed" the barrels in which the oil was to be shipped against leakage; that when the shipment arrived several of the barrels leaked, and that he on that account refused to accept the oil, and at once notified plaintiff of his rejection thereof.

The defendant was a merchant doing business at Mena, Ark., and the plaintiff was located at Little Rock, Ark. The defendant made a written order, directed to plaintiff, for 64 barrels of oil, and in said order was the following: "Guaranty against leakage." The order was accepted by the plaintiff, who delivered the 64 barrels of oil to a common carrier at Little Rock, consigned to defendant at Mena. When the oil arrived at Mena, the defendant found that several of the barrels leaked. He notified the plaintiff of this leakage, and refused to remove the oil from the car. The defendant testified that several of the

barrels leaked, but did not state the number thereof, or the extent of the leakage. There was some testimony that the barrels appeared to be in good shape, and that the car did not leak very much, and that there was no drip therefrom.

The lower court peremptorily directed the jury to return a verdict in favor of the defendant, which was done. The plaintiff prosecutes this appeal from the judgment entered upon that verdict.

The defendant executed a written order or contract for the purchase of 64 barrels of oil from plaintiff in which it was stated that there was a "guaranty against leakage." The rights of the parties under this contract of sale are determined by the nature and effect of this clause of "guaranty against leakage." In strict legal contemplation, there is a difference between a "guaranty" and a "warranty." They are both collateral undertakings; but a guaranty is the assurance of the payment of a debt or the performance of a duty or contract by another person, while a warranty is an assurance of the title or quality of property. The two are often used interchangeably and with the same effect. The meaning of the word "guaranty" in this contract must be gathered from the context of the entire instrument and from the subject-matter about which it treats; for this will more surely give the expression that meaning which will carry out the true intent of the parties. Considered in this way, it appears that the parties used the term "guaranty" synonymously with warranty; and the clause in effect stated that the barrels in which the oil was shipped were warranted against leakage. 20 Cyc. 1403.

Ordinarily, a warranty is an agreement to be responsible for all damages that arise from the falsity of the statement or assurance of a fact. But the statement or assurance is sometimes the condition upon which an executory sale is made, although it may be called a warranty. The general rule is that, in the absence of fraud or an agreement to rescind, a contract of sale cannot be rescinded for a mere breach of warranty. But where the stipulation is a condition, the performance of which is precedent to the completion of the sale, the purchaser is entitled to reject the article if such condition is not performed. 2 Mechem on Sales, § 816; Tiedeman on Sales, § 197; 24 Am. & Eng. Enc. Law, 1109.

A warranty is an undertaking that is collateral to the express object of the contract, and is in effect an agreement to pay the damages sustained by reason of the article not being as stated or represented. A condition is one of the essential terms which identifies and describes the article, and for a non-conformity to such description the article may be rejected. Benjamin on Sales, § 1349.

If therefore the stipulation in the contract involved in this case relative to leakage was in effect a warranty, properly so called, then the defendant did not, upon the breach of such warranty, have the right to rescind the contract. His remedy, in such event, was to recoup or sue for the damages sustained by reason of such leakage. In that event the sale was absolute and not conditional, and the warranty was only an undertaking that was collateral to the sale. In the case of *Thornton* v. *Wynn,* 12 Wheat. 183, it is said that "if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article and the vendee tendered a return of it within a reasonable time."

Where there is a contract for the sale of an article which is not at the time in existence or ascertained, or where there is a sale by sample, the agreement that such article shall be of a certain description or quality is not merely a warranty, but it is a condition upon the performance of which depends the completion of the contract of sale, and the sale does not become absolute until the article has been inspected and found to conform to the description of kind or quality. The existence in such case of the quality or kind of the article becomes essential to the identity of the article sold, and the purchaser cannot be required to accept and pay for an article which he in fact did not buy. 2 Mechem on Sales, § 1209; Tiedeman on Sales, § 197; *Norrington* v. *Wright,* 115 U. S. 188; *Pope* v. *Allis,* 115 U. S. 363; *Plant* v. *Condit,* 22 Ark. 454; *Overstreet* v. *Gallaher,* 42 Ark. 208; *Weed* v. *Dyer,* 53 Ark. 155; *Bunch* v. *Weil,* 72 Ark. 343; *Ward Furniture M'f'g Co.* v. *Isbell,* 81 Ark. 549.

But the contract of sale in the case at bar was not of an article not in existence, or by sample; nor was there any warranty as to its kind or quality.

In the case at bar the defendant purchased from the plaintiff 64 barrels of oil, which were then in the hands of the vendor. The oil was contained in wooden barrels, and at the time of the contract a fear was entertained that the barrels might leak. To save the purchaser harmless if any leakage should occur, the vendor warranted the same against leakage, and by that agreement simply undertook to pay to the defendant all loss and damage which he might suffer by reason of any leakage. The article purchased under the contract was oil, and no question is made of its quality, but it is conceded that the plaintiff shipped the identical article that was ordered. It was delivered to a common carrier properly directed to the defendant and in the barrels named in the contract. The sale then became complete. There was no stipulation in the contract that the defendant could refuse to accept, or that he could return the oil if the barrels leaked; but, on the contrary, by the use of the stipulation of "guaranty against leakage," it must have been in the contemplation of the parties that the barrels might leak; and in that event by this warranty the plaintiff undertook to pay to defendant all loss that he would suffer thereby. The stipulation was therefore not a condition the performance of which was precedent to the obligation upon the defendant; and the defendant was not entitled to reject the oil because several of the barrels leaked. The stipulation was a warranty, properly so-called; and if the barrels leaked, the defendant had a right to recoup, in a suit for a recovery of the purchase money of the oil, all damages which he sustained by reason of such leakage.

The circuit court erred in giving the peremptory instruction to the jury.

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

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

Opinion delivered January 31, 1910.

1. RAILROADS—FAILURE TO KEEP LOOKOUT.—Where plaintiff became entangled in wire attached to a spike at a railroad crossing, and was

injured by a passing train, evidence tending to prove that if the engineer had been keeping a lookout he could have stopped the train in time to avoid the injury will sustain a finding of negligence on part of the railroad company. (Page 460.)

2. APPEAL AND ERROR—HARMLESS ERRORS.—Appellate courts will not reverse cases for matters of form in instructions which were not prejudicial, and which could have been corrected in the trial court if its attention had been directed to the matter. (Page 461.)

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

Kinsworthy & Rhoton and *James H. Stevenson*, for appellant.

1. Under appellee's own statement there is no liability on the part of appellant for the injury. It is clear, from uncontradicted testimony, that there was nothing on the track, or apparently in danger from the train, for the engineer to see; and when the train came to a place 100 feet from the crossing from which the engineer could, and for the first time did, see that there was something *beside* the track, it was then impossible to have stopped the train before reaching the object. The "lookout statute," Kirby's Dig. § 6607, merely imposes the duty to keep a constant lookout "for persons and property *upon the track.*" As to a person not on, but beside, the track, the extent of the railway company's duty is only to exercise ordinary and reasonable care not to injure him. 69 Ark. 130, 133; 84 Ark. 220.

2. The court's instruction to the jury on the duty to keep a constant lookout, etc., in view of the evidence that appellee was not on the track, but beside it, where, had a lookout been kept, his peril could not have been seen nor his injury prevented by any degree of care, submitted the case upon a false issue, and is abstract and misleading. 65 Ark 429; 63 Ark. 177; 84 Ark. 270, 275; 3 Elliott on Railroads, § 1095 and note.

3. Appellant's request for an instruction in effect that it was not liable if from the evidence it appeared that the injury resulted from one of the unforeseen circumstances and accidents which ordinary skill and diligence would not anticipate or provide against, should have been given. 82 Ark. 172, 173; 84 Ark. 275, 276.

4. The court's instruction on the measure of damages to "take into consideration, not only the loss of his hand, his bodily

and mental pain and suffering, his mental anguish, his maimed and deformed condition for life as may be shown by the proof," etc., clearly assumes these facts as shown by the evidence, is not hypothetical and is erroneous.

Jobe & Carrigan, McRae & Tompkins and *D. L. McRae,* for appellee.

1. Appellant's contention that the evidence does not sustain the verdict ignores all testimony except that of the engineer. In view of the fact that if a lookout had been kept appellee must have been seen, and that if he had been seen one second before he fell and the trainmen had tried to stop the train he would have had time to remove his hand, the jury were fully justified in finding that no lookout was kept. 33 Cyc. 961; 79 Ark. 245; 78 Ark. 520. A railroad company is required to keep a lookout for persons and property not only on the track but also in proximity thereto. 69 Ark. 130, 132; 80 Ark. 535; 78 Ark. 22, 28. The rule which holds a traveler to see what was plainly visible, while on or approaching a railroad track, applies with greater force to trainmen. 78 Ark. 524.

2. There is no error in the instructions given. As to that given on the measure of damages, it is not open to the objection urged against it, that it assumes facts to be true; but, if it does, they are facts about which there is no dispute. 72 Ark. 398; 67 Ark. 147-154. Moreover, this objection was not raised in the lower court.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railway Company from a judgment rendered against it in the Hempstead Circuit Court in favor of J. H. Walker for injuries alleged to have been sustained by him while crossing defendant's railroad track at a public street crossing in the city of Hope, Arkansas.

On the 28th day of October, 1908, the plaintiff, J. H. Walker, started to cross the defendant's track at a public crossing at Laurel Street in the city of Hope, Arkansas, between 10 and 11 o'clock at night. He first looked for trains, and, not seeing any, started to cross the track. When he went upon the track at the Laurel Street crossing, both of his feet became entangled in some wire which had become fastened to a spike about six inches on the inside of the north rail of the track. He began to try to

get loose and fell flat across the rail. While he was trying to get loose, he saw a train coming from the north. His right foot was not fastened as tightly as the left foot, and he got it loose first. The train was rapidly approaching. The plaintiff began hallooing and trying to flag the train by waving his hat. At the same time, he was surging backward and forward, trying to unloose his left foot from the wire. He finally succeeded, and he fell alongside the track with head to the north and one hand on the rail, just as the train rushed by. The engine passed over his hand and crushed it. When the train rushed by, he arose up and put his hat on. His hand began to sting, and he then saw that it had been crushed by the train. His hand was mangled so badly that amputation was considered necessary, and it was amputated just above the wrist.

The track at the place where the injury occurred was perfectly straight and nearly level up to the brick yard, which was about one-half mile distant, and which was also in the direction from which the train was approaching. The plaintiff first saw the headlight when it was between 500 and 700 yards away. The above is substantially the account of the occurrence given by the plaintiff. Other witnesses in his behalf said that the track was level and straight for some distance in the direction from which the train was approaching. That the train was about 50 minutes late, and was running unusually fast.

On behalf of the defendant, the engineer testified that the engine was equipped with an electric headlight, and that he was keeping a lookout when he approached the Laurel Street crossing. That he blew his road crossing signal and the station signal. That he was making only twenty miles per hour, and was drifting when he passed the Laurel Street crossing, and that going at that rate, he could have stopped the train within 300 feet. That he could distinguish a man upright on the track 500 or 600 feet away; but that he could not see one lying down until within 100 feet. That when he first saw the plaintiff he was about 100 feet away. That he was on the side of the track and out of danger of the passing train. That he could not even then tell whether he was a man, some animal, or an inanimate object.

The chief contention of counsel for defendant is that the evidence does not support the verdict, and that there was no

question of fact to be submitted to the jury. We are not of that opinion. The engineer admitted that he could see five hundred yards ahead of the engine, but says that he could not see an object on the track at that distance. He admits, however, that he could distinguish a man standing upright at 500 or 600 feet, and at the rate he was running he could have stopped his train at 300 feet. He claims that he did not see plaintiff until he was within 100 feet of him, and that he was then lying beside the track. Plaintiff testifies that he was surging backward and forward trying to extricate his foot, and at the same time was hallooing and trying to flag the train with his hat. His effort was accompanied with sufficient exertion to cause him to fall when his foot was loose from the wire, and he hit the ground just as the train rushed by. It is evident from his testimony that, while trying to get loose, his body was swaying back and forth over the rail. The engineer said that he was keeping a lookout, and could have distinguished a man in an upright position 500 or 600 feet distant, and could have stopped his train within 300 feet. While he said that he could not have seen a man lying down until within 100 feet of him, there was an intermediate point where he could have seen a man, in a partially upright position, who was violently surging back and forth over the rail and frantically waving his hat; and it was a question for the jury to say whether this point was a sufficient distance within which, under the facts and circumstances adduced in evidence, the engineer, had he been keeping a lookout, could have stopped the train or have checked its speed in time to have avoided the injury. The jury found that issue against the defendant, and its verdict is final.

Counsel for defendants also contend that the court erred in its instruction to the jury as to the measure of damages. They say, "the vice of this instruction is that it assumes facts, and is not hypothetical." We do not think the instruction open to that objection. The most that can be said of it is that the form of it might have been couched in clearer terms; but this defect could have been cured by a specific objection, and none was made. Appellate courts should not reverse cases for mere matters of form in instructions, which manifestly were not prejudicial, and which could have been corrected in the trial court, had the court's attention been directed to the matter, of which complaint is here made for the first time.

Counsel for defendant also insist that certain of the instructions of the court in regard to the duty of defendant in keeping a lookout for travelers at public crossings should not have been given; but they only object to them because they say they are abstract. If we are correct in holding that there was evidence to support the verdict, our reasoning in that behalf is a sufficient answer to counsel's objections, and need not be repeated here.

We have carefully examined both the testimony and the instructions of the court, and think the conflicting theories of the contending parties were fairly submitted to the jury.

The judgment will therefore be affirmed.

WELLER v. STUDEBAKER BROTHERS MANUFACTURING COMPANY.

Opinion delivered January 10, 1910.

1. JUDGMENT—VACATING FOR FRAUD—BURDEN OF PROOF.—One who seeks to vacate a default judgment on the ground that it was procured by fraud assumes the burden of proving such fraud. (Page 470.)
2. SAME—VACATING FOR FRAUD.—A proceeding under Kirby's Digest, § 4433, to set aside a judgment for fraud whereby the judgment-defendant lost its defense, will fail where the judgment-plaintiff was guilty of no fraud or concealment, and the defense was lost by the judgment-defendant's negligence. (Page 471.)

Appeal from Baxter Circuit Court; *John W. Meeks,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant, being the owner of a lot of timber at Iuka, Baxter County, wrote the appellee in June, 1907, proposing to manufacture and sell said timber, and on July 3, 1907, appellee wrote Mr. Weller that it would buy his timber at certain prices quoted, and giving him directions how to cut and ship it, etc.

Weller failed to get a mill to cut his timber at that time, and nothing more was done till October 7, 1907, when Weller wrote the company that he would be ready to cut in a month or six weeks, as it would probably take that long to get the mill running. On October 11, 1907, the company replied to said

letter that it confirmed its proposition of July 3, 1907. Weller bought a mill, erected it, cut his timber and began cutting out the bill under the contract, and on January 20, 1908, wrote the company that he had his mill running and would soon have two cars ready for shipment, and the rest would follow soon on his contract for ten cars of wagon stock. January 22, 1908, the company wrote Weller a reply to his letter, in which it stated: "We note that you have two cars of stock out on memorandum order placed with you by Mr. Anderson, but that Anderson failed to send in a copy of the order, and consequently was not registered on the books." That the panic had struck them, and they could not take up the timber, and for him to stop sawing, stack the timber and cover it, and, as soon as they were again in position to receive material, would give him shipping instructions, but could not tell when that would be, but was sure it would not be until summer or the latter part of the year. On January 27 Weller wrote the company explaining his condition and urging it to comply with the contract, and on the 29th the company wrote him, admitting the order, but stated that it did not think it a binding contract, but directed him to stack the timber so it would not damage, sell it if he could, but that, if he could not sell it, they would try to take it up some time, but could not tell when it would be.

On May 11, 1908, Weller filed suit in the Baxter Circuit Court against the company for $1,984 damages, and secured due service of the summons on May 30, 1908. At the September term of the court following, appellant obtained judgment by default.

Several months later the appellee filed its complaint, alleging that said judgment was secured by fraud of Weller and his attorneys, Horton & South, and asking that the same be vacated and a new trial be granted.

J. H. Weller, plaintiff in original case and defendant in complaint for vacating judgment, filed an answer to said complaint as follows: (1) He denies that the judgment obtained by him against said plaintiff at the September term of this court was obtained by any fraudulent act, concealment or misrepresentation on the part of the defendant and his attorneys or either himself or his said attorneys. (2) The defendant denies that the

plaintiff used due diligence or any diligence in preparing for its defense in said suit; but negligently failed to appear and defend in said case, and suffered the same to go to judgment by default; and, if any wrong has been done to the plaintiff, it was the result of his own negligence. (3) He denies that his attorneys owed any duty to said plaintiff which they have refused or neglected to perform.

The evidence on behalf of appellee tended to show that it received a letter dated June 1, 1908, from its agent in Arkansas enslosing service of summons; that on June 26, 1908, it directed a letter to be written to J. H. Weller in which, after noting the fact that suit had been brought against it by him, it says: "We have gone through the correspondence and papers relating to this claim, and believe there is a misunderstanding on your part concerning the exact situation. We would, therefore, greatly appreciate it if you will place us in touch with your attorneys in order that we may canvass with them the basis of your claim."

This letter by mistake was addressed to J. H. Wells, but was received by Weller. He did not answer it. About the first of July, 1908, appellee sent its timber inspector to "Mr. Weller's place" "to take up what lumber he had manufactured and to fix the business up and have him (Weller) continue cutting and to finish filling the order." This witness was asked: "Did you not go there for the purpose of compromising the case with Mr. Weller and tell him so?" He answered: "Yes, sir; and I told him (Weller) he could cut more lumber to finish the order." This witness further testified that he understood that Weller had a contract, but that he (witness) did not know whether he did or not. The same witness and another witness also who went to inspect and "take up" the lumber cut by appellant on the order of appellee testified that only a small per cent. of the lumber he had cut was according to the specifications furnished him by appellee. But, in the view we have of the case, it is unnecessary to go into this evidence further. A witness for appellee further testified: "That, after quoting prices of material to Weller, they heard nothing further from him. He never did indicate that he would accept the proposition until he advised that he had cut two carloads of material. We just advised that we were giving certain prices for certain material. We had no contract with

him. He never accepted our offer, or informed us that he was sawing."

On the 2d day of September, 1908, appellee wrote a letter to appellant in which they say: "We wrote you letter on June 26. Not having any reply to this letter, we find on investigation that the letter was addressed to J. H. Wells, but the letter has not been returned. If received by you, we regret that we have not had any reply. We still feel as said before concerning this claim, and would be glad to have you give us the name of your attorney, in order that we may get in communication with him. Of course, if we cannot get a satisfactory reply from you before the first day of September term of court, we shall instruct our attorney to file our appearance and take such other steps as will be necessary to protect us, stating to the court at the same time that we have undertaken to get in touch with your representatives with a view to canvass the situation and determining the equities in the matter, and give this as our reason for any delay that may be necessary in order to properly face the trial if it finally comes to an issue. We are registering to make sure that it does not go astray.

"Scott Brown, Asst. Genl. Counsel."

On the same day appellee wrote Horton & South as follows: "We have secured the name of your firm from Hubbell's Directory, to which we are subscribers, and write you asking you to represent us to the extent that may be necessary in connection with the suit started against this company by J. H. Weller, of Iuka, Ark. We enclose carbon copy of letter that we have just written to Mr. Weller, and would ask that, if you do not receive word from us to the contrary, you file our appearance and answer in such form, prior to the first day of September term of court, as may be necessary to retain to us all our rights as defendant in this action. If, for any reason, you cannot represent us in this matter, kindly wire us, immediately on receipt of this letter, at our expense, as we shall need to arrange immediately for other representation. If you can represent us, kindly write us immediately on receipt of this letter, and we shall then furnish you with a full statement of the facts; and if proper adjustment is not made with Mr. Weller, we shall expect you to conduct the case for us."

Scott Brown, a witness for appellee, testified that he was the assistant general counsel for appellee, and also assistant secretary; that he directed the writing of the letters set out above to Weller and to Horton & South of date September 2, 1908, and he identified registry receipt of letter to J. H. Weller, and further testified that he did not receive any letter from Horton & South until the letter from them dated November 17, 1908, in which they informed the company that they had obtained judgment for J. H. Weller in Baxter Circuit Court at the September term and notifying the company that if the judgment was not paid they would take garnishment proceeding to collect the money.

On cross-examination the witness admitted that he did not know whether the letters dictated by him for the company to Weller and Horton & South of September 2, 1908, were mailed to them. He wrote the letters, and the stenographer attended to the mailing. He had charge of said case all of the time as assistant general counsel, and he learned of the institution of the suit in June, 1908, and he knew that the suit was in Baxter County and Mountain Home, the county seat, and that he made no effort to get an attorney to represent the company, except what appeared in the letter to Horton & South. That he has been practicing law since 1899; that the company had an agent in Baxter County in June, 1908, looking after this matter, and that he knew that court convened in September, and probably knew that it convened on the first or second week; that he did not make any inquiry about the case after September term of court, until he received the letter from Horton & South above mentioned. He also attached calendar of September, 1908, showing that Baxter Circuit Court convened on the 14th day of said month.

The testimony on behalf of appellant was, in substance, that as soon as appellant had brought suit a Mr. Marks, representing appellee, went to see appellant, and stated that he had come to settle up the matter, and wanted appellant to cancel his contract with the company and dismiss his suit, and said he would take up the timber appellant had cut, and give him a contract for more timber than the one he had, and appellant refused to dismiss his suit unless appellee would pay him $1,500 in cash for his

damages, but Marks said he had no authority to make such settlement as that. On June 10, 1908, Weller wrote the company at Marks's request that Marks had been there, and that he would not settle "on any other than a cash indemnity for damages."

Appellant after the letter of June 26 did not hear any more from them (by letter) until about the 10th of September, 1908, when he received a registered letter containing the letter above set out to Horton & South. Appellant placed this letter in an envelope addressed to Horton & South and walked three miles next morning to get the letter to Horton & South that day. The appellant did not understand what the letter meant. He did not conceal anything from the appellee about his suit, did not conceal anything from the court, and did not think his attorneys had done so. The case was set for trial the fourth day of the court. Appellant had four witnesses in attendance, and, his expenses being heavy, he was insisting on a trial. He and his attorneys discussed the question of the letter, and appellant believed that appellee was working to get a continuance of the case, and that it was not acting in good faith in claiming that it desired to employ Horton & South. He insisted on a trial, and secured it on the fifth day of the term, and obtained judgment herein sought to be set aside. The deputy postmaster corroborated the testimony of Weller to the effect that the latter received registered letter from appellee September 10, 1908, that Weller opened the letter at the office, and there was a letter in it from appellee to Horton & South, and nothing else in the envelope.

J. C. South testified that his firm of Horton & South represented Weller in the suit brought by him against appellee, that his firm was not employed by appellee, that the firm had never been subscribers to Hubbell's Legal Directory, that the only letter his firm ever received from appellee was the one sent in envelope to Mr. Weller and forwarded by him to Horton & South, that at the time the letter was received by the firm his wife was very sick, and he could give but little attention to court matters. Mr. Horton was absent on a trip to Oklahoma. He took care of most of the mail for the firm. He only returned at the beginning of court, and had not opened the letter until appellant came to court. When appellant came to court, he asked about the

letter; then Mr. Horton looked the letter up, and they discussed its contents, and he tried to send appellee a message two or three different times before taking judgment, but could not get the connection with telegraph office over the 'phone, the same being out of order, but that was their only means of getting wire to appellee, and it failed. He told the court about the letter his firm had received from appellee, and about the substance of its contents, before taking judgment against appellee. He also explained to the court that his client was in poor circumstances and was on expenses, that some of the witnesses had sick families at home, and that his client was urging a trial. He inferred that appellee wanted the firm to file an answer for it, but it sent no papers and no data, and no retainer fee. He informed the court of the letter in substance.

Horton testified that he did not return from Oklahoma until September 14, that he got the firm's mail and was answering it as fast as he could. He had not opened the letter from appellee until appellant on Wednesday or Thursday night came to court and asked his firm if it had received the letter from appellee. It was then that he found the letter, and they discussed its contents. He concluded, like Weller, that the letter to his firm was a subterfuge to get a continuance. He was at a loss to know whether the letter was sent first to appellant through mistake or on purpose. The appellee did not send to his firm any data, any statement of facts to show that it had any defense to the action. Hence he did not believe it was depending on his firm to represent it. The appellee waited until court to write his firm. Appellee was served with process in May. He did not think they would have been treating their client right, under the circumstances, if they had not taken judgment for him. Had the company written his firm in a reasonable time before court, they would have informed appellee that they were employed by appellant, and could not therefore represent appellee. When the appellee had its agent at Mountain Home in June, they were not consulted about the matter, and there were other lawyers in town besides the firm of Horton & South. The letter his firm received was postmarked September 3. It arrived at Mountain Home postoffice September 11, and never reached his hands until September 17. He did not state the contents of

the letter to the court that he remembered, but his understanding was that Mr. South did state the contents of the letter. If they had written appellee after getting the letter, it would not have received the letter before the case was tried. Mr. South's wife was at the point of death at the time of the trial, and he could not assist him (Horton) in court. No telegram or letter came to Horton & South except the letter in evidence.

The court set aside the judgment rendered at its September (1908) term in favor of appellant against appellee, and from this order vacating the judgment the appellant has duly prosecuted this appeal.

S. W. Woods, for appellant.

The court had no authority to vacate the judgment except upon one of the grounds set out in section 4431, Kirby's Dig. Appellee bases its action upon the fourth ground, which is for fraud in the procurement of the judgment. This statute being in derogation of the common law, the case must be clearly within the spirit of its enactment, else it cannot be invoked. 33 Ark. 454; 39 *Id.* 107; 46 *Id.* 552; 52 *Id.* 316; 63 *Id.* 323; 10 A. & E. Cas. 1104. The fraud must consist in the procurement of the judgment. 68 Ark. 492; 73 *Id.* 281; 73 *Id.* 440; 10 A. & E. Cas. 1104; 17 A. & E. Enc. (2 ed.) 828. And will never be presumed. 17 Ark. 151; 20 *Id.* 216; 38 *Id.* 419; 68 *Id.* 449; 77 *Id.* 351. The evidence in this case fails to establish fraud in the procurement of the judgment. Nor does the evidence establish the existence of a valid defense on the part of appellee at the time of the rendition of the judgment. Kirby's Dig. § 4434; 49 Ark. 397; 50 *Id.* 458; 54 *Id.* 539; 73 *Id.* 281; 83 *Id.* 17.

McCaleb & Reeder, for appellees.

The evidence adduced brings this case clearly within the fourth ground in section 4431 for setting aside a judgment. 12 Heisk. (Tenn.) 323; 32 Ark. 717; 73 *Id.* 281; 89 *Id.* 359; 23 Am. Dec. 720; 23 Cyc. 918; 51 N. E. 235; 63 N. W. 464; 32 N. E. 715; 23 N. W. 441; 60 S. W. 1035; 94 N. W. 969; 86 N. W. 638. A judgment may be set aside for misconduct of an attorney amounting to *constructive fraud,* as defined in 23 Cyc. 919, and 2 Pomeroy, Eq. Rem. § § 620, 649. 68 S. W. 396; 52 S. W. 642; 9 Ark. 354; 2 Words and Phrases, 1470. It has been held that courts have the inherent power of setting aside judgments

obtained through fraud, etc., independent of statutory provision. 23 Cyc. 907; 67 N. E. 39; 82 N. W. 62; 1 Black, Judgments, § 321; 23 Am. Dec. 720. And a statute authorizing the opening or vacating of a judgment should be liberally construed. 18 Abbott, Pr. 21; 66 N. W. 810; 9 S. W. 218. A proceeding to vacate a judgment is addressed to the sound discretion of the court; and unless that discretion is shown to have been abused, the court's action will not be disturbed. 46 S. E. 856; 46 *Id.* 823; 23 Cyc. 895 and cases cited. Appellee alleged and made out a complete defense to the original action. 32 Ark. 717; 63 *Id.* 323; 83 *Id.* 17. The evidence fails to establish the existence of a valid contract between the parties. 34 Ia. 218; 19 Minn. 535; 51 Am. Rep. 1; 38 Tex. 85; 136 Mass. 511; 52 Ia. 417; 48 Am. Rep. 516. The amount of the judgment was excessive. 56 Ark. 309; 60 *Id.* 151; 5 L. R. A. 493; 3 Page, Cont., 1591.

WOOD, J., (after stating the facts). 1. This is a proceeding under section 4433, Kirby's Digest, and seeks to vacate a judgment under the authority of section 4431, Kirby's Dig., as follows:

"The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order. * * *

"Fourth. For fraud practiced by the successful party in the obtaining of the judgment or order."

The evidence does not warrant a finding that fraud was practiced by appellant in obtaining the judgment which was vacated in this proceeding. Yet that is the only ground set up in the petition. The evidence shows that appellant, through whom appellee sent its communication to Horton & South, was exceedingly diligent in transmitting it to them, after he received it. The evidence shows that Horton & South, after they were advised of the contents of the letter of appellee requesting them to file answer or to notify appellee if they could not do so, used all the diligence that they could have been expected to exercise to notify appellee that they were employed by appellant and therefore could not represent appellee. The testimony of Horton & South gives a reasonable explanation of why they did not discover the contents of the letter earlier. They were under no legal or moral obligations to appellee. They were under a legal

as well as a moral obligation to serve their client to the best of their ability, and, as we view the evidence, they could not have been more courteous to appellee without being derelict to their client. He was insisting on a trial, and, for aught that appears to the contrary, he was entitled to it. He was not practicing any fraud or deception on the court in insisting on a trial of his case. He believed, and at least one of his counsel shared the same belief, that the letter to Horton & South was but a subterfuge to secure a continuance of the cause. The letter itself, as well as the circumstances under which it was transmitted, warranted such conclusion on their part, even though, in fact, their conclusion may have been erroneous. If appellant believed that he had a meritorious cause of action against appellee, and that appellee was endeavoring by the method adopted to postpone the day of settlement, he was not culpable, and was practicing no fraud, in urging his case to a hearing. Nor could his counsel have ignored his request to insist on a trial, under the circumstances, without being unfaithful to him. The evidence is set out in detail and speaks for itself. We do not discover any element of fraud, either actual or constructive, in the case. There were no concealments or misrepresentations on the part of appellant or his counsel.

The burden was on the appellee, and it fails to show that any fraud was practiced on the court by appellant in obtaining the judgment against appellee. On the other hand, the testimony of appellant and of his attorneys, Horton & South, shows affirmatively that no fraud was practiced. The testimony of appellant and of Horton and of South is reasonable and consistent. When considered with all the other evidence, the only reasonable conclusion to be drawn from it is that no fraud was practiced on the court in obtaining the judgment, but that appellee lost its defense, if it had any, to appellant's alleged cause of action through its own negligence. This court in *Izard County* v. *Huddleston,* 39 Ark. 107, said: "The statute to vacate judgments by this proceeding is in derogation not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have confidence in the judgments of our judicial tribunals as settlements of their controversies, and there should be some end of them. Unless a case be clearly

within the spirit and policy of the act, the judgment should not be disturbed."

The judgment is therefore reversed with directions to dismiss the petition to vacate judgment.

BERMAN v. SHELBY.

Opinion delivered January 3, 1910.

1. APPEAL AND ERROR—INVITED ERROR.—Where appellant requested the court to submit a certain issue to the jury, he cannot complain because the jury determined that issue. (Page 478.)
2. LANDLORD AND TENANT—MUTUALITY OF LEASE.—Where the terms of a lease bind the landlord to put a water heater in the bath room, and bind the tenant to pay rent, upon a failure of the landlord to supply the water heater the tenant may refuse to pay rent and vacate the premises. (Page 478.)
3. PRINCIPAL AND SURETY—ALTERATION.—A surety is discharged by any material and unauthorized alteration of his contract. (Page 478.)

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

STATEMENT BY THE COURT.

Appellant rented to D. H. and A. L. Shelby by written contract a ten-room house in Fort Smith, together with certain furniture and fixtures therein. A list of the furniture was attached to the lease. The lease contained mutual covenants, on the part of the lessees, that they would pay the rents as specified in the contract, would pay all charges for water, gas and electricity as they came due, would not make alterations in the premises, would not sublet without the consent of the lessor, would keep premises in proper sanitary condition, and surrender same in as good repair as they were then or as they should thereafter be put and other covenants as to boarding certain parties. On the part of the lessor, that he would paint the house and paint the bath tub, that he would leave certain articles of furniture for the use of lessees, among which were one mirror, oil cloth on floor, one machine, one couch, carpet for one room and moulding about

windows, and that he would "put a water heater in the bath room."

The lease was for two years, beginning April 15, 1905. The consideration was $900 per annum, payable in monthly instalments of $75 each. Some days after the lease was executed appellee Boone guarantied the payment of the rent in writing which, after reciting the terms of the lease, is as follows:

"Now, in consideration of said lease to the said Mr. and Mrs. D. H. Shelby and on compliance of the said P. Berman, his heirs and assigns, with the conditions of said lease, I hereby guaranty the payment of the said rent to the said P. Berman or his heirs or assigns." This instrument was attached by appellant's agent to the lease after the lease was executed. The Shelbys occupied the premises until the 1st of August, 1905, when they rented the same to Mrs. Alberfield, who occupied same until the 1st of October, 1905, and on October 4, 1905, the Shelbys gave appellant notice that they considered the lease at an end and declared same cancelled for the following reasons:

"First. You have failed to repair and put in proper sanitary condition the bath tub and bath room on said premises.

"Second. You have removed from said premises, without our knowledge or consent, certain furniture and fixtures which under the terms of said lease were to remain in the building on said premises.

"Third. You have failed to put and keep in proper sanitary condition the cellar underneath said building and also the plumbing, piping, etc., in said cellar.

"Fourth. That you failed to keep in proper sanitary condition by failure to properly construct or to properly repair the sewer on said premises.

"On account of the conditions as set out in third and fourth specifications above, a stench, almost unbearable at times, is emitted, and the building rendered unfit for the purposes for which it was leased by us."

In answer to this appellant notified appellees in writing that he declined to accept any surrender or cancellation of the lease, and that they could continue to occupy the premises under the lease, otherwise he would take charge of same and rent for the remainder of the term to the best advantage, and for the benefit

of those whom it might concern, but that he would hold appellee, and especially Boone, as guarantor, for the rent of the full term of the lease.

After appellees had abandoned the premises, appellant rented same to other parties, and collected the sum of $899 for rents, which he deducted from the amount he claimed to be due from appellee under the lease contract, leaving a balance of $526.90, for which this suit was brought.

The complaint set up the lease contract with the Shelbys, and the guaranty of the rent by Boone, alleged a breach of the contract by the Shelbys in abandoning the premises and failure to pay the rents, and that by reason of such breach the above amount was due him from the Shelbys and Boone.

Boone answered, denying all the material allegations of the complaint, and for affirmative defense set up "that plaintiff had failed and refused to comply with his contract of lease," and breach of the contract on the part of appellant as per the notice above set forth, and also alleged that he had been released from his contract on account of the act of appellant in modifying said contract, and in making new contracts with the Shelbys.

Appellant's testimony in chief tended to show that appellees vacated the premises he had leased them and had failed to pay the rents for the remainder of the term, that after appellees vacated he had leased to other parties, making the best contracts he could, had given appellees credit for the rents collected under these contracts, and that appellees were still due him, after making these deductions, the amount for which he sued. On cross-examination, among other things, he testified: "The heater was put in the kitchen; everybody got hot water in the tub in the bath room." "He did not put a hot water heater in the bath room. He put it in the kitchen. All a boarder had to do to get hot water for a bath in the bath room was to light the gas in the kitchen and get hot water. The kitchen was in the end of the house down stairs, and the bath room was up stairs. It was a mistake by putting that word (a water heater in the bath room) in there. The heater belonged to the kitchen and boiler. The boiler and heater was one piece of machinery." In regard to this provision of the lease appellee D. H. Shelby testified: "Mr. Berman refused to put the hot water heater in the bath

room. We selected a heater for that purpose, but Mr. Berman decided to put in a cheaper one and put it in the kitchen. I told him at the time that this did not comply with the contract, and I told him the reason why I did not want it in the kitchen. It was a gas heater, and I wanted it in the bath room, so that the boarders could turn on the heat whenever they desired to take a bath. With the heater in the kitchen, the boarders had to go through the kitchen every time they wanted a bath. The kitchen was down stairs, and the farthest room away from the bath room, which was up stairs. It was not desirable to have boarders come down stairs and go through the kitchen to light the heater to get hot water for their baths. They would come in at any time during the night, and we would have to get up to fix the water for them. They would come in from 9 o'clock to 11 o'clock at night, and would want baths."

Mrs. Shelby testified as to this as follows: "The condition of the bath tub and the failure of Berman to put a heater in the bath room had a bad effect upon our business. Prospective roomers would always want to know about the bath, and I would have to show them the conditions, which were not satisfactory; and when we got boarders, they would often go down town to get their baths. I heard Mr. Shelby protest to Mr. Berman about these conditions."

Among other instructions the court gave the following on its own motion:

"1. Before the defendants would be authorized to abandon the house and refuse to pay the rent, it must appear from the evidence that the premises became untenantable as a boarding house by reason of plaintiff's failure to comply with his agreement to repair; and if the jury find from the evidence that plaintiff agreed to make certain repairs, and failed and refused to make them, and defendants, after requesting that repairs be made as agreed to by plaintiff, and he failed and refused to make them, and, by reason of his failure to make same, the property became untenantable as a boarding house, your verdict should be for the defendant. By untenantable as a boarding house, the court tells you is meant unsuitable and not adapted to the purpose of keeping boarders."

And at the request of appellee the following among other prayers:

"8. If you believe from the evidence that there were any material alterations in the contract or lease, or that plaintiff failed to comply with any of the terms of said lease, without the consent of the defendant, T. W. M. Boone, then your verdict must be for the defendant, Boone."

"10. If you believe from the evidence that any material change was made in said contract of lease between the plaintiff and the Shelbys, or that any new agreements were entered into between the said plaintiff and said Shelbys, without the consent of the defendant Boone, then the defendant Boone is released, and your verdict must be for him."

"11. You are further instructed that if any material changes or alterations were made in said contract without the consent of said Boone, this would release the said Boone, even though said changes or alterations might be for the benefit of said Boone."

And at the request of appellant the following:

"8. The defendants set up certain breaches of the lease with plaintiff. You are instructed that the burden is upon the defendants to establish, by a fair preponderance of the evidence, the said breaches upon the part of the plaintiff alleged in the answer, and that for these reasons they canceled same, and if they failed to do so, you should find for the plaintiff."

"11. If plaintiff, instead of putting a water heater in the bath room, put a gas heater with boiler attachment in the kitchen, and defendants, after this hot water attachment was put in, continued to use the premises for several months, and then rented it in this condition to Mrs. Alberfield, who occupied it for several months, and, after she vacated it, defendants attempted to cancel the lease and did cancel it by notice to plaintiff, but such cancellation or attempted cancellation was not on account of failure of plaintiff to put a water heater in the bath room, but for other reasons, then this was waiver of his right to cancel for this reason."

The court among others refused the following prayer of appellant:

"3. If the plaintiff did not paint the bath tub, and did not put hot water attachment to the bath tub, defendant could not for these reasons abandon the contract if the evidence shows

they could have had the bath tub painted, and the hot water attachment put in, as provided by the contract, out of the rents. It was their duty to request compliance with the contract, and, if plaintiff failed to do so, then have the work done and take the cost of same out of the rent, if the rent was sufficient to meet this expense."

There was evidence on behalf of appellees tending to show that appellant had breached his contract of lease in other particulars. But there was a conflict in the evidence as to these. The court gave and refused other prayers bearing upon the issues of fact about which there was a conflict, the correctness of which rulings appellant challenged, but in our view of the case it is unnecessary to notice these.

From a verdict and judgment in favor of appellees this appeal has been duly prosecuted.

Ira D. Oglesby, for appellant.

1. There was no testimony on which to base instructions 10 and 11 given at defendants' request. No change of the lease contract is alleged nor proved, neither was there any new agreement entered into between plaintiff and the Shelbys. The lease provided for subletting with the plaintiff's consent, and none except him can complain if the lessee sub-rents without his consent. 59 Tenn. 374; 12 N. Y. St. Rep. 632.

2. Boone is not discharged as surety unless there was a new contract substituted for the original, without his consent, or some alteration in the original in some point so material as, in effect, to amount to a substitution of a new contract. 23 How. (U. S.) 149; 181 Pa. St. 251; 59 Tenn. 374; 7 Hun 244; 161 Pa. 87; 1 Denio 516; 67 Mich. 139.

Hill, Brizzolara & Fitzhugh and *A. A. McDonald,* for appellees.

1. The obligations of this contract were mutual, and, the appellant having failed to comply with his part of it, appellees were justified in rescinding it. 65 Ark. 320; 73 Mich. 577; Jones on Landlord and Tenant, § 673.

2. Boone was a surety for the tenant merely; his obligation having been executed separately from that of the tenant, and showing on its face that it was executed in consideration that the landlord would comply with the terms and conditions

of the lease. Any violation of the contract by the landlord, or any material alteration of the contract between the landlord and tenants, without the surety's consent, discharged him. 65 Ark. 550; 77 Ark. 128; 73 Ark. 473; 74 Ark. 600; 72 Ark. 80.

WOOD, J., (after stating the facts). Appellant, in his prayer for instruction number 11, asked the court to submit to the jury the question as to whether or not appellees had waived the right to cancel the lease because of any failure that might have been on the part of appellant to put the water heater in the bath room. Appellant therefore cannot complain of the finding of the jury that there was no such waiver. The case then, as we view it, is as follows: In consideration of the covenants on the part of appellees to pay rents, etc., appellant also covenanted on his part that he would do certain things mentioned in the lease, one of them being that he would "put a water heater in the bath room." The uncontroverted evidence shows that appellant failed to comply with his contract in the above particular, and appellees have not waived compliance with this provision of the contract.

The only question, therefore, is, can appellant compel appellees to comply with their covenants to pay rent when he has failed to comply with his covenant to "put the water heater in the bath room?"

The principles of law decisive of this question have been announced by this court in some very recent cases. *Harris* v. *Wheeler Lumber Co.*, 88 Ark. 491; *Jno. A. Gauger & Co.* v. *Sawyer & Austin Co.*, 88 Ark. 422, and cases cited. In the latter of the above cases we cite *Missouri Pacific Railway Co.* v. *Yarnell*, 65 Ark. 320, where we said: "The obligations of the contract were mutual; and if the appellee failed to comply with it, he could not hold the appellant to a compliance. This is too plain to require argument or authorities. The failure of one party to a contract to comply with its terms releases the other party from compliance with it." The above doctrine furnishes appellees D. H. and H. L. Shelby a complete defense to appellant's claim.

As appellee Boone was a mere guarantor or surety for the Shelbys, the defense that was complete as to his principals of course discharges him. Being a surety, he would have been dis-

charged upon the uncontradicted evidence, even if the Shelbys had not been. For "a surety will be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered." *O'Neal* v. *Kelly,* 65 Ark. 550. See also *White River, Lonoke & W. Ry. Co.* v. *Star Ranch & Land Co.,* 77 Ark. 128; *Lawhon* v. *Toors,* 73 Ark. 473; *Singer Mfg. Co.* v. *Boyette,* 74 Ark. 600.

Even if the Shelbys had consented to a different arrangement about the water heater (but they did not) from that specified in the lease, Boone did not consent to any change in the lease. The change was a material one, and, as we have said, according to the above authorities, Boone would have been released from the obligations of his contract, even though the Shelbys were not discharged from their covenants.

We need not inquire concerning other questions. For, under the law, upon the undisputed evidence as to the above, the judgment is right, and it must be affirmed.

BREWER *v.* STATE.

Opinion delivered January 31, 1910.

LARCENY—FINDING LOST GOODS.—If the finder of lost articles neither knows nor has any means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time; if he does know, or has the immediate means of ascertaining, who the owner is, there must be a felonious intent to steal at the time of the taking, in order to constitute larceny.

Appeal from Jackson Circuit Court; *Charles Coffin,* Judge, reversed.

S. A. Moore, for appellant.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee.

There was no error in the second instruction, and the eighth requested by the defendant was properly modified. Bishop's New Crim. Law § § 878-882; 1 Wharton, Crim. Law (10 ed.),

§ § 901-907; 3 Cox, C. C. 453; 33 Conn. 260; 8 Tex. App. 40; 19 Mo. 249; 116 Mass. 42; 29 O. St. 184.

McCULLOCH, C. J. The grand jury of Jackson County returned an indictment against defendant, Trigger Brewer, upon two counts, one charging him with the crime of grand larceny in stealing forty dollars in money, the property of J. B. Pritchard, and the other charging him with the crime of receiving stolen property. On a change of venue to Independence County he was tried and convicted of the crime of grand larceny, and appeals to this court.

The prosecuting witness testified, in substance, that he was a traveling salesman, and that one evening about 6:30 o'clock at Newport, in Jackson County, he entered the coach of a waiting railroad train standing at the station, after having purchased a ticket, which he placed in a pocket-book he calls his credential book, and which also contained his money, and that the book was in the hip pocket of his trousers; that he sat down beside a woman and conversed with her awhile, when defendant came in and talked to the woman a few minutes and then walked out of the train; that he saw a credential book in the defendant's hand as the latter left the train, but thought nothing of it until he missed his own book a few minutes later; that, after discovering the loss of his book, he went out to look for defendant, but did not find him until he came back in the coach; that he then walked up to defendant and demanded the book; that the latter denied having it, and that he then put his hand in defendant's pocket and drew out the book, with the money still in it. The book contained forty dollars in money. There was other evidence corroborating the testimony of this witness in each material feature.

Appellant testified that he was to some extent intoxicated that day, and found the pocket-book on the ground near the train and went into the coach with it in his hand, and so held it while he was talking to Pritchard and the woman, and that after he left the train he kept the book in his hand while he made a trip over to a restaurant. He testified that when he went back into the coach he had the pocket-book in his vest pocket, and when Pritchard took it out of his pocket and said "This is mine," he replied, "If it is, you could have had it before

now if you had said anything about it." Other witnesses testified that they saw defendant pick up the pocket-book off the ground as he started to get on the train, and that he spoke of it at the time. One witness said he remarked, "Some one has lost this book," and another that he said, "Look here what I have found," and another that he said, "I have found a book; do you know who it belongs to?"

The court gave the following, among other instructions, over defendant's objection: "2. If you believe from the evidence that the defendant found the pocket-book, and either knew or found out to whom it belonged, and on demand of the owner denied having it, or did not voluntarily return it to him, he would be guilty of larceny, and you should so find."

Defendant asked the following instruction, which the court over his objection modified by adding the words in italics: "8. If you believe from the evidence that the defendant found the pocket-book and contents, and within reasonable time thereafter made inquiry as to the ownership thereof, you should find the defendant not guilty as charged *unless you further find that he knew or soon learned who the owner was and denied having it.*"

Mr. Bishop, in discussing the offense of larceny in the finding and misappropriation of lost property, says: "Unless, therefore, there is larceny in the original taking, there can be none committed afterward. * * * The law gives to the finder a title in lost goods, but not full and unconditional; and so, if he takes them with the intent to steal them, he commits a larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man, knowing the owner of goods, cannot lawfully pick them up, without returning them to him; but a man, not knowing the owner, can. The doctrine, therefore, is that if, when one takes goods into his hands, he sees about them any marks, or otherwise learns any facts by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise, not. Some of the cases say, if he knows who the owner is, or has the means of ascertaining; but the better form of the doctrine is as just set down, because every man by advertising and inquiring can find the owner if he is to be found, while the guilt of a

defendant must attach at the moment, if ever, without depending on an if." 2 Bish. Crim. Law, § 882.

Prof. Wharton states the law on the subject thus: "When goods are lost—*i. e.*, when the owner has no trace of them, and they show no trace of the owner—the finder has such a special property in them, that according to the now prevalent view, as will presently be more fully seen, even though he feloniously intends to appropriate them when he finds them, it is not larceny. In other words, the mere subjective side is insufficient without the objective. To constitute larceny, there must be not only the intent to steal, but the thing taken must give on its face grounds from which it may be reasonably believed that the owner can be found. If there be no indications of ownership, then the owner may be inferred to have abandoned the goods, and consequently to consent to the finder taking them. In this way we can reconcile the position now before us with the position that when felonious intent and trespass are united in taking a thing, there is larceny. There is no trespass in taking a thing abandoned." 1 Wharton, Crim. Law, § 901 (10 ed.).

In the note to section 909, the author states the rule to be as in other larceny cases, that there must be a felonious intent at the time of finding, and cites many cases in support.

The Supreme Judicial Court of Massachusetts, in an opinion by Judge Gray, then Chief Justice, said: "The finder of lost goods may lawfully take them into his possession; and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny." *Commonwealth* v. *Titus,* 116 Mass. 42.

An interesting and instructive discussion on this subject may be found in the case of *Griggs* v. *State,* 58 Ala. 425, where all the authorities are reviewed.

Mr. Rapalje in his work on Larceny and Kindred Offenses, (§ 52) adopts the language of the Massachusetts court quoted

above with an addition which reaches to the precise point in the present case: "The finder of lost goods may lawfully take them into his possession; and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. Larceny cannot be of lost goods by their finder, if his original taking was without a felonious intent, though followed by a felonious asportation; and a charge to the jury that if the defendant, when he found the property, knew or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny, is error, for the reason that, if defendant, when he found the property, meant to act honestly with regard to it, no subsequent felonious intention could make him guilty of larceny."

So the rule clearly deducible from the authorities is that if the finder of lost articles neither knows nor has any immediate means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time. If he does know, or has the immediate means of ascertaining, who the owner is, there must be a felonious intent to steal at the time of the taking in order to constitute larceny; and a subsequently formed intent is not sufficient. The instructions hereinbefore quoted, given by the court, do not square with this rule; for they undoubtedly conveyed to the minds of the jury the idea that if the defendant either knew or afterwards ascertained who the owner was, and denied having the pocket-book, or failed to voluntarily return it, this made him guilty of larceny.

The eighth instruction requested by defendant was incorrect in failing to embrace the idea of good faith in making inquiry for the owner or of the absence of a felonious intent at the time of the original taking, and the court might well have refused the instruction altogether. But the modification was incorrect, and rendered the whole instruction prejudicial to defendant, by telling the jury in effect that, notwithstanding he had made inquiry for the owner, if he afterwards learned who the owner was and denied having the pocket book, he would be guilty of larceny.

There was evidence to warrant a submission to the jury of the questions covered by these instructions, and the error of

the court was prejudicial. The court gave other correct instructions on this subject, but they were in conflict with those quoted above, and were therefore calculated to mislead the jury.

Reversed and remanded for new trial.

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

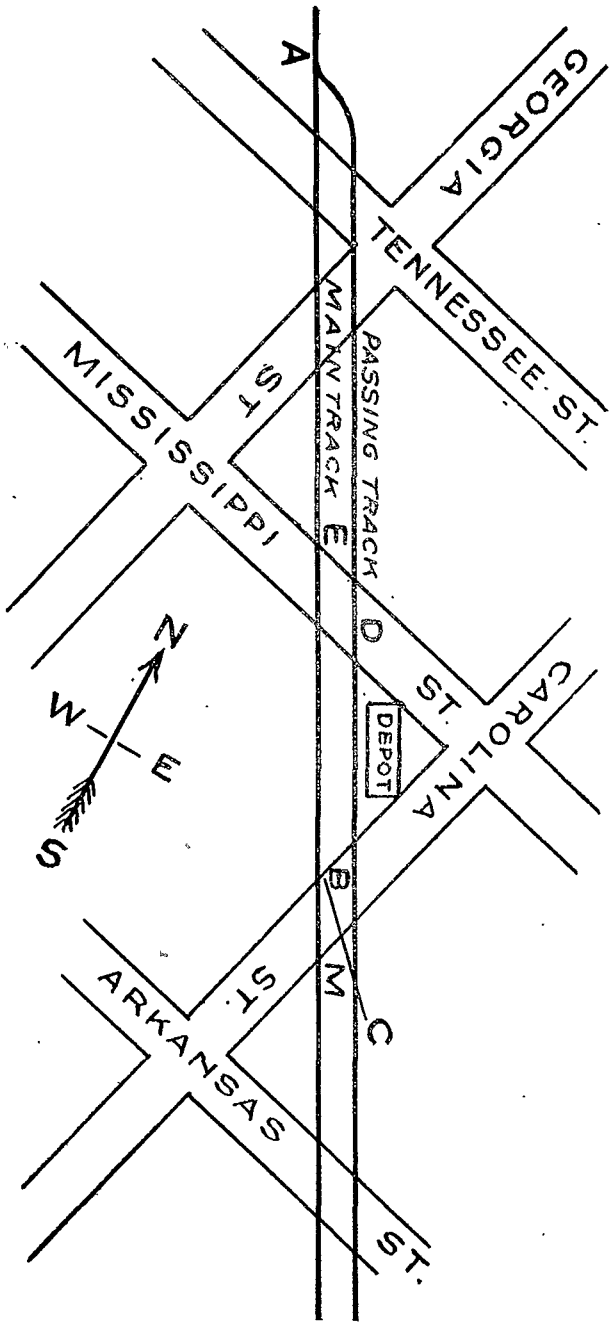
Opinion delivered January 10, 1910.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—The act of March 8, 1907, making railroad companies and all corporations liable for the negligence of fellow servants, did not abolish the defense of contributory negligence. (Page 489.)
2. SAME—DUTY TO KEEP LOOKOUT.—Where plaintiff's intestate failed to keep a lookout when it was his duty to do so, and thereby failed to discover a signal of danger, and was killed, plaintiff was not entitled to recover. (Page 489.)

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

STATEMENT BY THE COURT.

W. H. Davis was a brakeman in the employ of appellant. On the 22d day of August, 1908, he had charge of the "switching list" at Marianna, and in consequence thereof it was his duty to direct how the switching was to be done. It was the duty of the other members of the crew, the engineer, fireman and brakeman, to follow the directions of Davis in making whatever switching was necessary in the yards at Marianna after the train arrived there that day. The train came into Marianna from the south, and was cut in two in the edge of town. The engine with three or four cars was moved northward toward the depot. The crew accompanying it consisted of the engineer, the fireman, another brakeman named Holland, and Davis. To make the statement intelligible, we will use the plat that was in evidence.


GEORGIA
ST.
TENNESSEE
A
MAIN TRACK
PASSING TRACK
E
D
DEPOT
B
M
C
ST.
CAROLINA
ST.
MISSISSIPPI
ARKANSAS
ST.
N
W
E
S

"B M C" is a switch connecting the main track and the passing or house track, "A D C." When the engine and cars, proceeding northward on the main track, arrived at the point "B," the brakeman Holland opened the switch at that point, and it remained open until the accident and death of Davis occurred.

Taking the most favorable view of the evidence for appellee, the jury might have found that, after the switch was opened by Holland at "B," the engine and cars with the balance of the crew, including Davis, continued on the main track passing out at the switch "A" and back down to the depot, there "spotting," or leaving to be unloaded, two cars that were attached to the engine and tender. In spotting these two cars other cars that were on the passing track in front of the depot were pushed down south on the passing track toward "C." After the two cars were spotted, Davis cut the engine and tender loose, and got on the rear end of the tender. The engine then went north on the passing track beyond switch "A." Davis signaled the engineer to come back down the main line. He dropped off and opened the switch for the main line at switch point "A." When the engine and tender backing south passed switch "A," Davis closed the switch "A," then got back on the southeast corner of the tender. He sat down and crossed his legs with his arm in the handle on the tank. He signaled the engineer to back down the main track, which the engineer did at a speed of about fifteen or twenty miles an hour. The engine and tender ran into the open switch at "B," and collided with the cars that were standing on the house track near "C," producing the injury that resulted in the death of Davis. From the point "A" down the main track "A E B" to "B" is 961 feet, and 600 feet of that distance the track was perfectly straight, and there was nothing at the time of the occurrence to obscure the vision for that distance between Davis on the tender and the open switch at "B." There was at switch "B" the ordinary switch stands with the usual targets to show whether the switch was open or closed. The target showing that the switch "B" was open was a dull red color. It was turned that day at the time so as to indicate that the switch was open. On a clear day, such as that was, the target indicating the open switch could have been seen from 150 to 200 feet away. The target indicating "safety," or when the switch was closed, was colored green. Davis was facing in the direction the tender was moving.

On behalf of appellant the engineer who was on the engine

at the time of the accident testified in part as follows: "Mr. Davis was working that day as the 'swing man,' and at the time as the 'list man.' In the capacity of a list man a part of his work was to direct the movements of the engine. It was his place to direct us what movements to make. I looked to him for signals and directions for moving the engine. It was my duty to watch his signals and obey them. He was the one that signaled me to back down the main line. I know where the switch stand was there at that time. I did not know that the switch was open. I was depending upon Davis to keep the lookout down the track. The only ones on the engine were the fireman, Mr. Davis and myself, and Mr. Davis was in the best position to keep the lookout. Mr. Davis was the only man on the engine at that time that had an unobstructed view of the track on both sides, and we were depending upon him to keep the lookout. My view of the switch was obstructed by the body of the tank. The switch stand was on the side of the fireman. Mr. Davis was standing at the southeast corner of the tank right at the rear end. From the time that we got on the main line on down to the switch stand there was nothing to prevent Mr. Davis from seeing that the switch itself was open, and that the danger sign was exposed. I am well enough acquainted with the track to know there was nothing to obstruct his view. I was risking my life and depending wholly upon him to keep the lookout. While we were backing down the main track, Mr. Davis was standing on the rear stirrup of the tank on my side, holding with his right hand and signaling me with his left, with his face facing the track. He gave me a hurry-up signal, which I ignored, and got my injector and put that on, and just after I put that on I felt the tank jump, and it flashed through my mind that he had failed to throw the switch, and I rushed around and pulled out the injector. He kind of raised his left hand, and I halloed to him to jump. He kind of drew up, and I threw the reverse lever, and it got this knee between it and the side of the cab and bound me there. I had hold of the reverse lever and valve until the engine stopped. I stood there until the side of the car came in to the window and bound me there. Instead of jumping, Davis held on to the handrail. I can't describe it, but the expression of his face looked to me like he realized what had been done by his negligence."

The fireman testified in part as follows: "As we were backing down, I saw that the switch was open. I saw the red color

exposed. I did not call the engineer's attention to it because I knew the brakeman was there, and I supposed they were intending to go into the cut-off. I did not know the cars were standing there on the passing track. I was on the west side of the engine. I did not know that the cars extended down so as to block the cut-off. As we were coming down the track, I could see that the switch was open, but I thought Mr. Davis knew what he was doing, and that there was nothing on the track, and that they were going in there. I knew that it was the custom of the engineer to act on the brakeman's signals. My safety was depending upon Mr. Davis's directions, and I was relying wholly upon him as to that. I supposed that he knew what he was doing, and that the track was clear."

The appellee sued appellant, alleging that the death of Davis was caused by the negligence of appellant in backing its engine at a rapid speed, and by leaving the switch open.

The answer denied all the material allegations of the complaint, and set up the defense of contributory negligence.

Among other prayers by appellant was the following: "1. You are instructed, under the law and the evidence in this case, to return a verdict for the defendant." The prayer was refused, and exceptions duly saved.

The verdict and judgment were for $8,000, and this appeal has been duly prosecuted.

E. B. Kinsworthy and *Lewis Rhoton,* for appellant.

The court should have directed a verdict for defendant. 41 Ark. 542; 17 L. R. A. (N. S.) 542; 35 L. R. A. 833; 98 Cal. 19; 147 Mich. 667; 37 N. Y. Supp. 157; 23 Col. 226; 20 Ore. 285. The deceased assumed the risk of dangers which by the use of ordinary care he could have discovered. 67 Ark. 209; 137 Ind. 206: 134 Ind. 431; 149 Fed. 104. The presumption that the employer has performed his duty to his employee does not justify the employee in heedlessly going into danger. 79 Me. 397; 89 S. W. 1112; 14 L. R. A. 552. One entering the service of a railway company assumes the risks that are plainly open to observation. 53 Mich. 125; 152 Ind. 399; 122 U. S. 189.

N. W. Norton, Smith & Smith and *H. F. Roleson,* for appellee.

The negligence of the master is not one of assumed risks. 67 Ark. 217. Acts 1907, p. 162, controls this case and is consti-

tutional. 87 Ark. 587. Contributory negligence is an affirmative defense, and must be proved. The presumption is that the party injured was in the exercise of ordinary care until the contrary is shown. 48 Ark. 460; 46 Ark. 437; *Id.* 182; 81 Ark. 275; 79 Ark. 76. The children of deceased are entitled to compensation for the loss of training and care of their father. 81 Ark. 275; 61 Ark. 258; 67 Ark. 306; 60 Ark. 550.

WOOD, J. (after stating the facts). There was evidence to sustain a finding that appellant was negligent in causing the engine and tender to be backed at an unusual speed, and also in leaving open the switch. While this was the negligence of the fellow servants of Davis, yet, under the act of March 8, 1907, this was negligence for which appellant was liable. *Aluminum Company of North America* v. *Ramsey,* 89 Ark. 522. But the undisputed evidence shows that the negligence of Davis concurred with the negligence of his fellow servant in producing the injury which resulted in his death, and such contributory negligence on his part is a complete defense to the suit.

It was the duty of Davis under the uncontroverted evidence to keep the lookout for his own safety and that of his co-employees. "The lookout must be kept in the yards of the company as well as on other parts of the track, and is for the benefit of employees of the company as well as others." *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61, 68; *Kansas City So. Ry. Co.* v. *Morris,* 80 Ark. 528; *Little Rock & H. S. W. Ry. Co.* v. *McQueeney,* 78 Ark. 22. If Davis had been keeping such lookout, he could have seen the target that warned him of the open switch. This signal of danger was on, and, according to all the evidence on the subject, could have been seen by Davis, had he been keeping the lookout. If he did not discover the peril in time, it was through his own negligence.

There is nothing in the evidence to warrant the conclusion that the employees on the engine, discovered the peril of Davis in time, by the exercise of ordinary care, to have averted the collision. The testimony of the engineer shows that he did everything in his power to avoid the injury after the peril of Davis was discovered.

Contributory negligence was established as matter of law, and the court erred therefore in refusing appellant's prayer No. 1.

For this error the judgment must be reversed, and the cause remanded for new trial. It is so ordered.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT v. FLEMING.

Opinion delivered January 24, 1910.

1. JUDGMENT—ATTACK ON—BURDEN OF PROOF.—The burden is on one who attacks a decree which is valid and regular on its face. (Page 494.)
2. LEVEES—CONCLUSIVENESS OF DECREE ENFORCING TAXES.—A decree enforcing levee taxes, rendered upon due service, is conclusive as to whether the taxes were due and unpaid. (Page 494.)
3. SAME—POWERS OF LEVEE DISTRICT.—The Board of Directors of St. Francis Levee District is a *quasi* corporation, which can exercise no governmental powers except those expressly granted by the Legislature, and only in the manner pointed out expressly or by fair implication. (Page 495.)
4. SAME—ESTOPPEL BY UNAUTHORIZED ACTS OF OFFICERS.—The assessment and collection of levee taxes on lands belonging to a levee district by officers of such district who were not authorized to sell its lands will not estop the district from claiming the lands. (Page 495.)
5. ESTOPPEL—LEVEE DISTRICT.—Where a levee district foreclosed its lien for levee taxes on lands in the district and purchased the lands at the sale, it was not estopped to assert the title so acquired by the fact that its officers accepted subsequent levee taxes on the same lands from the former owner, the officers having no authority to do so (Page 495.)

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

N. W. Norton and *H. F. Roleson,* for appellant.

1. The decree for levee taxes was valid on its face, and recites proper notice. The report of sale was properly confirmed, and the deed from the commissioner to the board of directors was properly executed, examined and approved. It was in the nature of a proceeding *in rem,* immaterial that the ownership of the lands be accurately stated therein, and the judgment was enforceable against the lond only. Acts 1895, p. 88. McCann was a non-resident of the State, and no one was in possession of the land under him. Personal service on him was not required. The State's deed was not recorded until May 13, 1901. *Id.* p. 90; 74 Ark. 174.

2. Appellee's title rests upon the forfeiture for the taxes of 1883 and 1884. The tax sale was void, because (a) it does not affirmatively appear on the record that the clerk's certificate of publication was made before the day of sale. 74 Ark. 583; 55 Ark. 218; 51 Ark. 34; 68 Ark. 248. (b) The delinquent lists for taxes for those years were not returned by the collector and

filed with the clerk until April 13, 1886. 66 Ark. 422; Kirby's Dig. § 7083. (c) The lands were sold for too much costs. 61 Ark. 414; *Id.* 36.

3. The court erred in holding that appellant and its grantees were estopped. The officers of appellant charged with the duty of making assessments and collecting taxes upon the land were not agents, but public officers discharging an official duty. The district could not be bound by any unauthorized act nor official misconduct of theirs. 42 Ark. 118; 39 Ark. 580; 40 Ark. 251; 67 Ill. 435; 72 Ark. 52; 1 Allen 172; 4 Allen 58. These officers had no power to convey the land by deed, and hence could not indirectly, by estoppel, bind the board. 2 Herman on Estoppel, § § 1222, 1176; 63 N. H. 328. *Ultra vires* acts of officers of public corporations are incapable of ratification. 29 Am. & Eng. Enc. of L. 87, note 2. The land was public property, and held in trust by appellant for public purposes. 64 L. R. A., 333; 88 N. W. 523, 525.

Randolph & Randolph, for appellee.

1. Under the law authorizing the donation of lands forfeited to the State for non-payment of taxes, it was necessary that McCann prove to the satisfaction of the Commissioner of State Lands his right to a deed for the lands involved here, amongst other things, his actual residence upon the same for the period required by law. Kirby's Dig. § § 4809, 4811, 4813, 4815, 4817, 4819. The possession thus established is, in the absence of proof of its having been disturbed by some adverse holder, presumed in law to have continued until he made the deed to appellees. 75 Ark. 593; 34 Ark. 598; 38 Ark. 182; 1 Greenleaf, Ev. § 41. The commissioner's deed to McCann is conclusive, so far as the State had the title to convey, unless set aside in a court of equity for fraud or illegality. 24 Ark. 40; *Id.* 433; 13 Pet. 436, 448; 12 Ark. 297; 16 Ark. 414; *Id.* 440; 31 Ark. 425; *Id.* 609; 27 Ark. 200; 33 Ark. 833; 39 Ark. 120. The deed is valid, and is *prima facie* evidence of the grantee's title. 76 Ark. 450; 82 Ark. 31; 122 S. W. 111; 46 Ark. 96; 49 Ark. 266. The allegations in the complaint that McCann was a citizen and resident of the county, in possession of the lands when the suit for levee taxes was brought, had a tenant thereon occupying it, that he was not made a party to the suit, was not served with process nor given

notice thereof, and that no levee taxes were then due, were not denied by the answer, and must be taken as true. It was not necessary for appellee to prove those facts. 41 Ark. 17; 46 Ark. 132; 31 Ark. 346; 51 Ark. 399. Actual service upon McCann was essential. Acts 1895, p. 92; 174 Fed. 133.

2. McCann and his grantees, appellees, it is clearly shown, paid the taxes on the land continuously under color of title for more than seven years next preceding appellant's quitclaim deed to Williamson, at least three of which years were after the passage of the act of March 18, 1899. Kirby's Dig. § 5057. Title has ripened in appellees for this reason, in addition to the adverse holding of McCann for more than seven years after he obtained the donation deed. Acts 1899, p. 135; Kirby's Dig. § 655; 80 Ark. 411; 68 Ark. 551; 74 Ark. 302; 83 Ark. 158; *Id.* 522; 89 Ark. 300. See also 48 Ark. 312; 49 Ark. 266; 50 Ark. 340; 74 Ark. 488; Angell on Limitations, § § 1-5; 79 Ark. 364; 76 Ark. 443; 144 U. S. 533.

3. By reason of the fact that, prior to the decree of sale under which appellant obtained its deed, McCann paid to it the levee taxes for the years 1893 and 1895, that suit was brought for the levee taxes against the land in the name of a person other than McCann, and that thereafter appellant accepted from him the levee taxes for the year 1897 and subsequent years, appellant and its vendee, Williamson, were properly held by the court to be estopped to set up title against appellees. 34 Ark. 704; 140 U. S. 634; 68 Ark. 250; 35 Ark. 293; 37 Ark. 47; 50 Ark. 430; 55 Ark. 296; 75 Ark. 411; 80 Ark. 8; *Id.* 543; 81 Ark. 143; *Id.* 244. A plaintiff purchasing the property of a defendant under a judgment or decree in plaintiff's favor, or under an execution based thereon, takes only such title as the defendant had, which title may be defeated if the judgment or decree is erroneous or is reversed. 2 Freeman on Executions, § 348; 34 Ark. 569; 54 Ark. 239. And a sale under a decree which is void for want of jurisdiction by the court of the subject-matter or of the person of the defendant is itself void and passes no title. Freeman on Jud. Sales, 162, § 48.

McCULLOCH, C. J. This appeal involves a controversy over the title to a quarter section of land in Crittenden County. Appellees claim title under a tax forfeiture to the State and donation deed to appellee's grantor, McCann, and possession for the

statutory period of limitation under the donation deed. Appellants claim title under a sale for levee taxes in 1898, made pursuant to a decree of the chancery court rendered in a suit instituted by the levee district to enforce the payment of delinquent levee taxes. The decree of the chancery court in the foreclosure suit was rendered February 14, 1898, and condemned the land for the levee taxes of 1896. Sale was made by the commissioner of the court June 13, 1898, and the sale was reported to and confirmed by the court July 21, 1898. At that time the statute provided no period for the redemption of lands sold for levee taxes of that district. The board of directors purchased the land at the sale, and subsequently sold and conveyed it to the other appellants, who are the real parties in interest, and now claim the land.

The tax sale under which appellees claim title was void for several reasons not necessary to enumerate; but their grantor, McCann, was in possession the requisite length of time under his donation deed from the State to get title by limitation. This operated as a complete investiture of title, and enables appellees to maintain this action, unless their title has been divested by the subsequent levee tax sale.

The question in the case is whether or not appellants have a valid title under the levee tax sale made by the commissioner of the chancery court in 1898, which they can assert against appellees. The statute (Acts of 1895, p. 88) which authorizes foreclosure preceedings to enforce the payment of levee taxes due the St. Francis Levee District provides that "said proceedings and judgment shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; and said judgment may be enforced wholly against said land, and not against any other property or estate of said defendant. All or any part of said delinquent lands for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid, and all delinquent owners of said lands, including those unknown as aforesaid, may be included in said one suit as defendants; and notice of the pendency of such suit shall be given as against non-residents of the county and the unknown owners, respectively, where such suits may be pending, by publication weekly for four weeks prior to the day of the term of court on which final judgments may be entered for the said sale of said

lands." The same statute contains also the following provision in reference to the procedure in such suits: "As against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the court at least twenty days before the day on which said defendant is required to answer, as set out in said summons. * * * And provided, further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land."

The foreclosure decree involved in the present suit was the same one involved in the case of *Van Etten* v. *Daugherty*, 83 Ark. 534, where the court held that the decree was void as to the lands actually occupied by the owner or his tenant, and as to the lands of a resident of the county whose title appeared of record, unless there had been personal service of summons. McCann was not a resident of the county where the lands are situated. He was a non-resident of the State, and his donation deed was not recorded at that time; but appellees attempted to prove that a tenant of McCann occupied the land at the time the foreclosure suit was instituted. They failed, however, to prove it. The chancellor found against them on this issue, and we conclude that the finding was in accord with the preponderance of the evidence. The burden was on appellees, in attacking the decree of the chancellor, which was valid and regular on its face, to establish the grounds of their attack. We therefore treat the foreclosure decree, and sale thereunder, as having been done in accordance with the statute authorizing the proceedings.

It is contended that the levee district and its grantees are estopped to assert title under the foreclosure sale, on account of a payment by McCann and acceptancce by the officers of the levee district of the taxes of the years 1897 and 1898, and subsequent years, while the title under the foreclosure sale stood in the district. The chancellor sustained this contention, and rendered his decree on the ground that the appellants were estopped to assert title under the foreclosure, in dispute of the title of appellees, on account of the subsequent acceptance of taxes by officers of the levee district. The taxes of 1897 were paid prior to the decree, which was rendered on February 14, 1898, and there can be

no estoppel by reason of the acceptance of these taxes, for the decree is conclusive as to all matters which occurred before its rendition, the same having been rendered on due notice and in accordance with the provisions of the statute. The acceptance of the taxes of 1897 could, at most, amount only to an implication of the payment of the taxes of the prior year of 1896; and, even if the taxes of that year had in fact been paid, it is too late, after the final decree of foreclosure, to show payment in order to defeat a title acquired under that decree. So we look to things done after the decree and confirmation of sale in order to find acts and conduct which would estop the holder of title under the foreclosure from asserting that title.

Did the acceptance of the levee taxes after title was vested in the levee district operate as an estoppel? The title being then vested in the levee district, the only method by which it could be lawfully conveyed was by deed, executed by the president. The statute authorizes only that officer to sell lands of the district and execute deeds therefor. No one else has any authority to do so. The assessor values the betterments to lands for taxation, the collector collects the taxes levied, and the treasurer receives the funds collected, and this is all that either officer is authorized to do.

The Board of Directors of St. Francis Levee District is a *quasi* corporation, to which is delegated certain powers as a governmental agency. *Carson* v. *St. Francis Levee District,* 59 Ark. 513. "Such an agency of government is *sui generis,* and its powers cannot be likened to those of municipal corporations, whose powers are broader and more general within their prescribed territory and over the subjects delegated to them. They exercise no governmental powers except those expressly granted by the legislative authority which called them into existence, and then only in the manner pointed out expressly or by fair implication." *Altheimer* v. *Board of Directors Plum Bayou Levee Dist.,* 79 Ark. 229.

It is settled by decisions of this court that the State cannot be estopped to assert title to its lands on account of unauthorized acts of its officers. *Woodward* v. *Campbell,* 39 Ark. 580; *Pulaski County* v. *State,* 42 Ark. 118. In one of these cases the court said: "The State is liable only to the extent of the power actually given to its officers, and not to the extent of their apparent

authority; and all who deal with a public agent must at their peril inquire into his real power to bind his principal."

In a Georgia case, where officers had caused lands to be sold for the State, the court held that this did not estop the State from afterwards asserting that the lands were not subject to taxation and claiming them. The court said: "Nothing done by the comptroller general or the sheriff, or the tax officers of the county, or the treasurer of the State, in reference to the fund which went into the State treasury, derived from the sale of the land, or that derived from the taxes collected from year to year, would have the effect of estopping the State, no one of its public officers having acted within the scope of his authority when he dealt with the property or the fund."

The same rule should apply to any governmental agency in the exercise of purely public functions. Herman on Estoppel, § 1222; *St. Louis* v. *Gorman,* 29 Mo. 593. There is no reason why the unauthorized acts of a levee district should estop it from asserting its rights than that the State should not be estopped by the unauthorized acts of its officers or agents. The officers of the levee district who assessed and collected the taxes in the name of the district had no authority under the law to sell the lands of the district, and to hold that their unauthorized acts estop the district is to empower them to do indirectly that which they cannot directly do.

We do not intend to hold that the levee district cannot under any circumstances be estopped by unauthorized acts of its officers, for, when things are done by an unauthorized method which are within the power of the corporation to do, the unauthorized acts may be ratified by the corporation acting through those of its officers who have authority to do so. But the ratification, to be effective as an estoppel, must be made by the officers or agents authorized to do those things, as one who was unauthorized to perform the original act would be without authority to ratify the same act done by another. *Texarkana* v. *Friedell,* 82 Ark. 531.

The case of *Book* v. *Polk,* 81 Ark. 244, which is relied on by counsel for appellees, does not reach to the point involved here, and is without controlling force. There the court held that where the president of the levee district, who is authorized by statute to sell and convey lands for cash, conveyed land to a purchaser for part cash and part on credit, the conveyance was valid and

binding, and that the district, having received the money and notes of the purchaser, was estopped to deny that the title passed under the conveyance. That decision was put on the ground that the act done by the president was within his powers, and that the only departure was in the method of exercising the power.

We conclude that the decree is erroneous, so the same is reversed, and the cause is remanded with directions to dismiss the complaint for want of equity.

ON REHEARING.

Opinion delivered February 14, 1910.

PER CURIAM. We are asked to modify the judgment of this court so as to authorize the recovery by appellees of the amount of taxes paid on the land in controversy. Without deciding the question whether or not appellees would be entitled to recover the taxes in a separate action, we decline to modify the judgment for the reason that the recovery of taxes is not within the issues made by the pleadings in this case. Appellees instituted this suit to quiet title to the land and to restrain appellants from cutting timber. No issue was made as to the recovery of taxes.

Motion overruled.

READ'S DRUG STORE v. HESSIG-ELLIS DRUG COMPANY.

Opinion delivered January 31, 1910.

1. CONTRACTS—CONSTRUCTION.—A contract is to be considered as a whole, and different sections referring to the same subject-matter are to be read together. (Page 501.)
2. SALES OF CHATTELS—CONSTRUCTION.—Where a contract for the sale of drugs stipulated that the vendee should have the right to return the unsold drugs "at the expiration of the Arkansas advertising contracts," and that the vendor would do a certain amount of advertising in papers published in Arkansas during the twelve months following the date of the delivery of the goods to the vendee, the clause giving the right to return unsold drugs referred to the advertising to be done under the particular contract, and not to that to be done under other and disconnected contracts. (Page 502.)
3. TENDER.—WHEN UNNECESSARY.—Whenever the act of one party, to whom another is bound to tender money, services or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. (Page 502.)

4. SALES OF CHATTELS—SET OFF.—In an action for goods sold the vendee could set off the price of other goods previously sold to him which the vendor had agreed to take back from the vendee at their invoice price if they remained unsold at a certain time. (Page 503.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; reversed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. It was error to refuse defendant the right to open and close the argument. The burden of proof, under the pleadings, was on defendant. 32 Ark. 597; 13 Ark. 479; 29 Ark. 153; 82 Ark. 331.

2. The testimony of Brown as to the conversations and propositions had, etc., was inadmissible. They were made prior to the final agreement. Where a contract is reduced to writing, parol evidence is admissible to vary, alter or explain it.

3. A tender does not have to be made where a party is advised beforehand that if made it will not be accepted. 68 Ark. 521.

M. C. Hutton and *Campbell & Stevenson,* for appellee.

1. Plaintiff was entitled to open and close. Kirby's Digest, § § 3106, 3107-6196.

2. There was no error in allowing the witness Brown and others to testify as to conversations, etc., with Read. The contract was a *verbal one.* L. R. 4 App. Cas. 311.

HART, J. On the 12th day of January, 1909, the Hessig-Ellis Drug Company brought suit in the Pulaski Circuit Court against Read's Drug Store for $580.56 for goods sold on account. Both parties to the suit are corporations.

The defendant admitted the purchase of the goods, but denied that it was indebted to the plaintiff in said sum or in any other sum whatever. It pleaded:

First. That it had entered into a written contract with the plaintiff on the 18th day of December, 1907, whereby it purchased $672 worth of Muco-Solvent, and that it was provided in said contract, among other things, that defendant should have the right to return to plaintiff all Muco-Solvent which it might have on hand twelve months after the delivery of said Muco-Solvent to defendant, at the invoice price thereof; and that it had on hand and unsold $623.67 worth of said Muco-Solvent. That it

had tendered said goods to plaintiff, but plaintiff had refused to accept or receive the same and repay the defendant the invoice price therefor; and that plaintiff was therefore indebted to defendant on said Muco-Solvent contract in the said sum of $623.67.

Second. That at the time defendant purchased the bill of staple goods, towit, on May 1, 1908, it was agreed between plaintiff and defendant that plaintiff should carry defendant's account for staple goods to the amount of the Muco-Solvent purchased until the time matured when defendant could return said Muco-Solvent and receive back the purchase price therefor, and that defendant should have credit on the bill for staple goods by the amount of Muco-Solvent which it had on hand.

The facts are as follows:

The Hessig-Ellis Drug Company, by a written contract, sold to Read's Drug Store a certain quantity of a medical preparation known to the trade as Muco-Solvent. The goods were delivered on January 12, 1908. The contract contained a provision that the Hessig-Ellis Drug Company should take back all goods unsold remaining in the hands of Read's Drug Store at the expiration of the Arkansas advertising contracts. It also contained another clause whereby the Hessig-Ellis Drug Company agreed to do a certain amount of advertising in the Arkansas Gazette or Arkansas Democrat, or both, papers published in the city of Little Rock, where Read's Drug Store carried on its business. The advertising was to be done during the twelve months following the date of the delivery of the goods to Read's Drug Store. By the terms of the contract, the Muco-Solvent was to be paid for in 30, 60, 90 and 120 days from the date of the contract.

A. C. Read, who owned a controlling interest in the stock of Read's Drug Store, says that "we put the Muco-Solvent on sale in four drug stores in the city of Little Rock, and tried to push the sale of it, but found it to be unsalable. Read's Drug Store paid for the Muco-Solvent according to the terms of the contract; but complained to the Hessig-Ellis Drug Company that the preparation was worthless and could not be sold. Mr. A. C. Read notified the Hessig-Ellis Drug Company that he expected to return the goods unsold at the expiration of the year and get back their purchase price. The Hessig-Ellis Drug Company replied that they had other contracts in the State of Arkansas,

and claimed that, as long as they were in force, and advertising was done in the State of Arkansas, Read's Drug Store had no right to return the goods. Mr. A. C. Read continued to claim that he had a right to return the unsold goods at the expiration of the time for advertising under the terms of the contract above referred to. Read also continued to complain that he could not sell the goods, and on that account would be out the use of the purchase price of the goods until the end of the year, the date of the expiration of the advertising contracts provided by his contract. A. C. Read proposed to A. M. Brown, a salesman of the Hessig-Ellis Drug Company, that he would buy about $3,000 of staple goods from his company provided that company would carry about $675, the amount paid for the Muco-Solvent, until the Muco-Solvent transaction was settled. Brown did not think any amount should be specified, as he hoped to make Read's Drug Store a regular and permanent customer of his house for staple drugs. Brown made a proposition to Read, which is embodied in the following letter:

"Little Rock, May 16, 1908.

"Hessig-Ellis Drug Company, Memphis, Tenn.

"Dear Sirs: Regarding our proposed negotiations with Mr. A. C. Read, this city, beg to advise that I have made Mr. Read the following proposition: The amount of business to be given us by him I deem it, however, expedient to leave out. 'In consideration of his business, or that part of it which we can handle, we agree to carry his account on our books for the amount of his purchase of Muco-Solvent until such time as the Muco-Solvent has been disposed of to his satisfaction.' Mr. Read assures us of quite a good deal of business, but I did not consider it good policy to state the amount required, as he would be much more liable to continue his business with us under other circumstances. I wish you would either write me or Mr. Read a confirmation of this agreement and greatly oblige,

"Yours truly,

"A. M. Brown."

The letter was shown to Mr. Read, who acceded to the terms of it. The letter was then sent to the Hessig-Ellis Drug Company for its approval, which was obtained. Read's Drug Store bought from the Hessig-Ellis Drug Company between May 1 and June 1, 1908, a miscellaneous bill of drugs, to the amount of $580.56.

Because Read's Drug Store failed to purchase any more goods, the Hessig-Ellis Drug Company demanded payment of this bill, and, upon payment being refused on the ground that it was not due until the expiration of the Muco-Solvent contract, the account was placed in the hands of a lawyer for collection. Read's Drug Store offered to return the Muco-Solvent in payment of the account. The attorney for the Hessig-Ellis Drug Company declined to receive it on the ground that he had no authority to do so, but said he would notify his clients of the offer, which he did.

On the 12th day of January, 1909, one year after the delivery of the Muco-Solvent preparation to Read's Drug Store, the Hessig-Ellis Drug Company brought this suit. On May 21, 1909, the day of the trial of this cause in the lower court, an offer was again made to return the unsold Muco-Solvent, which offer was refused.

Upon a trial before a jury, a verdict was rendered in favor the Hessig-Ellis Drug Company for the amount sued for, and Read's Drug Store has appealed from the judgment rendered against it.

It seems plain to us that, under the terms of the contract of sale, Read's Drug Store had the right to return the unsold Muco-Solvent at full invoice price at the expiration of one year from the date of the delivery of the goods. The contract in express terms gives the right "at the expiration of the Arkansas advertising contracts." The clause just quoted evidently refers to the advertising to be done under the terms of the contract between the parties, and does not mean advertising to be done under other and different contracts not in anywise referred to and not having any connection whatever with the contract under consideration. The construction sought to be placed upon the contract by the Hessig-Ellis Drug Company might render entirely inoperative the clause which provides for a return of the goods unsold; for the company might be advertising under different contracts in other parts of the State for an indefinite number of years. It is a fundamental rule of construction that a contract is to be considered as a whole, and that different sections referring to the same subject-matter are to be read together. When so construed, it is obvious that the right to return the unsold Muco-Solvent existed at the date of the expiration of the advertisement provided for in the contract between the parties to this suit, which, as we have already

seen, was on January 12, 1909. The Muco-Solvent contract was not merged into or superseded by the later contract in reference to the sale of staple drugs.

The only effect of the latter was to postpone the payment of a sufficient amount of drugs sold under it to the time when a settlement should be made between the parties under the Muco-Solvent contract. The record shows that this view of the law was ignored by the trial court, and that the instructions given in the court below ignored the right of the vendee to return to the vendor the unsold Muco-Solvent under the first contract, but that the court based its instructions to the jury on the theory that the only question in the case was whether or not there had been an agreement that the bill sued for should not become payable until the parties had made a settlement of the Muco-Solvent controversy. This was error, for, as we have already seen, the second contract did not supersede the Muco-Solvent contract.

The court held that the vendee, Read's Drug Store, waited too long before attempting to assert that right. In other words, the trial court held that the right to return the goods existed only for a reasonable time, and that from January 12, 1909, the date when the right could have been exercised, to May 21, 1909, when the right was sought to be asserted, was unreasonable. But the court did not take into consideration the evidence that the vendor denied the right of the vendee to return the goods.

"On general principles, whenever the act of one party, to whom another is bound to tender money, services, or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. The law never requires a vain thing to be done." *Isham* v. *Greenham,* 1 Hardy 361, quoted in *Dodd* v. *Bartholomew,* 44 Ohio St. 171; *Union Central Life Ins. Co.* v. *Caldwell,* 68 Ark. 521; *Weinberg* v. *Naher,* 22 L. R. A. (N. S.) 956, and 28 Am. & Eng. Ency. Law, p. 8.

In the present case Read's Drug Store had been asserting their right and intention to return the unsold Muco-Solvent and receive back the purchase price when the time at which they could do so should arrive. They offered to do so when suit on the account for staple drugs was threatened. The Hessig-Ellis Drug Company had denied their right to return these goods, and instituted the present suit on the very day the right to return attached,

although it had notice that the Read's Drug Store was insisting on such right and would exercise it when the time for so doing arrived. It is manifest, then, that a formal tender would have been refused. This was "a sufficient reason for not making the tender, on the principle that the law does not require one to do vain or useless things." Therefore the court erred in not submitting to the jury the question of the waiver of tender.

And, if that issue had been found in favor of Read's Drug Store, it had the right to set off the invoice price of the unsold Muco-Solvent against the account of the Hessig-Ellis Drug Company against it for the staple drugs.

Other assignments of error are pressed upon us as grounds for reversal, but, as they are in regard to matters that will not likely arise on a new trial, we will not consider them.

For the error of the court in not submitting the question of the waiver of a tender of the unsold Muco-Solvent by the Hessig-Ellis Drug Company, and for the error in the court's instructions, as indicated in the opinion, the judgment must be reversed, and the cause remanded for a new trial.

JOBE v. CALDWELL.

Opinion delivered January 17, 1910.

1. STATE—ALLOWANCE OF CLAIM AGAINST—VALIDITY.—When there is an available fund duly appropriated for the purpose of paying a claim against the State, the Auditor cannot question the validity or regularity of the acts of any other officer or tribunal authorized to pass upon and certify the justness of the claim covered by the appropriation. (Page 511.)
2. MANDAMUS—COMPELLING AUDITOR TO ACT.—The Auditor of State acts in a ministerial capacity in issuing warrants on certificates of an officer or tribunal authorized to pass upon and certify the justness of a claim covered by an appropriation, and can be compelled to act when he wrongfully refuses to do so. (Page 512.)
3. STATE—VALIDITY OF APPROPRIATION FOR CAPITOL.—The act of 1903, appropriating the sum of one million dollars for the purpose of completing the new State Capitol building, in so far as it undertakes to appropriate money for that purpose for a longer period than two years, is in conflict with Const. 1874, art 5, § 28, forbidding the Legislature to make an appropriation for a longer period than two years. (Page 512.)
4. SAME—CONSTRUCTION OF ACT FOR COMPLETING NEW CAPITOL.—Section 6 of the act of May 12, 1909, providing a sum "for the purpose of *com-*

pleting the work [on the new State Capitol] covered by the Caldwell & Drake contract, subject to the changes in this bill," makes an appropriation merely to carry forward the unfinished part of the work covered by the Caldwell & Drake contract, and does not provide for the payment of any sum claimed by Caldwell & Drake under their contract. (Page 513.)

5. SAME—STATE CAPITOL—ALLOWANCE OF CLAIM.—Under section 12 of act of April 20, 1909, providing a commission for adjusting the claims of Caldwell & Drake, the Auditor cannot be compelled to issue a warrant for a claim in favor of Caldwell & Drake which had been allowed by the original State Capitol Commission, created under the act of April 29, 1901, which had not been paid for want of an appropriation, and which was never allowed by the commission created by the act of 1909. (Page 513.)

Appeal from Pulaski Circuit Court, Second Division; *James H. Stevenson,* Judge; reversed.

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

1. Whether the Oldham and Patterson acts of the Legislature are constitutional or not is immaterial to the right decision of this case. This court has already held that an appropriation is void after the lapse of two years. 85 Ark. 171.

2. As to the Oldham Act, that statute "itself furnishes the best means of its own interpretation," and there is no need to resort to other means of interpretation. Sutherland, Stat. Const., § 237. But, if it is necessary to resort to other means to ascertain the legislative intention, then the court may look to public events of sufficient notoriety to be known to all men of reasonable information, to public documents, executive messages, proclamations and recommendations, and to legislative proceedings and journals. 76 Ark. 309. It is clear from the Patterson Act that the Legislature did not intend that the State should pay appellees anything more except such amount as the commission created by the acts should find to be due them after a hearing before the commission. It is also clear, from the third subdivision of section 12 of the Oldham Act, that suit should be brought against appellees if the commission should find they were due the State any amount.

J. W. Blackwood and *James P. Clarke,* for appellees.

1. When any tribunal or officer other than the Auditor has been appointed by law to consider the justness of claims against the State, and in pursuance of law certifies a claim to the Auditor,

his duty to issue the necessary warrant is merely ministerial, and he may be compelled to perform such duty by mandamus. 14 Ark. 700; 20 Ark. 540; 33 Atl. 453; 31 Pac. 614; 26 Pac. 383.

2. An appropriation is the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other. 69 N. W. 373; 50 Neb. 88; 61 Am. St. Rep. 538; 27 Ark. 129; 45 Cal. 149; 41 Pac. 1075; 11 N. W. 860; 21 N. W. 397; 22 Pac. 143; 62 Am. St. Rep. 764. The Legislature at the outset levied a tax, and thereby raised a fund which was dedicated to the completion of the new State Capitol. Acts 1901, p. 225, § 13; Acts 1903, p. 257, § 10. And the act of May 12, 1909 (Acts 1909, p. 730, § 6), is sufficiently comprehensive to include the demand presented by the certificate upon which the warrant was called for in this case. The phrase "for the purpose of completing the work covered by the Caldwell & Drake contract" is merely another way of stating that it was for the purpose of completing the new State Copitol. The claim here is for materials furnished and work done in furtherance of the completion of that building. Nothing in the act of 1909 evidences an intention to separate acts in furtherance of the completion of the new State Capitol into those that are to be paid, and those that are not to be paid, out of such appropriations; but, if susceptible of that construction, it is plainly to that extent unconstitutional, since the Legislature could not divert the fund, wholly or in part, from the purpose for which it was created. When one construction of a statute would not only render it a breach of faith on the part of the State but an invasion of constitutional rights of a party, the court is bound, if possible, so to construe the statute as to lay it open to neither of these objections. 118 U. S. 235. Courts will divest an appropriation act of all improper and illegal conditions which were beyond the contstitutional competency of the Legislature to impose, and will direct payment to the person entitled thereto, when all the laws on the subject are considered together. 13 L. R. A. 177.

3. For the purposes of this action, the act of 1903 is still in force. The appropriation in that act is comprehensive, continuing and perpetual, for the period required to complete and pay for the building of the new State Capitol. The Legislature

had the power to levy a specific tax to raise funds for that purpose and to appropriate the same for a period coincident with the full completion of the building, notwithstanding the two years' limitation contained in § 29, art 5, Const. The opinion in *Moore* v. *Alexander,* 85 Ark. 171, is *obiter dictum,* since it is evident that the act of 1903 contains no provision making the *per diem* allowance of the members of the State Capitol Commission a charge upon the fund. There is no direction to pay the same from a particular fund, nor any direction to pay at all. Sections 1, 2 and 3 of the act; 36 Mo. 65; *Id.* 58; 19 R. I. 393. The opinion in *Moore* v. *Alexander* is wrong, and should be overruled. It overlooks the fact that the Constitution of 1874 provides two methods for the payment of claims against, and discharging public obligations incurred by, the State—one by the allowance of a State tax therefor and the other by an appropriation of money from some general fund for this purpose. Sections 29 and 30, art. 5 and § 11 art. 16, Const. The last named section supplies the rule in this case rather than § 29, art. 5. If the provisions of the Constitution are irreconcilable, it is for the Legislature, and not for the courts, to determine which states the rule of action that must be observed. 13 Kan. 228; 7 Ind. 570; 44 S. W. 923. The State Capitol fund is a trust fund. The circumstances under which that trust arose are not the test of an immunity from the necessity for biennial appropriation. It is the existence of the trust itself which protects the fund from diversion to other purposes. 107 U. S. 565; 138 U. S. 655; 10 How. 219; 39 So. 792; 5 Neb. 278; 53 Pac. 1114. As to origin of the time limit of an appropriation by constitutional provision, see art. 1, § 8, clause 12, Const. U. S., and in this connection see opinion of Solicitor General Hoyt, delivered January 2, 1904, approved by Attorney General Knox, wherein it was held that the inhibition of the Constitution was limited to the mere current "support" of the army, after the same had been mobilized and equipped. Uniform usage of all departments of the State government show that § 29, art. 5, does not apply where the fund is raised by special tax. 15 Ark. 664; 37 L. R. A. 189. See also 76 Ark. 197.

4. The Legislature had no power to repeal the appropriation in the act of 1903, and thus defeat matured and certified demands. Even if the Legislature in the act of 1909 had attempted in precise and comprehensive language to repeal the appropriation on

the faith of which the vested rights of appellees had accrued, such repeal would be wholly void as being in violation of our own Constitution and that of the United States providing that the State shall pass no law impairing the obligation of a contract. 16 Cal. 50; 30 Ill. 445; 70 Ark. 583; 81 Am. Dec. 199; 103 U. S. 358; 4 Pet. 514; 7 Cranch 164; 24 Ark. 319; 49 Ark. 193; 103 U. S. 5; 74 Ky. (11 Bush), 417; 89 N. Y. 45; 76 N. C. 199; 42 Ark. 244.

5. The State is estopped to set up, as against the payment of this claim, the invalidity of her purposely misleading legislation whereby she induced appellees to enter into a contract and to deliver to the State the value represented by the certificate which is the foundation of this action. 72 Ark. 195; 28 La. 460; *Id.* 121; 2 Herman on Estoppel, 1264, note 6; 11 Fed. 297.

McCULLOCH, C. J. This is an action instituted by Caldwell & Drake in the circuit court of Pulaski County against John R. Jobe, Auditor of the State, praying for a writ of mandamus commanding that official to issue to them a warrant on the State Treasury for the sum of $18,899.54 in payment of vouchers issued by the State Capitol Commission, aggregating that sum, on their contract for constructing a new State Capitol building. The Auditor refused to issue the warrant, on the alleged ground that no appropriation of funds had been made by the General Assembly of the State for the payment thereof. The circuit court rendered judgment awarding a writ of peremptory mandamus, and the Auditor appealed to this court.

The Auditor bases his refusal to issue the warrant on a provision of the Constitution which reads as follows: "Sec. 28. No money shall be drawn from the treasury except in pursuance of specific appropriations made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years." Art. 5, Const. 1874.

The statutes concerning the building of the State Capitol, and levying a tax and making appropriation therefor, which bear on the present controversy, are as follows:

The General Assembly of 1903 passed an act entitled, "An act to provide for the completion of the State Capitol building, and for other purposes." Section 10 of that act contains the fol-

lowing provision: "That, for the purpose of raising funds to carry out the provisions of this act, the sum of one million dollars, or so much thereof as may be necessary, be and the same is hereby appropriated for the purpose of completing the new State Capitol building; and, in order to raise said sum, there is hereby appropriated all funds in the State Treasury heretofore collected for or appropriated as a State Capitol fund, and the tax of one-half of one mill on each dollar of taxable property now levied in accordance with the act provided for the completion of the State Capitol building, and for other purposes, approved April 29, 1901, shall be continued to be levied and collected and appropriated, as provided in said act until the said Capitol is fully completed." Acts 1903, c. 146.

The Commission created by this statute entered into a contract with Caldwell & Drake for the construction of the Capitol building at a stipulated price for the material and work, and the latter proceeded with the work of constructing the building. The vouchers in question were issued to Caldwell & Drake in October and December, 1907, after which the contractors ceased operations in the construction of the building before it was completed. Neither the General Assembly of 1905 nor of 1907 made any appropriation of funds for the purpose of completing the Capitol building.

The General Assembly of 1909 passed an act approved April 20, 1909, entitled "An act to create a Commission to adjust the controversy between the State of Arkansas and Caldwell & Drake, and for other purposes." This statute is commonly known as the Patterson Act, and its provisions may be summarized as follows:

Section 1. Relieves the Capitol Commission from further duties as such; discharges the architect of the building; cancels the contract with Caldwell & Drake.

Sec. 2. Creates a commission, composed of certain citizens, whose names are mentioned, to be known as "A commission to settle the controversy between the State of Arkansas and Caldwell & Drake," and provides that, "upon the organization of said commission, if Caldwell & Drake shall file with said commission their agreement in writing to accept its action in full settlement and satisfaction of all their claims, on account of their contract to erect the Capitol building, said commission will proceed to investigate the controversy, hear such testimony as it may deem

proper, and make such report as it may deem a just and equitable settlement of the whole matter, fixing the amount, if any, the State should pay Caldwell & Drake, and what amount, if any, Caldwell & Drake should refund to the State, if the commission finds they have been paid more than was justly and fairly due them."

Sec. 3. Provides procedure of the commission, etc.

Sec. 4. Commission to file report with Secretary of State, and copies with President of Senate, Speaker of House and Governor.

Sec. 5. Provides punishment of witnesses who testify falsely.

Sec. 6. Expenses of the commission to be paid by warrant on treasury.

Sec. 7. Governor to appoint counsel to represent the State before the commission.

Sec. 8. Faith of the State is pledged to abide by and carry into effect the acts of the commission.

The General Assembly of 1909 also passed an act, approved May 12, 1909, entitled, "An act to provide for carrying forward the work of the new State Capitol, and making appropriations therefor, and for paying any sum which may be found due the former contractors, and for the creation and appointment of a Capitol Commission and defining its duties, and for other purposes, to carry out the provisions of this act." This is commonly known as the Oldham Act. It provides for a new Capitol Commission, to be composed of the Governor and four other citizens, to be appointed by him, in the place of and as successor to the old commission. The sections of this act bearing on the present controversy are as follows:

"Sec. 5. It shall be the duty of the Capitol Commission to cause the new State Capitol to be completed according to the original plans and specifications, except as hereinafter provided. The commission shall, so far as is safe and practicable, retain the building now under construction. The said plans and specifications shall be subject to revision and alteration by the commission, and the architect shall make changes when required by the commission to do so.

"Sec. 6. For the purpose of completing the work covered by the Caldwell & Drake contract, subject to the changes in this

bill, the sum of three hundred and thirty thousand ($330,000) dollars is hereby appropriated out of any funds in the treasury to the credit of the State Capitol fund, not otherwise appropriated, or so much thereof as may be necessary. * * *

"Sec. 7. The Capitol Commission is hereby directed to perform these duties:

"(a) To cause to be removed all the defective work and material and to replace the same in a substantial and workmanlike manner.

"(b) To change the construction of the present building so that the hallways shall be lined with white marble, with a scagliola finish on all the interior columns. * * *

"(d) To cause a proper water supply to be put in suitable places.

"(e) To change the plans so as to substitute stone dome for copper dome.

"Sec. 8. For the purpose of carrying out section 7 of this act, the following additional sums are appropriated from the Capitol fund:

"For the marble in the hallways and scagliola finish on the columns, the sum of one hundred thousand ($100,000) dollars.

"For replacing the defective work and material, one hundred and seventy-five thousand ($175,000) dollars.

"For water connections, salary and expenses of the commission, architect and superintendent, secretary of the commission, and incidental expenses, the sum of seventy thousand ($70,000) dollars.

"For substituting stone dome for copper dome, one hundred and twenty thousand ($120,000) dollars.

"That the Capitol Commissioners be and they are hereby required to file an itemized account with the Auditor showing the actual cost by items of tearing out and replacing any defective work in the new State Capitol.

"Sec. 9. The commission is hereby authorized to use any unexpended balance of an appropriation for any item in this act to any other item herein where the appropriation for an item is insufficient, and such unexpended balances are hereby specifically placed in charge of the commission to use upon other items where

"Sec. 10. When the work is done under contract, said contract shall be publicly let; and notice of the letting shall be given by publication in at least one newspaper in Little Rock, one in Memphis, one in St. Louis and one in Chicago, for at least twenty days prior to the letting. The commission shall require bonds of the contractors, an amount double the amount to be received by them under such contracts, to faithfully perform their contract and discharge all debts for material and labor incurred under their contracts.

* * * * * * * * * * *

"Sec. 12. The Capitol Commission is hereby required to certify to the Auditor of State the amount which may be found due Caldwell & Drake by the commission to settle the controversy between the State of Arkansas and Caldwell & Drake, created by an act of the General Assembly, approved April —, 1909, known as the 'Patterson Act,' on account of Capitol construction, should said commission find any sum due them. Sufficient money to pay the award in favor of Caldwell & Drake by said commission, if it should be made, is hereby appropriated out of the Capitol fund. The Auditor is required to issue his warrant on the Treasurer in pursuance of the certificate of the Capitol Commission for the amount so certified, and the Treasurer shall pay the same or other warrants provided by section 4 of this act, as required to be paid. In the event the said arbitration commission should find any sum due from Caldwell & Drake to the State, suit shall immediately be brought against them on their bond.

* * * * * * * * * * *

"Sec. 15. The object and purpose of this act is to complete the new Capitol, except the terrace, power-house, heating and lighting, and the work below basement floor line, according to the appropriation herein made, and is to create a new commission in place of the Board of Capitol Commissioners and to provide for the substitution of other contractors and architect in place of Caldwell & Drake and Geo. R. Mann, whose contracts have heretofore been canceled, and are hereby canceled, set aside and held for naught, on account of their failure to comply with their respective contracts."

The only controverted question of law in this case is whether or not a valid appropriation has been made by the Legislature

for the payment of appellee's claim, evidenced by the vouchers issued to them by the former Capitol Commission. It is conceded by all that the plain letter of the Constitution forbids that any money be drawn out of the treasury except in pursuance of specific appropriations made by law. On the other hand, it must be conceded that when there is an available fund duly appropriated for the purpose, the Auditor cannot question the validity or regularity of the acts of any other officer or tribunal authorized to pass upon and certify the justness of the claim covered by the appropriation. He acts in a ministerial capacity in issuing warrants upon such certificates, and can be compelled by mandamus to act when he wrongfully refuses to do so. *Danley* v. *Whiteley*, 14 Ark. 687.

Learned counsel for appellees make two contentions as to there being an appropriation to pay this claim: First, that the appropriation made in the act of 1903 was a continuing one, which is still available; and, second, that section 6 of the Oldham Act of 1909 made an appropriation available for the payment of this claim.

The case of *Moore* v. *Alexander*, 85 Ark. 171, settles the first proposition adversely to this contention. We are asked to overrule that case or to distinguish it, on the ground that, as it involved a claim of one of the Capitol Commissioners for salary, it was unnecessary to decide whether or not the appropriation in the act of 1903 was a valid continuing one. We did, however, put that decision wholly on the ground that the appropriation was not a valid continuing one, because the provision of the Constitution hereinbefore quoted forbids an appropriation for a longer period than two years; and in effect we held that it was necessary to decide that question. Substantially the same arguments were made in that case as in this in support of the contention that the provision of the Constitution referred to above does not apply to appropriations made for such specific purposes as this. We have carefully re-examined the question, in the light of the very forceful and persuasive argument of learned counsel, but see no reason for changing the view expressed in the former opinion. We decline to overrule that case, and we treat the doctrine therein announced as the settled construction of the constitutional provision in question. The fact that the claim is one for work done under the building contract does not affect the question whether or not

the Legislature can make appropriations continuing for a longer period than two years. The Constitution, of course, takes cognizance of valid claims and no others, and it is to those claims that are applicable the inhibitions that "no money shall be drawn out of the treasury except in pursuance of specific appropriations made by law," and that "no appropriation shall be for a longer period than two years."

The other contention is that section 6 of the Oldham Act appropriates funds for the payment of these vouchers. Counsel for appellees very correctly, we think, define an appropriation to be "a setting apart from the public revenue of a certain sum of money for a specified object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other." Applying that test, does section 6 of the act appropriate any funds for this purpose? That section appropriates $330,000 "for the purpose of completing the work covered by the Caldwell & Drake contract, subject to changes in this bill." Considering the whole of the statute together, what does the language of this particular appropriation mean? Manifestly, it means, for the purpose of carrying forward and completing the unfinished part of the work covered by the Caldwell & Drake contract, subject to such changes as the commission might make under the authority of the statute. Sections 7 and 8 direct the commission to remove all defective work and material (meaning, of course, that already done which might be found to be defective), and appropriates $175,000 for replacing such defective work and material. These portions of the act look forward and not backward, and the Capitol Commission, under the provisions of the act, have nothing to do with Caldwell & Drake except, as provided in section 12, to certify to the Auditor the amount, if anything, found to be due them by the commission created by the Patterson Act.

Section 12 is the only part of the act which attempts to recognize any rights of Caldwell & Drake. Whether the appropriation attempted in that section was abortive because no maximum sum was mentioned, we are not called on to decide in the present case, as that appropriation was to pay an award of the commission created to settle the controversy, and it is not alleged that the controversy was ever submitted to the commission or any award made. Until the amount of claims be adjusted and certified in the

manner prescribed by the legislative branch of the government, the Auditor cannot be compelled by mandamus to issue a warrant, even if there be an appropriation.

"It cannot be doubted that the Legislature has the power by law to refer to her officers or agents, other than the Auditor, the settlement of accounts or claims against the State, and by whose decision, within the scope of their authority, the State may agree to become bound. * * * It appertains exclusively to the sovereign power to provide the mode and means by which the claims of public creditors are to be ascertained and liquidated, and, without the express consent of the State allowing herself to be sued, such a case is not one of judicial cognizance. Nor does the submission of the State to an ordinary suit at law for her alleged indebtedness change, in this respect, the theory of a mandamus. The assumption of such a jurisdiction over the accounting officers of the treasury would not only disturb their regular business, but it would have the effect of drawing indirectly to the courts the irresponsible power and impossible duty of regulating the fiscal affairs of the government." *Danley* v. *Whiteley, supra.*

It is argued with much earnestness that the words in section 6 of the act, "for the purpose of completing the work covered by the Caldwell & Drake contract," are sufficiently comprehensive to cover work already done, as well as that still to be done after the passage of the act. It is true that the precise meaning of the words "to complete" or "for the completion of" is sometimes uncertain and indefinite, and the idea intended to be conveyed by them may depend upon the connection in which they are used and the object to which they refer. The Supreme Court of Indiana, in construing a private contract, said: "The word 'complete,' as used, signifies the finishing of unfinished work, bringing it from the condition in which it then was to a state in which there was no deficiency. The instrument is not broad enough to include the laborers' claims preceding its date in the list of preferred creditors." *McElwaine* v. *Hosey,* 135 Ind. 481.

In Massachusets it was held that a contract to "cause to be fully completed" certain houses then unfinished, and to guaranty that said houses should be "fully completed and finished as aforesaid to the acceptance" of the owner, should be construed to refer only to the unfinished work, and not to prior deficiencies in

workmanship or material. *Hyannis Savings Bank* v. *Moors,* 120 Mass. 459.

The New York Court of Appeals, in an early case, construed a clause of the Constitution authorizing an annual appropriation of certain funds to the completion of canals to forbid the use of the funds in payment of interest on borrowed money. *Newell* v. *People,* 7 N. Y. 9.

Now, when we consider the Oldham Act as a whole, especially in conection with the Patterson Act, to which it expressly refers, can it be reasonably inferred that the framers of the act intended to appropriate any part of the $330,000 mentioned in section 6 to the payment of Caldwell & Drake for any work already performed by them? We think not. Such a construction would defeat the whole legislative scheme outlined and manifested in the statutes enacted during the same session concerning the State Capitol building, which was to abolish the former Capitol Commission, cancel the contract with Caldwell & Drake and create a tribunal to ascertain and adjust the state of accounts between the State and Caldwell & Drake, and to create a new Capitol Commission for the completion of the building, and to make appropriations for that purpose. We do not pause to consider now to what extent the cancellation of the Caldwell & Drake contract was valid, for the question is not presented; but the Legislature undoubtedly has the power under the Constitution either to make appropriations of funds for legitimate purposes, or to entirely withhold appropriations, however meritorious and lawful the demands against the State may be. And certainly we should consider the whole of these statutes, without stopping to determine how far they may be valid, in ascertaining the legislative intent in making the appropriation referred to.

We entertain no doubt as to the intention of the Legislature in this respect, and we hold that the appropriation in section 6 of the Oldham Act is not available for the payment of these or other claims of Caldwell & Drake for work done or material furnished under their contract prior to the passage of the statute.

The judgment of the circuit court is therefore reversed, and the petition for mandamus is dismissed.

WOOD, J., (dissenting). Appellees allege *"that plaintiffs under their contract did a large portion of the work"* on the State Capitol, that the Board of Capitol Commissioners, whose duty it

was under the law, had issued certificates to appellees showing the amount due them for work done, and that these certificates entitled them to warrants of the Auditor upon the Treasurer for the payment of the amounts aggregating $18,899.54.

The Auditor does not deny the facts set forth in the petition. On the contrary, by his demurrer he admits that the facts are true, and depends solely on the ground of no appropriation. Acts of the Legislatures of 1901 and 1903 had appropriated for the "purpose of completing the New State Capitol Building" the sum of one million dollars. Appellees entered into a contract with the State to do the work for a specified sum. The act of 1903, under which the contract was executed, after creating the Board of Capitol Commissioners, prescribes, among other duties, that "the said Capitol Commissioners shall certify to the Auditor of the State, from time to time, such sum or sums of money as may be due such persons as may have claims against the State under the terms of this act, and the person or persons in whose favor such certificate is issued shall be entitled to a warrant upon the treasury for the amount therein named, and the State Auditor shall draw his warrant for the same, and the Treasurer shall pay the same from the State Capitol Fund, appropriated by this act."

Appellees held their certificates issued under the authority of the above section. The Legislatures of 1905 and 1907 neglected to make the biennial appropriations. The Legislature of 1909 in the act of May 12 provides: "Sec. 6. For the purpose of completing the work covered by the Caldwell & Drake contract, subject to the changes in this bill, the sum of $330,000 is hereby appropriated out of any funds in the treasury to the credit of the Capitol fund."

At the time this appropriation was made there was $330,000 in the treasury to the credit of the Capitol fund. This money, under the Constitution, could only be used "for the purpose of completing the New State Capitol Building," since that was "the purpose for which it was levied." Acts of April 29, 1901, and April 16, 1903; § 11, art. 16, Const. 1874. The language of the acts of 1901 and 1903 making the appropriation is: "For the purpose of completing the new State Capitol Building." The act of 1909 uses the same language, except it substitutes the words "work covered by the Caldwell & Drake contract" for the words "New State Capitol Building." But the words in the several

acts mean precisely the same thing. If any significance beyond this could be given the words, "work covered by the Caldwell & Drake contract," it would be to show that the Legislature of 1909 had in mind specifically work that had been done by Caldwell & Drake under their contract, as well as work that was to be done by others in "completing the New State Capitol Building" according to the terms and specifications of the Caldwell & Drake contract, but "subject to the changes in the bill." The word "completing" in the act of 1909 means just what it meant in the acts of 1901 and 1903. The Legislature used the term "completing" in its ordinary sense. To "complete" means "to bring to a state in which there is no deficiency." Webster, Dictionary. When applied to a building, it includes everything from foundation to roof necessary to the finished structure. The language included, and was doubtless intended to include, an amount sufficient to pay appellees for the work that had been done by them in the building of the New State Capitol (for which they had not already been paid), as well as an amount to pay for the work to be done by others. Both were necessary for "completing the New State Capitol." The work that *had been done* was just as essential as the work *that was to be done*. The Legislature has made no distinction in the appropriation between liabilities incurred in the past and those to be incurred in the future in the work necessary for the completion of the New State Capitol, and certainly this court should make none. It seems to me that the only fair and reasonable construction of the language of the act makes it an appropriation to pay for *all the work* done and to be done "for the purpose of completing the New State Capitol Building." Thus construed, the act would not be under the ban of section 11, art. 16, of the Constitution inhibiting the diversion of funds. Otherwise it would be, for the Legislature could not, without a palpable diversion, exhaust the money in the treasury to the credit of the Capitol fund in appropriations to pay for certain parts of the work, and thereby exclude other parts equally essential to the "completed" building. For instance, the Legislature could not appropriate all the money in the New State Capitol fund to pay for the roof, and thereby refuse to pay for the foundation. But it is said that the intention not to make an appropriation to pay appellees appears when section 6, above, is considered, as it must be with other sections of the same act, and of the act of April

20, 1909. Let us see. The act of April 20, 1909, provides: "Sec. 1. * * * That the contract entered into between the State Capitol Commission and Caldwell & Drake, in August, 1903, for the erection of the Capitol building, be and the same is hereby annulled, cancelled and set aside."

Succeeding sections provide for a "commission to settle the controversy between the State of Arkansas and Caldwell & Drake," and its method of procedure, concluding by saying in section 8: "The faith of the State is hereby pledged to abide by and carry into effect the commission." The act makes no appropriation to pay appellees anything, if the commission should find in their favor, but in pledging the faith of the State to abide by and carry into effect the work of the commission it shows that the intention of the Legislature was to pay appellees whatever, if anything, might be due them. The act made it optional with Caldwell & Drake to submit their claims to the commission. It nowhere prescribes that the submission to the commission of their controversy with the State is a condition precedent to payment of whatever might be due them.

Section 12 of the Act of May 12, 1909, provides: * * * "Sufficient money to pay the award in favor of Caldwell & Drake by said commission, if it should be made, is hereby appropriated out of the Capitol fund." Certainly, this does not show an intention on the part of the Legislature not to make an appropriation to pay Caldwell & Drake whatever might be due them. By this section 12 the Legislature simply meant that, if any amount should be found due Caldwell & Drake in the manner there indicated, such amount should be paid out of the $330,000 already appropriated by section 6 "for the purpose of completing the work covered by the Caldwell & Drake contract," or the "New State Capitol Building."

Section 12 was not an appropriation in itself because it does not designate the maximum amount in dollars and cents which might be drawn to pay Caldwell & Drake. Sec 29, art. 5, Const. But the section does show indisputably that the Legislature believed it had already, in the prior section 6, made a sufficient appropriation to pay Caldwell & Drake whatever amount might be due them. Why else should the Legislature in the same section have directed a warrant to be drawn on the Treasurer for the amount due appellees? Such an act would have been the sheerest

folly if there had not been an appropriation. It can not be said that section 12 excludes Caldwell & Drake from the appropriation made in section 6, under the doctrine of *expressio unius est exclusio alterius,* for, as I have shown, section 12 was not an appropriation at all, while section 6 was. The two sections harmonize, and they show clearly that the Legislature, in making an appropriation "for completing the New State Capitol Building," intended to include, and believed they had done so, the amount that might be due appellees for work done by them. Of course, it was not necessary to name the appellees any more than it was to name various other parties who had furnished or might furnish money, material and labor for the work of completing the New State Capitol. If the act was broad enough to compass appellees' claim without naming them or designating the specific amount due them, it was sufficient to meet all the requirements of an appropriation act. To my mind a cogent argument in support of the view I have presented is that the Patterson and Oldham acts cancel the contract of Caldwell & Drake with the State and discharge them, substituting other contractors. It would have shown downright dishonesty in the members of the Legislature who passed these acts to have cancelled the contract of appellees with the State, without making some provision to pay them whatever amount might be due them for work they had done under and according to their contract. Futhermore, acts cancelling the contract and discharging the contractors, without in any manner recognizing the obligations of the State under the contract, would reveal the grossest ignorance of, or the most flagrant disregard for, constitutional provisions which the members of the Legislature had sworn to support and defend. Our State Constitution provides: "No law impairing the obligations of contracts shall ever be passed." Sec. 17, art. 2. The Constitution of the United States provides: "No State shall pass any law impairing the obligations of contracts." Sec. 10, art. 1. One of the obligations of the contract between the State and the appellees was that the State should pay them for the work done under the contract. Under the State and Federal Constitutions above quoted, the Legislature could pass no law impairing the obligations of the State to pay appellees for the work that had been done by them under the contract for the building of the State Capitol.

This is the law in our own and all jurisdictions having similar constitutional provisions: *McConnell* v. *Ark. Brick & Mfg. Co.*, 70 Ark. 568; *St. Louis, I. M & S. Ry. Co.* v. *Alexander*, 49 Ark. 193; *Berry* v. *Mitchell*, 42 Ark. 244; *Hawkins* v. *Filkins*, 24 Ark. 319; *Hall* v. *Wisconsin*, 103 U. S. 5; *Wolf* v. *New Orleans*, 103 U. S. 358; *State of New Jersey* v. *Wilson*, 7 Cranch, 164; *Providence Bank* v. *Billings*, 4 Pet. 514; *Danolds* v. *State*, 89 N. Y. 45; *Baldwin* v. *Commonwealth*, 74 Ky. (11 Bush) 417; *Clements* v. *State*, 76 North Carolina, 199; *Trustees* v. *Bailey* (Fla.), 81 Am. Dec. 199; *McCauley* v. *Brooks*, 16 Cal. 50.

It will not do to say that the Legislature, in the act cancelling the contract and creating the commission of arbitration, has made an appropriation to pay them whatever, if anything, that commission might have found to be due. For I have shown, if section 6 of the act of May 12, 1909, does not make an appropriation to pay them, then no appropriation whatever is made in the acts by which the contract has been cancelled.

Now, the State cannot be compelled to pay even her honest debts. For she can not be sued. But neither can she by legislation impair the obligations of any contract she has entered into. The one provision of the Constitution is as sacred as the other. She may, by the law under which her contract was made, or the law in existence at that time, designate the agents or tribunals that shall determine the amount that may be due under the contract. But when the agency or tribunal named by the contract and the law, which is a part of the contract, determines the amount, then she cannot by act of her Legislature repudiate her obligation to pay by cancelling the contract under which the obligation accrued. The obligations of every contract are fixed by the contract itself and the law under which it was executed. If the State differs with parties to the contract with her as to the amount due, she may through her Legislature appoint a commission to arbitrate the amount if the other party to the contract consents thereto. But she can not impose the condition that unless the other party to the contract submits to the arbitration she will cancel the contract. She can not shuttlecock from board to board the disputed claims of parties who contract with her. If she disputes the amount due and desires by affirmative action to have the matter determined, she must go, like any other suitor, into the tribunals provided by the Constitution for settling disputes arising out of

contractual obligations. If her legislative agents lay their hands upon a contract she has made to destroy it without in any manner recognizing the binding force of her obligations, their act in so doing is unconstitutional and void.

All this the Legislature knew. Unless impelled thereto by language the most imperative and unmistakable, we must so construe their acts as not to impeach their intelligence and integrity.

"Where one construction of a section of a statute would not only render the section a breach of faith on the part of the State (United States), but an invasion of the constitutional rights of the appellee, we are bound, if possible, so to construe the law as to lay it open to neither of these objections." *United States* v. *Central Pac. Rd. Co.*, 118 U. S. 235.

Hence I conclude that the act of May 12, 1909, makes an appropriation to pay appellees whatever amount might be due them. Whether or not the Oldham and Patterson acts are void notwithstanding the appropriation, I do not decide. For in my view of the case that question is not presented.

There being no controversy as to the justness and correctness of the claim of the appellees, the judgment of the lower court is right, and should be affirmed.

ROACH v. RECTOR.

Opinion delivered November 22, 1909.

1. PARTNERSHIP—TEST.—As between the parties to an alleged partnership, the true test of a partnership is whether the parties actually joined together to carry on a trade or adventure for their common benefit, each contributing property or services and having a community of ownership in the property and of interest in the profits of the business. (Page 525.)
2. TROVER—LIABILITY OF JOINT TORT FEASORS.—In case of a wrongful conversion of property by several persons, the law permits an action and a recovery against all the wrongdoers or against any number less than the whole. (Page 528.)
3. AGENCY—WHEN PRINCIPAL BOUND.—A principal is bound by the acts of his agent within the authority that has been actually given, and this includes, not only the precise act which is expressly authorized, but also whatever usually belongs to the doing of it or is necessary to its performance. (Page 528.)
4. TROVER—DEFENSE.—A creditor who has seized his debtor's goods without authority of law and sold them cannot mitigate or defeat a

recovery by showing that the property taken has, without the debtor's assent, been applied to the debt. (Page 529.)

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

Wright Prickett and *Read & McDonough,* for appellants.

The cause should have been transferred to equity. The facts disclose a partnership between the plaintiff and N. M. or E. T. Roach. 87 Ark. 142; 134 Pa. 482; 104 Cal. 302; 35 Ga. 234; 74 Ark. 437; 63 Ark. 518; 44 Ark. 423; 80 Ark. 23; 145 U. S. 611.

Hal L. Norwood, J. I. Alley, J. S. Lake and *Wm. H. Rector,* for appellee.

1. As to whether or not a partnership exists, it is the intention of the parties which controls and is conclusive as between them. 2 Ark. 346; 22 Ark. 381; 39 Ark. 280; 44 Ark. 423; 54 Ark. 384; 56 Ark. 281; 42 Ark. 390; 4 Ark. 421; 74 Ark. 437; 87 Ark. 412; 145 U. S. 611; 71 Ill. 148; 28 O. St. 319; 30 Cyc. 260-388.

2. All the instructions are to be considered together in determining whether either of them is erroneous. 74 Ark. 377; *Id.* 431; 77 Ark. 458.

3. Exceptions not brought into the bill of exceptions will not be considered here. 74 Ark. 364; 8 Ark. 428; 25 Ark. 503; 37 Ark 399; 33 Ark. 807.

4. That the verdict was in favor of E. T. Roach is no ground for reversing the judgment against N. M. Roach. They were severally liable, and she will not be heard to complain because he escaped. 34 Ark. 63; 57 Ark. 547.

FRAUENTHAL, J. The appellee, George L. Rector, who was the plaintiff below, instituted this suit in the Polk Circuit Court against the defendants, N. M. Roach, E. T. Roach, Fred Teeter and B. E. Milam, for damages on account of the wrongful taking and conversion of a stock of merchandise. In his complaint he alleged that in 1905 and prior to that time his wife, W. K. Rector, was engaged in the mercantile business at Gillham, Ark., and that she was indebted to the defendant N. M. Roach; that N. M. Roach was the wife of defendant E. T. Roach, who was her agent in the management and conduct of her business. In January, 1906, W. K. Rector was adjudged a bankrupt, and her stock of merchandise was ordered sold in the

bankruptcy proceedings. Prior to the day of the sale of said goods E. T. Roach, acting as the agent of his wife, conferred with the plaintiff relative to her said indebtedness against W. K. Rector and the assets of that business; and they considered that, after the sale of the goods and the distribution of the proceeds amongst the creditors, there would still remain due to N. M. Roach $800. They then agreed that at the sale of the goods under the bankruptcy proceedings E. T. Roach would bid in the stock of goods for the plaintiff, who would then own and conduct the business and repay the amount bid for the goods and also pay N. M. Roach the said balance of her indebtedness against W. K. Rector.

In pursuance of said agreement E. T. Roach did at said sale bid in said stock of goods, and did purchase same for the plaintiff at and for the price of $3,300; and plaintiff did for said purchase price execute to N. M. Roach his note for $3,000, payable 90 days after date, and did afterwards pay to her the sum of $300, the balance of the purchase money for the goods. He alleged that he thereupon took possession of the stock of goods, and conducted the business at Gillham for a time, and later moved the stock of goods to Mena, Ark., where he carried on the business until April, 1907, when E. T. Roach, acting for and as the agent of his wife, N. M. Roach, wrongfully took possession of the goods and dispossessed him of the storehouse, and then sold the goods to the defendant Fred Teeter, who is a brother of the said N. M. Roach; that Teeter held possession of the goods and business until August, 1907, when he sold same to the defendant B. E. Milam. He alleged that the goods in April, 1907, were of the value of $5,754.27. He asked for judgment for the value of the goods and also for damages incurred by reason of being deprived of the business.

The defendants, in their answer, denied that the plaintiff was the owner of said goods, or that same were purchased by or for him; and denied in detail each allegation of the complaint. They alleged that at the sale of the goods of W. K. Rector under the bankruptcy proceedings the said E. T. Roach purchased the same for himself and solely as his own property, and employed the plaintiff at a salary of $40 per month to conduct the business under the name of the "Cash Buyers' Union;" and that "E. T. Roach was at all times the absolute owner of the stock of goods,

and was in possession of the same, and the plaintiff was conducting the said business for E. T. Roach." They alleged further that it was agreed that the stock of goods should be sold as soon as possible, and the proceeds applied to the payment of the amount bid and paid for same at said sale in bankruptcy proceedings and to the payment of any goods that should be bought to replenish the stock; and that, after these sums were all paid and the further sum of $800 to N. M. Roach, the said E. T. Roach would turn the stock remaining over to plaintiff.

In their answer the defendants asked that the cause be transferred to the chancery court, which motion to transfer the court overruled.

The cause was tried before a jury, and there was a sharp conflict in the evidence introduced by the respective parties. The testimony on the part of the plaintiff tended to prove the allegations as set out above in his complaint; while that on the part of the defendants tended to establish the allegations in the answer; upon the one hand tending to establish that the stock of goods at said sale in the bankruptcy proceedings was purchased for the plaintiff and was his sole property, and upon the other hand tending to prove that said stock was bought by E. T. Roach as his sole property.

The evidence tended further to prove that when the plaintiff and E. T. Roach were conferring, just prior to the day of the sale of said stock of goods under the bankruptcy proceedings, relative to the purchase thereof, it was thought by them that the same would bring $3,000 at the sale. In order to obtain that money, the plaintiff executed to N. M. Roach his note for $3,000, payable 90 days after date, and this note was indorsed by N. M. Roach and negotiated to the National Bank of Mena, of Mena, Ark., and a certified check was given therefor by said bank payable to N. M. Roach. And on the day of the sale, when the stock brought $3,300, this certified check was paid over to the receiver making the sale, and the balance of $300 was paid by check of N. M. Roach. The testimony on the part of the plaintiff tended further to prove that he renewed the above note from time to time, paying the interest thereon, until April, 1907, and that the note was finally taken up or paid to the bank by N. M. Roach, but was not actually marked paid by said bank, but was turned back to N. M. Roach; that plaintiff at once took possession

of the stock of goods after the sale in the said bankruptcy proceedings and conducted the business at Gillham for several months, and paid to defendant Roach $300 on the balance of the purchase price of said stock of goods; that later he moved the stock to Mena, where he conducted the business until April, 1907; and that from time to time he put into the business moneys and goods of his own amounting to $1,800; that during the time E. T. Roach advised with him concerning the management of the business, and at his suggestion employed defendant Teeter as a clerk in the store; and that shortly thereafter they dispossessed the plaintiff of the store house and stock of goods by changing the locks and taking possession of and disposing of the stock over his protest and against his rights.

There was considerable testimony introduced by the parties to sustain their respective contentions, but the above presents the substantial portions of the evidence relative to the issues which are involved in the determination of this case.

A verdict was returned by the jury in favor of the plaintiff for $5,754.27, the value of the stock of goods in April, 1907, the time of the alleged conversion, and against the defendants N. M. Roach and Fred Teeter. From the judgment entered thereon these two defendants prosecute this appeal.

The first question involved in this case to be determined is whether or not the plaintiff and the defendant N. M. Roach were partners in the stock of goods and business after the purchase at the sale under the bankruptcy proceedings. Upon the contention that the allegations in the pleadings and the testimony showed that such relationship did exist between these parties, the defendants requested at the trial and now urge that this cause should have been transferred to the chancery court.

It has been found difficult to state any precise rule or any precise test for the determination of the question of when the relation of partnership is created or exists. The difficulty arises in those cases where the agreement does not profess to create a partnership, and yet it is contended that the effect of the agreement is to create one. Each case is so dependent upon its own varying circumstances, and distinctions are made between a partnership between the parties themselves and a partnership as to third persons, that the determination of the question must necessarily depend upon the special facts of each case. There are

certain well established principles, however, which fix the requisites of a partnership. The rule recognized and followed for a long time was that participating in and receiving a certain share of the profits of the business was a conclusive test of a partnership. But this rule has been abandoned in England and generally in America. In this State the test of a partnership between the parties is thus formulated by Chief Justice COCKRILL in the case of *Culley* v. *Edwards,* 44 Ark. 423:

"But while the old rule prevailed that participation in the profits was conclusive as to third persons, and before the introduction of the modern principle that it is a mere circumstance to show the relation of principal and agent between the persons taking the profits and those carrying on the business, the test of partnership between the parties themselves has always been their actual intent." This is the true test of a partnership between the parties themselves, as recognized in this State. *Johnson* v. *Rothschilds,* 63 Ark. 518; *Rector* v. *Robins,* 74 Ark. 437; *Paris Mercantile Co.* v. *Hunter,* 74 Ark. 615.

This intention to form a partnership may be expressed in the contract, or it may be gathered from the acts of the parties and from the circumstances which may interpret the agreement between them. But there are certain requisites necessary before the law will in any event regard the relationship between the parties as that of partners. In the case of *Meehan* v. *Valentine,* 145 U. S. 611, it is said: "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services and having a community of interest in the profits." There must be a community of interest in the property employed in the business and in the profits as profits themselves. They must be co-principals in the business; and if the business is owned by one of the parties, and the other receives the profits or a portion of the profits in payment for his debt or for services or otherwise, the relationship of partners between them has not been created and does not exist. Parsons on Partnership, § 58; 30 Cyc. 370.

A creditor of a business might under agreement receive a portion of the profits of the business in payment of his debt or by way of interest, and still he would not be a partner of such business. Instead of having an interest in common with the

business, his interest would more often be in opposition to it. 30 Cyc. 372.

As between the parties themselves, before it can be said that the relationship of partners has been created, it is therefore essential that the parties themselves intended by the effect of their contract to form such partnership business, and that they should have common ownership and community of interest in the properties of the business, and that they should share in some fixed proportion in the profits thereof only as profits of the business. *Culley* v. *Edwards, supra; Johnson* v. *Rothschilds, supra;* 30 Cyc. 366.

Measured by these principles, we do not think that the relation of partners was created or existed between the parties in this case under the allegations of the complaint or answer or under the testimony of either party.

The plaintiff contended that he had purchased the property and business solely as his own, and was indebted to the defendant, N. M. Roach, for the purchase money thereof. If, under the agreement, that debt was to be paid out of the business, it would not even be a sharing in any certain portion of the profits nor would it be receiving the profits as profits of the business. Every creditor of the business might or would be paid in the same manner. And if she was held out to third persons as being so connected with the business that she became liable to them, it would not be because she was actually and in fact a partner, but rather because by her acts and conduct she was estopped as to such third persons to deny that she was a partner.

The defendant E. T. Roach contended that he actually bought the property as his own, and was the sole and absolute owner thereof. His contention was that plaintiff had no title to or ownership in the stock of goods; but that, on the contrary, he was to have no interest in it until defendant should turn the remaining goods over to him after certain debts were paid.

Each of the parties was claiming to be the sole owner of the goods, and under the testimony of neither of them were they joint owners of it with a community of interest in the property or profits.

The true issue, therefore, involved in the case was whether the plaintiff bought and owned the stock of goods, or whether E. T. Roach bought for himself and owned the stock. That issue

was presented to the jury under instructions in which we find no reversible error. Upon that issue the jury found in favor of the plaintiff; and we are of the opinion that there is substantial evidence to sustain that verdict.

It being thus decided that the stock of goods was the property of and owned by the plaintiff, all the defendants who took possession of the goods and exercised acts of ownership over them and thus converted them to their use became liable to the plaintiff. There was evidence sufficient to show that all the defendants did this. They were in that event all liable therefor jointly and severally to the plaintiff. This is an elementary principle of the law of torts. The law permits an action and a recovery for a wrongful conversion against all the wrongdoers, or against them severally, or any number less than the whole. *Ray* v. *Light,* 34 Ark. 421; 1 Cooley on Torts, 224, 227; 13 Enc. of Evidence, 73; 28 Am. & Eng. Enc. Law (2 ed.) 685. It follows that appellants cannot legally complain because the verdict was not against all the defendants.

The testimony on the part of the plaintiff tended to prove that the defendant E. T. Roach was the agent of his wife, N. M. Roach, in the conduct of her business and in all the transactions and acts done by him in this case. A principal is bound by the acts of the agent within the authority that actually has been given, and this includes not only the precise act which is expressly authorized, but also whatever usually belongs to the doing of it or is necessary to its performance. The power of the agent is to do all that is necessary to effect the purpose which is the subject of his employment. 1 Am. & Eng. Ency. Law, 991; 31 Cyc. 1326-1344; *Knowles* v. *Street,* 87 Ala. 357.

It then becomes a question for a jury to decide under the evidence whether the agency existed and whether the act done was within the scope of such agency. In this case there was testimony showing such agency. In fact the entire management and control of the business and affairs of N. M. Roach were intrusted to her husband in the prosecution and the settlement of the matters involved in this case.

Under the testimony the jury were warranted in finding that he was the agent of his wife in every act done by him in endeavoring to collect the debt due to her, in indorsing her name on the note, in accepting in her name the draft of the bank and indors-

ing her name on it, and in making the agreements relative to the stock of goods, and finally in taking and selling them in order to collect her debt. The issue as to this agency and the scope thereof was submitted to the jury under instructions in which we find no prejudicial error.

The defendants made a general objection to the instruction on the measure of damages given at the request of plaintiff. They did not specifically point out any inaccuracy of language in that instruction of which they now complain. On the contrary, they asked that the instruction be modified to the effect that from the value of the goods should be deducted the amount of the note. The objection, therefore, now made, which is in effect only to the alleged inaccuracy of certain language therein, is not well taken.

It is urged by the defendants that the amount of the recovery should have been diminished by the amount of the note which was for the purchase money of the stock of goods, and also by the amount of the indebtedness which was incurred in the operation of the business by the plaintiff. But as to said note and as to the indebtedness that one of the defendants may have paid or shall pay for the plaintiff she is only his creditor. For the collection of that note and that indebtedness she had and still has the right to institute suit against the plaintiff and thus obtain recovery. She has not done this; nor in this case has she sought to have the same allowed as a counterclaim. In order to obtain the satisfaction of that note and the debt, she has, under the testimony of the plaintiff, forcibly taken charge of and possession of the property of the plaintiff without legal process; and after selling same has applied the proceeds to her debt against the plaintiff. This she did not have the right to do. As is well said in the case of *Northup* v. *McGill*, 27 Mich. 240: "No creditor without process and without authority or right, except such as belongs to him as creditor, can dispossess his debtor of his goods and then mitigate or defeat a recovery by showing that the property taken has, without any assent or concession of the debtor, been applied to the debt. Such intervention must have the sanction of the debtor or the law. The opposite view would lead to gross oppression and abuses. The creditor would be enabled to take the law into his own hands and unite in himself the power to judge and execute in his own favor and according to his own pleasure."

In this case a number of instructions were given, and some refused over objections duly saved. We do not think it necessary to note them severally. The above principles of law, which we think are applicable to the facts of this case, will show that no reversible error was committed by the court in his rulings thereon. The cause was tried upon sharply conflicting evidence by a jury. As to the weight of that evidence, they were the sole judges; and, whatever may be the opinion of this court as to the weight thereof, it cannot, under the repeated rulings of this court, affect that verdict, as there was substantial evidence to sustain it.

The judgment is affirmed.

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

Opinion delivered December 20, 1909.

1. WITNESSES—MILEAGE.—A witness who attends court is entitled to mileage, though he lives 30 or more miles from the place where the court sits, even though no order of court was obtained requiring his attendance. (Page 532.)
2. COSTS—DISCRETION.—While the taxation of costs is a matter within the discretion of the trial court, a judgment of the court with reference thereto will be reversed on appeal where it appears that such judgment was based upon an erroneous view of the law. (Page 534.)

Appeal from Desha Circuit Court; *Antonio B. Grace,* Judge; reversed.

Joseph T. Robinson and *Rascoe & Botts,* for appellant.

Kirby's Dig., § 3156, providing that the deposition of a witness who lives more than thirty miles from the place of trial and in an adjoining county *may* be used is only permissive; and if such witness actually attends the trial in obedience to a subpœna, he is entitled to his mileage. 18 Ind. 32; 29 Ind. 426; 51 Mo. 532; 103 Ala. 542; 96 Ia. 202.

Kinsworthy & Rhoton and *Jas. H. Stevenson,* for appellee.

The deposition of such witnesses may be used. Kirby's Dig., § 3156. And in such cases they shall not be required to attend the trial. *Id.* § 3158. The matter was entirely within the sound discretion of the trial court. 17 Ark. 361; 65 Ark. 219.

FRAUENTHAL, J. This is an appeal from the judgment of the Desha Circuit Court upon an application made by the defendant to have the costs retaxed in a cause tried in that court wherein the appellants were the plaintiffs and the appellee was defendant. On March 31, 1908, the plaintiffs instituted suit in the above court against the defendant for the recovery of the value of certain personal property which had been lost or destroyed while in the possession of the defendant as a common carrier. Upon a trial of that cause, a verdict and judgment was rendered in favor of the plaintiff and against the defendant for the value of the property and for all costs of the case. Sometime prior to the day set for the trial of said case in the Desha Circuit Court, the clerk of that court, at the instance of the plaintiffs, issued a subpœna for Fred McCarty, Pete Douglas, Pete Wolf and Jack Douglas, to appear as witnesses in that case. The above witnesses resided in Arkansas County, which adjoins said Desha County, and more than thirty miles from the place where the circuit court sits in said latter county. The subpœna was duly served upon said witnesses in Arkansas County, and in obedience thereto those witnesses appeared in said Desha Circuit Court on the day of the trial of said cause. At the same term of said court the said witnesses proved up their attendance and the number of miles they had traveled in consequence of the summons. The clerk of the court taxed the amount of the attendance and mileage of each witness as costs arising in said cause, and gave to each witness a certificate thereof.

At the following term of said circuit court the defendant by written motion made application to retax the costs in said case, and asked that the mileage claimed by said witnesses be disallowed. The grounds for the application to retax said costs are set out in the motion as follows:

"Defendant states that the case was disposed of on the day it was set for trial, and that no one of said witnesses was subpœnaed, and no order of the court was obtained requiring his attendance, and that all said witnesses came from a distance of more than thirty miles. That said witnesses are entitled to $1.50 each as witness fees, which amount the defendant is ready and willing to pay."

It appears that the witnesses were actually subpœnaed in Arkansas County, where they resided, as above set forth; and the only ground set out in said motion for the disallowance of said mileage, which is sustained by the evidence, is that the witnesses resided more than thirty miles from the place where the court in which the action was pending did sit; and no order of court was obtained requiring their attendance.

Upon the hearing the court sustained the motion to retax the costs, and disallowed the mileage of said witnesses, and adjudged that the same be stricken from the fee bill. From that judgment this appeal is prosecuted.

The question involved in this case is whether or not the mileage of a witness should be taxed as a part of the costs of the case where such witness resides thirty or more miles from the place where the court sits in which the action is pending, and in an adjoining county, if he actually attends in obedience to a subpœna but under no order of court for his personal attendance.

It is provided by section 3157, of Kirby's Digest, that the deposition of the witness may be used in the trial of all issues where "the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance on the court." By section 3158 of Kirby's Digest it is provided that: "A witness shall not be compelled to attend in court for oral examination where his deposition may be used, unless he has failed when duly summoned to appear and give his deposition." And by section 3159, Kirby's Digest, it is provided: "Where it is made to appear by the affidavit of the party, and the written statement of his attorney, that the testimony of a witness is important, and that the just and proper effect of his testimony cannot in a reasonable degree be obtained without oral examination before the jury, the court may, at its discretion, order the personal attendance of the witness to be compelled, although such witness may otherwise be exempt from personal attendance by law."

It is claimed that by reason of the above provisions of the statutes the witnesses in this case were not entitled to mileage because they attended the trial without an order of court for their personal attendance. But we are of the opinion that the above provisions are for the benefit and protection of the wit-

ness, and deny to the party a right to compel the personal attendance of the witness without an order of the court when he resides thirty or more miles from the place where the court sits. The witness may waive that privilege.

The statute only provides that the witness shall not be compelled to attend at the place of trial if he resides thirty or more miles therefrom. It does not provide that in such event the witness should or shall not attend the court, but forbids only the compulsion of his attendance. From this it would appear that the witness may attend in obedience to the subpoena if he desires to do so. If, then, he does waive this privilege, and does obey the subpœna, and does attend the court, he should receive the mileage and fee which the statute prescribes, unless his personal attendance was unnecessary or for other reasons it would be unreasonable to allow same.

The party desiring the attendance of the witness may under certain circumstances obtain an order of court compelling the attendance of the witness. In such event it is conceded that his mileage is a just part of the costs. But the only reason why the attendance of the witness is compelled by order of the court is because the witness himself refuses to attend. If he waives his privilege and is willing to attend, there would be no necessity of obtaining the order compelling his attendance.

The statute does not require that the deposition must be taken, and that the testimony of the witness cannot be taken by oral examination at the trial of the case. On the contrary, the statute provides that if the witness is in attendance on the court his deposition should not be used, although he resides thirty or more miles from the place where the court sits.

By the code of Iowa it is provided that witnesses in civil cases cannot be compelled to attend district court at a place more than seventy miles from the place of their residence. It was held by the Supreme Court of that State that said statute was for the benefit of the witness; and that the witness could waive the exception, obey the process, and that his traveling fee should be taxed for the actual travel. *Briggs* v. *Rumely Co.*, 96 Iowa, 202.

In the case of *Alabama Midland Ry. Co.* v. *Rushing*, 103 Ala. 542, it is said (quoting from syllabus): "While under the provisions of the statute when a witness resides more than 100

miles from the place of trial his evidence may be taken by deposition, the statute does not require that the evidence must be so taken; and if a witness residing in the State more than 100 miles from the place of the trial attends the trial in obedience to a subpoena, he is entitled to his mileage and *per diem.*" See also *Parsons Band Cutter* v. *Sciscoe,* 129 Iowa 631; *McGlauflin* v. *Wormser,* 28 Mont. 177; *Spencer* v. *Peterson,* 41 Oregon, 257; *Alexander* v. *Harrison* (Ind.) 28 N. E. 119; *Anderson* v. *Bach Sheep Co.,* 12 Idaho, 418.

And so we are of the opinion that, although the deposition of the witness who resides thirty or more miles from the place of trial may be used upon such trial, this does not deprive him of his mileage and *per diem,* if he attends the court in obedience to the process of subpœna for oral examination. Section 3523 of Kirby's Digest seems to have provided mileage for the witness under such circumstances. That section is as follows: "A witness subpœnaed to attend without the limits of the county within which he resides shall receive five cents per mile going and coming from and returning to his residence by the most direct route."

It does not provide, as a requisite to obtaining mileage, that the witness must first be compelled to attend by order of the court. In this case it is further shown that the witnesses resided in a county adjoining Desha County, in which the trial was had, and they were subpœnaed more than three days before the time of the trial. Section 3119, of Kirby's Digest, provides: "A witness shall not be obliged to attend for examination in the trial of a civil action, except in the county of his residence or an adjoining county; nor to attend to give his deposition out of the county where he resides or where he may be when the subpœna is served on him, requiring his attendance within three days."

We are therefore of the opinion that the court was in error in its view of the law that the witnesses were not entitled to mileage solely because they resided more than thirty miles from the place where the trial was held and attended without an order of court requiring their attendance.

It is contended that in the disallowance of the mileage the court has only acted in the exercise of its discretion, and unless that discretion has been abused its judgment should not be

disturbed. It is true that it is within the power of the circuit court within its sound discretion to disallow such costs which the court finds have been unreasonably and unnecessarily accumulated. Upon appeal this court will not, in reviewing taxation of costs, overrule the circuit court unless its judgment has been made under an erroneous view of the law or a manifest abuse of power. *Meadows* v. *Rogers,* 17 Ark. 361; *Davies* v. *Robinson,* 65 Ark. 219.

With the exercise of the discretion of the court in the matter of retaxation of costs this court will not interfere. But where the judgment of the court is based upon an erroneous view of the law, it is the duty of this court to correct that error. *Morris* v. *Wheeler,* 45 N. Y. 708.

In the case at bar the court did not disallow the items of mileage of these witnesses upon the ground that the attendance of the witnesses was unnecessary, or because they attended the trial for the purpose of increasing the costs, or because under the circumstances the oral examination of the witnesses was not necessary to obtain the proper effect of their testimony, or because it was unreasonable to allow the mileage; and its judgment is not based upon any allegation to the above effect in the application to retax the costs, and the judgment is not attempted to be sustained by any evidence of that character. But the court disallowed the mileage solely upon the ground set out in the application to retax the cost, and that ground was that under the provisions of the statute the witnesses were not entitled to mileage because they resided more than thirty miles from the place of trial and attended the trial without an order of court being obtained requiring such attendance. Its judgment was therefore based upon an erroneous view of the law.

For the error indicated the judgment is reversed, and this cause is remanded with directions to overrule the motion to retax the cost.

HART, J. I dissent in this case. In the case of *Russell* v. *Ashley,* Hempstead's Rep. 549, the court, in passing upon a similar statute, said: "Indeed, a witness residing more than one hundred miles from the place of trial is beyond the coercive power of a subpœna. The party may take his deposition, but cannot compel him to attend at court and give oral testimony. This has

been expressly held by the Supreme Court of the United States, in the case of the *Patapsco Insurance Company* v. *Southgate,* 5 Peters, 615. The party desiring his testimony has no right to issue a subpœna to coerce his attendance, and, if he does, he must pay the costs incident thereto, and not throw them upon the other party."

In the present case the witnesses were not compelled to obey the subpœna, and their attendance upon the court was voluntary. The rule is so firmly established in this State that statutes regulating costs are strictly construed against the party claiming them as to render a citation of authorities unnecessary. The decisions of the courts of other States which have passed upon similar statutes are in hopeless conflict. Most of the decisions on the question are collected in a note in 10 Am. & Eng. Ann. Cas. 397. They appear to be about equally divided in numbers, but we think the rule that fees should not be allowed witnesses in cases where the subpœna does not amount to compulsory process and where the witnesses may disregard it is more in accord with our previous decisions upon the allowance of costs and fees, and is a protection to the parties to the suit against unnecessary and vexatious costs.

This construction works no hardship upon the witnesses because their attendance has been voluntary, and not in obedience to the order of the court. It works no injustice upon the parties to the suit, for we have a statute which provides that where it is made to appear that the testimony of a witness is important and that the just and proper effect of his testimony cannot, in a reasonable degree, be obtained without oral examination before the jury, the court may, at its discretion, order the personal attendance of the witnesses to be compelled although such witness may otherwise be exempt from personal attendance by law. Kirby's Digest, § 3159.

Mr. Justice BATTLE concurs.

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

Opinion delivered January 31, 1910.

1. CARRIERS—CONCLUSIVENESS OF BILL OF LADING.—Previous contracts between a shipper and carrier relating to the shipment of freight will be deemed to be merged in the bill of lading. (Page 545.)
2. SAME—RELEASE OF LIABILITY—CONSIDERATION.—A stipulation in a bill of lading releasing a carrier from liability for damages already accrued is not binding where there is no consideration for such release. (Page 546.)
3. SAME—STIPULATION AS TO TIME OF CARRIAGE.—A stipulation in a bill of lading that cattle should not be transported within any specified time or delivered at any particular hour does not exempt the carrier from the consequences of its failure to transport the cattle within a reasonable time. (Page 546.)
4. SAME—CONTRACT AGAINST LIABILITY.—Carriers cannot contract for exemption from liability for losses and damages happening from the negligence of themselves or their sarvants. (Page 546.)
5. SAME—CARRIAGE OF LIVE STOCK—WHEN LIABILITY BEGINS.—Under the Hepburn Act of Congress, carriers may stipulate with shippers of live stock that the latter shall assume all risk and expense of caring for the live stock until loaded in the cars. (Page 546.)
6. SAME—CARRIAGE OF LIVE STOCK.—A contract for shipment of live stock which exempts the carrier from liability for the cattle while in the pen and unloaded does not change the duty of the carrier to furnish cars for the transportation of the cattle within a reasonable time after demand therefor. (Page 547.)
7. SAME—AGREEMENT TO PAY FOR LOST CATTLE—CONSIDERATION.—Where a shipper of live stock agreed to be liable for them until placed in the car, and they escaped from the cattle pen, and some of them were never recovered, an agreement made by the carrier's agent that the carrier would pay the value of the lost cattle if the shipper would get up such cattle as he could find and ship them was without consideration and not binding on the carrier. (Page 547.)

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

Kinsworthy & Rhoton, S. D. Campbell and *James H. Stevenson,* for appellant.

1. Appellee, having been offered a choice of contracts and having for a consideration elected to take a contract limiting the liability of the carrier, was bound by its terms. Although forbidden on grounds of public policy from contracting against

liability for loss or damage to goods by its own or its servants' negligence, a carrier may, for a consideration, contract against liability as an insurer and against losses from unavoidable accident. 39 Ark. 148; *Id.* 523; 50 Ark. 397; 73 Ark. 112; 46 Ark. 236; 47 Ark. 97; 57 Ark. 112; *Id.* 127; 82 Ark. 353; 81 Ark. 469. The provision for notice in contracts of this nature has frequently been upheld by this court. 63 Ark. 351; 67 Ark. 404; 89 Ark. 454; 90 Ark. 308. The validity of the stipulations of such contracts, when reasonable, and based on valid considerations, is not affected by the Hepburn Act. 89 Ark. 404; 90 Ark. 308. The stipulation in a bill of lading of live stock that the shipper "shall assume all risk, expense of feeding, watering, bedding and otherwise caring for the live stock covered by the contract, while in cars, yards, pens or elsewhere," being based on a reduction of freight rates, is valid and binding. 82 Ark. 469, 475; 56 Ark. 424. If, by reason of the shipper's carelessness, cattle escape from the stock pen of the carrier, he cannot recover. 68 Ark. 218.

2. The first instruction given at appellee's request is erroneous, being in conflict with that part of the contract waiving all former understandings, promises or contracts with or by the appellant, and also in conflict with the stipulation in the contract that the cattle were not to be forwarded by any particular train or any particular time, or in season for any particular market, and that no agent of the company should have authority so to agree. 63 Ark. 443, 447-8.

3. The second and fourth instructions erred in telling the jury that it was appellant's duty to furnish a car without delay. Moreover, there being no evidence of negligence in this respect, there is no evidence on which to base such instructions. The extent of appellant's duty was to forward the cattle within a reasionable time. 63 Ark. 443. Plaintiff's fifth instruction is erroneous, being in direct conflict with the provision of the contract providing that "no agent of this company has any authority to waive, modify or amend any of the provisions of this contract, or to agree to ship said cars by any particular train," etc. Erroneous also because the agreement with Fullenwider, if made, was without consideration and was not binding. It was plainly appellee's duty, in the light of the contract, to search for and re-

cover the strayed cattle, to say nothing of his duty, independent of the contract, to exercise reasonable diligence to mitigate the damages. 13 Cyc. 71-2, 73, 75; *Id.* 73, 75; 67 Ark. 112. The proposition that an agreement to do that which one is already bound to do is not a valid consideration needs no citation of authorities: but see 52 Ark. 174; *Id.* 151; 1 Beach on Contracts, § § 157, 165.

O. C. Blackford, for appellee.

1. Both in the admission of evidence and in the instructions of the court to the jury, the latter were correctly allowed to pass upon and determine the question of negligence of appellant and contributory negligence of appellee, giving due consideration to the bill of lading, and not permitting the same to extinguish and make a nullity of the statute providing that carriers shall "furnish sufficient accommodations for the transportation of all such * * * property as shall, within a reasonable time previous thereto, * * * be offered for transportation," etc. Kirby's Digest. § 6592. See also, *Id.* § 6804.

2. A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; and it is not just and reasonable for a common carrier to stipulate for exemption from responsibility for the negligence of itself or its servants. 46 Ark. 241.

3. While it is true that the contract did not require the carrier to forward the stock in time for any particular market, yet there is implied a contract to ship with reasonable promptness and without unnecessary delay. 82 Ark. 358.

BATTLE, J. Charles Jones enclosed about thirty head of his cattle in the stock pen of the St. Louis, Iron Mountain & Southern Railway Company at Minturn, Arkansas, for shipment over its railway. About the 10th day of June, 1908, the cattle escaped from the pen. After much trouble and some expense he recovered a part of them. About eleven of them he never recovered. He brought this action against the railway company to recover the losses sustained by him by reason of their escape. He alleged in his complaint as follows:

"That on or about the 10th day of June, 1908, plaintiff made arrangements with the station agent of the defendant at Minturn, Arkansas, to set a car at the stock pen, suitable to the

shipping of a carload of cattle. That the defendant, by negligence of its agents and employees in the first instance, unlawfully failed and refused to spot or locate said car within the statutory time or at the proper place for the loading of the cattle. That he, depending upon the defendant to comply with its contract and the provisions of law, procured and gathered together and placed in the stock pen, at said station, a carload of cattle for shipment to E. St. Louis, Ill., consisting of twenty short four-year-old steers, average weight of which was 900 pounds each, six head of cows, average weight of which was 800 pounds each, four three-year-old heifers, average weight 600 pounds each, one two-year-old heifer, weight 500 pounds, and one two-year-old steer, weight 500 pounds. That by the malicious, wanton negligence of the defendant's agents and employees in locating car at the proper place for loading and within the proper time, and by negligently failing to accept and receive for transportation of cattle, the same having remained in the stock pen for fifteen hours, without food or water, after they had been delivered to defendant for transportation, and after the defendant, by its station agent at Minturn, had executed and delivered to plaintiff its bill of lading for same, the cattle became restless and began to try to break out of the stock pen, and about ten o'clock on the night of the 10th day of June, 1908, the cattle remaining in the stock pen by the negligence of the defendant as aforesaid, said cattle became frightened and stampeded by reason of the different trains of the defendant that were passing upon the main line of its road and upon the side track at the station, breaking out of the stock pen and scattering in every direction, some going upon the track and being killed by the trains of the defendant, some being crippled, the number of which that were killed or crippled, the kind of trains or the direction going being to the plaintiff unknown. Plaintiff states that he made an agreement with P. H. Fullenwider, purporting to be the agent of the defendant, subsequent to the time that the cattle escaped from the stock pen as above alleged, that plaintiff should get up all of the thirty-two head of cattle he could find upon the range, and ship them to the same market, and the same commission men that he had originally contemplated, and that the defendant would pay the market

price for every and all of such cattle as plaintiff failed to find, and pay the plaintiff the difference he received on those he could find and ship, and the price they were worth at the time they would have reached the market had plaintiff got proper transportation originally, and for such shrinkage as the cattle that he should find sustained by reason of delay in shipping and to pay plaintiff a reasonable price for his trouble in locating and repenning the cattle; and for such necessary expenses as he might be put to in and about the same. Plaintiff states that he has made diligent search to find all of the cattle, but that he is unable to find any except nine steers, four years old, two three-year-old heifers, and four cows, of the original thirty-two head, which cattle were under the agreement shipped, together with other cattle of plaintiff, on the 23d day of June, 1908.

"That, by reason of the defendant's negligence, plaintiff was compelled to sell the cattle upon the market for a price less than he would have received for the fifteen head of cattle on the date he would have sold them as originally contemplated, in the sum of $51.80, and that the cattle were caused to shrink by reason of the defendant's negligence aforesaid two hundred pounds, to his further damage in the sum of $7, and that he employed help in getting up the fifteen head of cattle and expended therefor the sum of $10, and that he was compelled to hire pasturage for the cattle during the time he was regathering same, and paid therefor the sum of $15, and that since shipping the fifteen head of cattle, he has located one of the cows, one three-year-old heifer and one two-year-old steer, and one two-year-old heifer, and that plaintiff, after making diligent search for all of the cattle as aforesaid, had been unable to find eleven head of the twenty four-year-old steers, as aforesaid, except those that were dead or crippled by the negligence of the defendant's agents and employees, and says as he believes and avers that all of the eleven head of steers were either killed or entirely gone, which were worth to the plaintiff the market price at the time he placed same in defendant's stock pen at Minturn, which was four and a half cents per pound on foot, amounting to $445.50, to his great damage all in the sum of $529.30.

"Wherefore, premises considered, plaintiff prays judgment against the defendant in the sum of $529.30, for costs and all other and proper relief."

The defendant answered, and denied the allegations of the complaint, and alleged that plaintiff's damages, if any, were caused by his own negligence, and that by the terms of the bill of lading executed by it to him it was not liable for the loss sustained by the escape of the cattle from the stock pen.

The plaintiff testified in the trial of the issues as follows: Sometime in June, 1908, he went to Minturn in this State, and made arrangements with the defendant's station agent at that place to furnish him with a car for the shipment of his cattle. He collected his cattle, and drove them to Minturn, and placed them in the defendant's stock pen. There was no means provided for fastening the gate of the stock pen, except a trace chain, but no lock. He purchased a lock and fastened the gate with the chain and lock, keeping the key to the lock. On the 9th of June, 1908, the agent told him that there would be a special train at the station on the next morning about 7:40 o'clock A. M., and the agent wanted him to ship his cattle on that train, but he failed to ship on that train. The agent, then, said that "there will be another train here in a short time, and you can ship on that." In the meantime the agent executed to him a bill of lading for the cattle, which he accepted. Among other things it substantially provides as follows:

"1. That the live stock was not to be transported within any specified time, or delivered at destination at any particular hour, nor in season for any particular market.

"2. That the railway company is exempted from loss or damage arising out of any accident or causes not arising out of its own negligence.

"3. That the shipper assumes all risk and expense of feeding, watering, bedding and otherwise caring for said stock while in the pens or elsewhere, and of loading and unloading same.

"4. That the shipper, by said contract, releases and waives all cause of action for damages that may have accrued to him by any prior written or verbal contract.

"5. That the shipper acknowledges that he has had the option to select this or the unlimited liability contract, and has taken this one because the rate is cheaper.

"6. That no agent of the company has the right to agree

to ship said live stock by any particular train or to reach any particular market, or to furnish cars on any particular day; and that the carrier expressly declines to do this."

About the time the bill of lading was executed the promised train passed without stopping. The agent then said there will be another train here about 5 or 6 o'clock of the evening of the same day, and "it will stop and take your cattle." At the designated time the train arrived, and because his cattle was not already loaded refused to take them and moved on. The agent then said there will be another train here tonight at 11 o'clock, and it has orders to take your cattle. It came between 11 and 12 o'clock that night, but the stock was gone. The gate to the pen was opened, and the chain with which it was fastened was broken. He further testified that he made an agreement with P. H. Fullenwider to the effect stated in his complaint; and that he sustained damages as stated in his complaint. Other witnesses testified, but plaintiff's testimony is most favorable to him.

There was no evidence adduced to show how the cattle escaped from the pen, except through the gate. A part of the evidence tended to show that they were let out by some one. There was no complaint, or evidence to show, that the pen was defective.

Over the objections of the defendant the court instructed the jury as follows:

"1. The jury is instructed that if they believe, from the preponderance of the evidence in this case, that the plaintiff, Charley Jones, had an understanding with the station agent at Minturn that he desired to ship certain live stock to a foreign market, and it was understood between said plaintiff and said agent that a proper car for the shipment of said live stock would be spotted at the proper place for loading on the morning of the 10th day of June, 1908, and on the strength of said understanding the plaintiff gathered together a carload of live stock, had them placed in the stock pen of defendant at Minturn, Ark., and that the agent was negligent, and that said negligence concurred with the negligence of other agents of the defendant, failed and refused to properly place said car for the loading of said live stock at the time agreed upon between the parties, and that (by) the failure on the part of the defendant's agents

aforesaid the plaintiff was not permitted to load said cattle in time to be taken and transported to the market which plaintiff contemplated to place them for sale, and that said failure on the part of defendant's agents aforesaid was the direct and proximate cause of the injury complained of in plaintiff's complaint, then you are authorized to find for the plaintiff in whatever sum you find he was damaged by such failure on the part of the defendant, unless you further find that the plaintiff was negligent, and that his negligence contributed to the injury complained of.

"2. The jury is instructed that it is the duty of the defendant, after accepting personal property for shipment, such as live stock, to transport same without delay, and that any negligence on its part through its agents and employees in the nonperformance of such duty is chargeable to it; and if you believe by a preponderance of the evidence in this case that the agents and employees of the defendant were negligent in furnishing speedy facilities for the transportation of the cattle in question, and that such failure was the direct and proximate cause of the injury complained of in plaintiff's complaint, then you are authorized to find for the plaintiff in such sum as the evidence warrants under the instructions of the court, taken together in this case, unless you find that plaintiff contributed to the said injury by his own negligence.

"4. The jury is instructed that it is the duty of the defendant to provide without delay reasonable facilities of transportation to all shippers at any station who, in the regular and expected course of business, offer their freight for transportation; and if you believe that the defendant was negligent in furnishing the plaintiff a car, properly placing same, in which to ship his cattle, and that such negligence was the direct and proximate cause of the injury, then you should find for the plaintiff, unless you further find that the plaintiff contributed to his injury by his own negligence.

"5. If you find that there was an adjustment agreed upon between the plaintiff, Jones, and Fullenwider, the agent of the defendant company, agreed that the company would pay for all the cattle lost and for the expense of getting up the cattle, and for pasturage, you should find for the plaintiff as to all items

included in such agreement, irrespective of the question of the prior negligence of the company."

The jury returned a verdict in favor of the plaintiff, and the court rendered judgment accordingly. To reverse the judgment defendant prosecutes an appeal to this court.

In the bill of lading executed by the defendant, and signed by both parties, and which is the contract of shipment entered into by them, the plaintiff released and waived all causes of action for damages, if any, that may have accrued to him by any prior written or verbal contract. All previous contracts were merged in the contract evidenced by the bill of lading. This included the agreement by the agent to furnish a car for the shipment of the cattle made prior to the execution of the bill of lading. But the bill of lading did not have the effect to release the appellant of liability for damages already accrued, there being no separate consideration for such release. *St. Louis & San Francisco Railroad Company* v. *Pearce,* 82 Ark. 353, 358.

It was also agreed that the cattle was not to be transported within any specified time, or delivered at destination at any particular hour nor in season for any particular market. This did not however exempt the carrier from the consequences of its or its agent's negligence. While it was not bound according to agreement to transport cattle within any specified time, or to deliver them at destination at any particular time, it was its duty to transport them with all convenient dispatch, with such suitable and sufficient means as it was required to provide in its business, that is to say, in a reasonable time. *St. Louis, I. M. & S. Ry. Co.* v. *Deshong,* 63 Ark. 443; 2 Hutchinson on Carriers (3 ed.), § 651.

From what we have said it follows that instruction numbered 1, copied in this opinion, should not have been given.

The escape of the cattle from the stock pen of appellant was the immediate cause of the greater part of the damages suffered by appellee, if not all. There was no duty of the appellant to furnish cars for their shipment after their escape and before their recovery. Who is responsible for their escape? The contract provides: That the second party (appellee) shall assume all risk and expenses of the feeding, watering, bedding, and otherwise caring for the live stock (cattle) covered by this

contract while in cars, yards, pens, or elsewhere, and shall load and unload the same at his own expense and risk." By this contract appellee assumed all care and risk for the cattle while in the pen, and appellant did not become liable for them until they were loaded on its train. Was it a valid contract? This court has repeatedly held that common carriers cannot contract for exemption from liability from losses and damages happening from the negligence of themselves or their servants—that it is against public policy to permit them to do so. *Taylor, Cleveland & Co.* v. *Little Rock, Mississippi River & Texas Railroad Co.*, 32 Ark. 393, 398; *Taylor* v. *Little Rock, Mississippi River & Texas Railroad Co.*, 39 Ark. 148, 156; *St. Louis, I. M. & S. Ry. Co.* v. *Lesser*, 46 Ark. 236; *Little Rock, Mississippi River & Texas Railway Co.* v. *Talbot*, 47 Ark. 97. And yet, while so holding, it has sustained contracts similar to the one in this case as valid, when based upon a consideration as this is. *St. Louis S. W. Ry. Co.* v. *Butler*, 82 Ark. 469, 475; *St. Louis & S. F. Rd. Co.* v. *Burgin*, 83 Ark. 502; *St. Louis, I. M. & S. Ry. Co.* v. *Weakley*, 50 Ark. 397; *Fordyce* v. *McFlynn*, 56 Ark. 424. Under the rulings of this court such contracts are not stipulations against the negligence of the carrier or its servants.

The contract in this case is for the shipment of cattle from this State to another, and it is said that it is in conflict with the act of Congress known as the Hepburn Act. So much of that act as is applicable to this case is as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property *caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered* or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed," etc. The act prohibits contracts, receipts, rules or regulations by the carrier against liability for any loss, damage or injury caused by it, its servants and agents, or connecting carriers, and not against consequences of any other causes. The liability of the carrier does not begin until the prop-

erty is delivered, or lawfully tendered for transportation. The carrier and shipper may stipulate as to when the property is delivered before it is placed upon the car or other conveyance for transportation. It is not necessary that the carrier take possession before it is placed upon his car or conveyance for transportation if the shipper desires and does retain control until that time, and such contracts are not against liability for his own acts. If he is willing and does retain control, who has the right to complain or object? In such cases there is no conflict between the shipper and carrier or their rights.

In *St. Louis, Iron Mountain & Southern Railway Company* v. *Ozier,* 86 Ark. 179, 182, it is said: "The delivery or tender of freight to the carrier for shipment may be made in accordance with such arrangement between the parties—that is, between the shipper and carrier's agent—as they may choose to make in regard to the mode of delivery. Says Mr. Hutchinson: 'They make such stipulations upon the subject as they see fit; and when such stiplations are made, they, and not the general law, are to govern.' 1 Hutchinson on Carriers, § 115. A station agent has authority to consent to such arrangements. 1 Hutchinson on Car., § 462."

According to the contract entered into by the parties to this action the appellee assumed the risk and care of the cattle until they were loaded upon the car; and appellant became liable for them after they were loaded.

The contract as to the liability of the appellee for the cattle while in the pen and until loaded did not interfere with or change the duty of appellant to furnish cars for the transportation of the cattle within a reasonable time after a demand therefor, provided such reasonable time did not expire before the escape of the cattle. It would still be liable for damages incurred by appellee by reason of the failure to furnish the car within such reasonable time.

The contract with P. H. Fullenwider was without consideration and not binding on appellant. The principal, if not the sole, inducement to enter into the contract was the undertaking of appellee to collect and ship all of the cattle he could find. If appellant was liable for the losses sustained by the escape of the cattle, it was the duty of appellee to use all rea-

sonable means to arrest and reduce the loss. He could not stand idly by and permit the loss to increase and then hold the appellant liable for the loss which he might have prevented. *Railway Company* v. *Neal,* 56 Ark. 279, 288; *St. Louis, I. M. & S. Ry. Co.* v. *Stroud,* 67 Ark. 112; *St. Louis, I. M. & S. Ry. Co.* v. *Ayres,* 67 Ark. 371; 13 Cyc. pp. 71, 72, 74, 75. He is seeking compensation for doing his legal duty, which is not a sufficient consideration for the agreement with Fullenwider.

The instructions are not in accordance with the law as we find it.

The judgment reversed and cause remanded for a new trial.

HART, J., dissents.

LOWE *v.* HART.

Opinion delivered January 31, 1910.

1. JUDGMENT—REFUSAL TO AMEND.—Where the court's recollection was that its judgment was correctly entered, its refusal to amend the judgment will not be interfered with if there is no evidence to show that any different judgment was in fact rendered. (Page 558.)
2. INSTRUCTIONS—REPETITION.—The court's refusal to give a particular instruction is not error if the proposition of law contained therein is fully covered by other instructions given. (Page 559.)
3. GIFTS—REQUISITES OF GIFT INTER VIVOS.—To constitute a valid gift *inter vivos,* the donor must have been of sound mind, must have actually delivered the property to the donee, and must have intended to pass title immediately, and the donee must have accepted the gift. (Page 559.)
4. INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—If the various instructions given in a case separately present every phase of the law as a harmonious whole, there is no error in a particular instruction failing to carry qualifications which are explained in others. (Page 559.)
5. PLEADING—CONSTRUCTION OF COMPLAINT.—Where a complaint alleged that plaintiff was entitled to a chose in action by virtue of a gift, it was admissible to prove that the gift was either *inter vivos* or *causa mortis.* (Page 560.)
6. ACTIONS—ELECTION.—Where a complaint alleged that plaintiff was the owner of a certificate of deposit by gift, it was not error to refuse to compel plaintiff to elect to claim that the gift was either *inter vivos* or *causa mortis.* (Page 560.)
7. INSTRUCTIONS—WEIGHT OF EVIDENCE.—An instruction which directs the jury to consider "all the facts and circumstances surrounding the

transaction," and mentions particular facts which the evidence tends to prove, without isolating any facts so as to give them special emphasis, is not objectionable as being on the weight of the evidence. (Page 560.)

8. GIFTS—BURDEN OF PROOF.—The rule in civil cases that the jury must decide in favor of the party in whose favor the weight of the evidence proponderates applies in case of a gift *causa mortis,* though the evidence to establish such a gift must be clear and convincing. (Page 561.)

9. SAME—WHEN INTER VIVOS.—Where the holder of a certificate of deposit intended at the time he handed it to another to pass the title immediately, and the latter accepted it as her own, the gift was *inter vivos,* though the donor knew he was about to die. (Page 562.)

10. SAME—WHEN CAUSA MORTIS.—When one on his deathbed gave a chattel to another, intending to pass title in the event of his death, and the latter accepted the gift, there was a gift *causa mortis.* (Page 562.)

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

STATEMENT BY THE COURT.

J. H. Carroll died March 2, 1908. His only known next of kin were seven children of a brother who had died in Leeds, England. Carroll deposited with the First National Bank of Paragould, Arkansas, a sum of money, and received the following certificate:

"The First National Bank of Paragould

"No. 1323.

"Certificate of deposit not subject to check.

"Paragould, Arkansas, Oct. 18, 1907.

"J. H. Carroll has deposited with this bank eighteen hundred ten and no-100 dollars ($1,810), payable to the order of himself in current funds on return of this certificate properly indorsed.

"Not over two thousand dollars—$2,000.00.

"With interest at the rate of 4 per cent. per annum if left 6 months; — per cent. per annum if left — months.

"J. M. Lowe, Cashier."

This suit was brought May 22, 1908, against the bank; appellee alleging that on or about the 19th of February, 1908, J. H. Carroll gave to appellee the certificate of deposit and the money represented by it, and that she is the lawful owner and holder thereof; that on the 2d day of March, 1908, J. H Carroll

died; that said certificate is past due and unpaid. She prays judgment for the amount and her costs.

The bank on August 21, 1908, filed petition for "bill of interplea" under section 6013, Kirby's Digest, setting up the death of Carroll, intestate, that J. M. Lowe was the administrator of his estate, and praying for an order requiring said J. M. Lowe as administrator to appear within such time as the court may fix, and either maintain or relinquish all claims he may have as such administrator, and that such judgment be rendered as will protect it against the payment of said certificate of deposit or any part thereof to any other person or persons whomsoever," etc.

The citation was issued, and Lowe responded, setting up that he was the administrator of J. H. Carroll, deceased, and asking that he be substituted as party defendant in said cause of action; that the style of said cause of action be changed to 'Agnes Hart, plaintiff, *v.* J. M. Lowe, as administrator of the estate of J. H. Carroll, deceased, defendant,' and that as such he be permitted to plead, answer or demur to said plaintiff's complaint, and for all other proper and needful relief."

On September 2, 1908, Lowe, administrator, filed a motion to compel plaintiff to make her complaint more specific by stating whether she claimed the certificate as a gift *inter vivos* or *causa mortis*. This motion was overruled, and appellant duly excepted.

On September 2, 1908, Lowe, administrator, filed his answer, alleging therein his appointment, denying the gift, and setting up Carroll's mental incapacity to make a gift.

On the 8th day of February, 1909, the cause was submitted to a jury upon the evidence and under the instructions of the court. A verdict was rendered for plaintiff.

Two days after the trial, on February 10, 1909, Lowe, as administrator, filed his motion for the allowance of an order *nunc pro tunc,* showing that the style of the cause of action had been changed on motion of appellant before the hearing, substituting him as defendant and making the style of the case: "Agnes Hart, plaintiff *v.* J. M. Lowe, as administrator of the estate of J. H. Carroll, deceased, defendant."

The court heard evidence on the motion for *nunc pro tunc* order. The cashier of the First National Bank testified that he

made an entry in the certificate of deposit register of the bank opposite certificate 1323, which is the certificate involved here, as follows: "Transferred to court, 9-1-08; do not pay except by instruction of court. Lowe, Cashier." The clerk of the court was introduced and identified the record of the minutes of the judge's docket. These were as follows: "Third day: Response of administrator and petition to be made party defendant. Order granted, and administrator made party defendant, and exceptions."

The court overruled the motion for order *nunc pro tunc,* stating: "So far as the recollection of the court goes, the record reflects what was done. * * * I think the order of record upon the minute made on the second day practically takes care of both propositions," [*i. e.* for the bank to pay the money to the clerk, and for appellant to be made a party defendant.] The main idea at the time was, for a variety of reasons, to make the administrator a party, and over the objection of plaintiff this was done, and that is what is intended to be done by these orders." The appellant duly objected and excepted to the court's ruling. Counsel for appellee state the facts as they might have been found in her favor as follows:

J. H. Carroll came to this country many years ago from Ireland. He was a section foreman on the Paragould Southeastern Railway, and lived for some time with Mr. and Mrs. Hart. He had no other home, and had no relatives except a brother in England, whom he had not heard from in nine years. When Mr. and Mrs. Hart left the P. S. E. Railway and moved to Paragould, Mr. Carroll expressed great regret that they moved away and left him. He told Mr. Wright and Mr. Stout that he liked to live with Mr. and Mrs. Hart; that their house was his home; that Mrs. Hart had treated him so well when he was sick at her house, and had taken such good care of him, that she was like a mother to him, and the family were more like homefolks to him than anybody he had ever met.

About February 1, 1908, Mr. Carroll took sick, and his friend, Mr. Wright, engineer on the P. S. E. railroad, brought Mr. Carroll to Paragould on his train. At the station Mr. Wright told Mr. Carroll that he must go to the sanitarium, but Mr. Carroll said: "No, I want to go home." Wright asked him

where his home was, and Mr. Carroll replied: "John Hart's." Wright insisted that he go to the sanitarium, but Mr. Carroll as strongly insisted on going to Hart's. Upon Wright's repeated and urgent requests Mr. Carroll finally consented to go to the sanitarium. But he was not satisfied there. He sent for Mrs. Hart to come up and see him, and she did so.

At the sanitarium Mr. Carroll gave Mr. Wright some instructions about unloading his ties, and Mr. Wright told him not to bother himself about ties, and said to Mr. Carroll: "You have got plenty of money, haven't you?" and Mr. Carroll then showed Mr. Wright the certificate in controversy and two P. S. E. railroad checks for wages. Mr. Wright then told him that he needn't bother himself any more about ties, that he had enough money to last him as long as he would live, and then Mr. Wright asked him, "What are you going to do with this stuff anyhow? You may die." And Mr. Carroll said, "John Hart's folks will know what to do with my stuff." Mr. Carroll then told Wright to tell John Hart to come up there; that he wanted to go to John Hart's house; that he wanted to get away from the sanitarium; that he didn't like the place.

Mr. Carroll told Dr. Dickson, one of the proprietors of the sanitarium, that he wanted to go over to Mrs. Hart's home; that he had lived there before; he thought he wasn't going to get well in the sanitarium, and Dr. Dickson intimated to him that he could not get well, and he seemed to want to die at the home of his friend Hart. At Mr. Carroll's request he was taken to the home of Mrs. Hart.

Upon entering Mrs. Hart's home Mr. Carroll, after seating himself by the fire, took an envelope from his pocket, opened it, took out of it the certificate of deposit, read it carefully, and then, in the presence of Mrs. Gregory, handed it to Mrs. Hart, and said: "Here is a check for my money." Mrs. Hart took it and put it away. Dr. Dickson advised Mrs. Hart to get Mr. Carroll to make a will and to call in Father Feurst to advise him to do so, but Mr. Carroll would not talk business with the priest. Mr. Carroll's old friend, Mr. Stout, called to see him several times, and on one occasion he talked about making a will. Mr. Carroll said he had thought at first he would make a will, but afterward changed his mind; that

he had already given the certificate to Mrs. Hart; that if he willed what he had away he would die a pauper; Mr. Carroll asked Mrs. Hart to get the certificate and show it to Mr. Stout; and he asked Mr. Stout to look it over and see if it is "O. K.," and in the presence of Mr. Stout, Mrs. Gregory and Mrs. Hart, Mr. Carroll said he had given the certificate to Mrs. Hart, and handed it back to Mrs. Hart. He said then when he handed it to her that he had given it to her, and she would know what to do with it in a few days. Mrs. Hart kept the certificate as her own property from the time Mr. Carroll first gave it to her. Mr. Carroll was of sound mind, and knew what he was doing when he gave Mrs. Hart the certificate and when these various transactions occurred.

The jury might have found the facts as thus stated. The court instructed the jury as follows:

"1. Gentlemen of the jury: Mrs. Hart claims that Mr. Carroll gave her the certificate of deposit which was introduced in evidence. Mr. Carroll is dead, and his administrator now comes and denies that Mr. Carroll ever gave Mrs. Hart this certificate, and further denies that at the time of the alleged gift Mr. Carroll had sufficient capacity to make a valid gift."

"2. You are instructed that, in order for you to find that Mr. Carroll made a valid gift of the certificate in question, you must find, first, that Mr. Carroll was at the time of the alleged gift of sound mind, that is, that he knew and understood the effect of his act and intended that effect; second that he actually delivered the certificate in question to Mrs. Hart; third, that by such act he intended to pass title to said certificate in question to Mrs. Hart to take effect immediately; and, fourth, that Mrs. Hart actually accepted said certificate as a gift.

"3. In determining whether, at the time of the alleged delivery of the certificate to Mrs. Hart, Mr. Carroll intended to make a gift of it to her, you may take into consideration all the facts and circumstances surrounding the transaction, the acts and declarations of the deceased at the time and before and after the alleged gift, the relationship existing between Mr. Carroll and Mrs. Hart or her family, whether friendly or otherwise, and his mental condition.

"5. Neither sickness nor infirmity will disqualify one for

making a gift if sufficient mind remains; and if the jury believe from the evidence that Mr. Carroll delivered the certificate of deposit in controversy to Mrs. Hart with the intent of making it a gift to her, and that he made any declarations with reference thereto, the jury may consider these things, in connection with all the other evidence, in determining the mental capacity of Mr Carroll; and if they believe from all the evidence before them that he knew what he was doing at the time and intended by such delivery and declaration to make a gift of the certificate to Mrs. Hart, they will find a verdict sustaining the gift.

"9. The burden of the proof is upon the plaintiff to establish by a preponderance of the evidence a valid gift of the certificate in question by Mr. Carroll to her. So if, from a consideration of the entire case, you find the evidence equally balanced for and against the alleged gift, it will be your duty to find for the interpleader and against the plaintiff."

The appellant objected and duly excepted to the giving of the above prayers.

The court at the request of appellant gave instructions defining "gift" and enumerating the essential elements of a gift *inter vivos* and *causa mortis*.

In instruction number 5 given at appellant's instance the court said: "You are instructed that, before the plaintiff can recover in this case, she must show by a fair preponderance of the evidence a specific intent of Carroll to part with all right, title and interest in and all dominion and control over the certificate and to confer on plaintiff and vest her with the absolute right, title and interest in said certificate and the money which it represented, and delivery by him to her of the certificate for the purpose of safe-keeping or any other purpose, either express or implied, other than a specific intent to give her would not constitute in law a gift."

The court refused the following prayers:

"This is a suit brought by the plaintiff, Mrs. Agnes Hart, against the First National Bank of Paragould, Arkansas, to recover on a certificate of deposit issued by the bank to one J. H. Carroll for the sum of $1,810. She alleges that J. H. Carroll is dead, but that he gave her the certificate before he died. The bank

answered, disclaiming any and all interest in the money, and informed the court that J. M. Lowe, the administrator of the estate of J. H. Carroll, claimed the money as belonging to the heirs of J. H. Carroll, and the bank no longer has an interest in the lawsuit. The court then issued a citation to the said J. M. Lowe, as administrator of the estate of J. H. Carroll, deceased, and required him to file, within three days, his pleadings. The administrator, Mr. Lowe, answered and denied that J. H. Carroll ever gave the certificate to Mrs. Hart, and further denies that at the time of the alleged gift Mr. Carroll had sufficient mental capacity to make a valid gift. Mrs. Hart now offers to pay all debts of the estate, and so the parties interested in this lawsuit are Mrs. Hart, upon the one hand, and the children of Charles Carroll, represented by the administrator, upon the other hand. The court tells you that Mr. Lowe not only has the right, but it is his duty as administrator to protect whatever right, if any, the children have in the money." The above is designated "statement."

"1. You are instructed to return a verdict for the defendant.

"6. You are instructed that the First National Bank of Paragould, Arkansas, has no interest whatever in the results of this lawsuit; that it filed in this suit its disclaimer, tendering into court the full amount of money represented by said certificate, and was by order of this court discharged; and that the only parties interested in the result of this lawsuit are the plaintiff, Agnes Hart, on the one hand, and the heirs of Charles Carroll mentioned in the stipulation, who are here represented by J. M. Lowe, administrator of the estate of J. H. Carroll. deceased.

"8. A mere intention to give, however strongly held or expressed, is not sufficient in law to constitute a gift; and you are instructed that, even if you should find from the evidence that Carroll intended to give the certificate to plaintiff at some time before his death, still this would not be sufficient to entitle the plaintiff to recover, unless you further find from the evidence that said gift was actually made and concluded."

The court entered a judgment in accordance with the verdict in favor of the appellee for the sum of $1,846.20.

A motion for new trial, assigning as error the various rulings to which exceptions were saved, was filed and overruled. This appeal has been duly prosecuted.

Huddleston & Taylor, for appellant.

1. It is clearly shown by the evidence that the court had previously actually granted an order discharging the bank and changing the style of the cause by substituting Lowe, administrator, as defendant, and that this order had not been entered upon the record. The court's arbitrary refusal to grant the *nnunc pro tunc* order and cause the record to speak the truth is not to be justified on the ground of discretion. The bank was an interpleader, every essential element of an interplea being contained in the only pleading filed by it until it joined with Lowe in asking for the *nunc pro tunc* order. 23 Cyc. 3. The only order the court could have legally made was to discharge the bank, substitute Lowe, and order the cause to proceed to trial. 19 Ark. 148; *Id.* 297; 54 Miss. 642; 23 Cyc. 31; 29 Cent. Dig. § 5, tit. "Interpleader;" 18 Atl. (N. J.) 680.

2. It was error to refuse the statement of the case requested by the appellant. The jury could not take judicial knowledge of the pleadings, nor know their meaning unless explained to them. This statement should have been given either alone, or in connection with instruction No. 6. 1 Brickwood, Sackett on Instructions, § 367; 50 Cent. Dig., § 587, "Witnesses."

3. It was manifest error to refuse the eighth instruction requested by appellant. Certainly, he was entitled to a specific instruction on the point that a mere intention to give, however strongly expressed, is not sufficient, and such refusal is not cured by the giving of a general instruction. 90 Ark. 247; 69 Ark. 134; 82 Ark. 503; 76 Ark. 227; 80 Ark. 438; 80 Ark. 454.

4. The second instruction given is erroneous. If there was a gift, it was a gift *causa mortis,* a necessary element of which is that the donor must, at the time, be under the apprehension of death. This element of a gift *causa mortis* was entirely omitted from the second instruction, and it cannot be said that the error was cured by the giving of another instruction at appellant's request covering that point. It was im-

possible for the jury to know which instruction should guide them or to know which one they followed. 61 L. R. A. 337; 8 L. R. A. 494; 65 Ark. 64; 87 Ark. 364; 77 Ark. 201; 82 Ark. 111. The rule that all instructions given must be considered together cannot be invoked to cure the error in an instruction which is wrong and misleading. 74 Ark. 585; 75 Ark. 266; 76 Ark. 224; 79 Ark. 427. 1 Blashfield's Instructions to Juries, § 76, p. 168.

5. Instructions which single out certain facts on which a party relies, and which inform the jury that they may consider certain facts in determining questions of fact before them, are erroneous. The third and fifth instructions given were erroneous for these reasons. 1 Blashfield on Instructions, § 109, pp. 246-249; 4 So. 225; 5 So. 454; 73 S. W. 903; 30 Ark. 383; 37 Ark. 333; 75 Ark. 76; 37 Ark. 251.

6. The ninth instruction, to the effect that a preponderance of the evidence was sufficient to support a finding that there was a valid gift, was erroneous. Deathbed donations, to be upheld, ought to be above question or suspicion at all times. 15 Moo. P. C. 215; 43 Atl. (Md.) 45; 26 N. E. (N. Y.) 744; 21 N. E. (N. Y.) 141; 30 Atl. (R. I.) 626; 1 Wills. C. H. 445; 54 Pa. 267; 52 N. E. 465; 65 S. W. 592; 27 Atl. 127; 5 Gill, 506; 16 Gray 402; 47 Atl. 34; 36 N. C. 130; 3 N. E. 532; 37 Atl. 936; 24 S. E. 280; 28 W. Va. 412; 5 S. E. 721.

7. The plaintiff should have been required to elect which kind of gift, *causa mortis* or *inter vivos,* she would go to trial upon. 25 L. R. A. 856; 69 L. R. A. 601.

8. To constitute a valid gift *causa mortis,* the delivery of the gift must be accompanied by some act or declaration by the donor indicating that such gift was intended. 85 Pac. 1056, 15 Wyo. 34; Thornton on Gifts and Advancements, § 73; 139 Mass. 379; 16 S. W. 201; 60 N. Y. Supp. 523; 26 N. E. 744; 111 N. W. 761; 56 N. W. 770; 65 Atl. 129.

Johnson & Burr, for appellee.

1. The court did not err in refusing to enter the *nunc pro tunc* order. A *nunc pro tunc* order does not create, but states what has been done. 72 Ark. 21; 51 Ark. 224; 55 Ark. 30. Allowance of amendments to the record by *nunc pro tunc* orders, long after the term, addresses itself to the sound discretion of the court. 17 Enc. Pl. & Pr. 921, 926.

2. There is no error in the court's charge. The court properly refused the *statement of the case* as requested. A mere intention to give is not a gift of any kind. In all the court's instructions every element of a gift *inter vivos* and *causa mortis* is clearly and specifically set out. 119 S. W. 261. An instruction which might be misleading by reason of incompleteness, when standing alone, may be cured by other instructions which supply the omission. 67 Ark. 416; 60 S. E. 630. None of the instructions unduly single out or emphasize any particular fact in evidence. 13 S. W. 1098; 49 Ark. 367.

3. The *quantum* of evidence necessary to establish a gift is a preponderance only, and not "beyond a reasonable doubt," as in criminal cases. 20 Ark. 592-8; 1 Straskie, Ev. p. 543; 1 Greenl. Ev. 13a; 11 Am. & Eng. Enc. (2 ed.) 491; 11 Current Law, p. 416; 14 Am. & Eng. Enc. L. (2 ed.) p. 1067.

4. It was not necessary for plaintiff to elect; the complaint stated a good cause of action. 5 Enc. Pl. & Pr. pp. 334-337; 5 Am. & Eng. Enc. L. (2 ed.) 776. It was wholly immaterial whether the gift was *inter vivos* or *causa mortis.* 44 Ark. 42; 43 Ark. 307; 59 Ark. 191; 60 Ark. 169; 72 Ark. 307.

5. Where a verdict is based on conflicting evidence, it will not be set aside on appeal, unless there is *no legal* evidence to support. 116 S. W. 660; 67 Ark. 399; 73 Ark. 377; 75 Ark. 111; 76 Ark. 115; 121 S. W. 920. The sufficiency of the evidence was not properly challenged in this case. 121 S. W. 1046-50; 118 *Id.* 253; 79 Ark. 401-7.

6. It was proper to give the certificate to Mrs. Hart without indorsement, and the failure to indorse it does not create any presumption against the gift. 3 Pom. Eq. Jur. (3 ed.), § 1148; 103 S. W. 147; 104 S. W. 1031; 81 Ky. 425.

7. Where a verdict seems to be against the preponderance of the evidence, still, if it is supported by legal evidence, it is conclusive on appeal. 116 S. W. 660; 121 *Id.* 920.

WOOD, J., (after stating the facts). 1. As a "*nunc pro tunc order*" is intended to state what the court did, and not what it should have done, we must take the finding of the court as correct, that what was done and intended to be done by the orders "was to make the administrator a party." *Tucker* v.

Hawkins, 72 Ark. 21; *Gregory* v. *Bartlett,* 55 Ark. 30; *Cox* v. *Gress,* 51 Ark. 224.

The court's recollection and construction of its own order must be accepted, in the absence of any oral evidence or anything in the record itself to the contrary. The minutes on the judge's docket do not show that any different order was made than that found by the court to have been made at the time of the entry on the minutes of what was done on the judge's docket. These minutes do not warrant us in reaching a conclusion contrary to the finding of the court. It was within the sound discretion of the court under the evidence adduced to refuse to make the order *nunc pro tunc,* as requested by appellant. See 17 Enc. Pleading & Practice, 921, 926; *Stockdale* v. *Johnson,* 14 Ia. 178.

But, even if the rulings of the court were erroneous, the error is not prejudicial. The bank was a mere depository of the fund, and held the same in trust for the owner, as the jury must have known. The interest that a cashier and clerk would have in a matter of that kind would be so slight that no sensible juror would distrust their evidence on that account or give it less weight.

2. It follows that there was no error in the rulings of the court in refusing appellant's prayer designated "statement" and his prayer number 6, nor in the giving of appellee's prayer number 1.

3. There was no error in refusing appellant's prayer number 8. The court in several instructions at appellant's request fully covered the proposition of law contained in this prayer, and the jury were specifically instructed on this point. See *Maxey* v. *State,* 66 Ark. 523.

4. Prayer number 2, given at the request of appellee, was a correct declaration of law as to the essential elements of a gift *inter vivos.* The appellee claimed the money on deposit as a "gift," and under the allegations of her complaint she could prove that it was either a gift *inter vivos* or *causa mortis.* In another instruction the court correctly told the jury what was necessary to constitute a gift *causa mortis.* These instructions, taken together, accurately declared the law as to the essential elements of a gift either *inter vivos* or *causa mortis,* and

gave the jury a correct guide to determine from the evidence whether there was a gift of either kind. It often occurs that the law applicable to every phase of a case can not be presented in a single instruction.

"If the various instructions given in a case separately present every phase of the law as a harmonious whole, there is no error in a particular instruction failing to carry qualifications which are explained in others." *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61; *Southern Anthracite Coal Co.* v. *Bowen, ante* p. 140, and cases there cited.

The separate and independent propositions of law defining the two kinds of gifts were not erroneous, and were not in conflict. The two together declared the law applicable to the facts in evidence. *Thomas* v. *State,* 74 Ark. 431; *Lackey* v. *State,* 67 Ark. 416.

5. It follows also that the court did not err in refusing to compel appellee to elect as to the character of the gift. The sole issue was whether or not there was a gift. If appellee established the fact of a gift, either *inter vivos* or *causa mortis,* her cause of action was complete, because in either case, if proved, she was the owner of the money and entitled to recover. See *Newton* v. *Snyder,* 44 Ark. 42; *Nolen* v. *Harden,* 43 Ark. 307; *Ammon* v. *Martin,* 59 Ark. 191; *Hatcher* v. *Buford,* 60 Ark. 169; *Ragan* v. *Hill,* 72 Ark. 307. There was but one cause of action stated in the complaint.

6. Instructions three and five given at appellee's request are not instructions on the weight of the evidence. They are not so framed as to give undue prominence to any particular fact. The jury are told that they may consider "all the facts and circumstances surrounding the transaction;" and while mention is made of particular facts which the evidence tends to prove, no one of these is isolated and stressed so as to give it special emphasis or importance over any other fact proper for the jury to consider. Similar instructions have been approved in former opinions of this court. *Campbell* v. *Carnahan,* 13 S. W. 1098. It is the duty of the court "to give specific instructions correctly and clearly applying the law to the facts of the case." *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134; *Taylor* v. *McClintock,* 87 Ark. 243, 280-281, and cases cited. Such in-

structions do not violate the rule against "singling out certain parts of the evidence." *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt,* 76 Ark. 227.

7. This court as early as *Yarborough* v. *Arnold,* 20 Ark. 592, 598, announced the rule that in civil cases it is the duty of the jury "to decide in favor of the party in whose favor the weight of the evidence preponderates, and according to the reasonable probability of truth." It is only in criminal cases that the jury must be satisfied beyond a reasonable doubt. The rule has never been departed from in this State, and is the prevailing doctrine. See cases cited in 11 A. & E. Ency. of Law, (2 ed.) 491, and cases cited.

There is no exception to the rule in cases of gifts *"causa mortis,"* and therefore the court did not err in telling the jury in instruction nine that the burden was on the appellee to establish a valid gift of the certificate by a preponderance of the evidence. This rule as to the burden of proof does not in any manner contravene the doctrine that the evidence to establish a *donatio causa mortis* should be "clear and convincing, strong and satisfactory," as is properly held in many jurisdictions. *Lewis* v. *Merritt,* 21 N. E. (N. Y.) 141, and numerous cases cited in appellant's brief. The latter doctrine relates not to the burden of proof or the preponderance of the evidence, but to its quality or probative force. Instruction number nine was an instruction on the burden of proof and declared the law on that subject applicable to the case at bar.

The instructions upon the whole were comprehensive and clear declarations, submitting accurately every phase of the evidence to the jury. If it were not so, the cause would have to be reversed, for the most difficult question with us has been to determine whether or not there was any evidence to sustain the verdict.

8. Giving the evidence its strongest probative force in favor of appellee, a majority of the court have reached the conclusion that there is sufficient evidence to support the verdict. Although, if sitting as jurors, we might have rendered a different verdict, yet we feel that, under well established rules of this court, we could not disturb it without invading the province of the jury. *St. Louis, I. M. & S. Ry. Co.* v. *Petty,*

63 Ark. 94; *Wallis* v. *St. Louis, I. M. & S. Ry. Co.,* 77 Ark. 556; *Rogers* v. *Choctaw, O. & G. Rd. Co.,* 76 Ark. 520; *Priest* v. *Hodges,* 90 Ark. 131; *Scott* v. *Moore,* 89 Ark. 321; *McClintock* v. *Frohlich,* 75 Ark. 111; *Davis* v. *Trimble,* 76 Ark. 115; *St. Louis S. W. Ry. Co.* v. *Byrne,* 73 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Osborne,* 67 Ark. 399.

The evidence is set forth at length in the statement of facts. The kindly offices of the Harts to Mr. Carroll during the time he had formerly lived with them caused him to regard them as homefolks and their house as his home. When disease had prayed upon his frame until it became necessary for him to go to an asylum to be treated, and to seek the assistance of others, he said he wanted "to go home" to "John Hart's." His friend, believing that the hospital would be a better place for him to be treated, finally prevailed upon him to go there. But he was never satisfied there, and when the attending physician "intimated to him that he was not going to get well, he seemed to want to die at the home of his friend Hart." Before leaving the hospital, he was told that he might die, and was asked what he was going to do with his stuff (his money), and his reply was, "John Hart's folks will know what to do with my stuff." In a little while after he was carried to Hart's home, he took the certificate from his pocket, and in the presence of a witness handed it to Mrs. Hart, and said, "Here is a check for my money." On another occasion in the presence of witnesses he asked Mrs. Hart to get the certificate and let another look over it to see if it was O. K., and when this was done, and the certificate was handed to Carroll, he said he had given the certificate to Mrs. Hart, and handed it back to her. Now, if Carroll intended at the time he handed the certificate to Mrs. Hart to immediately pass to her the title and the right to draw his money on deposit, as the above evidence tends to show, and if she accepted it as her own, then the intention on his part to give, and on her part to accept, accompanied by delivery of the certificate for the purpose indicated, would constitute an absolute gift *inter vivos. Ammon* v. *Martin,* 59 Ark. 191. In such case the gift would still be *inter vivos,* although the donor was on his deathbed, and knew that he was going to die. For, although a man may be upon his deathbed, he may

still make a gift *inter vivos*. *Hatcher* v. *Buford,* 60 Ark. 109. There was some evidence to warrant the jury in finding such a gift. If, instead of giving Mrs. Hart the certificate, he had in fact given her a check for the money, the evidence of an absolute gift, under the circumstances, would have been conclusive. Well, the fact that Carroll spoke of the certificate as "a check" was some evidence that he intended to treat it as a check, and meant for it to have the same effect as a check in transferring the immediate title of the money on deposit from himself to appellee. He called the certificate "a check," and the jury might have concluded that he gave it this designation because he intended that appellee might use it as she would a check given her under the same circumstances. When approached in regard to making a will, Mr. Carroll said "he had thought at first he would make a will, but afterwards changed his mind; that he had already given the certificate to Mrs. Hart; that if he willed what he had away he would die a pauper." Then, after having the certificate examined and pronounced O. K. by Stout, he, Carroll, again handed the certificate to Mrs. Hart, saying to those present at the time, "I have given it to her, and she would know what to do with it in a few days." The above testimony, taken in connection with the other evidence tending to prove that Carroll then realized that he was soon going to die, warranted the jury in finding that there was a gift of the money "to appellee *causa mortis.*" In other words, the jury might have found from the above testimony that Carroll, being then on his deathbed and expecting soon to die, gave the certificate of deposit to appellee, which was a symbolic delivery of the money itself, and that appellee accepted the gift; that the intention of Carroll at the time was that no title or property in the money should pass to appellee except in the event of his death. These facts would constitute a gift *causa mortis.* The essential elements and characteristics of such gifts are fully set forth in *Hatcher* v. *Buford,* 60 Ark. 169.

It is unnecessary to repeat here what we said there. The doctrine of that case as to gifts *causa mortis* rules this upon the facts as the jury might have found them.

There is no reversible error in the record, and the julgment is therefore affirmed.

McCULLOCH, C. J. and BATTLE, J., dissent on the ground that there is no evidence of a gift, either *inter vivos* or *causa mortis,* legally sufficient to sustain the verdict.

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

Opinion delivered February 14, 1910.

1. MASTER AND SERVANT—DEFECTIVE APPLIANCE.—Evidence tending to prove that the sill to which a stirrup or step on a freight car was attached was in a defective condition, and that the condition could have been discovered by proper inspection, is sufficient to establish negligence on the part of the railway company in failing to discover the defect. (Page 568.)
2. SAME—DUTY AS TO APPLIANCES.—It is the duty of a master to exercise ordinary care and diligence to furnish its servants with reasonably safe appliances with which to work and to keep them in a reasonable state of repair. (Page 569.)
3. SAME—DUTY AS TO INSPECTION.—It is the duty of the master to search for latent defects in appliances, but the servant is required to take notice of such defects only as are open to ordinary observation. (Page 569.)
4. SAME—ASSUMED RISK.—A servant does not assume the risk of danger created by his master's negligence unless he is aware of the negligence and appreciates the danger. (Page 569.)
5. INSTRUCTIONS—IGNORING ISSUE.—An instruction which ignores a material issue in the case about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge. (Page 570.)
6. SAME—CONSTRUCTION AS A WHOLE.—Though the instructions in a case may be apparently conflicting, yet if, from the language used or the relation which the instructions bear to each other, they may be read without conflict and as a harmonious whole, they will be so treated. (Page 573.)
7. TRIAL—IMPROPER ARGUMENT.—Reversal of a case on account of an improper argument will not be ordered unless it appears that such argument worked a prejudice to the losing party. (Page 575.)
8. DAMAGES—EXCESSIVENESS.—In a personal injury suit the evidence was that plaintiff was 21 years old, with a life expectancy of 41 years; he was then earning from $75 to $85 per month, and was in line of promotion with prospect of receiving much higher wages; both of his legs were amputated on account of the injury; he was in the

hospital four or five months, and endured great and prolonged pain. *Held,* that a verdict for $25,000 as damages was not excessive. (Page 576.)

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

W. E. Hemingway, Kinsworthy & Rhoton, James H. Stevenson, P. R. Andrews and *S. D. Campbell,* for appellant.

1. The evidence fails to show such negligence as to make the company liable, and does show an assumed risk and such negligence on part of plaintiff as to preclude recovery. Negligence must be shown affirmatively. 79 Ark. 76; 57 Ark. 461; 26 Cyc. 1202-3-4; 116 Fed. 627; 106 Fed. 645; 1 Am. St. 22. Contributory negligence bars a recovery. 63 Ark. 427.

2. Specific objections were made to those instructions which direct a verdict for plaintiff when the question of assumed risk was entirely ignored. 20 S. W. 271; 81 *Id.* 204; 77 Ark. 307; 87 Ark. 511; 30 Ark. 362; 51 Ark. 88; 91 Am. Dec. 309; 28 Tex. 203. The vice in these instructions is not cured by considering them as a whole. 55 Ark. 393; 57 *Id.* 203; 87 *Id.* 511.

3. The measure of damages on the element of decreased earning capacity would be the present value of the same, and not a lump sum consisting of the aggregate of such amounts over a long period of time. 89 Ark. 326.

4. The remarks of counsel were highly prejudicial, and of such nature as to excite the passions and prejudices of the jury. 58 Ark. 368, 473; 61 *Id.* 130; 63 *Id.* 176; 69 *Id.* 486; 65 *Id.* 625; 70 *Id.* 305; 72 *Id.* 427.

5. The verdict is excessive. 89 Ark. 326-333-4; Scribner on Dower (2 ed.) 816; 82 Ark. 61; 76 *Id.* 190; 78 *Id.* 109.

Smith & Blackford, and *Brundidge & Neelly,* for appellee.

1. There was no assumed risk. An employee never assumes a risk caused by the negligent act of the master, but only the ordinary risks incident to employment which he knows of or may know by ordinary care. 67 Ark. 209; 77 *Id.* 367; 120 S. W. 151, 766, 598, 599, 601; 121 S. W. 999, 268; 119 *Id.* 73, 672.

2. There is no error in the charge. Instructions should not be considered isolated and alone, but all together in connection with all others given. 57 Ark. 208; 55 Ark. 393. The

court should not have stressed the question of assumed risk. 87 Ark. 443; 48 Ark. 333.

3. The negligence of defendant in supplying a safe road-bed, place, tools, etc., was not assumed. 88 Ark. 188.

4. No request was made by defendant as to the measure of damages. Similar instructions on the measure of damages have been approved. 65 Ark. 627.

5. Instruction 7 on assumption of risk was approved in 88 Ark. 188; 83 Ark. 321. See also 48 Ark. 333.

6. No harm was done by modifying the instructions. 48 Ark. 333.

7. A reversal will not be ordered on account of improper argument where no unfair advantage is secured nor prejudice results. 75 Ark. 67; 74 *Id.* 256; 73 *Id.* 453-8; 71 *Id.* 427; 74 *Id.* 355; 77 *Id.* 238.

8. The damages not excessive. 67 Ark. 377; 87 Ark. 443.

McCULLOCH, C. J. Plaintiff, Clyde Rogers, recovered judgment against the railway company for damages in the sum of $25,000 as compensation for personal injuries received while working for the company as brakeman on a freight train. In attempting to mount a moving box car the stirrup or step into which he placed his foot on the side of the car turned, his foothold gave way, and he fell under the wheels, and both legs were so badly crushed that they had to be amputated. This occurred at Tuckerman, Arkansas, about nightfall, or between sundown and dark. Some of the witnesses say it was still light enough to see, but that lanterns were lighted. The train was north-bound, and had taken a siding to allow a south-bound train to pass. After the south-bound train had passed on the main line, the head brakeman opened the switch, and the engineer started the train forward, when a drawhead on the rear end of a car pulled out and broke apart. This was car marked "W. of A. 1551." Part of the drawbar and coupling fell down on the track between the rails, and when this was discovered plaintiff and the conductor went to the place and endeavored to throw the pieces off the track so as to free the track of the obstruction, but they found them too heavy to handle. While they were working at this, it was decided to set the broken car out of the train and leave it on the side

track, and the engine with fourteen cars attached—car marked "W. of A. 1551" being the rear one—pulled forward out of the siding and backed down the other track with this car in front, the broken end being forward. As the backing cars came down the other track and approached within a few feet of where plaintiff and the conductor were working to remove the broken pieces, the conductor directed plaintiff to get on this car and help set it out. Plaintiff attempted to obey, and as he mounted the car the stirrup turned when he placed his foot in it, his handhold also loosened, and he fell under the wheels.

The stirrups are of iron, and are made to hang down under the side of the car, near the end, and are bolted to the sills. On examination of this stirrup a day or two later it was found that the bolt in one end was missing, so that the stirrup was held only by the bolt in the other end, which had also slipped down about an inch. The sills to which it was bolted were old and rotten, and made of wind-shaken timber, and there was a split where the bolt went through, which appeared to be old. Some of the witnesses said that the stirrup swung down under the side of the car, without anything apparently wrong with it to ordinary observation, but that when touched it would swing around on the one bolt under the side of the car. Others said it was slightly bent, and that one end hung around under the car. There was no evidence given by any witness to the effect that the stirrup was observed before the accident to be out of repair, or that to ordinary observation it appeared to be out of repair. Plaintiff testified that he had not noticed anything wrong with it. He stated that when he attempted to mount the car it appeared to be all right; that the stirrup was in its usual place, and that he looked at it when he ran to get on the car. He said that the first he knew of anything being wrong with the stirrup was when it gave way beneath his foot.

A car inspector for the company testified that he inspected this car, as well as all the others in the train, at Baring Cross, and that the car was in good condition and free from defects.

Defendant put in evidence from the standard book of rules two covering the duties of brakemen, as follows: "Rule 400. While on the train, brakemen are under the directions of the

conductor. It is their duty to attend to the brakes, be provided with, take care of and properly display train signals and danger signals, assist the conductor in loading and unloading freight, in inspecting cars and in all things necessary to the lighting, heating and ventilation of the cars; open and close the car doors and assist the conductor in the proper disposition of passengers and in preventing them from riding on the platform or in any wise violating the regulations provided for their safety, in preserving order and in all things requisite for the comfort of the passengers."

"Rule 401. Trainmen must examine and know for themselves that the brake-shafts and attachments, ladders, running boards, steps, handholds and other parts and mechanical appliances, which they are to use, are in proper condition; if not, report them to the proper authorities, that they may be put in order before using."

The conductor, Mr. Parker, who was introduced by defendant as a witness, testified that the common interpretation of these rules is that brakemen are required to look around the train to see if anything is the matter, but that a brakeman would not be required to make a thorough examination like a car inspector. Quoting further his testimony, he stated: "It is a general inspection of conductors and also of brakemen looking over the train for such defects as they may find. A man would not have to grab hold of every piece. It is the duty of the inspector to do that, as I understand. They have a car inspector at Argenta, and that is the last place the car inspector could have looked at it. It is the business of the car inspectors, as I understand it, to make an examination for hidden defects." This testimony was not contradicted.

It is, in the first place, insisted that there is not sufficient evidence to show that there was a defect in the car when it started on the trip, nor to sustain a charge against defendant for failing to discover the defect, if any existed. In other words, that there was no defect which defendant by the exercise of ordinary care could have discovered at the time of the inspection when the train started on the trip. We think there was sufficient evidence, however, to sustain that charge. Some of the witnesses who examined the car shortly after the accident

testified that the stirrup was loose, that the sills to which it was bolted were old and made out of wind-shaken timber, and that there was an old crack where the bolts went through. The evidence also warranted a conclusion that these defects in the stirrup and the sill to which it was bolted were not attributable to the pulling out of the drawbar when the train broke in two. Now, if this condition existed as testified by the witnesses, it justified a finding that the defects could, by the exercise of ordinary care on the part of the car inspector, have been discovered when the inspection was made at Baring Cross, and that he was guilty of negligence in failing to discover them. *St. Louis & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372; *Kansas City So. Ry. Co.* v. *Henrie,* 87 Ark. 443; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes,* 88 Ark. 181.

It was the duty of defendant, through its car inspector, to search for hidden defects. This is a part of the master's duty to exercise ordinary care and diligence to furnish its servants with reasonably safe appliances with which to work and to keep them in reasonable state of repair. *St. Louis, I. M. & S. Ry. Co.* v. *Rice,* 51 Ark. 467; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes, supra.*

Counsel argue that, if there was a defect which the inspector could have discovered, it was equally open to the observation of the brakeman, and that he should not have been permitted to recover, because he, too, failed to discover it. This does not follow, for the duties of the master and of the servant are not the same. It was the duty of the master, through its inspector, to search for hidden defects, while the servant is required only to take notice of such defects as are open to ordinary observation. *Little Rock, M. R. & T. Ry. Co.* v. *Leverett,* 48 Ark. 333. Nothing in the rules of the company, as interpreted in the light of the evidence introduced in this case, imposed any greater obligation on the part of the servant or any less on the part of the master. The evidence justified the belief that the master failed to discharge its duty; it does not show that the servant failed to exercise ordinary care for his own safety.

But it is claimed that plaintiff assumed the risk of danger of the defective stirrup, and that on this account he should not

be permitted to recover. The second instruction given at appellee's request omitted any mention of the question of assumed risk, and authorized the jury to find for plaintiff upon the facts stated therein without considering that question. It was specifically objected to on that ground, and the ruling of the court is assigned as error. Was there any evidence that the plaintiff assumed the risk except under the general contract of employment?

The question of contributory negligence was, as will presently be shown, submitted to the jury on correct instructions. The controlling principles of this branch of the case were stated in a recent case as follows: "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. * * * 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." *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102.

Judge RIDDICK announced the same principle in the Jones case, *supra*: "The servant is not presumed to know of risks and dangers caused by the negligence of the master, after he enters the service, which change the conditions of the service. If he is injured by such negligence, he cannot be said to have

assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on contract; but, if the injury was caused in any part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk."

Was there any evidence adduced in the case that plaintiff knew of the defective condition of the stirrup? None whatever. He says that he did not notice the defect, and there is no proof of any defect which, before the accident, was open to ordinary observation. He could have stooped down and examined the fastenings of the stirrup closely, as the car inspector should have done; but he was not required to do that, and did not assume the risk of the danger by failing to do it. Some of the witnesses who examined the stirrup after the occurrence say it was slightly bent, and one that it turned in under the car; but there is no evidence that this condition existed before the accident. It is probable that, when plaintiff put his foot in the stirrup and threw his weight on it, it gave way because of the defective fastenings and turned around out of place, in the condition in which the witnesses found it the next day. Because it was subsequently found in this condition does not warrant the inference, in the absence of other proof and under the circumstances in this case, that it was in that condition when plaintiff placed his foot in it. We do not overlook the fact that one of defendant's witnesses who never saw the car, but who testified as an expert, said that a stirrup of this kind is on the car in plain view, and that there is nothing to prevent a brakeman from seeing it if it is loose. This witness, however, did not state that because one of the bolts was out of the stirrup, or because the sills were rotted or split so that the bolts were likely to drop out at any time, it was such a defect as was open to ordinary observation. We are therefore of the opinion that the court did not err in failing to properly submit the question of assumed risk. Instruction number two, of which appellant complains, permitted plaintiff to recover only on condition that defendant was guilty of negligence; and if the jury

found defendant guilty of negligence, there is no evidence of any assumption of risk.

We come next to the question of contributory negligence. The court gave the following instructions at plaintiff's request:

"2. The jury are instructed that it was the duty of the defendant railroad company to exercise ordinary care and prudence to provide the plaintiff, Rogers, with cars having reasonably safe appliances for his use in the discharge of his duty as a brakeman; and if you believe from the evidence that the plaintiff was injured by reason of the failure of said defendant railroad company to exercise such care and prudence in furnishing cars having reasonably safe appliances for going upon them, when it became necessary in the discharge of his duty, and that he was injured as the direct and proximate result thereof, and that the plaintiff at the time was engaged in the performance of his duties as an employee of said defendant company, and that said plaintiff was not guilty of such negligence as contributed to his injury, then it will be your duty to return a verdict in favor of the plaintiff."

"3. The jury are instructed that by the term 'proximate cause' is meant the efficient cause, without which the injury would not have happened."

"4. The jury are instructed that if you believe, from the greater weight of testimony in this case, that the plaintiff, while working as a brakeman for the defendant company, was injured by either falling or slipping from one of the defendant's cars or a car hauled by the defendant, and that such fall or slipping was caused by an iron step being loosened at one end, and that such iron step was not properly fastened at both ends, and that the condition of said step was known to said defendant railroad company, or might have been known by reasonably careful inspection of the same, before the injury, then you may find for the plaintiff."

"5. If the defendant company relies upon the plaintiff's contributory negligence as a defense, then the burden rests on the defendant to establish such contributory negligence, unless it appears from the testimony introduced in behalf of the plaintiff."

The court gave numerous instructions on the subject of

assumption of risk and contributory negligence, in other parts of the charge, at the request of both plaintiff and defendant. Defendant objected to instruction number two specifically on the ground that it ignored the question of assumed risk; and specific objections were made to instruction number four on the ground that it ignored both the questions of assumed risk and contributory negligence; and instruction number five was specifically objected to on the ground that it erroneously stated the rule of evidence applicable to the case.

It has been decided by this court in an unbroken line of cases that an instruction which ignores a material issue in the case about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge. Where the instructions are thus conflicting, it is impossible for an appellate court to tell which of them the jury followed, and such an error calls for a reversal. Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole. *Selden* v. *State,* 55 Ark. 393; *Goodell* v. *Bluff City Lbr. Co.,* 57 Ark. 203; *Rector* v. *Robins,* 74 Ark. 437; *Fletcher* v. *Eagle,* 74 Ark. 585; *St. Louis & N. A. Rd. Co.* v. *Midkiff,* 75 Ark. 263; *Grayson-McLeod Lumber Co.* v. *Carter,* 76 Ark. 69; *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 224; *Bayles* v. *Daugherty,* 77 Ark. 201; *White River L. & W. Ry. Co.* v. *Star R. & L. Co.,* 77 Ark. 128; *Merchants' Fire Ins. Co.* v. *McAdams,* 88 Ark. 550; *Jones* v. *State,* 89 Ark. 213; *Southern Anthracite Coal Co.* v. *Bowen, ante* p. 140.

There are, however, cases, as we conceive, not inconsistent with that rule, where we have held that the law of the case can not be stated in one paragraph or instruction and, though the instructions given may be apparently conflicting, if, from the language used or the relation which the instructions are made by the whole charge to bear toward each other, it is readily seen that they are to be read together without conflict and as a harmonious whole, and they can be so read, then it is our duty to so treat them. *Arkadelphia Lumber Co.* v. *Posey,*

74 Ark. 377; *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458; *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61; *Pettus* v. *Kerr,* 87 Ark. 396; *Burke* v. *Sharp,* 88 Ark. 433.

It is seen that in instruction number two quoted above the court included the question of contributory negligence, and made the plaintiff's right to recover depend upon his own freedom from negligence which contributed to his injury. The court also followed instruction number four with one on the subject of contributory negligence, number five, as well as gave several others on the same subject at the request of both parties. Instructions numbers four and five, on account of their juxtaposition, must be read together, practically as paragraphs of the same instruction. They are separated only by the figure indicating the number of the latter. In fact, instructions number two, three, four and five all relate to the same subject, and should be read together. If asked to do so, the court would doubtless have stricken out the figure separating four and five, so as to let them appear to be one instruction. Instead of asking this, defendant contented itself with an unfounded objection to number five. The objection to these instructions is not, we think, well taken. *Arkansas Midland Ry. Co.* v. *Rambo,* 90 Ark. 108.

Numerous objections were made to the closing argument of plaintiff's counsel, and exceptions were duly saved. One objection was to a reference to the absence of a car inspector named McAlister, who is said to have inspected the car at Argenta or Baring Cross. When the case was called for trial, defendant moved for a continuance to procure the attendance of a witness named Estes, who was a car inspector. His testimony was set out in the motion, and showed that if present he would testify that he inspected car "W. of A. 1551" and the other cars in the train at Baring Cross when they started on this trip, about twelve hours before the accident, and that the car was in good condition and free from defects. The court overruled the motion for continuance, but permitted defendant to read to the jury the statement in the motion as the deposition of Estes. In addition to this, the court permitted defendant to prove by another car inspector, Reynolds, the record of inspection showing that this car had been inspected when the train started on the trip and found to be in good condition.

Reynolds testified also that he thought the car had been inspected by McAlister, and that the latter was assisted by Estes. He stated that he thought McAlister was then at Pinnacle, Ark. In the closing argument plaintiff's counsel said: "If you believe Reynolds, the railroad company had it within their power to have shown this car was duly inspected at Baring Cross, and they have not done so, Reynolds stating that the man lived within twenty miles of Little Rock." We fail to discover any prejudicial effect of the statement. Reynolds was not certain that McAlister had made the inspection, but said that Estes assisted. The testimony of Estes was to the effect that he inspected the car and found it to be in good condition; but whether or not the inspection was accurate or sufficient was a question for the jury to pass on in the light of the other evidence in the case.

Another objection was to that part of the argument in which counsel said that "The first limb had been amputated and the boy is placed in the baggage car along with the chickens, the ducks and the geese, and they start on that long, sad and painful ride to St. Louis." When the plaintiff was injured at Tuckerman he was carried to Newport, where he remained over night, and one of his legs was amputated by the company's surgeon, and then he was carried to the defendant's hospital at St. Louis. On the journey to St. Louis he rode in the baggage car on a cot. The evidence shows that he suffered intensely during the journey. The other leg was amputated in St. Louis.

Now, we understand from the argument of counsel that he referred to the inconvenience of the journey and the suffering which it entailed, and not to any kind of mistreatment on the part of the company's servants. It was, of course, not correct to say that he rode with the chickens, the ducks and the geese, for there was no proof of any being in the baggage car, or that their presence would have augmented the pain. We presume the jurors were possessed of an ordinary degree of intelligence, and it is therefore impossible to conceive of any prejudicial effect which the statement could have had on their minds.

Still another objection relates to counsel's harsh criticism of the agents of the company in attempting to induce plaintiff

to give a statement as to the manner in which he was injured. Defendant proved contradictory statements made by plaintiff to the surgeon while he was laboring under great pain and mental distress, waiting for his leg to be dressed or amputated. On cross examination, the plaintiff's attorney drew out the fact that the surgeon had asked plaintiff to sign a written statement; and this was the basis of counsel's criticism. Counsel had a right to comment on the circumstances under which the alleged contradictory statements were made, but beyond that it was improper for him to go. But we have said in many cases that the reversal of a case on account of alleged improper argument must rest on an undue advantage secured by an argument which has worked a prejudice on the losing party. *Kansas City So. Ry. Co.* v. *Murphy,* 74 Ark. 256. The reversal does not necessarily follow from an improper argument, when it does not appear that it had a prejudicial effect. The verdict in this case does not appear to be against the preponderance of the testimony, either as to defendant's liability or the amount of the damages. Therefore, we cannot attribute the verdict to the improper argument. The same rule does not apply to improper comments like this in argument as to statements of facts not in evidence.

It is contended that the verdict is excessive. Plaintiff was twenty-one years of age, with a life expectancy of about forty-one years; and the evidence warrants a finding that he was then earning from $75 to $85 per month, and was in line of promotion with a prospect of receiving much higher wages. Both of his legs were amputated on account of the injury. He was in the hospital four or five months and endured great and prolonged pain. We will not say that under the proof the verdict of $25,000 is excessive.

Judgment affirmed.

WOOD, J., (dissenting). The rule by which to determine the correctness of a single instruction, or the charge of a trial court as a whole, is announced in the opinion as follows: "An instruction which ignores a material issue in the case, about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents

that issue is found in other parts of the charge. Where the instructions are thus conflicting, it is impossible for an appellate court to tell which of them the jury followed, and such an error calls for a reversal. Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole."

Applying this rule, which is undoubtedly sound, to the instructions given in the case at bar, it is impossible to escape the conclusion that prayer number four, granted by the court at the request of appellee, is erroneous, misleading and prejudicial. That prayer is as follows:

"The jury are instructed that if you believe from the greater weight of testimony in this case that the plaintiff, while working as a brakeman for the defendant company, was injured by either falling or slipping from one of the defendant's cars, or a car hauled by the defendant, and that such fall or slipping was caused by an iron step being loosened at one end, and that such iron step was not properly fastened at both ends, and that the condition of said step was known to said defendant railroad company, or might have been known by a reasonably careful inspection of the same before the injury, then you may find for the plaintiff."

A material issue in the case was the contributory negligence of appellee. It was one of the defenses, and it is conceded that under the evidence it was a question for the jury. The above instruction completely "ignores that issue" and "allows the jury to find for the plaintiff without considering it." A specific objection was made to it at the time, "because it directed a verdict for the plaintiff upon finding the hypothetical facts stated in the complaint, ignoring the proposition of contributory negligence." If the attention of the court had not thus been specifically directed to the error, we could have excused and overlooked it, as we did recently in the case of *Ark. Mid. Rd. Co.* v. *Rambo,* 90 Ark. 108. See also *St. Louis, I. M. & S. Ry. Co.* v. *Carter, post* p. 589. In the case of *Ark. Mid. Ry. Co.* v. *Rambo, supra,* speaking of such an omission in an instruction, we said: "It can not be doubted that, if the attention of the trial judge had been called to the

fact that the qualification in this respect had been left out of the instruction now under discussion, he would have corrected it. No such request was made, and only a formal general objection was made to the instruction. We think it was the duty of counsel to have made a specific objection." Nothing like that can be said in this case. Here a specific objection was made, and in my opinion the refusal of the court to have the instruction so amended as to recognize the defense of contributory negligence permitted the appellee to recover upon the facts stated in the instruction, notwithstanding he may have been guilty of contributory negligence. True, in other instructions the court correctly charged the jury as to contributory negligence. But the failure of the trial judge to have instruction number four corrected in the particular indicated after his attention was called specifically to the defect showed that he was willing to give instructions that were in irreconcilable conflict. For instruction number four was a complete proposition of law, stating the facts which, if found in favor of appellee, would entitle him to a verdict. If the court would not require the instruction to be amended when its attention was specifically called to the defect, what warrant have we for saying that the court would not have permitted the attorney for the appellee to argue that this instruction meant just what it said? The most prejudicial effects could be created in argument by such imperfect and misleading instructions. The jury had no certain guide, and the court refused to give one.

Where instructions are numbered separately and stand out as independent propositions, the juxtaposition of the numbers of certain instructions on a particular subject as they appear in the transcript here can make no difference. They might not have been thus presented to the jury in argument. Who can tell how few or how many instructions the attorneys dwelt upon in their argument, or in what order they presented them? In the closing argument it would have been the most natural thing, in view of the ruling of the court, for the attorney for the appellee to have singled out instruction number four, which ignored the defense of contributory negligence, and to have told the jury to find for the appellee if they found certain facts stated therein to be true. To prevent just such undue advantages as here

indicated, the charge of the court as a whole should be made harmonious. There is nothing in this record to indicate that the court even told the jury that they must consider all of the instructions together as the law of the case. It seems to me that the instructions must fall under the condemnation of the cases of our own court cited in the opinion, and these cases are but in line with the authorities generally. 2 Thompson on Trials, § 2328; 1 Brickwood's Sackett on Instructions, § 173; 1 Blashfield, Instructions to Juries, § 104; *Adams* v. *Roberts,* 2 How. 486, 496; *Russ* v. *Beck,* 24 Ala. 651, 662; *Swope* v. *Schafer* (Ky.) 4 S. W. 300; *Chappell* v. *Allen,* 38 N. W. 213, 222; *Raysdon* v. *Trumbo,* 52 Mo. 35, 38; *Maxwell* v. *H. & St. J. Ry. Co.,* 85 Mo. 96; *Cornelius* v. *Burford* (Me.), 91 Am. Dec. 309; *Miller* v. *McKinney,* 45 Ill. App. 447, cited by appellant.

The cause should be remanded, and a trial had upon correct instructions. Prayer number four in the form presented should not have been granted.

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

Opinion delivered February 21, 1910.

RAILROADS—CONTRIBUTORY NEGLIGENCE.—In an action against a railroad company for negligently injuring a trespasser on the railroad track it was not error to direct a verdict for the defendant where plaintiff's testimony shows that she was negligent in being in a place of danger, and fails to show that the trainmen were negligent after discovering that plaintiff was oblivious to her danger.

Appeal from Craighead Circuit Court, Lake City District; *Ed H. Mathes,* Special Judge; affirmed.

STATEMENT BY THE COURT.

Clara Grayson, a young woman, lives at Blytheville, Arkansas. On July 7, 1904, she stepped on the railroad track where it intersects one of the main thoroughfares of the city. The street had no sidewalks, but the main track of the railroad and the siding had sand and cinders placed upon it, which made it "a nice place to walk," and it was used, and had been used

for a period of two years, by pedestrians as a walk, "just like they would use one of the streets of the town." Her intention was to walk south down the track toward the depot, and on to her home. When she got on the main line at the crossing, she noticed an engine and two or three cars standing north of the crossing. Soon after she started down the track on the main line, the engine and cars started toward her. She walked on down the main line to the frog, a distance of about 100 feet. At the frog she looked back and saw the engine and cars still coming down the main line with the engine right about even with the switch. Thinking the engine and cars were going down the main line, she stepped over on the siding and walked on down the siding oblivious to her danger. When the engine passed the switch target, the brakeman threw the switch, and turned the cars down the siding, while the engine went down the main line. At the time the engine passed the switch, it was going at the rate of about 6 miles an hour, but the cars were moving not so fast. She walked on down the siding, first in the middle of the siding and then two or three steps on the end of the ties, in all a distance of 140 feet from the switch target, when the detached cars struck her in the back and injured her. At the time, and just before, the detached cars struck her, the engine was passing her on the main line a few feet away making so much noise that she did not hear the cars approaching her from the rear and the outcry of bystanders some distance away. It was daylight. Clara was a young woman, having good use of her senses of sight and hearing. There was a path fourteen feet wide leading from the main street crossing to the depot. This path was smooth and covered with cinders, and people were accustomed to walk thereon going toward the depot. She thought the train she saw was the local. She had often seen the local do switching on the track where she was injured. She did not know that any of the cars were going down the switch track that day, but supposed they were on the main line, and hence she was walking on the siding and on the end of the ties of the siding.

The above states the facts in the strongest light that they may be considered from the viewpoint of appellant.

She brought her suit for damages against appellee, alleging

that its agents and employees negligently "run its train of cars upon and against plaintiff, thereby knocking her down and permanently injuring her internally."

The appellee denied the allegation of negligence, and set up the defense of contributory negligence. The court directed the jury to return a verdict in favor of appellee. To reverse the judgment in favor of appellee this appeal has been duly prosecuted.

D. F. Taylor and *J. T. Coston,* for appellant.

1. Appellee having covered its switch and main line of its railroad with sand and cinders for the purpose of making it a suitable walkway for pedestrians, which had been in use by such pedestrians more than two years prior to appellant's injury, she was not a bare licensee, but was on appellant's track by invitation, and it owed her the duty of ordinary care to discover her presence and avoid the injury. 92 S. W. 791; 27 Atl. 479; 51 Atl. 506; 98 N. W. 143; 89 S. W. 987; 63 S. W. 1054; 57 S. W. 602; 56 S. W. 699; 94 S. W. 971; 74 Fed. 359. Failure of appellee to exercise such ordinary care was negligence, and it is liable for the resultant injury, unless she herself was guilty of contributory negligence in failing to continue to look for the approaching train after she stepped upon the side track. In the light of the misleading circumstances, believing, as any reasonably prudent person would have believed, that the cars following the engine would follow it down the main track, she cannot be held to the duty to look for the approach of the cars after she stepped upon the side track, and she was, therefore, not guilty of contributory negligence. 93 S. W. (Ark.) 564; 95 S. W. 491-2-3.

2. The making of a "flying switch" is so fraught with danger to human life, so prolific a source of injuries, that public policy, as well as humanity, requires that railroads be held liable for such injuries, even though the injured party be a bare licensee or a mere trespasser. 2 Thompson on Neg., § 1717; 15 S. W. 921; 12 S. W. 765-6; 10 S. W. 345-6; 12 S. W. 919.

3. Even if appellant was guilty of contributory negligence, yet, her peril having been discovered by the switchman in time to have prevented the injury by the exercise of ordinary care, appellant is still liable, under the "last clear chance" doctrine.

He had no right, under the circumstances of this case, to presume that appellant would get off of the track without some warning of danger. 86 S. W. 429; 62 Tex. 254; 54 S. W. 631-2; 1 Wigmore, Ev. § 460; 44 Pa. 608; 86 S. W. 305; 95 S. W. 137-8; 104 S. W. 534; 96 S. W. 979; 117 S. W. 543; 109 S. W. 515.

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

It is immaterial whether appellant was an invited guest, bare licensee or trespasser. If one in the full possession of all his senses and faculties steps upon a railroad track at a public crossing, or elsewhere, discovers a train approaching, and, having the present ability to escape to a place of safety by taking to the safer of two routes offered, fails to do so but deliberately continues in the dangerous route, he is guilty of contributory negligence. Appellant, according to her own statement, was guilty of such negligence. 84 Ark. 270, and cases cited below. A breach of duty with reference to "flying switches" would give no right of action unless the injured party was on or about to use a public highway in a town. Appellant was not on such a highway. Discovered peril is not alleged in the complaint. Moreover, there is no evidence that appellant's peril was discovered by any one having the ability to prevent the injury in time to have done so. 62 Ind. 301; 123 Wis. 297; 85 N. W. 1018; 32 So. 507; 114 Ala. 492; 70 Ark. 603; 26 Ark. 3; 64 S. W. 350; 88 S. W. 1001; 40 Ark. 298; 49 Ark. 277; 54 Ark. 25; 59 Ark. 122; 33 S. W. 1054; 16 S. W. 169; 49 Ark. 106; 46 Ark. 513; 88 S. W. 824; 91 S. W. 747; 99 S. W. 693; 91 S. W. 748; 103 S. W. 725; 49 Ark. 257; 36 Ark. 374; 62 Ark. 245; 54 Ark. 431; 69 Ark. 134; 64 Ark. 364.

WOOD, J., (after stating the facts). The judgment was correct. Conceding that it was a question for the jury as to whether appellant was negligent in making the flying switch under the facts in evidence, appellee was nevertheless negligent in walking where she did under the circumstances, and this negligence contributed proximately to the injury of which she here complains.

Giving the evidence its strongest probative force in favor of appellant, it still shows beyond controversy contributory negligence on her part. The uncontradicted evidence shows that ap-

pellant knew, when she reached the main line at the crossing on her way home, that "the train was standing about the alley north of Main street." Appellant herself testified that she looked "back and saw the engine and cars all coming down the main line." When she "looked back the last time, the engine and cars were on the crossing, and the engine was about at the switch." This testimony by appellant shows that she knew the train was moving in the direction she was going. Appellant knowing that the engine and cars were following her, it was negligence of the reckless kind for her to walk either down the main line or the siding without definitely ascertaining, before she did so, on which track the engine and cars would go, or whether the engine would go on one track and the cars on the other, as they often did in making the flying switch. Appellant's testimony shows that she knew that the *local,* which she supposed this train to be, often did switching at this point. She expected it to do switching that day as usual, she heard the engine "start up quick, like it was about to switch cars," yet she did not take the pains to ascertain whether any cars were switched on to the side track where she was walking or not, but carelessly walked on, as appellant's counsel says, "oblivious to her danger." It is undoubtedly true that she was oblivious of her danger, but why was she oblivious? She had no right to be oblivious. It was her duty, with the train following in her footsteps, to be alert and thoughtful. She had no right to suppose that the train would go on the main line, and not on the siding. She could not speculate about which track the train would take, and escape the disastrous consequences of such speculation. It was her duty to know under the circumstances which track the train had taken before she put her foot in the dangerous way, when the way of perfect safety was open to her.

In *Burns* v. *St. Louis S. W. Ry. Co.,* 76 Ark. 10, the facts were stated as follows. "Burns had just left the depot, and saw a train standing just northeast of the depot at the tank, and knew that it could not get on the 'passing' track until it came thirty steps south of the depot; and about time said freight train reached said 'passing' track he turned round and looked at it, and saw it turn, *as he thought,* on the 'passing' track, which

he was then on, as it was the custom of trains of that kind to do. He was familiar with the different trains on the Cotton Belt Railroad. Some are local freight trains, and some are through freight trains, and there are fifteen or twenty passing during the day. Now, he walked down the 'passing' track for some distance, which was the common walk way, and, hearing the train move rapidly, thought it would be safer to step over on the main track, and be further away, so it could pass. He used his eyes, and he thought he saw it go on the 'passing' track, as it was the custom of that class of trains to do so."

Of these facts the court said: "This leaves nothing for the jury. According to familiar rules often announced by this court, appellant did not make that use of his senses for his own protection which the law exacts before he can recover for the negligence of the company that concurred in his injury.

"Appellant's great familiarity with the tracks and trains where he was injured, and the ever imminence of peril, where there was so much passing and switching, should have kept his senses alert, and have caused him to walk between the railroad tracks where, according to the witnesses, it was 'nice and smooth' and free from all danger. The law wisely and justly holds the company liable for its own acts of negligence which result in injury to another. But there would be no reason or justice in holding it responsible for the mistakes of another which it did not cause, and could not prevent, and but for which there would have been no injury, notwithstanding its own negligence."

The facts in the case at bar showing conclusively the contributory negligence of appellant are even stronger than they were in the above case. See other cases there cited and also the case of *St. Louis & S. F. Rd. Co.* v. *Ferrell,* 84 Ark. 270.

The complaint does not allege that appellee was liable because of the discovered peril of appellant in time to have avoided injuring her. But, treating that as an issue upon the testimony that was offered without objection from appellee, still there is no evidence to warrant a finding against appellee on that issue. While there is some evidence tending to show, and that would justify a finding, that appellee's servant discovered appellant, there is no evidence whatever that he knew that she was oblivious to her danger. On the contrary, the undisputed

evidence is that she had loooked back, and, while she says she "didn't see anybody" when "she looked back," yet other witnesses in her behalf and witnesses for appellee testify that the switchman was at the switch. Then, if the switchman was there and saw appellant, when he discovered her he had the right to rest upon the assurance that she was cognizant of the fact that the train was following her, for she had looked and had seen it. He was not culpable for not giving her further warning or for not making a more strenuous endeavor to rescue her. For, from his viewpoint, as appellant's witnesses place him, he could see that appellant was not unconscious of the movements of the train, and therefore he had the right to assume that she would exercise the ordinary prudence of an intelligent person, conscious of danger, and step aside, out of harm's reach, as the cars passed by.

The proof did not make appellee liable. There was no issue of fact for the jury. Affirmed.

CARR v. STATE,

Opinion delivered November 1, 1909.

1. SUPREME COURT—SUPERVISORY JURISDICTION—AUTHORITY OF JUDGE.—Const. 1874, art. 7, § 4, giving the Supreme Court superintending control over inferior courts and power to issue writs of error, supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs, and impowering the judges severally to issue any of the aforesaid writs, does not authorize a judge of the Supreme Court to review, on certiorari, the decision of a circuit judge denying bail. (Page 587.)
2. BAIL—REVIEW OF PROCEEDING.—In a capital case where the evidence leads to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he will probably be punished capitally if the law is administered, the judgment of the circuit judge or court denying bail to him should be affirmed on appeal. (Page 588.)

Certiorari to Pulaski Circuit Court, First Division; *Robert J. Lea*, Judge; affirmed.

W. H. Pemberton, F. T. Vaughan, and *Palmer Danaher,* for petitioner.

Ordinary rules of law do not apply to applications for bail. 39 Ark. 126. The authority given to a judge of the Supreme Court to issue the writ of habeas corpus carries with it the right to hear and determine the same. 40 Ark. 507; 15 S. W. 850; 40 S. W. 650. Section 3834, Kirby's Digest, provides that writs of habeas corpus may be issued by the judges of the Supreme Court, chancery and circuit courts. Nothing is said about the right to "hear and determine," yet it would hardly be contended that they have not this right. A statute granting a power grants everything necessary to make the grant effectual. 40 S. W. 650. As to inherent powers of judges in vacation, see 32 Wash. 50; 72 S. W. 539. The order of Judge WOOD is not appealable nor subject to review. 40 Ark. 507; 27 Am. Rep. 218; 9 Am. St. Rep. 816; 83 Am. Dec. 292; 98 *Id.* 404.

Waiving all other questions, appellant is entitled to bail because the "proof is not evident or the presumption great." 39 Ark. 126; 75 Ark. 246; 59 Ark. 132; 69 Ark. 649; 67 Ark. 594; 76 Ark. 515; 24 Ark. 275; 54 S. W. 587; 20 S. W. 983; 38 S. W. 770; 15 S. W. 173; 10 L. R. A. 847; 5 Am. Dec. 706. When there is both passion and provocation, an unlawful killing is only manslaughter. 70 Ark. 278; 82 Ark. 97. If it be clear that appellant is guilty of murder, but there is a doubt as to the degree, he is entitled to bail. 85 Ark. 357; 76 Ark. 515.

Roy D. Campbell, Prosecuting Attorney, and *Lewis Rhoton,* for respondent.

BATTLE, J. George Carr was accused of, and arrested and imprisoned for, murder in the first degree, committed by the killing of Adolph Topf in Pulaski County, in this State, on the 5th day of June, 1909. He applied to Robert J. Lea, Judge of the Pulaski Circuit Court, to be admitted to bail, which was refused. On the second day of September, 1909, he applied to CARROLL D. WOOD, an Associate Justice of this court, for a writ of certiorari to bring up for revision a transcript of all the proceedings before the circuit judge, Robert J. Lea, including the evidence heard by him, to the end that he might be admitted to bail if he be entitled to it. Upon examination of a transcript of such proceedings and evidence, which was admitted by the parties to be a true and correct record, and upon waiver of the writ of certiorari, Mr. Justice WOOD allowed him bail in

the sum of $7,500. This record is now before us to determine whether the circuit judge erred in refusing to grant bail.

The first question we shall consider is, what is the force and effect of the order of Mr. Justice WOOD admitting the prisoner to bail?

Section four of article seven of the Constitution provides: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error, and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs; and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs."

In Ex parte *Good,* 19 Ark. 410, this court held that, in the exercise of its constitutional power of superintending control over inferior tribunals, it could review, on certiorari, the decision of a circuit judge refusing bail, and indicated the proper mode of practice of bringing the decision before it for review. This decision was approved in Ex parte *Kittrell,* 20 Ark, 500, and Ex parte *Harbour,* 39 Ark. 126.

The circuit judge had the power in this case to admit the prisoner to bail or refuse it. The authority to review his order or judgment refusing it or set it aside is supervisory, and is vested exclusively in the Supreme Court. No appellate or supervisory jurisdiction is invested in any of its judges. They have the authority to issue certain writs in aid of the appellate and supervisory jurisdiction of the Supreme Court; and for that purpose, and subject to the restrictions prescribed by law, can issue them to stay temporarily proceedings on the judgment appealed from for its enforcement, to preserve the *status in quo* of the parties pending the determination of the appeal, and for the purpose of protecting the jurisdiction and making the judgment of the court effective when rendered, but not to reverse, modify or affirm the judgment of the inferior tribunal. In the

exercise of the jurisdiction of this court no less than three of its judges can make an order affecting an order or judgment appealed from. It is obvious that one judge has not the power of three, nor in the vacation of the court can exercise its jurisdiction.

The Legislature once attempted to vest a judge of this court with the power to compel a judge of the circuit court, or any circuit court, by a writ of mandamus, to grant an injunction after he or it has refused an application for such relief. This was the effect of an act entitled "An act to regulate the practice in suits for injunction and for the appointment of receivers," approved March 23, 1881. In Ex parte *Batesville & Brinkley Railroad Company,* 39 Ark. 82, this court held that the Legislature could not vest a judge of this court with such power. Judge Smith, delivering the opinion of the court, said: "So far as it (act of March 23, 1881) authorizes a single judge of this court to review the chancellor's decision, the act is certainly unconstitutional; because the concurrence of two judges is in every case necessary to a decision; and it is the court, and not the individual members thereof, that is impowered to hear and determine mandamus and other remedial writs." Mandamus is one of the writs the Constitution authorizes the judges of the Supreme Court to issue. What is said of it is true as to the other writs mentioned in the Constitution in the same connection.

The order of Mr. Justice WOOD granting bail is without authority and of no effect.

Did the circuit judge commit a reversible error in refusing to grant bail? The Constitution provides: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption is great." In Ex parte *Good,* 19 Ark. 410, 416, this court held that the power of revising the action of a court or judge refusing bail should be cautiously exercised, and that the decision of the court or judge "should not be overturned except in cases of manifest error." In Ex parte *Jones,* 20 Ark. 9, and Ex parte *Bird,* 24 Ark. 275, Ex parte *Good* was approved, but the court said we should "not lose sight of the humane principle of the law that requires every reasonable doubt to go to the

benefit of the prisoner." We should also not lose sight of the provision of the Constitution which declares that persons shall not be bailable in capital cases "when the proof is evident or the presumption is great," and the object of bail, which is to secure the attendance of the prisoner.

In cases where it will not in all probability be sufficient for that purpose it should be denied, and that is in capital cases where the proof is evident or the presumption great. In such cases the temptation to forfeit the bail in preference to endangering life by a trial might be beyond resistance. Hence in cases like this we should consider the evidence heard by the circuit judge as a whole and the reasonable doubt that the prisoner will be entitled to on a trial, and if, so considering, we find that "the evidence is clear and strong, leading a well guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he will probably be punished capitally if the law is administered," the judgment or order of the circuit judge or court denying bail shall be affirmed, and, if otherwise, should be reversed.

Guided by the foregoing test and the fact that the circuit judge was present when the witnesses in the case were examined, and was more competent to judge of the credit that should be given to their statements than this court can be upon the record before it, we affirm the judgment or order of the judge denying bail. A warrant for the arrest and imprisonment of the accused, if at large, may be issued and executed.

WOOD, J., dissents.

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

Opinion delivered February 21, 1910.

1. INSTRUCTIONS—GENERAL OBJECTION.—A general objection is insufficient to call attention to an ambiguity in an instruction. (Page 595.)
2. SAME—REFUSAL OF ABSTRACT INSTRUCTION.—It is not error to refuse an abstract instruction. (Page 597.)

3. SAME—HARMLESS ERROR.—A cause will not be reversed for the giving of an instruction which was erroneous, but which could not have misled the jury. (Page 598.)

4. SAME—INVITED ERROR.—Appellant cannot complain of an abstract instruction given at appellee's instance if it asked an instruction bearing upon the same subject. (Page 598.)

5. SAME—CONSTRUCTION AS A WHOLE.—As it is generally impossible to state all of the law in one instruction, if the various instructions separately present every phase of the law as a harmonious whole, there is no error in an instruction failing to carry qualifications which are explained in others. (Page 598.)

6. SAME—NECESSITY OF SPECIFIC OBJECTION.—The failure of an instruction to contain a qualification which is correctly stated in another instruction given by the court cannot be relied upon on appeal unless it was specifically pointed out in the trial court. (Page 599.)

7. EVIDENCE—PHYSICAL EXAMINATION.—It was not error to refuse to compel the plaintiff in a physical injury suit to submit to a physical examination before the jury where, on defendant's motion, the court appointed a board of four physicians, two of whom were of defendant's selection, to examine the plaintiff's physical condition. (Page 599.)

8. TRIAL—IMPROPER ARGUMENT.—A new trial will not be granted on account of an improper argument of appellee's counsel, tending to aggravate the damages, if the argument was in answer to an argument made by appellant's counsel, where the court told the jury not to consider such argument, and where the verdict was not so extravagant as to indicate that the jury was influenced by passion or prejudice. (Page 599.)

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

Kinsworthy & Rhoton, E. A. Bolton, H. S. Powell, and *James H. Stevenson,* for appellant.

1. The eleventh instruction given by the court is erroneous because of incorporating therein the clause, "thinking it a settlement for wages for time lost on account of the injury." To avoid a written instrument on the ground of mistake, such mistake must be mutual. 74 Ark. 336. One who signs a contract without reading it, after being given an opportunity so to do, cannot afterwards complain that he signed it without having read it. 70 Ark. 512; 71 Ark. 185. The instruction is contradictory and confusing. It is impossible to tell which theory the jury adopted, whether the instrument was a release, but void because induced by misrepresentation, or a receipt for money

and not a release, and not binding on account of mistake. 72 Ark. 31; 74 Ark. 437; 70 Ark. 29.

2. The court erred in giving the second instruction requested by appellant. It is abstract and misleading in declaring it to be the duty of the defendant to use ordinary care to furnish plaintiff with a reasonably safe place to work, which was a matter not in issue. 76 Ark. 69. It is further erroneous because it assumes to state to the jury the propositions upon which they may base a verdict for the plaintiff, and ignores the issue as to the validity of the release. 25 Ark. 490, 493; 30 Ark. 362, 376; 51 Ark. 88; 2 Thompson on Trials, § 2328; 2 How. 486, 496; 24 Ala. 651, 662; 38 N. W. 213, 222; 52 Mo. 35; 38; 85 Mo. 96, 105.

Davis & Pace, T. W. Hardy, and *Hamlin & Seawel,* for appellee.

1. If the eleventh instruction was susceptible to the objections urged here by appellant, such objections will not be considered, because the objection in the lower court was general only, and the court's attention was not called to it by a specific objection. 90 Ark. 108; 89 Ark. 404; 88 Ark. 204; 89 Ark. 574; 88 Ark. 182; 89 Ark. 522; *Id.* 24. But it is not open to the objections urged. It plainly states that the execution of the release by appellee is not denied, and nowhere does it authorize the jury to relieve appellee from the effect of the release if he signed it merely thinking it was a settlement of wages or a receipt.

2. Considered as a whole, the second instruction does not state an abstract principle of law not applicable to the case. It requires the master in the *handling and operation* of its trains to use ordinary care, etc. It does not predicate the right to recover on account of any defect in the car, or in the facilities afforded him for keeping a lookout. If erroneous, however, it was invited by appellant's fifth instruction, and appellant cannot complain. 67 Ark. 531; 88 Ark. 138; *Id.* 129. All the law of a case cannot be presented in one instruction; hence all the instructions are to be considered as a whole, and if, when so considered, they present every phase of the law governing the case, there is no error in a particular instruction failing to carry qualifications which are explained in others. 88 Ark. 524; *Id.* 434; 86 Ark. 104; 77 Ark. 458; 69 Ark. 558; 67 Ark. 531; 75 Ark. 325; 74 Ark. 377; 56 Mo. 289; 162 Mo. 238; 161 Mo. 412.

FRAUENTHAL, J. This was an action brought by the plaintiff below, A. M. Carter, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for personal injuries claimed to have been sustained by him while in the employ of the defendant as a brakeman. In his complaint he alleged that the injuries were caused by the wrongful negligence of the defendant. The defendant denied all allegations of negligence on its part, and pleaded contributory negligence on the part of the plaintiff and assumption of the risk by him. It further pleaded an accord and satisfaction of all claims for damages growing out of the alleged injuries and a release of all such claims by plaintiff. In his reply the plaintiff admitted the execution of said release, but alleged that it was not binding because it was obtained by misrepresentations, fraud and deceit. The testimony on the part of the plaintiff tended to establish the following facts: The plaintiff was in the employ of the defendant as a brakeman on one of its freight trains. On November 6, 1908, he was engaged in the performance of his duties as such brakeman in unloading freight from said train, after its arrival at Arkadelphia. The box car from which plaintiff was unloading freight had been stopped at the depot, and the engine attached to other cars had moved on to do certain switching. The plaintiff was inside of the car, and had rolled a barrel of lard, weighing from 400 to 500 pounds, to the door of the car. While he was engaged in removing the barrel from the car, the defendant negligently and carelessly kicked or shoved a number of cars with great violence against the box car, knocking the plaintiff and the barrel of lard from the car to the ground, so that the heavy barrel of lard struck him with great force on the small of the back, injuring him very severely. In a few days thereafter his disability by reason of the injury developed more fully, and, on the advice of the local physician of the defendant, he went to defendant's hospital at St. Louis, Mo. He remained at this hospital from November 18, 1908, until March 2, 1909. The injury affected his entire nervous system, and while at the defendant's hospital he was under the treatment of a number of defendant's surgeons and specialists. On March 2, 1909, the chief surgeon of defendant

at said hospital made an examination of plaintiff, and told him that he was completely recovered, and that there was nothing the matter with him. In the language of the witness, the surgeon said: "He would talk to me just like he would a boy of his own, and there wasn't a thing the matter with me, only I stayed at the hospital so long and worried myself; and when he told me that, I asked him could I depend on what he said, and there wouldn't be any danger hereafter; and he said: 'You sure can do it.'" The surgeon then sent him to the general claim agent of the defendant, where plaintiff executed the release. There is a sharp conflict in the testimony of plaintiff and the claim agent as to what occurred at the execution of the release. The plaintiff testified that they spoke about the surgeon pronouncing him to have fully recovered; and that they then agreed that the amount of the wages that would be due to him for the time which he had lost was $325; that he then signed the release and received a check or voucher for that amount. The release in effect stated that the receipt of the said sum was in full accord and satisfaction of all claims and damages growing out of said injuries. The plaintiff returned to his home at Little Rock, and in a few days he began to suffer pain from the injury, and to grow worse. He consulted his family doctor, who examined him and then called in two other physicians to examine him. These physicians testified that he had a depression in the lower portion of his spine between the fourth and fifth lumbar vertebrae, and that he had a fracture of what is known as the coccyx or tail bone. These physicians continued their examination and treatment of him for some time; and at the trial of this cause a board of four physicians was appointed to make a physical examination of the plaintiff. Two of the members of this board were selected by the plaintiff and two by the defendant; and they appeared in the case as witnesses. In addition, other physicians gave testimony upon the trial of the case relative to the nature and extent of the injury sustained by the plaintiff. The evidence on behalf of the plaintiff tended to prove that the injury had caused a great depression between the fourth and fifth lumbar vertebrae and a fracture of the coccygeal bone; that this caused a present paralysis of one of plaintiff's legs, and might result in the paralysis of

his urinal organs and the muscles controlling the bowels; that the injury did, and would continue to, give the plaintiff intense pain and disable him from labor; and some of the physicians declared the injury permanent.

The plaintiff is a married man, twenty-eight years old, and he sued for $50,000 damages. The jury returned a verdict in favor of plaintiff for $5,000, less the $325 received by him.

From the judgment entered on the verdict the defendant prosecutes this appeal.

It is not contended by counsel for defendant in their brief that there is not sufficient evidence adduced upon the trial of this cause to sustain the verdict of the jury. They urge that there were certain errors committed by the lower court in giving and refusing certain instructions which were prejudicial to the rights of the defendant. They also urge other errors in the conduct of the trial, which we will hereafter refer to.

1. At the request of the plaintiff the court gave the following instruction:

"11. The execution of the release by the plaintiff, which bears date March 2, 1909, and put in evidence, is not denied. But if the jury find from the preponderance of the evidence that before or at the time the consideration was paid for said release and the same was executed, the physician and surgeon of the defendant railway company made an examination of the plaintiff's injuries, and thereupon assured the plaintiff that his injuries were not permanent, but that plaintiff would be able to resume his position and duties with defendant in a short time, and, relying upon said statement to be true, he executed said release, thinking it a settlement for wages for time lost on account of the injury, but soon afterwards it was developed that plaintiff was permanently injured, and that he would never be able to perform labor in his line of employment, but that at the time of making said statements defendant's physician and surgeon either knew that plaintiff was permanently injured and misrepresented that fact, or was honestly mistaken as to extent of plaintiff's injuries, and misled him into signing said release, then plaintiff is not bound by the same, and the jury should so find."

This instruction, with the exception of the clause, "think-

ing it a settlement for wages for time lost on account of the injury," is in effect essentially the same as an instruction which was approved by this court in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Hambright,* 87 Ark. 614, in which a state of facts was shown quite similar to those adduced in this case. The defendant urges that the instruction was erroneous by reason of the insertion of said clause. It is contended that the instruction in effect told the jury that the plaintiff would not be bound by the release, either in the event it was obtained by misrepresentations or fraud, or in event the plaintiff thought it was only a settlement for wages for the time lost. But we do not think that the instruction, taken as a whole, will bear that meaning or construction. The plain meaning of the instruction is not that the release could be avoided either by proof of fraud and misrepresentation in procuring it, or by proof that plaintiff thought it was a settlement of wages and an instrument different from a release; but a fair interpretation of the instruction would require the plaintiff to prove both that the instrument was obtained by misrepresentation or fraud and also in the thought by him that it was a settlement for wages. It therefore in effect imposed upon the plaintiff the duty of proving that he thought the instrument was a settlement for wages, in addition to proving that it was obtained by fraud or misrepresentation, before it could be avoided. The error of this clause was therefore not prejudicial. Futhermore, the defendant made a general objection to this instruction. It did not call the court's attention specifically to this clause which it considered objectionable. If it thought that the incorporation of this clause in the instruction made it misleading or ambiguous, it was its duty to make a specific objection to it on that ground, and thus have given the lower court an opportunity to correct it. *Aluminum Company* v. *Ramsey,* 89 Ark. 522; *St. Louis, I. M. & S. Ry. Co.* v. *Furlow,* 89 Ark. 404; *Sloan* v. *Little Rock Ry. & Elec. Co.,* 89 Ark. 574.

2. It is urged that the court committed error in refusing to give the following instruction, which was asked by the defendant:

"10. The jury are instructed that if they find from the evidence in this case that the plaintiff signed the release intro-

duced in evidence after an opportunity to examine it, then you are told that he cannot be heard to say that, when he signed it, he did not know what it contained."

The issue that was presented to the jury relative to the release was whether or not it was obtained by fraud or misrepresentation, and not whether the plaintiff knew or did not know what it contained when he signed it. That issue was made plain by the pleading. The defendant set up the release as a defense to the claim for damages. The plaintiff in his reply admitted the execution of the release, but alleged that it was not effective because it was obtained by fraud and misrepresentation. The mere fact that the plaintiff, in giving his testimony, stated that he thought that the $325 was in payment of wages could not affect this issue, which was squarely presented by the instructions that were given by the court. For this statement of plaintiff would not tend to prove that he did not understand that it was a release that he was executing, but would only tend to show that, relying upon the representation of defendant's surgeon that he was cured, he did not expect and did not receive payment for not being entirely cured. It would simply be a circumstance to show a full reliance by him upon the representation of his physical condition made by the defendant's surgeon, and to impeach the release only on the ground of fraud. By the above instruction—number 11—the court told the jury that the execution of the release was not denied, and further that it could be only avoided by proof that it was obtained by fraud or misrepresentation. And at the request of the defendant the court gave the following instruction to the jury:

"7. The court instructs the jury that fraud is never presumed in any transaction, and when a party sets it up it must be proved; and you are instructed that in this case the plaintiff, in his reply filed to the answer setting up an accord and satisfaction, alleged that the accord and satisfaction and release was obtained by fraud. The burden of proof is upon the plaintiff to satisfy you by a clear preponderance of the testimony that he was imposed upon, and the fraud alleged in said reply was practiced upon him; and, unless you so find, the release set up and pleaded, which the plaintiff admits to have signed, is a complete bar to his recovery in this action."

The sole issue presented by these instructions to the jury relative to this release, therefore, was whether or not it was obtained by fraud. The instruction requested was therefore without the issue involved in the case, and was abstract. It was not error to refuse it.

3. It is contended that the court erred in giving the following instruction at the request of the plaintiff:

"2. The court instructs the jury that it is the duty of the defendant in the handling and operation of its trains to use ordinary care to provide its servants with a reasonably safe place in which to work, and to use ordinary care to avoid injuring them, and in this case, if you find from a preponderance of the evidence that the plaintiff, A. M. Carter, was in the employ of the defendant on the 6th day of November, 1908, as brakeman on one of its trains running between Malvern and Texarkana, and at the station of Arkadelphia was engaged in unloading freight from a car that belonged to said train, in the ordinary course of his duty as brakeman under the directions of those in charge of said train, said car having been detached and spotted, or left for the purpose of permitting freight to be unloaded, and that this fact was known to those in charge of said train, and that it was necessary for plaintiff to go inside of said car to unload said freight, and that, while so engaged at work inside said car, without negligence on his part, those in charge of said train negligently, carelessly and without reasonable regard for the safety of the plaintiff, and without notice or warning to him, kicked, knocked or shoved other cars into and against the car in which plaintiff was at work with unusual force and violence, and knocked him from said car, and injured him, the defendant is liable, and you should find for the plaintiff such damages as you may believe that he has sustained."

It is claimed that the portion of the instruction which declared it to be the duty of the defendant to use ordinary care to furnish plaintiff with a reasonably safe place to work was abtract and misleading. The negligence alleged was not in the failure to furnish plaintiff a safe place in which to work, but was in the operation of the train. But this portion of the instruction could not have been misleading or prejudicial. The issue as to the negligence which it was alleged caused the injury

was clearly submitted to the jury in other instructions that were given, and, when considered as a whole, was the only issue as to negligence submitted by this instruction. No negligence is predicated in this instruction upon the failure to furnish plaintiff a safe place. The negligence is wholly predicated upon the manner of the operation of the train at the time of the injury. But, if this portion of this instruction should be deemed abstract, the defendant cannot now be heard to complain of it, because the court gave, at the request of the defendant, instruction No. 5, which stated that the defendant "must furnish them (its servants) a reasonably safe place to work and reasonably safe appliances, and after this is done it has discharged its duty in this respect."

As was held in the case of the *St. Louis, Iron Mountain & Southern Railway Company* v. *Baker,* 67 Ark. 531: "Appellant cannot complain of an instruction given at appellee's instance as abstract if it asked, and the court gave, an instruction bearing upon the same subject." *St. Louis & San Francisco Rd. Co.* v. *Vaughan,* 88 Ark. 138.

It is further urged that this instruction was erroneous because it assumes to state the propositions upon which the jury might base their verdict for the plaintiff, and ignores the issue as to the validity of the release pleaded by the defendant. A like criticism is made of other instructions in this particular. But the court, both on the part of the plaintiff and the defendant, had given instructions relative to the validity of the release and its effect, if valid, as a complete bar to the action.

In the above instruction No. 7, given at the request of defendant, it instructed the jury as to this issue, and it is fully covered in other instructions given, which we do not deem it necessary to set out. As is said in the case of *St. Louis Southwestern Ry. Co.* v. *Graham,* 83 Ark. 61: "It is generally impossible to state all the law of the case in one instruction; and if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others." It is conceded that this instruction deals correctly with the phase of the case therein presented. Other instructions presented the phase of the case relating to the validity and effect

of the release as a complete bar to the action. If the defendant desired that this instruction should contain the qualification of the effect of the release, it should have made this specific objection to this instruction to the lower court in the first instance. It did not do this, but objected generally thereto. The defect should have been met by a specific objection, so as to have directed the lower court's attention to it, that it might be corrected. It is evident, from the instructions which the court gave relative to the effect of the release as a bar to the action, that it would also have incorporated the qualification in this instruction if it had been requested, or if its attention had been called to the omission. The defendant should therefore have specifically called the court's attention to the objection based on this ground. Failing in that, it will not be permitted to specifically point out this defect for the first time on appeal. *Ark. Midland Rd. Co.* v. *Rambo,* 90 Ark. 108; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes,* 88 Ark. 181; *St. Louis, I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 204; *St. Louis, I. M. & S. Ry. Co.* v. *Rogers, ante* p. 564.

4. There were other instructions given at the instance of plaintiff which counsel for defendant call to our attention, and which they urge are erroneous. We have examined each of these, but upon careful consideration we do not find that any of these alleged errors was prejudicial. Nor do we find any error in certain portions of the testimony which were admitted and of which defendant complains. Upon carefully examining those portions of the testimony complained of, we are of the opinion that they were relevant and competent.

It is claimed that the court erred in refusing to compel plaintiff to submit to a physicial examination before the jury. But on the motion of the defendant the court appointed a board of four physicians to examine the physical condition of the plaintiff. This examination was made by these physicians during the progress of the trial, and two of them were of the defendant's own selection. These physicians thereafter testified fully relative to the examination and the physical condition of the plaintiff. We cannot say, under these circumstances, that the court abused its discretion by refusing this request.

It is urged that counsel for plaintiff made an improper argu-

ment to the jury. Some of the remarks complained of were made either in reply to or upon the instigation of remarks made by counsel for the defendant, who thus invited such argument; and the court told the jury to exclude from their consideration the other statements of counsel which are complained of. Even if we should consider that the argument was not legitimate, we think that any prejudice therefrom was dissipated by the reference by the court to them and his direction to the jury to disregard them. They related chiefly to the amount of the verdict, should one be returned for plaintiff. We do not think that, under the circumstances of the case, and in the light of the amount returned, this argument worked to the disadvantage of defendant. The counsel for defendant, in their brief, do not complain that the verdict is excessive. The appeal made by the plaintiff's counsel for a verdict for an exaggerated amount was not effective; for, if the testimony on the part of the plaintiff is true, the verdict is not so extravagant as to indicate that the jury were influenced by passion or prejudice.

The judgment is affirmed.

BELL v. STATE.

Opinion delivered February 21, 1910.

1. LIQUORS—ILLEGAL SALES BY AGENT.—The owner or proprietor of a saloon is criminally responsible for illegal sales of liquor made by his servants and agents within the scope of their general employment. (Page 603.)
2. AGENCY—HOW PROVED.—The fact of agency can not be established by the declarations of the alleged agent. (Page 603.)
3. SAME—HOW PROVED.—The fact of agency may be proved by circumstantial evidence. (Page 603.)
4. EVIDENCE—VENUE.—The courts will take judicial notice that a town of several hundred inhabitants with post and express offices is located in a certain county. (Page 604.)
5. INSTRUCTIONS—GENERAL OBJECTION TO PARTICULAR WORD.—Where, in a prosecution for unlawfully selling ardent, malt and fermented liquors, the evidence tended to prove an unlawful sale of beer, the error of referring in an instruction to the liquor alleged to have been unlawfully sold as "whisky" should be reached by a specific objection. (Page 605.)

Error to Sebastian Circuit Court, Greenwood District; *Daniel Hon,* Judge; affirmed.

C. T. Wetherby, for appellant.

1. The venue was not proved. If it be conceded that the court can take judicial notice that cities and incorporated towns in the State are within the jurisdiction of any particular court, it nevertheless could not take judicial notice of collections of houses, although they may have a name by which they are locally known. "Old Jenny Lind" or "Mine 18" is not found on any map, and is not even a postoffice. Bonanza is on the State line, and there is nothing in the record to show that Old Jenny Lind or Mine 18 may not be in Oklahoma, or in the Fort Smith District. 7 Ark. 512; 100 Va. 860; 106 Cal. 690.

2. The verdict is contrary both to the law and the evidence. The indictment charges defendant with selling liquor without license. There is no allegation that he sold by agent. The evidence would sustain a verdict of guilt on the part of Peet, but the fact that he drove a wagon at Bonanza for defendant, and his bare statement to Blackard that the beer, team and wagon belonged to appellant, were not sufficient to connect appellant with this transaction. There is also a variance between the indictment and the proof, in this: he is charged with selling liquor at Jenny Lind, and is met at the trial with proof of a sale at a different place. 12 O. St. 387; Black on Intox. Liquors, § 516.

3. It was error to charge the jury to find appellant guilty if they found that he sold *whisky* at Old Jenny Lind. There was no proof that whisky was sold.

4. When the appellant requested the court to instruct the jury that it was necessary for the State to prove beyond a reasonable doubt that the man who delivered the beer was the agent of appellant, before the latter could be convicted, it was error to strike out of the instruction the words "beyond a reasonable doubt." Agency was the only question in the case, as, under the proof, there was no doubt of Peet's guilt. When these words were struck out, the jury were left with no guide whatever as to the burden resting upon the State.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. The venue is sufficiently established by the proof. It is not necessary that it be proved beyond a reasonable doubt. A preponderance of the evidence is sufficient.

2. If Peet acted as appellant's agent in the sale of the liquor, appellant is criminally liable. Such agency is sufficiently shown in the evidence.

3. There is no error in the instructions. As to the use of the word "whisky" in the instructions, it was not prejudicial, and moreover, if objectionable, it should have been met by a special request for instruction, so as to call the trial court's attention to it.

4. If a preponderance of the evidence showed the agency of Peet, that was sufficient to establish such agency. Nevertheless, under the proof, the jury would have been warranted in saying that Peet was appellant's agent in the transaction, beyond a reasonable doubt.

FRAUENTHAL, J. The appellant was convicted of the offense of selling liquor without license in violation of section 5112 of Kirby's Digest, and seeks by this appeal a reversal of the conviction. The indictment in effect charged that the appellant did, in 1908, unlawfully sell and was interested in the sale of ardent and malt and fermented liquors in Jenny Lind in the Greenwood District of Sebastian County without first having procured a license therefor.

The evidence tended to establish the following facts: The appellant was in 1908 engaged in the saloon business at Bonanza, which is in said Greenwood District, a short distance from Jenny Lind, which is also located in said district; and he was the agent of the Cook Brewing Company; at this time one Joe Peet was working for appellant, and was employed in driving appellant's wagon in the delivery of beer and other liquors, and on a number of different occasions delivered kegs of beer in appellant's wagon in Jenny Lind.

The prosecuting witness, who resided in "old" Jenny Lind, as he called the town or in Jenny Lind, as the town is called by another witness, gave an order to Joe Peet for beer, and in a few days thereafter Joe Peet delivered the beer to him at Jenny Lind in the appellant's wagon, and there received the payment therefor. Upon cross-examination this witness stated that

Joe Peet told him he was then working and delivering the beer for appellant.

It is earnestly urged by counsel for appellant that there is not sufficient evidence adduced in this case to sustain the verdict of the jury. The owner or proprietor of a saloon is responsible for the illegal sales of liquor made by his servants and agents within the scope of their general employment; and under the above section of Kirby's Digest the employer is criminally liable if he makes an unlawful sale of liquor by such servant or agent or if he is interested in such sale. As is said in the case of *Robinson* v. *State,* 38 Ark. 641: "The law says to persons wishing to engage in selling spirituous liquors, or to be interested in sales thereof, you must be careful in the selection of your partners or servants, and watchful of their conduct in your business; for, if they make forbidden sales, you are responsible. You must see that sales in which you are interested are not made without license." *Lewis* v. *State,* 21 Ark. 209; *Waller* v. *State,* 38 Ark. 656; *Edgar* v. *State,* 45 Ark. 356; *Mogler* v. *State,* 47 Ark. 109.

But it is claimed that there is no proof that Joe Peet was the servant or agent of appellant. It is true that agency is a fact the proof of which must be made by the party affirming it. The declarations of the alleged agent are not admissible to prove the fact of the agency, but it must be established by other evidence. *Carter* v. *Burnham,* 31 Ark. 212; *Holland* v. *Rogers,* 33 Ark. 251; *Chrisman* v. *Carney,* 33 Ark. 316; *Howcott* v. *Kilbourn,* 44 Ark. 213; *Turner* v. *Huff,* 46 Ark. 222; *Beekman Lbr. Co.* v. *Kittrell,* 80 Ark. 228.

But the fact of agency need not be proved by direct evidence. Any evidence which is otherwise competent and has a tendency to establish the agency is admissible, and it becomes then the province of the jury to pass upon the weight and sufficiency of it. Circumstanctial evidence is competent to establish the fact of agency. 31 Cyc. 1661.

The relation and connection between the principal and agent, or between the employer and servant, may be shown by facts and circumstances from which the relation may be inferred. Although it may not be directly proved that the alleged servant was employed or authorized to make the illegal sale, neverthe-

less, if the facts and circumstances introduced in evidence are sufficient to induce in the minds of the jury the belief that the relation of employer and servant did exist between the parties and that the alleged servant was acting for the employer in the forbidden sale, then this would be sufficient to sustain a conviction. 23 Cyc. 256.

In this case we think there was some testimony adduced from which the jury were warranted in finding that Joe Peet was in the employ of appellant when he sold and delivered in appellant's wagon the beer to the prosecuting witness, and that appellant was interested in the sale. The jury were the exclusive judges of the weight of that testimony, and their determination of that question of fact is conclusive.

It is urged that the venue of the offense has not been proved, because no witness testified that the sale was made in the Greenwood District of Sebastian County. The evidence showed that the sale was made in Jenny Lind. As held in *St. Louis, I. M. & S. Ry. Co.* v. *Magness,* 68 Ark. 289, the courts will take judicial notice that a town of several hundred inhabitants with post and express offices is located in a certain county. And Jenny Lind is such a town; and the courts will take judicial notice of the fact that it is located in Greenwood District of Sebastian County. *Wilder* v. *State,* 29 Ark. 293; *Forehand* v. *State,* 53 Ark. 46; *Lyman* v. *State,* 90 Ark. 596.

It is also urged in this connection that one of the witnesses testified that the place where the sale was made was "old" Jenny Lind. But the other witness named the place as Jenny Lind. This would be sufficient to establish the place, and the jury were warranted in concluding that the witness who characterized the place as "old" Jenny Lind referred to the Jenny Lind named by the other witnesses, and that the descriptive word of "old" may have been an expression by the witness of familiarity or attachment for the place.

In its first instruction to the jury the court, in referring to the liquor charged to have been unlawfully sold, called it "whisky," and the appellant contends that this was error because there is no evidence that any whisky was sold. It is true that all the evidence showed that only beer was sold; but if the appellant intended to press and rely upon this objection to the

instruction, he should have made this objection specifically to the instruction in the lower court. He did not call the court's attention to this obvious defect in the expression used in the instruction, but only made a general objection thereto. This emphasizes the need of the rule that, before such an objection can be considered as well taken, a specific objection must be made to the instruction, in order to call the court's attention to the omission or error complained of, so that the court could have an opportunity to correct it. *Ark. Midland Rd. Co.* v. *Rambo,* 90 Ark. 108.

In this case the jury could not have been misled by the use of the incorrect name of the liquor, or the defendant prejudiced thereby; because the other instructions referred to the liquor by its correct name. The use of an objectionable word in an instruction should be met by a specific objection, which was not done in this case. *Sloan* v. *Little Rock Ry. & Elec. Co.,* 89 Ark. 574.

The appellant asked the court to instruct the jury, in effect, that, before they could convict, it was necessary for the State to prove beyond a reasonable doubt that the driver of the wagon who delivered the beer was the agent or employee of and acting for appellant at the time the beer was delivered. The court eliminated the words "beyond a reasonable doubt," and otherwise gave the instruction as requested. The appellant urges this as error. But in other instructions given by the court to the jury it told the jury, in effect, that, before they could convict, they must find from the evidence beyond a reasonable doubt that the defendant did make or was interested in the sale of the liquor. The instruction, as modified and given, was not erroneous, and was in harmony with the other instructions, which sufficiently required that the proof on the part of the State should be beyond a reasonable doubt in this essential, as well as in every essential ingredient of the offense, before the jury could convict the defendant.

In the trial of the case we find no errors that are prejudicial to the rights of appellant, or which deprived him of a fair trial.

The judgment is affirmed.

SALYERS v. LEGATE.

Opinion delivered February 21, 1910.

1. STATUTE OF FRAUDS—AGREEMENT FOR PARTY WALL.—Where defendant joined the wall of his building to the wall of plaintiffs' building, under an oral agreement to pay plaintiffs one-half of the cost of their wall, he could not defend an action for one-half of the cost of the wall upon the ground that the contract was within the statute of frauds; performance of the contract having taken it without the statute. (Page 607.)
2. PARTY WALL—EFFECT OF AGREEMENT.—Where defendant joined the wall of his building to the wall of plaintiffs already erected under an agreement to pay half the cost of plaintiffs' wall, a party wall was created by the agreement. (Page 608.)
3. SAME—AGREEMENT—DEFENSE TO ACTION FOR PRICE.—Where defendant joined the wall of his building to wall of plaintiffs under agreement to pay one-half of the cost of such wall, the fact that plaintiffs' building is mortgaged will be no defense to an action to recover the amount so agreed to be paid. (Page 608.)

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

Pole McPhetrige and *J. I. Alley,* for appellant.

1. This was not a party wall, nor an agreement, nor a sale for a party wall. Tiedeman on Real Property, 620; 54 Ark. 519; 78 Ark. 65; 22 Am. & E. Enc. Law, 237.

2. If it was, it comes within the statute of frauds. Kirby's Digest, § 3654; 49 Ark. 503; 54 Ark. 519.

3. There was no such part performance as to take the agreement out of the statute. 22 A. & E. Enc. Law, 250.

4. There was a mortgage lien on the lot which was not disclosed at the time of the agreement.

Elmer J. Lundy, for appellee.

1. The mortgage cuts no figure in this case.

2. The chancellor found that the contract was for a party wall, and his finding is supported by the evidence.

3. Performance of a contract takes it out of the statute of frauds.

McCULLOCH, C. J. Plaintiffs, George and Henry Legate, owned a lot in the city of Mena, Polk County, Arkansas, described as lot one of block sixty-one of the original townsite of Mena; and the defendant, Salyers, owned an adjoining lot

described as lot two in said block. Plaintiffs were engaged in the livery business, and in the year 1906 they erected on their said lot a livery barn or stable, the walls of which were made of cement blocks. Plaintiffs intended to put the wall of the building out to the boundary line of their lot on the side next to defendant's lot, but it was afterwards found that the wall failed to precisely follow the line. At the east end, the edge of the foundation underground is on the line, and the wall proper drops back about an inch inside the line on plantiff's side of the lot; but at the west end the wall is eight or ten inches back from the line of plaintiffs' lot. The whole of the wall is therefore on plaintiffs' lot, and most of it is a few inches back from the line.

It is alleged by the plaintiffs that in January or February, 1908, after the completion of their said building, defendant, desiring to erect a building on his own lot, entered into an agreement with them to the effect that they were to allow him, in erecting his building, to join to the wall of plaintiffs' building so as to use the wall as a part of his own building, and that in consideration he, defendant, would pay plaintiffs one-half the original cost of the said wall. They alleged that pursuant to said agreement defendant proceeded to erect his building, and in doing so joined to their wall, and entered upon and occupied a strip of their land, but that he has refused to pay one-half of the cost of the wall as agreed. They instituted this action to recover the amount alleged to be due, and offered in their complaint to execute a deed or written agreement granting to defendant the right to use said wall in accordance with the terms of said oral agreement.

Defendant answered, presenting an issue as to the allegations of the complaint. The chancellor heard the case on the pleadings and oral testimony, and rendered a decree in favor of plaintiffs for the amount sued for, and directed plaintiffs to "execute and deliver to the defendant a good and sufficient deed conveying to the defendant a one-half interest in that portion of the wall and foundation used by defendant as long as the same shall stand." Defendant appealed from the decree.

The evidence sustains the finding of the chancellor that the wall in question is situated wholly on plaintiffs' lot, and that de-

fendant entered into an agreement to join to it in the construction of his building and use it as a part thereof, and to pay to plaintiffs one-half the cost of said wall. Defendant denies that he agreed to use plaintiffs' wall or to pay a part of the cost. He admits that before he began the construction of the building he had a conversation with plaintiffs in which they proposed to let him use the wall if he would pay one-half of its original cost, but he says that afterwards he found that the wall was defective, and could not be used with safety in the construction of his building. He built his side walls up to plaintiffs' wall, and joined it with mortar, but did not cut into the wall, or tie his wall onto it except with the mortar joints. He put the tin roof close to the wall and supported it with posts, but did not actually join it to the wall.

Defendant's conduct is nothing short of an ingenious attempt to make use of plaintiffs' wall without paying for it, and he now attempts to evade liability by pleading the statute of frauds. According to the testimony accredited by the chancellor, he agreed to use the wall and pay for it. In order do so, he invaded plaintiffs' premises, with their permission, by making use of the strip of land between the wall and the boundary line of the lot. Unfortunately for his contention, this amounted to performance of the contract, which took the case out of the statute of frauds and gave plaintiffs a right of action for the agreed price. *Walker* v. *Shackelford,* 49 Ark. 503; *Rudisill* v. *Cross,* 54 Ark. 519. It is unimportant that the wall was not built as a party wall. It became a party wall by force of this agreement (*Dorsey* v. *Habersack,* 84 Md. 117), and its use as such by defendant took the agreement out of the operation of the statute.

The evidence shows that there is a mortgage on plaintiffs' lot; but this does not absolve defendant from his obligation to pay one-half of the cost of the wall. He has enjoyed the rights acquired under the contract, and must pay according to his obligation. A different question might be presented if the premises were sold under the mortgage; but defendant cannot plead an outstanding mortgage lien in bar of plaintiffs' right to recover on the contract.

Decree affirmed.

BANK OF WALDRON *v.* EUPER.

Opinion delivered February 21, 1910.

1. GARNISHMENT—JUDGMENT AGAINST GARNISHEE IN FAVOR OF DEFENDANT.—A garnishment proceeding only draws in controversy so much of the garnishee's indebtedness as is necessary to satisfy the plaintiff's debt, and the remainder of the debt does not become involved in the controversy, and there is no statutory authority for a court to render judgment against the garnishee in favor of the defendant. (Page 611.)
2. BANKRUPTCY—PARTIES.—In a proceeding in bankruptcy to hold a bank as trustee for the proceeds of a check assigned to it by the bankrupt and collected by it, one to whom the check was handed to be delivered to the bankrupt, and who had no interest in it, is not a necessary party. (Page 611.)
3. PARTIES—NONJOINDER.—A request that a new party be brought into a suit comes too late after the case has been argued and submitted, and the chancellor has intimated what his decision is to be. (Page 611.)

Appeal from Sebastian Chancery Court, Fort Smith District; *J. Virgil Bourland,* Chancellor; affirmed.

Youmans & Youmans, for appellant.

The court should have made G. R. Mitchell a party for the protection of the bank.

Winchester & Martin, for appellee.

1. The motion to make G. R. Mitchell a party came too late—after the case was tried. Besides, he had no interest.

2. No judgment can be properly entered against a garnishee in default of an answer until after judgment for plaintiff. 70 Ark. 127; 62 *Id.* 616; 48 *Id.* 350; 45 *Id.* 271.

3. All parties interested were before the court.

McCULLOCH, C. J. This is an action instituted by appellee, W. L. Euper, as trustee of the estate of L. L. Mitchell, a bankrupt, to recover from appellant bank the sum of $500, alleged to be the property of the bankrupt's estate. The facts are undisputed, and but one point is raised—whether or not one G. R. Mitchell was a proper or necessary party to the action. Before L. L. Mitchell filed his petition in bankruptcy, he sold his stock of merchandise to one Abbott for the sum and price of $500; and, in payment of the price, Abbott delivered to G. R. Mitchell, who is a son of L. L. Mitchell, a check for that

amount, drawn by McCraw & Hawthorne on the Bank of Waldron, payable to Abbott's order. There were sufficient funds of the drawer in the bank to pay the check, and have been at all times. The Stein Mercantile Company, a creditor of the Mitchells, instituted an action at law against them and garnished the bank. When the case was tried, said creditor recovered judgment against Mitchell for $352.85, and the trial court ordered the garnishee to pay that sum over to the garnishment creditor and pay the balance, $147.15 over to G. R. Mitchell. After the institution of that suit, but before judgment, G. R. Mitchell, with his father's consent, assigned and delivered the check to Johnson, an attorney at law, in payment of a fee due him or to become due him for defending the Mitchells in a criminal prosecution. Johnson assigned the check to the Sallisaw Bank & Trust Company, and the latter presented it to the Bank of Waldron for payment, which was refused on account of the pending garnishment proceedings. The Sallisaw Bank & Trust Company returned the check to Johnson. The petition in bankruptcy was then filed by L. L. Mitchell, and he was adjudged to be a bankrupt, and appellee became trustee of the estate.

This action was first instituted in the circuit court, and then transferred to the chancery court, and the Stein Mercantile Company, the Sallisaw Bank & Trust Company and Johnson were made parties, as well as appellant Bank of Waldron. The Stein Mercantile Company answered, renouncing any claim to the funds except as a general creditor of the bankrupt estate of L. L. Mitchell. The Sallisaw Bank & Trust Company filed its joint answer and cross-complaint, claiming the funds under the assignment of the check by G. R. Mitchell. Appellant Bank of Waldron filed its answer, admitting that it held the funds covered by the check, and pleaded judgment against it in the garnishment case in bar of appellee's right to recover the funds.

The court heard the case on the pleadings and proof, and found, among other things that said L. L. Mitchell was the sole owner of the stock of goods, and sold same to Abbott in fraud of his creditors, and that Johnson received the check from G. R. Mitchell with knowledge of these facts, and rendered a decree in favor of appellee as such trustee for the recovery of the funds. The Bank of Waldron alone appeals, and as ground for re-

versal urges that G. R. Mitchell should have been made a party to the action. This is urged on the ground that in the garnishment proceeding the court ordered the balance of the fund, after deducting the claim of the garnishment creditor, to be paid over to G. R. Mitchell. The court made that order probably on the theory that G. R. Mitchell was the holder of the check, and without any showing that he had assigned the check to Johnson.

This order did not constitute a judgment in favor of G. R. Mitchell against the bank as garnishee. Mitchell was a defendant in that action, but was not entitled to a judgment against the garnishee for the balance after satisfying the claim of the creditor. There is no authority in law for the court to render such a judgment. Garnishment is only a method provided by statute for a plaintiff to enforce a judgment against a defendant who is his debtor, and such a proceeding only draws in controversy so much of the garnishee's indebtedness to the defendant as is necessary to satisfy the plaintiff's debt. *Davis* v. *Choctaw, O. & G. Rd. Co.*, 73 Ark. 120. The remainder of the debt, if any, does not become involved in the controversy, and there is no statutory authority for a court to render judgment against the garnishee in favor of the defendant. Kirby's Dig. § 3702.

G. R. Mitchell had no interest in the fund, either at the time of the judgment in the garnishment proceedings or during the pendency of the present action, for he had assigned the check to Johnson, who, with his assignee, the Sallisaw Bank & Trust Company, was party to the action. He asserted no claim to the funds in this action, and did not ask to be made a party. The check had merely passed through his hands, and he had no interest in it when this action was instituted. Moreover, appellant's request for G. R. Mitchell to be made a party came too late. The request came after the case was argued and submitted, and after the chancellor had intimated what his decision was to be.

Decree affirmed.

Ex parte BYLES.

Opinion delivered February 21, 1910.

1. CERTIORARI—QUESTION RAISED.—Upon certiorari to review the action of the chancellor below in discharging the petitioner in habeas corpus, the question of the petitioner's guilt cannot be raised, the proper method of raising that question being by appeal from the judgment of conviction. (Page 614.)
2. TAXATION—LEGISLATIVE POWER.—Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. (Page 616.)
3. SAME—PRIVILEGE TAX.—A tax on peddlers is not a tax on property within the constitutional mandate requiring that all property shall be taxed according to its value, and that all taxation shall be equal and uniform. (Page 616.)
4. STATUTES—CONSTRUCTION.—It is the duty of the courts, in testing the validity of a statute, to resolve all doubts in favor of the legislative action and to uphold it unless it is clearly an abuse of legislative power. (Page 617.)
5. TAXATION—LEGISLATIVE CLASSIFICATION.—In determining the propriety of a classification made by the Legislature for the purpose of taxing or regulating privileges or occupations, it is the duty of the courts to uphold the legislative determination unless the classification is clearly unreasonable and arbitrary; the Legislature being primarily the judge as to that. (Page 617.)
6. SAME—VALIDITY OF CLASSIFICATION.—The Legislature may impose a privilege tax on certain callings or trades, without taxing other trades or callings. (Page 618.)
7. SAME—UNIFORMITY OF CLASSIFICATION.—A privilege tax is uniform if it bears equally upon all persons belonging to the class upon which it is imposed. (Page 618.)
8. STATUTES—ENFORCEMENT IN PART.—Statutes valid only in part will be disregarded as to the void part and enforced as to the residue. (Page 620.)

Certiorari to Independence Circuit Court; *Charles Coffin*, Judge; reversed.

Hal L. Norwood, Attorney General, for appellant.

1. The act of 1909 omits the objectionable proviso of the act of 1901, which led this court to pronounce the latter act void. 75 Ark. 542. The Legislature was familiar with this decision, and passed an act without any exceptions to its provisions.

2. The act does not interfere with or attempt to burden commerce among the States. 82 Ark. 309-321. The Legislature

is presumed to act in view of the Constitution, and not to intend the violation of its provisions. Lewis' Sutherland on Stat. Const. § 498; 75 Ark. 309; 89 Ark. 466; 63 Ark. 576; 112 U. S. 261; 4 N. H. 16; 17 N. Y. 235; 118 Mass. 239; 200 U. S. 226; 197 U. S. 60; 27 Mont. 394; 77 Minn. 483; 90 Pac. 307; 153 Miss. 205; 114 U. S. 196; 136 U. S. 114; 100 U. S. 676; 156 U. S. 296; 21 Cyc. 365.

3. The act may be sustained on two grounds: (1) on the police power of the State for regulation; (2) on the power of taxation for revenue. 179 U. S. 270; 50 L. R. A. 685; 68 Fed. 750; 8 Cyc. 875 and note 31; 92 Me. 453; 8 N. D. 286; 78 N. W. 984; 8 Cyc. 1046. A certain class of persons may be required to procure license for the sale of certain classes of goods or for the pursuit of certain avocations without violating the 14th amendment. 8 Cyc. 1046; 179 U. S. 270; 50 L. R. A. 685; 68 Fed. 750; 110 Ga. 584; 59 *Id.* 535; 63 S. C. 61; 68 Vt. 625; 9 Fed. Stat. An. 620 and cases cited, 623 notes, 546; 194 U S. 621; 171 *Id.* 106.

4. The act does not conflict with section 5, article 16, Const. Byles was a peddler, pure and simple. Kirby's Dig. § § 1881, 3106; 8 N. E. 609; 84 Ga. 754; 105 *Id.* 457; 192 U. S. 500.

Arthur C. Lyons and *Samuel M. Casey,* for appellee.

1. States cannot burden commerce among the States by legislative acts. They are void. Const. U. S. art. 1, § 8; 153 U. S. 289; 120 *Id.* 489; 127 *Id.* 640; 95 *Id.* 465; 92 *Id.* 259; 135 *Id.* 161; 128 *Id.* 129; 187 *Id.* 622.

2. States cannot discriminate against nonresidents in favor of their own citizens. Const. U. S., art. 4, § 2; 136 U. S. 313; 75 Ark. 542; 87 S. W. 1030; 97 Pac. 129; 45 Fed. 3-5; 42 N. W. 977-8; 120 U. S. 489-498; 19 U. S. 45.

3. No person can be denied the equal protection of the laws. Const. U. S. and Const. Ark., art. 2, § 18; 100 Pac. 296; 43 S. W. 513; 51 N. E. 136; 97 N. W. 124; 70 Atl. 986; 97 Pac. 129; 47 So. 1008; 46 Pac. 255; 72 N. W. 67; 100 Pac. 296; 123 N. W. 823; 184 U. S. 540; 79 Fed. 627; 165 U. S. 150-165; 104 Pac. 401-5-8; 123 N. W. 408; 55 S. W. 627; 49 Fed. 164.

4. Taxation must be equal and *uniform.* Const. Ark., art. 16, § 5; 109 S. W. 293.

5. The act is prohibitive of competition and void. 149 Fed. 913; 88 Pac. 459; 97 Pac. 129-131; 104 Pac. 401-5; 104 S. W. 153.

Moore, Smith & Moore, amici curiae.

1. The appellee was not a peddler within the act. 12 Cush. 393; 114 Mass. 267; 114 Mass. 267; 12 Cush. 493-6; 20 S. E. 544; 47 Fed. 539; 8 Pac. 865; 39 N. W. 191; 28 *Id.* 13; 6 So. 393; 132 Ill. 380; 55 N. J. L. 522; 69 N. H. 424; 50 La. An. 574; 74 S. W. 31; 167 Ind. 502; 84 Ga. 754; 105 *Id.* 457.

2. The act is in conflict with art. 1, § 8, Const. U. S. and void. 120 U. S. 489; 128 *Id.* 129; 135 *Id.* 100; 153 *Id.* 289; 185 *Id.* 27; 187 *Id.* 622; 203 *Id.* 507.

3. The method of the Spaulding Company in doing business was clearly within the protection of the interstate commerce clause. 47 S. E. 651; 125 U. S. 465; 135 *Id.* 161; 170 *Id.* 413; 191 *Id.* 441; 47 S. E. 658; 156 U. S. 296; 100 *Id.* 676; 114 U. S. 622; 8 Wall. 123.

McCULLOCH, C. J. The respondent, W. H. Byles, was arrested in Independence County on the criminal charge of violating the provisions of an act of the General Assembly approved April 1, 1909, entitled "An act to regulate the sale of lightning rods, steel stove ranges, clocks, pumps, buggies, carriages and vehicles in the several counties of this State," and on a trial before a justice of the peace of that county he was convicted of the alleged offense, and a fine was assessed against him. The proceedings before the justice of the peace were in regular form, and the information which was the basis of the prosecution properly charged a violation of the statute referred to above. Respondent refused to pay the fine assessed against him, and presented to the chancellor of the Pulaski Chancery Court his petition for habeas corpus, asking that he be discharged from custody. On the return of the writ the chancellor decided that the statute in question is void, and ordered respondent's discharge. The Attorney General brings the proceedings here by certiorari for review, and seeks to quash the judgment of the chancellor.

The only question before us now is as to the validity of the statute, for, if the statute is valid, the question of re-

spondent's guilt of a violation of its provisions can not be tested in any other manner than by direct appeal from the judgment of conviction. *State* v. *Neal*, 48 Ark. 283; Ex parte *Foote*, 70 Ark. 12.

The statute, the validity of which is attacked, reads as follows:

"Sec. 1. That hereafter before any person, either as owner, manufacturer, or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle or either of said articles, he shall procure a license as hereinafter provided from the county clerk of such county, authorizing such person to conduct such business.

"Sec. 2. That, before any person shall travel over or through any county and peddle or sell any of the articles mentioned above, he shall pay into the county treasury of such county the sum of two hundred ($200) dollars, taking the receipt of the treasurer therefor, which receipt shall state for what purpose the money was paid. The county clerk of such county, upon the presentation of such receipt, shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such county and sell such articles or article for a period of one year from the first day of January preceding the date of such license.

"Sec. 3. Any person who shall travel over or through any county in this State and peddle or sell, or offer to peddle or sell, any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty ot a misdemeanor, and upon conviction shall be fined in any sum not less than two hundred ($200) dollars nor more than five hundred ($500) dollars.

"Sec. 4. That any person who shall travel over or through any county in this State and peddle or sell any of the articles mentioned above shall be deemed and held to be a peddler, under the provisions of this act."

This statute taxes the privilege of peddling the several articles enumerated, and defines a peddler within the meaning of the statute to be "any person who shall travel over or through any county in this State and peddle or sell any of the articles

mentioned above." The Constitution of this State (art. 16, § 5) provides that "the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper." But, aside from any express constitutional sanction, as said by Judge Cooley, "everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall at any time select it for revenue purposes." 1 Cooley, Taxation (3 ed.), p. 9.

We need not stop, therefore, to consider whether the statute in question imposes a tax for revenue purposes or is merely a police regulation, for the Legislature can exercise either power, and its effect is to impose a license tax on certain privileges. If the statute be found free from objection on the charge of unjust classification, it can be justified either as a police regulation or as a privilege tax imposed for the purpose of raising revenue. *State* v. *Montgomery,* 92 Me. 433; *State* v. *Webber,* 214 Mo. 272; *People* v. *Russell,* 49 Mich. 617. It does not, however, impose a tax on property, and is therefore not within the constitutional mandate requiring that all property shall be taxed according to its value, and that all taxation shall be equal and uniform. *Fort Smith* v. *Scruggs,* 70 Ark. 549.

In the case of Ex parte *Deeds,* 75 Ark. 542, we declared to be invalid a similar statute, except that it contained a proviso exempting from its operation resident merchants of the county. The General Assembly of 1909 re-enacted the statute without the exemption, thus freeing it from the objectionable feature condemned in the Deeds case. That decision was placed on the ground that the statute unjustly exempted from its operation a certain class of merchants, and it has no bearing on the present case. The statute is attacked on the ground that it arbitrarily classifies certain articles of trade and taxes the business of selling the same, and that this operates as an unjust discrimination against those engaged in the business of selling those articles.

Before entering into a discussion of this question, it is well to notice a general principle which guides the courts in determining the validity or constitutionality of legislative enactments. It is that the duty of a court in testing the validity of a statute is to resolve all doubts in favor of the legislative action and to uphold it unless clearly an abuse of legislative power. *State* v. *Moore,* 76 Ark. 197; *Louisiana & Ark. Ry. Co.* v. *State,* 85 Ark. 12; *Bacon* v. *Walker,* 204 U. S. 311. Chief Justice Marshall said that, before a court should feel justified in annulling a statute, "the opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher* v. *Peck,* 6 Cranch 87.

Judge Cooley announces the same principle as follows: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power." Cooley, Const. Lim. (7 ed.) 236.

This principle is especially applicable when it comes to a question of the propriety of a classification made by the Legislature for the purpose of taxation of privileges and occupations or for police regulation. Unless the classification be clearly unreasonable and arbitrary, and without just distinction as a foundation, the Legislature being primarily the judges of that, it is the duty of courts to respect and uphold the legislative determination. *Williams* v. *State,* 85 Ark. 464; *Missouri & N. A. Rd. Co.* v. *State,* 92 Ark. 1; *American Sugar Re-*

fining Co. v. *Louisiana,* 179 U. S. 89; *Cargill* v. *Minnesota,* 180 U. S. 452; *Kehrer* v. *Stewart,* 197 U. S. 60; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251.

The mere fact that the privilege of selling other articles escapes taxation affords no ground for invalidating the taxation or regulation of those mentioned, for, as we have already said, the constitutional provision that all taxation should be equal and uniform does not reach to the taxation of privileges. The Supreme Court of the United States very aptly said: "A tax may be imposed only upon certain callings and trades, for, when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless at the same time it taxed all property or all callings." *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540.

So, treating this statute as one imposing a tax on privileges or occupations, it is valid, as the Legislature has the power to select certain occupations and tax them, without taxing others, and to classify the peddling of certain articles as an occuption and tax it. But, whether we treat it as a tax or a mere police regulation, we fail to discover any reason for declaring the statute void on account of its being an arbitrary and unwarranted classification. To do so would be to disregard entirely the legislative determination as to the propriety of the classification. We can see some reason for selecting the articles enumerated in this statute and putting them into a class to themselves for the purpose of taxing the privilege of peddling them over the State, or of regulating the peddling of them. They are articles of merchandise the sale of which bear larger profits than some others, and the sales amount to more. Therefore, the privilege of peddling them should be taxed higher. It might not do to tax the tinware peddler, or the peddler with a pack of small wares on his back, the same as one who peddles lightning rods, steel stove ranges, clocks, pumps, buggies or carriages, whose sales and profits in a day amount to more, perhaps, than those of the former in a month, for they do not belong in the same class. Moreover, the Legislature doubtless

made investigation and found that lightning rods, steel stove ranges, clocks, pumps, buggies and carriages are the articles which constitute the stock of peddlers of this day in the State, and the present legislation was designed to meet the conditions which were found to exist. This it was proper and right for the Legislature to do, and the fact that the precise conditions are found not to be met will not invalidate what the Legislature has done. That is the idea expressed by this court in *Williams* v. *State, supra,* and by the Supreme Court of the United States in the case of *Ozan Lumber Co.* v. *Union County Bank, supra.* Mr. Justice Peckham, speaking for the Supreme Court of the United States in the latter case, said: "It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and the Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things."

Our conclusion in upholding the validity of the statute in question is fully sustained by the following cases: *Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226; In re *Watson,* 17 S. Dak. 486; s. c. 2 Am. & Eng. Ann. Cas. 321; *State* v. *Webber,* 214 Mo. 272; *Singer Mfg. Co.* v. *Wright,* 97 Ga. 114, s. c. 35 L. R. A. 497; *State* v. *Montgomery,* 92 Me. 433; *Hays* v. *Com.,* 107 Ky. 655; *People* v. *Smith,* 147 Mich. 391; *State* v. *Stevenson,* 109 N. C. 730; Ex parte *Heylman,* 92 Cal. 492.

A review of the opinions in the several cases cited above would unduly lengthen this opinion, and that will not be attempted, but an examination will disclose that they are based upon statutes similar to the one now under consideration, or sufficiently so to call for the application of the same principle.

It is insisted that this particular question was not raised nor decided in the Supreme Court of the United States in the cases cited above; but in the case of *Emert* v. *Missouri, supra,*

though the particular question discussed is as to whether or not the statute violated the interstate commerce clause of the Constitution, the opinion contains, we think, a distinct recognition of the validity of the Missouri statute imposing a tax on the privilege of peddling certain articles and exempting others.

Learned counsel for respondent cite us to the following cases which sustain their contentions that the statute in question is an improper and unjust classification: *State* v. *Wright,* (Oregon) 100 Pac. 296, s. c. 21 L. R. A. (N. S.) 349; *State* v. *Bayer* (Utah), 97 Pac. 129; *Smith* v. *Farr* (Colo.), 104 Pac. 401. We cannot, however, reconcile our views with the conclusions reached in those cases, and we are of the opinion that the views we here announce are in accord both with sound reason and the weight of authority.

Counsel insist that the statute selects a few articles not manufactured in this State and imposes a prohibitive tax on the sale thereof, thus excluding foreign manufactured articles and preventing non-resident merchants from selling them here. Such is not, however, the effect of the statute, nor does that appear to be its design. We are not advised that none of these articles are manufactured in the State; but, even if there are none, this does not affect the validity of the statute. It bears alike on all persons peddling these articles, wherever manufactured, and it does not, either in letter or in spirit, discriminate against any. *Armour Packing Co.* v. *Lacy, supra.* Neither can we say that the tax or license fee of $200 per annum is prohibitive.

It is unnecessary to pass on the question argued, whether or not the business transacted by respondent constituted interstate commerce. We cannot go into that question, as the case is presented here, for, as already stated, if the statute is found to be valid and the proceedings against respondent were regular, the question of his guilt or innocence of violating the statute must be tested in a direct appeal from the judgment of conviction. If the statute should be found to burden interstate commerce, and be held to that extent void, that part could be eliminated and disregarded and leave it valid and enforcible as to transactions not within the realm of interstate commerce. It has become the settled rule of construction in this court to separate statutes

valid in part and void in part on account of the excess of the legislative power, so as to disregard the part which was beyond the power of the Legislature to enact, and preserve the part which was within the legislative power. *Leep* v. *Ry. Co.*, 58 Ark. 407; *Wells Fargo & Co.* v. *Crawford County*, 63 Ark. 576; *Hartford Fire Ins. Co.* v. *State*, 76 Ark. 303; *Western Union Tel. Co.* v. *State*, 82 Ark. 309; *Oliver* v. *Chicago, R. I. & P. Ry. Co.*, 89 Ark. 466; *Parkview Land Co.* v. *Imp. Dist.*, 92 Ark. 93.

The judgment of the chancellor discharging the respondent is therefore reversed and quashed.

STATE v. SOUTHWESTERN LAND & TIMBER COMPANY.

Opinion delivered February 21, 1910.

1. LEVEES—SUCCESSION TO PROPERTY OF LEVEE INSPECTORS.—The swamp land commissioners of Chicot County, elected under the act of January 10, 1861, were the successors to the levee inspectors of that county elected under the act of January 7, 1857, and entitled to all the assets held by the latter for the building of levees in Chicot County. (Page 628.)
2. STATUTES—REPEAL.—A general statute will not be held to repeal a prior special statute, where there is no express repeal and no invincible repugnancy between the two statutes. (Page 629.)
3. LEVEES—SUCCESSION OF PROPERTY.—The act of March 20, 1883, providing "for building and repairing levees in Chicot County," in effect revived the act of January 7, 1857, providing for making and repairing levees in Chicot County, as well as the provisions of the act of January 10, 1861, relating to the same subject, and as a consequence property owned by the boards created by the earlier acts passed in succession to the board created by the later act. (Page 629.)

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

Hal L. Norwood, Attorney General, and *C. A. Cunningham*, Assistant, for appellant; *Murphy, Coleman & Lewis*, of counsel.

1. The act of 1857 was repealed by the act of 1861. (Acts 1861, 161), but the old board continued to act until 1862, when the last meeting was held. A meeting in 1867 is not proved.

2. No title passed by the assignment of the certificates of entry. The legal title was in the State, only the equitable title

passing to the board, a creature and agency of the State. Upon the legal death of the board the lands reverted to and vested in the State. 44 Ark. 454; 49 *Id.* 87.

3. The board has no authority to delegate its powers to a third person. The power of attorney was a nullity. 1 Am. & E. Enc. Law (2 ed.), p. 973; 23 Ark. 87.

4. The State is not bound by the wrongful acts of its agents. 39 Ark. 582.

J. C. Hawthorne, and *Block & Sullivan,* for appellee.

1. The Chicot special acts created a corporation. 87 Ark. 493; 147 Ill. 598; 95 Ky. 414; 29 N. J. L. 36; 60 Miss. 318; 5 Mich. 119.

2. Mere inaction by the board would not terminate its existence. 98 Cal. 51; 1 Dill. 130; 24 Ala. 398; 98 *Id.* 359; 5 Ill. 269; 3 Burr. 1866; 72 Tex. 182; 28 Cyc. 250-2.

3. The acts of 1879 and 1883 did not repeal the act of 1857, a special law. 72 Ark. 120; 80 *Id.* 413; 50 *Id.* 134; 53 *Id.* 417; 63 *Id.* 397.

4. The board of 1883, and not the State, succeeded to all rights of the old board. 73 Ark. 541.

5. The power of Reynolds was coupled with an interest. 36 Ark. 599; 11 *Id.* 709.

6. The patents passed the title. 31 Ark. 425; 44 *Id.* 452; 27 *Id.* 200.

7. Whatever claim the State had passed to the St. Francis Levee District. 70 Ark. 358.

BATTLE, J. The State of Arkansas, on the relation of L. C. Going, prosecuting attorney, for the use of Board of Directors of the St. Francis Levee District, brought this action against the Southwestern Land & Timber Company on the 14th day of August, 1907, and alleged that certain lands, consisting of 14,700 acres, and lying in the county of Poinsett, in this State, had escheated to the State of Arkansas in 1863; that Daniel H. Sessions, as president of the Board of Levee Inspectors of Chicot County, was last lawfully seized in trust for such Board of Levee Inspectors; and that the circumstances in consequence of which the lands escheated to the State are substantially as follows: On the 5th day of March, 1860, the Board of Levee Inspectors of Chicot County purchased the

lands from the State with levee warrants belonging to the Board, and the State's certificates of entry were issued to Daniel H. Sessions, as president of the board for the same, and he thereby acquired the certificates and the equitable title to the lands in trust for the board. In 1862 the board was dissolved. At the time of its dissolution it was the absolute owner of the lands, and owed no debts, and had no successor or representative capable of succeeding to the lands, and the result was the lands escheated to the State. In August, 1883, the defendant fraudulently procured from the State Land Commissioner a patent to the lands by falsely representing that it was the equitable owner of the same as a result of its being the last assignee of the certificates, which representations were untrue and known to be false at the time, and were made for the purpose of deceiving the Land Commissioner. As a part of its scheme to procure the patent, the defendant wrongfully obtained possession of the certificates, and caused indorsements to be made upon them purporting to be assignments thereof by Daniel H. Sessions, as president of the board, by his attorney in fact, D. H. Reynolds, to John T. Burns, bearing date January 10, 1882, and from John T. Burns to the defendant, bearing date August 10, 1883. The alleged power of attorney from Sessions, as president, to D. H. Reynolds bears date the 5th day of December, 1867, when Sessions was not the president of the board, and had no authority to execute the power of attorney or to assign the certificates, and when the board was not in existence, and had not been for five years, all of which was well known to defendant before the 10th day of August, 1883, when it presented the certificates, power of attorney and assignments to the Land Commissioner, and procured patents; and it was also well known to the defendant at the time that the land had escheated to the State, and that this fact was unknown to the commissioner.

The plaintiff asked for final judgment, vesting title to the land in the State of Arkansas for the use of the Board of Directors of the St. Francis Levee District.

Plaintiff amended its complaint by alleging as follows: "By the act of January 7, 1857, the State Legislature authorized the election of five levee inspectors in Chicot County to supervise

the construction and repairing of levees in that county; that the State had undertaken the construction and repairing of these levees in execution of the trust imposed by the swamp land grant from the Federal government; that these Chicot County levee inspectors were merely administrative agents of the State in carrying on the work; that, in the discharge of their duty, this board acquired levee scrip from the State to be used in payment for work done on the levees, and with this scrip the board had entered the lands described in the original complaint, and certificates of entry had been issued to Daniel H. Sessions, as president of the board to enable the board to use the lands, or the proceeds thereof, in the further prosecution of the levee work; that neither Daniel H. Sessions, nor the board, nor any member thereof, had any beneficial interest in the land, but the same belonged to the State, and was to be used exclusively in the work of building and repairing levees; that this board disbanded in July, 1862, at which time the entire work of building and reparing levees, under the act of January 7, 1857, was terminated and abandoned; that no further meetings of the board were held after that time, and no disposition of these lands were made by the board, or attempted to be made; that the legal title to the lands was then in the State, and that the State also owned the equitable title, because the lands had never been used for the purpose for which they were granted to this Board of Levee Inspectors."

Defendant answered and alleged that Sessions held the certificates of entry in trust to sell and apply the proceeds of sale to the discharge of obligations in favor of certain contractors who had built levees in Chicot County, for the building of which the land warrants used in the purchase of the lands had been issued by the State; that, if any claim or interest existed in the board on these warrants or the lands, it was only to the extent of directing the sale thereof and the application of the proceeds by Sessions to the discharge of the indebtedness due to the contractors; that the defendant, in August, 1883, received patents for the land from the Commissioner of State Lands, and became the absolute owner of the premises; that prior to the 5th day of December, 1867, the board passed a resolution directing its president, Sessions, to execute to Daniel H. Rey-

nolds a power of attorney authorizing and impowering him to dispose of the certificates and the lands and to apply the proceeds in discharge of sums due for the construction of levees in Chicot County, as evidenced by its outstanding and unpaid warrants; that, in accordance with this resolution, Sessions, on the 5th day of December, 1867, executed the power of attorney to D. H. Reynolds; that on the 10th day of January, 1882, this indebtedness still being in existence, Reynolds, acting under the power of attorney, sold and transferred the certificates of entry to John T. Burns, and used the proceeds of sale in discharging warrants issued by the board; and upon Burns's subsequent assignment of the certificates to the defendant it acquired the equitable title; and the defendant, except those directly or impliedly admitted, denied the allegations in the complaint and the amendment of the same.

Plaintiff amended its complaint by striking out the words "for the use and benefit of the Board of Directors of the St. Francis Levee District" wherever they occur.

The defendant moved to transfer the cause to the Poinsett Chancery Court, which was done.

A short time after the enactment of the act entitled "An act to provide for making and repairing levees in Chicot County," approved January 7, 1857, five levee inspectors were elected in that county, who organized as a board, and proceeded to discharge their duties under the act, and laid off the county into five levee districts. On the 5th day of May, 1857, the board met and authorized and instructed its president to apply to and contract with State engineers of this State for the building of all the levees in the county of Chicot which may be let out under the provisions of the supplemental act of the General Assembly, approved the 13th day of January, 1857. He entered into twenty or more such contracts for and in behalf of such board and with the State of Arkansas, acting by and through William B. Gaw, an engineer, under the authority and instructions of the Governor of the State. On the 22d day of December, 1857, the board met and ordered the president to sublet, at private letting, all contracts he had made with the State, requiring the subcontractor in every case to receive from him payment for work at such time and in the manner that he should receive payment

from the State under the contracts with the State, and to receive the same rates as should be paid by the State, "unless said work could be subcontracted at less rates." In subsequent resolutions they ordered that such subcontractors, when their work was done, should have precedence, and should be first paid out of money received from the State for such work. The board, through subcontractors, performed its contracts with the State, or a part of them, and received Auditor's warrants of the State in payment, which were receivable in payment for swamp lands. On the 5th day of March, 1860, Daniel H. Sessions, as president of the board, applied to the agent of the State to purchase the lands in controversy, which are swamp lands, and did purchase them and paid for the same with such Auditor's warrants, and as such president received certificates of entry for the lands. There is some evidence that a meeting of the board was held in 1867. A result of that meeting was a power of attorney, which, in part, is as follows:

"Whereas, the Board of Levee Inspectors of Chicot County, Arkansas, in 1860, purchased certain lands of the State Land Office in Helena, for which certificates were issued to me, Daniel H. Sessions, as president of said board, by John C. O. Smith, State Land Agent for the Helena District, and which certificates are numbered as follows: 4601, 4602, 4603, 4604, 4605, 4606, 4607, 4608, 4613, 4615, 4617, 4618, 4619½ and 4621; and,

"Whereas, said Board of Levee Inspectors did at a meeting held on the first Monday and second day of September, 1867, appoint Daniel H. Reynolds of said county their agent and attorney in fact to take charge of all said lands and to sell and dispose of the same, or any part thereof, upon such terms as to him might seem best, and to redeem any of said lands that may have been heretofore sold or forfeited for nonpayment of taxes, and to pay taxes upon any of said lands from time to time; and did direct me as president of said board of levee inspectors to execute to said Daniel H. Reynolds a power of attorney to carry out the objects of said appointment.

"Now, therefore, know ye, that I, the said Daniel H. Sessions, as such president as aforesaid, by virtue of the authority aforesaid, have made, constituted and appointed, and do by these

presents make, constitute and appoint, the said D. H. Reynolds the true and lawful attorney of said board of levee inspectors, and for me and in my name as such president to sell and convey any or all of the lands mentioned in said certificates to such person or persons and for such price as he shall think fit and convenient, and to assign and transfer any or all of said certificates, or to make and execute any deeds or other instruments in writing in relation to the sale of any or all of said lands and of the transfer of any or all of said certificates, and to redeem any of said lands that may have been sold or forfeited for the nonpayment of taxes and to pay such taxes as may from time to time become due on any of said lands; hereby ratifying and confirming all such assignments, transfers, deeds, conveyances or sales as may be made by said attorney touching the matters hereinbefore mentioned.

"In testimony whereof, I, the said Daniel H. Sessions, as such president aforesaid, have hereunto set my hand and seal this 5th day of December, 1867.

(Signed) "D. H. Sessions (Seal)."

On the 10th day of January, 1882, Reynolds executed in the name of Sessions an assignment of the certificates of entry to John T. Burns; and on the 10th day of August, 1883, Burns assigned them to the defendant, the Southwestern Land & Timber Company, and on the day following it received a patent from the Commissioner of State Lands, of this State, for the lands.

These lands have been regularly assessed for State and county taxes, and the defendant has paid the taxes continuously since 1884, expending thereby the aggregate sum of $10,968.34. The Board of Directors of the St. Francis Levee District have regularly and annually assessed levee taxes on the land, and the defendant has likewise paid them, those for 1893 and 1894 having been paid by redemption and others in regular course, and in so doing paid in the aggregate $10,584. It has in 1883 and until 1899 spent annually large sums of money in looking after them and in protecting the timber growing on the same from depredation.

The lands are unimproved and uninclosed, and have never been in the actual possession of any one, and are chiefly valuable

for their timber. They were worth about one dollar an acre in 1883, about $2.50 an acre in 1899, and were worth $15 an acre at the commencement of this suit, which was the 14th day of August, 1907.

There is no evidence of the meeting of the Board of Levee Inspectors, which was organized under the act of the 7th day of January, 1857, since the 14th day of July, 1862, unless one was held in 1867. All the members of the board have died or removed from the State. The outstanding warrants of the board on the 14th day of July, 1862, amounted to $265,013.31.

Upon final hearing the chancery court dismissed the plaintiff's complaint for want of equity, and the State appealed.

This suit was first brought in the name of the State for the use of the Board of Directors of the St. Francis Levee District. It had no such power. If the lands belonged to such board, it had the right to institute and maintain a suit to recover them in its own name, as it is a body politic and corporate with power to sue. Acts of 1893, page 24. But the State amended its complaint by striking out the words "for the use and benefit of the Board of Directors of the St. Francis Levee District" wherever they appear in the complaint. The State thereby sought to recover the lands in its own right. Is it entitled to maintain the suit? The lands are swamp lands, and were granted to the State by an act of Congress entitled, "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," approved September 28, 1850. They were sold to the "Board of Levee Inspectors of Chicot County," and the proceeds of the sale were appropriated for the purpose of reclaiming the swamp lands as provided by the act of September 28, 1850. The State parted with the title to the same. We see no way in which it could have regained title, except by escheat. Has it done so?

The lands were acquired by the Board of Levee Inspectors of Chicot County, and thereby became assets in its hands for the building of levees to protect lands in Chicot County against overflows of water, and remained so during the existence of that board. In 1861 the General Assembly of this State passed an act entitled "An act to protect all land in Chicot County which is subject to overflow," approved January 10, 1861. This act

provided that the qualified voters of that county shall at every general election elect five swamp land commissioners; that the districts then established in the county, and known as levee districts, shall be known as swamp land districts, and each of them shall be entitled to elect one of such commissioners, and that these commissioners shall constitute a board and elect a president and other officers named; and imposed upon them, substantially, the duties of the board organized under the act of January, 7, 1857; and provided that the levee inspectors of Chicot County shall be deemed the predecessors of the first swamp land commissioners elected under the act of 1861, and shall be governed in all things, as far as may be practicable, by the act of 1861, during the remainder of their term of office, as if they had been elected swamp land commissioners under the act of 1861. The swamp land commissioners of the act of 1861 thereby became the successors of, or substitutes for, the levee inspectors of the act of 1857, and entitled to and owners of all the assets held by the inspectors for the building of levees in Chicot County. The same duties were imposed upon them; they are entitled to the means in the hands of the levee inspectors to accomplish the purposes for which the board of swamp land commissioners was created.

It is said that the act entitled "An act to provide for building and repairing the public levees of this State," approved March 20, 1879, "repealed all previous laws for the construction of levees." But it is a general statute and the act of January 10, 1861, was a special statute; and, the former not expressly repealing the latter and there being no invincible repugnancy between the two, the former did not repeal the latter. *Chamberlain* v. *State,* 50 Ark. 134; Ex parte *Coleman,* 54 Ark. 235; *Baugher* v. *Rudd,* 53 Ark. 417; *Durrett* v. *Buxton,* 63 Ark. 397; *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119; *Lawyer* v. *Carpenter,* 80 Ark. 413.

In 1883 the General Assembly, by an act entitled "An act to provide for building and repairing levees in Chicot County," approved March 20, 1883, in effect and in the main revived the act of January 7, 1857, with some changes or additions which did not affect the identity of the act. The object of the three acts of 1857, 1861 and 1883 was the same, and the means pre-

scribed for accomplishing it were substantially the same; either of the last two boards created by the acts being a successor of the one preceding. As said in *United Hebrew Ass'n.* v. *Benshirmol,* 130 Mass, 325, 327, the latter two acts are in practical operation and effect a continuance and modification of the preceding acts, and not an abrogation of the preceding and the reenactment of new ones. As a consequence of this legislation, property owned by one board passed to its successor, and, if the assignments of the certificates of entry, respectively, to Burns and the appellee be void, the lands in controversy did not escheat to the State, but passed to the board organized under the act of March 20, 1883, for building and repairing levees in Chicot County. *Pratt* v. *Dudley,* 73 Ark. 536. Further than this it is unnecessary for us to determine. The State has no right to recover the lands.

Decree affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

St. Louis, I. M. & S. Ry. Co. *v.* Rush; appeal from Miller Circuit Court; Jacob M. Carter, Judge; affirmed December 20, 1919; *per* McCulloch, C. J.

Chicago, R. I. & P. Ry. Co. *v.* Dyal; appeal from St. Francis Circuit Court; Hance N. Hutton, Judge; affirmed January 17, 1910; *per* Hart, J.

Barton *v.* Haltom; appeal from Craighead Circuit Court, Jonesboro District; Frank Smith, Judge; reversed February 7, 1910; *per* Hart. J.

Planters' Mut. Ins. Co. *v.* Simpson; appeal from Union Circuit Court; George W. Hays, Judge; affirmed July 31, 1910; *per* Frauenthal, J.

St. Louis S. W. Ry. Co. *v.* Oliphant; appeal from Monroe Circuit Court; Eugene Lankford, Judge; affirmed January 31, 1910; *per* McCulloch, C. J.

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Fort Smith Light & Traction Company *v.* E. P. Purcell; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; advanced and affirmed with penalty as a delay case, December 20, 1909; *per curiam.*

Thompson Cotton Company *et al. v.* R. H. Gullick *et. al.;* Miller Chancery Court; James D. Shaver, Chancellor; settled and appeal dismissed, December 20, 1909; *per curiam.*

Western Union Telegraph Company *v.* Mrs. E. L. Tucker; Ouachita Circuit Court; George W. Hays, Judge; judgment rendered in accordance with stipulations filed, December 20, 1909; *per curiam.*

Charles T. Abeles & Company *v.* National Surety Company; Pulaski Circuit Court, Second Division; James H. Stevenson, Judge; appeal dismissed on appellant's motion, January 3, 1910.

Arkansas Midland Railroad Company *v.* J. B. Galloway & Company; Monroe Circuit Court; Eugene Lankford, Judge; settled and judgment entered in accordance with stipulations filed, January 3, 1910; *per curiam.*

Citizens' Fire Insurance Company of Clarksville, Arkansas, *v.* William Yates; Hot Spring Circuit Court; W. H. Evans, Judge; appeal dismissed on appellant's motion, January 3, 1910; *per curiam.*

George W. Lewis *v.* Mary E. Stringham; White Circuit Court; Hance N. Hutton, Judge; advanced and affirmed with penalty as a delay case, January 10, 1910; *per curiam.*

Charles M. Newton Trap Rock Company *v.* Good Roads Machinery Company *et al.;* Pulaski Chancery Court; John E. Martineau, Chancellor; settled and appeal dismissed on appellant's motion, January 10, 1910; *per curiam.*

Mattar Brothers *v.* E. F. Winegar; Garland Chancery Court; Alphonso Curl, Chancellor; settled and appeal dismissed on appellant's motion, January 17, 1910; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* A. J. Bell; Jackson Circuit Court; Charles Coffin, Judge; affirmed for noncompliance with rule nine, January 24, 1910; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* F. B. Murphy, administrator; Faulkner Circuit Court; Eugene Lankford, Judge; judgment in accordance with agreement of parties, January 24, 1910; *per curiam.*

W. B. Miller *et al. v.* State for use of R. Kaufman; Pulaski Circuit Court, Second Division; F. Guy Fulk, Judge; settled and appeal dismissed, January 31, 1910; *per curiam.*

J. B. Buford *v.* J. A. Lewis *et al.;* Polk Chancery Court; Jas. D. Shaver, Chancellor; appeal dismissed without prejudice, on appellant's motion, January 31, 1910; *per curiam.*

George W. Donaghey *et al. v.* John E. Martineau, Chancellor; prohibition to Pulaski Chancery Court; John E. Martineau, Chancellor; dismissed on respondent's motion, the original cause in Chancery Court having been dismissed; February 7, 1910; *per curiam.*

Vincent Liberto *v.* Lillie Reutzel and Kate Compagnion; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; settled and appeal dismissed, February 14, 1910; *per curiam.*

Johnson Berger & Company *v.* Iriquois Canning Company; Craighead Circuit Court, Jonesboro District; Frank Smith, Judge; settled and appeal dismissed, February 21, 1910; *per curiam.*

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