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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

EDGAR A. McCULLOCH, - - -	CHIEF JUSTICE.
CARROLL D. WOOD, - - - -	ASSOCIATE JUSTICES
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

SIMS *v.* AMERICAN NATIONAL BANK OF FORT SMITH.

Opinion delivered February 20, 1911.

1. BILLS AND NOTES—LIABILITY OF DRAWEE.—The payee of a check, unaccepted, cannot maintain an action upon it against the bank upon which it was drawn, as there is no privity of contract between them. (Page 7.)
2. SAME—LIABILITY OF DRAWER OF CHECK.—The action of a drawee bank in paying a check upon a forged indorsement purporting to be the payee's did not constitute an acceptance thereof nor release the drawer from its payment. (Page 8.)
3. SAME—NOTICE OF PRESENTMENT AND NONPAYMENT.—Where a drawee bank paid a check upon a forged indorsement, and the check was returned to the payee who, at the drawer's suggestion, again presented the check to the drawee bank which refused payment, the drawer was not discharged by the payee's failure to give notice of presentment and nonpayment, as such notice would have been of no benefit to the drawer. (Page 9.)

Appeal from Sebastian Circuit Court; *J. S. Maples,* Judge on exchange; reversed.

STATEMENT BY THE COURT.

Appellants brought this action against the American National Bank of Fort Smith, Ark., on a draft for $500, which Alice Sims had purchased from said appellee, said draft being drawn upon the Mechanics-American National Bank of St. Louis, and payable to the order of Jesse Sims.

The complaint alleged "that on the 14th of September, 1909, the said plaintiff, Alice Sims, bought from the defendant, the American National Bank of Fort Smith, Ark., a draft on the Mechanics-American National Bank of St. Louis, Mo., for $500,

payable to the order of her co-plaintiff, Jesse Sims, and said Alice Sims paid said American National Bank the sum of $500 for said draft, and said draft was thereupon delivered to plaintiff, Alice Sims. A copy is attached and marked, 'Exhibit A.' That the money represented by said draft belonged to said Alice Sims. That said Jesse Sims caused said draft to be presented to said Mechanics-American National Bank of St. Louis, Mo., for payment with his genuine indorsement, and said Mechanics-American National Bank refused to pay the same. That afterwards the said Alice Sims demanded payment of said draft of said American National Bank, and it refused to pay same." Prayer for judgment for the amount with interest.

The answer admitted the purchase of the draft and payment of the money as alleged; denied that Jesse Sims presented the draft for payment to the Mechanics-American National Bank, and that said bank refused to pay same; alleged that it sold the draft upon said drawee bank and at the time had funds in said bank upon which it had a right to draw to a larger amount than the draft, and immediately credited said drawee bank with the amount of said draft and paid the same to the said Mechanics-American National Bank of St. Louis, the drawee, before said draft was delivered to the payee, Jesse Sims; alleged upon information that Alice Sims sent the draft to some one at Nacona, Texas, by the name of Jesse Sims, and that the Farmers & Merchants National Bank at Nacona, Tex., purchased same from some one representing himself to be Jesse Sims, and cashed and paid full value therefor after said draft had been indorsed by said Jesse Sims or the party representing himself to be Jesse Sims; that thereafter said draft was paid by the drawee in the due course of business; that it discharged its full duty by delivery to Alice Sims of a good and valid draft upon the drawee bank, in which it had funds sufficient to meet the payment, "and which drawee did pay and cash said draft when the same was presented to it, purporting to have been indorsed by the payee Jesse Sims;" that plaintiff failed to notify defendant of the refusal of the drawee bank to pay said draft after its presentment.

The testimony tended to show that on the 14th day of September, 1909, Alice Sims purchased from the appellee a draft for $500 payable to the order of Jesse Sims and drawn on the

Mechanics-American National Bank of St. Louis; that she, pursuant to an agreement had with her brother and co-plaintiff, Jesse Sims, sent said draft to Jesse Sims in a registered letter, addressed to Jesse Sims at Nacona, Texas, intended for her said brother and co-plaintiff; that the registered letter containing said draft was delivered by a rural route carrier at Nacona, Tex., to some person other than the plaintiff Jesse Sims, which person represented himself to such carrier to be Jesse Sims; that said person to whom said letter was delivered by said carrier, took the draft therefrom, wrote on the back thereof the words "Jesse Sims," and presented the same to the Farmers & Merchants National Bank of Nacona, Tex., which said bank took said draft, and gave to said person so presenting the same the sum of $50 and deposit certificate for $450; that the indorsement of the name "Jesse Sims" on the back of the draft was a forgery, and was unauthorized by Jesse Sims, the brother of Alice Sims. The said Farmers & Merchants National Bank indorsed said draft, and guarantied all prior indorsements, and deposited the same with the Merchants & Planters Bank of Sherman, Tex., which on September 20, 1909, indorsed it and guarantied all indorsements, and deposited it with the National Bank of Commerce of St. Louis, Mo. The said draft was presented on the 22d day of September, 1909, to the drawee, said Mechanics-American National Bank, and paid by it, and the amount, $500, charged up against the American National Bank of Fort Smith, Ark., the drawer, which had funds in the drawee bank more than sufficient to pay said draft. In the ordinary course of business the draft was returned to the appellee as a voucher. The appellee was notified by appellant, Alice Sims, that she had received a letter purporting to be from her brother, which she regarded as a forgery. The testimony was conflicting as to whether this occurred before or after the return of the draft to appellee. In the latter part of January, 1910, the appellee delivered to Alice Sims the said draft which had been returned to it as a voucher, and the same was indorsed by Jesse Sims, and it was presented for payment to the Mechanics-American National Bank of St. Louis, and payment was by said bank refused, because it had already paid said draft once. On February 14 appellants demanded the payment of $500, the sum for which the draft was issued, from the appellee,

the American National Bank of Fort Smith, at the time advising of its presentment to the drawee and its refusal to pay, and payment of said sum was refused.

The draft reads:

"American National Bank
"No. 25763
"Fort Smith, Ark., Sept. 14, 1909.
"Pay to the order of Jesse Sims $500.00
"five hundred and no-100 dollars.
"E. M. Dickerson,
"Asst. Cashier.
"To Mechanics-American National Bank of St. Louis, Mo.
[Indorsed on the back] "Jesse Sims."
"Jesse Sims."
"Pay to the order of any bank of banker, previous indorsements guarantied, Sept. 20, 1909, Merchants & Planters National Bank, Sherman Tex.
"C. B. Dorchester, Cashier."
"Pay to the order of any bank or banker,
all prior indorsemnts guarantied, Farmers
& Merchants National Bank.
".....Texas
".....Cashier."

Another indorsement is so dim it cannot be deciphered.

Alice Sims testified when she got the letter from Nacona, Texas, acknowledging receipt of the draft, she knew it was not from her brother, and went to the American National Bank, and told Mr. Ball, the cashier, that she had received such a letter, and was sure her brother did not get the money; that she gave him the letter later on, she thought, and he said it was their funeral if somebody cashed it without being identified. On September 25, three days after the draft was paid by the drawee on the 22d, she wrote the bank at Nacona, Texas, asking information about the person for whom it cashed the draft on the forged indorsement. On November 3, 1909, appellee notified the drawee bank at St. Louis that the indorsement on this draft was a forgery, and asked that the amount $500 be placed to appellee's credit, and that it proceed against the bank from whom it received the draft, advis-

ing of a letter it had received from the cashier of the bank at Nacona, Texas. On November 4, the drawee bank replied, asking that an affidavit from the payee, Jesse Sims, be furnished that the indorsement had been forged, upon receipt of which it said the matter would have attention. On November 8 appellee sent the old draft, with the requested affidavit from Jesse Sims, to the Mechanics-American National Bank of St. Louis with this request: "Kindly give us credit for this amount, as there is no question whatever but that the indorsement is a forgery." On the 11th follows another letter to the drawee by appellee, complaining of the delay in allowing the credit, and stating: "We are charging the amount to your account today, and will ask you to give us credit for the same." On the 17th of November the St. Louis bank returned the old paid draft to the Fort Smith bank, declining to give credit for it.

Appellee bank afterwards turned this draft over to appellant, expressing the hope that they would be able to get the Texas bank or the St. Louis bank to pay it. It was then indorsed by Jesse Sims, appellant, who demanded payment of the drawee bank, which was refused because it had already paid the draft.

The case was submitted to the court without a jury, and after making findings of fact the court made the following declarations of law, to which the appellants excepted:

"1. That the action of the Mechanics-American National Bank in charging up the amount of $500 against the defendant on account of said draft constituted an acceptance of the same on the part of the said Mechanics-American National Bank, upon which it is liable to the plaintiffs.

"2. That the defendant is not liable in this action to plaintiffs."

And rendered judgment dismissing the complaint and for costs, against appellants, from which this appeal is brought.

Youmans & Youmans, for appellants.

1. The action of the Mechanics-American National Bank in charging up the amount of the draft against the appellee did not constitute such an acceptance by that bank as would warrant a suit by appellants against it, but their suit must be to recover from appellee. 94 U. S. 343; 143 Ill. App. 625; 40 Vt. 733; 107 Mass.

45; 13 Allen, 444; 23 La. Ann. 49; 46 N. Y. 82; 10 Wall. 152; 34 Md. 574; 5 Col. 189; 55 Mich. 203; 62 Mich. 348; 54 O. St. 68; 82 N. Y. 1; 75 Atl. 313; 79 Mo. 168; 79 Mo. 251; 83 Mo. 337; 71 Mo. App. 132; Zane on Banks and Banking, § § 146, 147. The holding in Pennsylvania and Tennessee, 73 Pa. St. 483 and 88 Tenn. 380, contrary to the above, is contrary not only to the case on which those courts rely, 94 U. S. 343, but also to reason and the weight of authority.

2. Regardless of whether or not there was such an acceptance, appellants can maintain suit against appellee for the amount paid for the draft. 82 N. Y. 1; 91 N. Y. 111; 119 N. Y. 195; 75 Atl. 313, and authorities cited.

3. While, under the statutory law, Kirby's Dig., § § 507, 508, the draft in question may be termed a bill of exchange and subject to the rules of law governing such bills, yet those rules do not apply to a bill of exchange which has been lost or upon which an indorsement has been forged. In such a case the mere failure to give notice by protest or otherwise is not sufficient to constitute a defense. 75 Atl. 313; 67 Ark. 249.

4. This record does not present a case for the application of the rule that "where one of two innocent parties must suffer by the fault of a third, that one shall sustain the loss who put it into the power of the third to occasion it." It is *not* negligence for one to fail to anticipate that a crime will be committed. 49 Ark. 45.

Hill, Brizzolara & Fitzhugh, for appellee.

1. Appellants cannot recover against appellee, because (1) plaintiff, Alice Sims, received all she paid or contracted for, viz., a good and valid draft for $500. If, after she received this draft, she sent it to the wrong person or it passed from her into the hands of an impostor who defrauded her out of the money, appellee is not responsible for that loss. Morse on Banks and Banking, § § 491, 493, 494, 499, 500, 506, 510, 511.

2. Daniel, Neg. Inst., § § 1637, 1638; Byles on Bills, § 96, note 1; Randolph, Com. Paper, § § 589, 599, and as to latter section, note 126 and authorities cited; 47 S. W. 234; 88 Tenn. 379; 92 Tenn., 154; 120 Ind. 514; 73 Pa. 473; 55 Wis. 364; 19 O. St. 526; 20 *Id.* 234. After a check or draft is accepted by the drawee

the drawer is released from further liability. 1 Morse on Banks and Banking, § 414; 4 Baxt. 414; 52 N. Y. 350; 107 N. Y. 179; 108 Pa. St. 1.

3. Appellants cannot recover because, this being foreign paper, plaintiff failed to have the draft protested and notice of the dishonor given to appellee. 22 Ark. 315; 23 Ark. 633; 37 Ark. 276; 53 Ark. 519; 13 Ark. 394; 26 Ark. 155; Joyce on Defenses to Com. Paper, § 572; 25 Ark. 67.

KIRBY, J., (after stating the facts). Can the payee of a check or draft whose indorsement was forged, after payment by the bank upon which it was drawn upon such forged indorsement, maintain an action against the drawee to recover the amount of it?

The question is before this court for the first time. There are many authorities holding that the payee of a check, unaccepted, may bring suit against the drawee, upon the theory that it has the amount of the draft in its hands subject to the order of the drawer which is in effect by the check assigned to the payee, but the great weight of authority is against the proposition. Zane on Banks and Banking, § § 146, 147; Morse on Banks and Banking, § 493.

The precise question was answered in the negative by the United States Supreme Court in *First National Bank* v. *Whitner*, 94 U. S. 343, 24 L. Ed. 230, the court saying: "We think it is clear, both upon principle and authority, that the payee of a check, unaccepted, cannot maintain an action upon it against the bank on which it was drawn;" and, continuing in answer to a like contention made there that such unauthorized payment constituted an acceptance, that court, said:

"It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawee; and in law the check remains

unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before.

"We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent."

In such matters it is important that uniformity should obtain in the different jurisdictions, and that but one rule should be applied to the business dealings of the citizens of the different States with each other, so closely interwoven is such business activity and association with the vast commercial life of the nation; and since the United States Supreme Court is the highest court of last resort, and does not follow the decisions of the State courts upon general banking and commercial questions, we will follow it. *Exchange National Bank* v. *Coe,* 94 Ark. 387.

We hold that there was no privity of contract between the holder of this draft, which had been paid by the drawee bank upon the forged indorsement of the payee, which would entitle him to bring suit against said drawee bank, and that its action in the payment of such draft did not constitute an acceptance thereof that would release the drawer from its payment. See, also, *Bellows Falls Bank* v. *Rutland Co. Bank,* 40 Vt. 377; *Carr* v. *National Security Bank,* 107 Mass. 45; *Dana* v. *Third National Bank,* 13 Allen, 445; *Case* v. *Henderson,* 23 La. Ann. 49; *Aetna National Bank* v. *Fourth National Bank,* 46 N. Y. 82; *Bank of Republic* v. *Millard,* 10 Wall. 152; *Moses* v. *Franklin Bank,* 34 Md. 574; *Colorado Nat. Bank.* v. *Boettcher,* 5 Col. 189; *Grammel* v. *Carmer,* 55 Mich. 203; *Brennan* v. *Merchants' & Manufacturers' Nat. Bank,* 62 Mich. 348; *Cincinnati, H. & D. Rd. Co.* v. *Bank,* 54 Ohio St.

68; *Thomson* v. *Bank of British North America,* 82 N. Y. 1; *Pratt* v. *Union Nat. Bank,* 75 Atl. 313; *Merchants' National Bank* v. *Coates,* 79 Mo. 168; *Dickinson* v. *Coates,* 79 Mo. 251; *Coates* v. *Doran,* 83 Mo. 337.

The drawee bank had no right to pay out the money of the drawer upon his draft upon the forged indorsement of the payee thereof, nor to charge such sum of money so wrongfully paid to the account of the drawer, and is, of course, liable to it for said amount.

There is nothing in the contention here that appellee had no notice of the refusal of the drawee bank to accept and pay this draft when it was presented by the payee, long after it had already been paid by said drawee bank upon the forged indorsement and returned as a voucher to the drawer bank, who had been notified before it was turned over after such receipt by it, to the payee, that the drawee had already paid said draft, and refused to allow the drawer any credit for same upon its demand therefor, on account of it having been paid upon the indorsement of a person not entitled to receive it. Appellee knew the payee's indorsement had been forged; it knew that the drawee bank had wrongfully paid said draft upon such forged indorsement, and refused to repay the same to it, the drawer, and declined to give it credit therefor. Knowing all these things, a notice of its presentment afterwards, which was made by the payee in effect for the benefit of appellee, if not at its suggestion, was not required, and could have been of no benefit to it. *Auten* v. *Manistee National Bank,* 67 Ark. 249.

The appellee was liable to the payee of the draft for the amount of it, and, its drawee having failed and refused to pay it, it can only discharge such liability by the payment thereof itself. The facts being virtually undisputed, and there being no useful purpose to serve by remanding this cause, the judgment is reversed, and judgment will be rendered here in favor of appellants for the amount of the draft, $500, with interest.

It is so ordered.

VAUGHT v. PADDOCK.

Opinion delivered February 20, 1911.

1. FRAUDS, STATUTE OF—AUTHORITY TO SELL LANDS.—A contract for the employment of an agent to find a purchaser of lands is not within the statute of frauds. (Page 13.)
2. AGENCY—EVIDENCE.—Where it was a question whether defendant's agent had authority to make a certain sale of land, it was competent to show that such agent had made similar sales for defendant to other parties, as such evidence tended to show either that the agent had such authority or that defendant had ratified his acts. (Page 13.)
3. REFORMATION OF INSTRUMENTS—WHEN DECREED.—When, through mistake or fraud, a conveyance fails to express the actual agreement of the parties, it will be reformed in equity. (Page 14.)

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

Gibson Witt, for appellant.

1. The demurrer to the complaint should have been sustained because there was no sufficient allegation of fraud.

2. Plaintiff has failed to establish, by any proper evidence, any agency in Jones further than that of solicitor to procure purchasers for the lots. In the absence of proof that the written instruments had been lost, destroyed or could not be procured, oral testimony was inadmissible to prove the various transfers and the property conveyed. 77 Ark. 177; *Id.* 244. Written instruments cannot be proved, nor the terms thereof altered or varied, by parol evidence. 52 Ark. 389; *Id.* 60.

3. Appellant not only denies that he had knowledge that an amended plat was prepared and avers that he never authorized such a plat, but the proof fails to bring home to him such knowledge or authorization.

4. A mere preponderance of evidence is not sufficient to justify a decree of reformation. The evidence must be clear, unequivocal and decisive. 75 Ark. 72; 71 Ark. 614; 84 Ark. 352; 81 Ark. 420. There was no ratification of Jones's acts by appellant. Ratification of an agent's acts involves knowledge by the principal of those acts. 76 Ark. 567; *Id.* 212.

A. Curl, for appellee.

1. The whole record, complaint, demurrer, answer and evi-

dence, was before the court for consideration at the same time. If the record in the whole case authorized the decree rendered, objection to the ruling on the demurrer came too late.

2. We concur in appellant's statement of law that, in order to justify the reformation of a written instrument, the evidence must be clear and decisive, but the evidence in this case fully met that requirement.

3. Jones's agency is clearly shown by the testimony, and when appellee spoke to appellant about buying lots, and was by the latter referred to Jones, that authorized appellee to rely on any statements or representations made by Jones with reference to the lots, and appellant is bound by them.

4. Not all the evidence introduced before, and considered by, the chancellor has been brought into the transcript. His decree, which is right on the facts, should stand for that reason also. 58 Ark. 134; 54 Ark. 159.

FRAUENTHAL, J. This suit was brought by Porter Paddock, the plaintiff below, to secure the specific performance of a contract for the conveyance of land and the reformation of a deed in which, it was alleged, a portion of the land had been omitted from the description thereof. The defendant filed a demurrer to the complaint; but, without seeking a ruling of the court thereon, he filed an answer, in which he joined issue on every allegation of the complaint and set forth every defense that he had looking to a full development of the merits of the case. Testimony was thereupon taken which fully developed the merits of the case upon both sides. The cause was then submitted to the court for its final determination upon the pleadings and the testimony that was taken, both sides having announced that they were ready for trial. The court, after thus hearing the entire case, rendered its decree, in which it overruled the demurrer to the complaint and granted to the plaintiff the relief that was prayed for. Under these circumstances we must consider the complaint as amended to conform to the proof; and if that was sufficient to entitle the plaintiff to the relief which the court granted him, then the decree should not be reversed because the court overruled the demurrer to the complaint, even if it was defective. It is only necessary, therefore, to determine whether or not under the evidence

the plaintiff was entitled to the relief which he obtained, and whether or not the finding of the chancellor is clearly sustained by the evidence that was adduced upon the trial of the case. From the testimony it appears that the defendant was the owner of certain rural lands in Montgomery County upon which was established the town of Caddo Gap. He laid out and divided his lands into lots and blocks, and made a plat thereof, which was in 1906 duly recorded in the proper office of said county. Upon this original plat, block number 17 was laid out and divided into lots which contained a frontage of 25 feet and a depth of 125 feet each. In 1907 the defendant employed one W. D. Jones to make sale of his said lots, and on June 10, 1907, said agent sold to the plaintiff lots numbers 1, 2, 3 and 4 in said block number 17 according to said original plat. The land he thus sold him contained a frontage of 100 feet with a depth of 125 feet. At the time that the sale was made the testimony shows that the parties actually measured the frontage of the land bought by the plaintiff and located it on the ground as containing 100 feet frontage. Just before the purchase defendant's agent had made an amended plat of the block, in which each lot had a frontage of 50 feet, and on this amended plat lots 1, 2, 3 and 4 of the original plat of said block were indicated as lots 1 and 2, and these two lots in the amended plat embraced the same land as the lots 1, 2, 3 and 4 of the original plat. At the time of the purchase defendant's agent stated to plaintiff that the amended or new plat would be duly adopted and recorded as the controlling plat. The plaintiff thereupon made full payment for the lots, and in the deed executed by defendant to him the lots were described as lots numbers 1 and 2, but the court found (and we think that his finding is fully sustained by the evidence) that this description was according to the amended or new plat, and that plaintiff actually bought and the deed was intended to describe and convey the land indicated on the original plats as lots 1, 2, 3 and 4 of said block 17 with a frontage of 100 feet. The plaintiff went into possession of the land and built permanent improvements on all four of said lots according to said original plat. Subsequently the defendant abandoned his intention to record or adopt said amended or new plat. The plaintiff testified that at the time he made the purchase of the lots and measured same the defendant was present and

understood that the lots which he purchased contained 100 feet frontage, and that defendant also told him that the new or amended plat upon which the lots were indicated as lots 1 and 2 and containing 50 feet each would be recorded and adopted as the actual plat of the lots. While the defendant denied this, yet from the circumstances adduced in evidence we think that the finding of the chancellor that the testimony of the plaintiff was sustained is clearly correct. These circumstances were that the plaintiff made permanent improvements on all the four lots as they are indicated on the original plat with no objection from defendant; and defendant executed to other persons deeds for lots in this block which described them according to the amended or new plat, and these descriptions he afterwards corrected by describing the lots according to the original plat. These sales to the other persons were made by the agent Jones during the same year that plaintiff purchased the lots involved in this suit.

The chancellor made findings of fact in accordance with the above, and entered a decree reforming said deed so that the description of the land therein should embrace lots 1, 2, 3 and 4 of said block 17 according to said original plat, which was recorded in 1906, and invested plaintiff with title thereto.

It is urged by the defendant that he did not know that his agent Jones had made a new or amended plat of said block, and that his agency to do this was not sufficiently established. But it is conceded that Jones was the agent of defendant with full authority to seek purchasers for the lots and to make sales thereof. The contract employing Jones to find purchasers of his lots and the authority given to him by defendant to sell the lots could be made by parol, and did not fall within the statute of frauds. *Daniels* v. *Garner,* 71 Ark. 484; *McCurry* v. *Hawkins,* 83 Ark. 202; *Kempner* v. *Gans,* 87 Ark. 221; *Forrester-Duncan Land Co.* v. *Evatt,* 90 Ark. 301.

The agent Jones had then authority by implication to do all acts necessary to effect sales of the lots. It is conceded that he had authority to sell the lots involved in this case, and his acts in making the sale would be binding on the defendant, whether they were described according to the original plat or the amended plat. 31 Cyc. 1364. But the testimony of the plaintiff and of the agent shows that the defendant did have knowledge of this new

or amended plat, and that lots 1 and 2 of block 17 as indicated thereon contained a frontage of 100 feet, and embraced the same land as lots 1, 2, 3 and 4 of block 17 in the original plat. Against this testimony is only the statement of the defendant. But the circumstances also are contrary to his contention. Immediately upon making the purchase the plaintiff began the erection of houses and other improvements upon the entire 100 feet of frontage of the lots and without objection from defendant. It appears also that defendant had executed deeds to other persons for lots in this block. These parties testified that they had made purchases through Jones of two lots in said block, and that deeds had been executed to them describing the lots in accordance with the amended or new plat, and that subsequently defendant had executed new deeds so as to correct the descriptions, and described the lots in the new deeds as they were indicated on the original plat. We think that this testimony was perfectly competent because it tended to show that either Jones, the agent, had authority to sell according to the descriptions as contained in the amended or new plat, and that defendant knew of the sales that he was making according to that plat, or that he ratified sales thus made by Jones. This testimony tended further to sustain the contention made by plaintiff that the lots as described in the deeds which these parties first obtained contained a frontage of 50 feet each and were described according to the amended or new plat, and that each lot so described embraced the same land as two lots described according to the original plat.

Upon an examination of all the testimony adduced upon the trial we think the chancellor is sustained by the evidence in his findings that the plaintiff purchased and defendant sold to him lots in block 17 containing a frontage of 100 feet and a depth of 125 feet, and that these lots embraced lots 1, 2, 3 and 4 in block 17 according to said original plat recorded in 1906, that through mistake or a fraudulent representation that an amended plat would be recorded these lots were described in the deed as lots 1 and 2 in block 17, and that this latter description is erroneous and the former description is the correct one, and we think that the evidence is clear and decisive to this effect. We are also of the opinion that the decree which the chancellor entered was right.

Courts of equity will rectify an instrument so as to make it

convey property or enforce rights which have been omitted from the instrument itself through mistake or fraud. The previous oral agreement subsists as a binding contract, and upon clear proof of its terms the court will compel the incorporation of that which has been omitted or the modification of that which is inserted in the writing so that the agreement as actually made shall be truly expressed and executed. As is said by Denio, C. J., in *DePeyster* v. *Hasbrouck,* 11 N. Y. 591: "It is unnecessary to refers to cases to establish the familiar doctrine that when through mistake or fraud a contract or conveyance fails to express the actual agreement of the parties it will be reformed by a court of equity so as to correspond with the actual agreement." *Stinson* v. *Ray,* 79 Ark. 592; *Stephenson* v. *Garner,* 105 S. W. 572; *Hunt* v. *Rousmaniere,* 1 Pet. 1; 1 Story, Eq. § 161; *Gillespie* v. *Moon,* 2 Johns. Ch. 585.

The decree is affirmed.

KILLION v. KILLION.

Opinion delivered February 20, 1911.

1. BILL OF REVIEW—REQUISITES.—A bill of review is an independent proceeding, whose object is to reverse or modify a decree rendered in a former case, and should specifically state the grounds upon which the relief is sought. (Page 16.)
2. SAME—NEW EVIDENCE.—Where a bill of review is based upon newly discovered evidence, it should state facts showing that this alleged new evidence is relevant and material to the issue involved in the original case and of such a character and cogency that might probably change the result. (Page 16.)
3. SAME—NECESSARY ALLEGATIONS.—A bill of review should set out, at least substantially, the former pleadings and decree, in addition to the other necessary allegations, in order to determine whether the alleged new evidence would call for a reversal of the decree sought to be reversed. (Page 16.)
4. SAME—DOES NOT LIE WHEN.—A bill of review or petition for new trial under Kirby's Digest, § 6220, based on newly discovered evidence, will not lie for new evidence which is merely cumulative, or which was known to the petitioner or could by reasonable diligence have been discovered by him before the rendition of the decree that is attacked; nor if the new evidence is not material and could not change the result. (Page 17.)

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

Appellants *pro se.*

No brief filed for appellees.

FRAUENTHAL, J. This is an appeal from a decree sustaining a demurrer to a pleading which, under the liberal construction given to pleadings, we find to be a bill of review. The pleading is filed under the style of a cause in which a decree was rendered by the court at a former term, and the petitioners therein call themselves defendants and ask for a new trial of said original case. The pleading is, however, styled by the pleader as a "motion for a new trial and bill of review," and prays that the former decree be set aside. It seeks to reverse the former decree upon the ground of newly discovered evidence; and the bill sets forth only the evidence which it claims had been newly discovered and also some of the testimony that it alleges was heard at the trial of the case. But it does not set forth the complaint upon which the former case was based nor the answer or other pleading therein, nor the decree which it seeks to reverse; and it does not state facts which might be considered to allege these matters in a general way. It is impossible from the allegations of this pleading or bill to determine what was the issue involved in the former case and the judgment of the court thereon. We are unable to say therefore from the bill, after giving to the allegations therein the most liberal construction and taking into consideration every inference that is deducible therefrom, whether the evidence set out in the bill is material to the issue involved in the former case or whether it is of a nature that is newly discovered within the purview of the law. A bill of review is an independent proceeding, and is a complaint made by the party seeking the relief as the complainant. Its object is to reverse or modify a decree rendered in a former case, and it should specifically state the grounds upon which it is based. If it is based upon newly discovered evidence, it should state facts showing that this alleged new evidence is relevant and material to the issue involved in the original case and of such a character and cogency that it would change or at least probably change the result. The questions that are thus brought forward for determination upon a bill of review arise from the pleadings,

proceedings and decree in the former case, and it is essential, therefore, that the bill of review set out, at least substantially, the former pleadings and decree therein, in addition to the other necessary allegation. *Buffington* v. *Harvey,* 95 U. S. 99; 16 Cyc. 525. This is necessary in order to determine whether or not the evidence which it is alleged is newly discovered is of such a character as to entitle the party to the relief of reversing a decree solemnly entered. The bill for review will not lie where such new evidence is merely cumulative, or was known to the petitioner, or by reasonable dilegence could have been discovered by him before the rendition of the decree that is attacked; nor will it lie if such new evidence is not in fact material to the issue that was decided by the former decree and could not change the result. *White* v. *Holman,* 32 Ark. 757; *Greer* v. *Turner,* 47 Ark. 17; *Bartlett* v. *Gregory,* 60 Ark. 453; *Smith* v. *Rucker,* 95 Ark. 517.

It is necessary, therefore, that a petition seeking to reverse or modify a decree rendered at a former term of the court should set out the above matters and should make such allegations as would show that the petitioner was entitled to the relief sought, whether the petition is a bill of review or a petition for a new trial provided for in section 6220 of Kirby's Digest. The pleading filed below seeking to reverse the former decree did not state facts sufficient to entitle the petitioners to this relief, and the court did not err in sustaining a demurrer thereto.

The decree is affirmed.

OHIO HANDLE & MANUFACTURING COMPANY *v.* JONES.

Opinion delivered February 20, 1911.

1. INSTRUCTIONS—GENERAL AND SPECIFIC.—It is reversible error to refuse a specific instruction applying the law to the facts of the case, although the law is covered by general instructions, unless it affirmatively appears that no prejudice resulted. (Page 21.)
2. MASTER AND SERVANT—INSTRUCTIONS.—Where, in an action against a master for negligently causing the death of plaintiff's intestate, the defendant asked a proper and specific instruction to the effect that plaintiff can not recover unless defendant was negligent, a modification by the court which made the care due by the master to depend upon the decedent's contributory negligence was erroneous and misleading. (Page 22.)

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

J. F. Gautney, for appellant.

1. The court erred in refusing to direct a verdict for appellant. There was no evidence of negligence; and where the facts are undisputed, and the minds of reasonable men could draw but one conclusion from them, the question of negligence becomes one of law. 61 Ark. 549, 555; 75 Ark. 406; 57 Ark. 503; 48 Ark. 575; 87 Ark. 190; 89 Ark. 50; 161 Mass. 153; 36 Law. Ed. 758. Deceased was guilty of contributory negligence. Had he made that use of his senses which the law requires of one engaged in a dangerous employment, the injury would not have occurred. 51 Ark. 46.

2. By his modification of instruction 3D, the court changed the entire meaning of the instruction. Its effect was to instruct the jury that they should find for the plaintiff unless they also found that the act of deceased in reversing the carriage was negligent. 71 Ark. 501.

E. L. Westbrooke and *E. H. Mathes,* for appellee.

HART, J. Appellant prosecutes this appeal from a judgment for damages rendered against it in favor of appellee. The undisputed evidence shows that on March 10, 1909, Geo. E. Jones was employed by appellant as sawyer at its mill, and was killed while in the performance of his duties as such sawyer. The man who carried off the slabs or flitches as they were sawed was named Barnett. We quote from appellant's abstract as follows:

"The machine consisted of a saw table 24 feet long, on which was set at a point about equidistant from the ends of the table a circular saw 54 inches in diameter, driven by steam power. The table was about 4 feet wide, and the saw nearly in the center. The table was so constructed that the saw carriage mounted upon it came flush with the opposite side of the table, or the side occupied by the offbearer. The saw carriage was about 30 inches wide, and 12 feet long. Jones stood on the right hand side of the table to the right, and four feet from the front of the saw. Barnett, the offbearer, was on the opposite or left side of the table, about two and one-half or three feet to the rear of the saw. Barnett testified:

"Jones cut the logs into slabs. He would first take a slab off

the side of the log, then turn the log so that the flat side would rest upon the carriage and rip the log into planks. The log on which he was working was 4½ or 5 feet long. The log must have been half sawed when Jones was injured. The log was perhaps 12 or 18 inches in diameter when Jones first began working on it. I was about 15 feet from Jones at the time he was injured. Jones was killed by one of the pieces that had been sawed by him being caught in the saw carriage, drawn into the saw, and by the saw hurled against Jones." On direct examination, witness testifies as follows:

"Q. He was not killed by the main log he was sawing? A. No, sir. Q. He was killed by the piece that had been sawed, and had fallen over? A. Yes, sir. Q. What caused it to strike him or go back where he was? A. Of course in sawing the flitches nearly always after they pass the saw, those short ones—very often they but little get past the saw. Those saws are three and a half feet or something like that, and some of them larger than that, and the short timber, of course, one end of the flitches barely passes the saw, and then often the short pieces stand there until they run another flitch, and that pushes it on past so we can get hold of it. When the flitch is turned loose, it is my business to take it up and pile it on the rack for the rip saw."

The slab, when it was sawed off the log, fell on the saw carriage, instead of on the table. When the saw carriage was reversed, the slab was drawn against the rapidity revolving saw, and was thus hurled against Jones. Usually the slab or the flitch falls on the table when it is sawed off the log, and is carried away by the offbearer. It is usual when a slab falls on the table, and one end will rest against the saw, for it to remain there until it is pushed back by the next slab that comes through the saw. Counsel for appellant claim that the death of Jones was purely accidental, and that appellee is not entitled to recover. We cannot agree with his contention. The testimony shows that the offbearer could carry away the pieces of lumber as fast as they were sawed, and that it was his business to take them away whenever the saw turned them loose. Just about the time Jones was struck, the attention of the offbearer was distracted by the rip-sawyer calling to him, and he had turned his head away to answer him.

There is a guard which hangs over the circular saw, made of a piece of plank 6 or 8 inches wide. It is right up over the saw, and is tipped with a piece of gum belting nailed on the lower end, to keep the saw dust from flying back.

Barnett further testified that nine times out of ten the slabs will fall on the table, instead of the carriage; that the sawyer stands facing the table looking at his work, and that there was nothing to hinder Jones from seeing that the slab fell on the carriage, instead of the table. Other evidence for appellant showed that it was the duty of the sawyer to see that his carriage is free from slabs when he reverses it; otherwise the chances are that some one will get killed by the slab striking the revolving saw. One witness testified that Jones was not looking at his carriage when he reversed it. Another said that there was a blower system in operation which carried away all the dust. On the other hand, an experienced sawyer, who has worked at appellant's saw mill, says there is some dust flying all the time; that the operation of the saw and the reversal of the carriage after the saw has gone through the log are so rapid that the dust does not all have time to be carried away or settle; that the sawyer couldn't see whether the slab fell on the table or carriage while the saw was running because it would fill his eyes with dust; that the sawyer's vision to the rear of the saw is practically obstructed all the time by the floating sawdust; that the size of the guard that hangs down above the saw is about 10 inches wide. Under these facts and circumstances, we do not think it can be said there is no legal evidence to support the verdict.

Taking into consideration that the slab fell behind the log that was being sawed, and was behind the saw and the guard hanging over it, and the further fact that particles of sawdust were continually floating around the saw, it cannot be said as a matter of law that Jones could, by the exercise of ordinary care, have seen that the slab or flitch fell on the saw carriage, instead of the table, had he been looking.

Among other instructions counsel for appellant asked the court to give the following:

"3D. If you find from the evidence that Barnett, the offbearer, was taking the slabs or boards from the table in the usual and ordinary manner, and that one of the slabs or boards, after

being cut, fell on the carriage instead of on the table, that Barnett exercised ordinary care and diligence in attempting to remove said slab or board, but was prevented from so doing by the slab falling on the carriage, and the carriage being reversed so as to carry the board beyond his reach, and as a result of such failure on the part of Barnett, combined with the act of deceased in reversing the carriage, deceased was injured and died as a result of such injury, then you are instructed to find for the defendant.

"6D. It is contended in this case that the negligence which caused the injury was that of a fellow servant of deceased; and unless you find by a preponderance or greater weight of the evidence that the injury and death of deceased were brought about by the negligence of Barnett, the offbearer, then you will find for the defendant.

"8D. You are instructed that if you find from the evidence that the injuries and death of deceased were caused by an accident, and were not due to the negligence of Barnett, the fellow servant, then you will find for the defendant."

The court gave the two latter as asked, but modified the first named by making it read as follows:

"3D. If you find from the evidence that Barnett, the offbearer, was taking the slabs or boards from the table in an ordinarily careful manner, and that one of the slabs or boards, after being cut, fell on the carriage instead of on the table, that Barnett exercised ordinary care and diligence in attempting to remove said slab or board and in discharging his duty in that behalf, but was prevented from so doing by the slab falling on the carriage and the carriage being reversed so as to carry the board beyond his reach, and as a result of such failure on the part of Barnett, combined with the act of deceased in reversing the carriage (which act of deceased you find was a negligent one as defined in these instructions), deceased was injured and died as a result of such injuries, then you are instructed to find for the defendant."

Counsel for appellant assigns as error the action of the court in modifying the instruction; and contends that the modification changes the entire meaning of the instruction. He insists that, if Barnett was not negligent, it would make no difference whether deceased was negligent or not. It is well settled in this State that it is error to refuse a specific instruction applying the law to

the facts of the case, although the law is covered by general instructions, and such action is prejudicial unless the contrary appears. *St. Louis & San Francisco Rd. Co.* v. *Crabtree,* 69 Ark. 172; *Taylor* v. *McClintock,* 87 Ark. 243; *St. Louis & S. F. Rd. Co.* v. *Dyer,* 87 Ark. 531; *Nebraska Underwriters' Ins. Co.* v. *Fouke,* 90 Ark. 247.

The instruction as asked was the only instruction that presented appellant's whole case in a concrete form to the jury; and, as above stated, it had a right to have its case presented in this form, although the law in a general way had been given. To say the least of it, the modification nullified the whole instruction, and rendered it meaningless as a specific instruction. We refer to the clause, "which act of deceased you find was a negligent one as defined in these instructions."

The question of negligence or not of a defendant is wholly unconnected with and independent of negligence on the part of the plaintiff, while on the other hand contributory negligence on the part of the plaintiff necessarily assumes negligence on the part of the defendant.

The instruction, as modified, made the due care of appellant dependent upon the contributory negligence of the deceased. The modification was misleading, and its vice was not cured by the general instructions copied above.

For the error in giving instruction marked 3D, the judgment will be reversed, and the cause remanded for a new trial.

McCULLOCH, C. J. (dissenting). Instruction numbered 3D, requested by the defendant, was a negative one, telling the jury in substance that if Barnett, the offbearer, was not negligent, but that the injury occurred by reason of the slab falling on the carriage and being drawn back against the saw by the act of plaintiff's intestate, then the plaintiff could not recover. The effect of it was to tell the jury that if Barnett was not negligent the plaintiff could not recover. The court erroneously modified it by inserting the words imputing negligence on the part of plaintiff's intestate, but this did not change the instruction so as to make the plaintiff's right to recover depend otherwise than on the negligence of Barnett. The court in two instructions specifically told the jury that the plaintiff could not recover unless the injury was caused by Barnett's negligence. The jury could not have been

misled. I am clearly of the opinion that the erroneous modification was not prejudicial to defendant, and that the judgment should be affirmed.

MARTIN v. HEMPSTEAD COUNTY LEVEE DISTRICT NO. 1.

Opinion delivered February 20, 1911.

1. TRIAL—TRANSFER OF CAUSE.—Where, in an action for the balance due under a contract for work, defendant asked for a reformation of the contract to conform to the agreement of the parties, the action was properly transferred to equity. (Page 27.)
2. EQUITY—JURISDICTION—REFORMATION OF INSTRUMENT.—Equity has jurisdiction to reform an instrument alleged to have been fraudulently altered. (Page 28.)
3. REFORMATION OF INSTRUMENT—WHEN RELIEF GRANTED.—The mere negligence or omission to read or know the contents of a writing is not necessarily a bar to reformation; the relief being proper when the instrument fails to conform to the agreement between the parties, through mutual mistake or mistake coupled with fraud, however the mistake may have been induced. (Page 28.)
4. SAME—LACHES.—Lapse of time will not bar an action to reform an instrument on account of fraud or mistake until discovery of the fraud or mistake or until it ought to have been discovered. (Page 28.)
5. SAME—SUFFICIENCY OF EVIDENCE.—To justify or authorize the reformation of a written instrument on account of mistake, the proof must be clear, unequivocal and decisive. (Page 28.)

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

STATEMENT BY THE COURT.

Appellant instituted this action in the circuit court to recover the sum of $1,864.86 on an alleged balance due and unpaid under a contract for the construction of a levee along Red River in Hempstead County, and for the sum of $1,000 alleged to be due on account of appellee's failure to perform its part of said contract. A copy of the contract, plans and specifications is exhibited with the complaint.

The appellee filed an answer and cross complaint, in which it asked that the cause be transferred to the chancery court. Appellee alleges that the contract for the construction of the levee was

made by the members of the levee board with P. J. Martin acting for appellant; that the plans, specifications and contract, with the changes indicated by interlineations as agreed upon, were turned over to Etter & Monroe, attorneys, to be rewritten; that after the contract, plans and specifications were rewritten, and before the same were signed, a copy was turned over to P. J. Martin to be submitted by him to persons at Lewisville, Ark., who contemplated signing appellant's bond for the faithful performance of the contract; that thereafter P. J. Martin returned to the office of the Levee Board at Fulton, Ark., a copy of the plans, specifications and contract, which he represented at the time to be the copy borrowed of the officers of the levee board, but which in fact was a copy rewritten, altered and changed for appellant's benefit and profit, and among other changes appellee alleges the following material changes, towit:

The contract as agreed upon read in paragraph 29 of the plans and specifications read:

"When the embankment has been brought up to the proper height, it shall be dressed and planted with tufts of living bermuda grass four inches square *three feet apart,* well pressed into the earth and lightly covered with soil."

The contract as changed and rewritten by the said P. J. Martin, acting for the said W. Martin, reads:

"When the embankment has been brought up to the proper height, it shall be dressed and planted with tufts of living bermuda grass four inches square, well pressed into the earth and lightly covered with soil."

Appellee alleges that section 49 of the contract as agreed upon by the said parties, read:

"It is understood that no compensation will be allowed for refilling the muck ditch, stump holes or other excavations outside of the slope stakes. Payment will be made at the same price per cubic yard as the levee itself."

The contract and plans and specifications as changed by the said P. J. Martin for the said W. Martin, reads as follows:

"It is to be understood that no compensation will be allowed for refilling the muck ditch, stump holes or other excavations when within the base of the levee. For filling holes and refilling the muck ditch, stump and other excavations outside the slope

stakes, payment will be made at the same price per cubic yard as the levee itself."

Appellee alleges that the said P. J. Martin, acting for the said W. Martin, returned said plans, specifications and contract rewritten, altered and materially changed for the benefit of said W. Martin, to the said appellee, and represented that the same was the contract borrowed for the purpose above stated; there being attached to said contract the bond signed and executed by the bondsmen. The officers of the said board, relying upon the representations of the said P. J. Martin as being true and on account of the length of the document referred to, accepted the said plans, specifications and contract as signed.

Appellee alleges that these changes and alterations were not discovered until the present suit was instituted; and asks for a reformation of same. Appellee's cross complaint alleges a violation of the terms of the contract in certain respects, which will be hereafter more specifically referred to, and asks judgment for damages against appellant on account of her failure to perform the contract according to its terms. A copy of the contract, plans and specifications as appellee allege them to be is made an exhibit to their answer.

The circuit court transferred the case to the chancery court over the objections of appellant, and the chancellor, over the objections of appellant, heard and determined the cause. The chancellor found that the contract, plans and specifications should be reformed in the manner asked in the answer and cross complaint; that the $1,000 alleged in the complaint for negligent delay caused appellant by appellee should be disallowed; that the sum of $835.45 alleged to be due appellant for filling stump holes outside of the slope stakes should be disallowed; that appellant should be only entitled to recover the sum of $1,032.41, on embankment work in the event she completes said levee according to the plans and specifications.

The chancellor further found that appellant has not completed the construction of said levee according to contract, in that she has not constructed the borrow pits at a distance of 25 feet from the base of the levee on the river side, or within 50 feet of the land side, and in the construction of said borrow pits has ex-

ceeded the depth of three feet on the river side, with a slope of one on twenty-five.

The chancellor further found that appellant has not cut 216 standing trees within 40 feet of the base of said levee, and has not properly sodded said levee with tufts of living bermuda grass four inches square and not more than 3 feet apart, and has not filled in the washes which have resulted in the levee from the defective sodding.

The chancellor was, however, of the opinion that appellant should be given further time to complete the levee according to the contract plans and specifications, and four months' time was given her for that purpose, and final judgment was deferred until the expiration thereof.

Appellant did not attempt to do further work upon the levee, and the chancellor found that the damages as proved on the counterclaim of appellee were greater than the amount due appellant under the contract. A decree was accordingly entered, reforming the contract as prayed for by appellee and dismissing the complaint of appellant. Appellant has duly prosecuted an appeal to this court.

D. L. King, for appellant.

1. The circuit court erred in transferring the case to chancery. 96 Ark. 371. One who enters into a contract and receives the benefit thereof cannot afterwards object that he was not authorized to enter into such contract. 89 Ark. 96.

2. One will not be heard to deny the existence of a state of facts which he, either in express terms or by contract represented as existing, which he intended that the other should act upon, and which was acted upon by the other party in good faith, to his detriment. 64 Ark. 639; 81 Ark. 81. And where one party to a contract suffers the other to fully perform his part of it, and receives such benefit as would accrue to it under the contract, it will be estopped to assert that its agent exceeded his powers in making the contract. 86 Ark. 287; 67 Ark. 238; 24 Ark. 210; *Id.* 269; 6 L. R. A. (Mass.) 342; 48 L. R. A. 685; 1 L. R. A. 826.

William H. Arnold and *Will Steel,* for appellee.

1. Where affirmative relief is sought on the ground of fraud

or mistake in the execution of a contract, such contract may be reformed in a court of equity. 76 Ark. 182; 77 Ark. 41; 89 Ark. 259; 85 Ark. 25; 79 Ark. 592; 76 Ark. 43; 69 Ark. 406; 71 Ark. 614; 66 Ark. 155; 75 Ark. 240; *Id.* 382; 32 Ark. 346; *Id.* 399; 50 Ark. 179; 33 Ark. 119; 60 Ark. 304. The long and complicated account exhibited with the complaint, the correctness of which was denied in the answer, was itself sufficient cause for transferring the case to equity. 82 Ark. 550; 31 Ark. 345; 51 Ark. 201; 48 Ark. 434; 49 Ark. 576.

2. It is conceded that the proof must be clear, unequivocal and decisive in order to justify the reformation of a contract, but the evidence here is of that character, and the court properly decreed a reformation in conformity to the copy of the contract exhibited with the answer. The chancery court, having obtained jurisdiction of a cause for one purpose, will retain it for the purpose of doing complete justice between the parties and effect an adjustment and settlement of all matters in controversy growing out of the subject-matter of the action. 83 Ark. 554; 77 Ark. 570; 92 Ark. 16; 48 Ark. 312; 46 Ark. 96; 34 Ark. 410; 30 Ark. 89.

HART, J., (after stating the facts). Counsel for appellant first earnestly insist that the court erred in transferring the cause to equity over her objections. To sustain their contention, counsel cite the case of *Stewart* v. *Fleming,* 96 Ark. 371, where this court held: "In a suit upon a contract an answer alleging that the contract was procured by fraud sets up a defense available at law, and there was no error in refusing to transfer the case to equity." We do not think the case in point. There the plaintiff sought to recover a sum of money alleged to be due under a certain provision of a lease. The defendant did not assert any affirmative rights under the lease, but only defended the suit brought on the ground the provision of the lease, which was the foundation of the action, had been inserted without his knowledge by reason of certain false and fraudulent representations of the plaintiff. Here the appellee asks that the contract be made to conform to the agreement entered into according to the intention of the parties, and when so reformed appellee alleges that it is entitled to damages because appellant failed to perform the contract according to its terms; that is to say, appellee first asks that

its rights under the contract be established, and, second, that its rights as established be enforced affirmatively against appellant. The first is granted as preliminary to the final relief; and in such cases equity has exclusive jurisdiction. 1 Pomeroy's Equity Jurisprudence (3 ed.), 171.

"The mere negligence or omission to read or know the contents of a writing is not necessarily a bar to reformation. The relief is proper when the instrument fails to conform to the agreement between the parties, through mutual mistake or mistake coupled with fraud, however the mistake may have been induced. The doctrine of laches is applicable to these suits, and in some jurisdictions the statute of limitations is expressly made applicable. The rule is here, as in all cases of fraud and mistake, that the time does not begin to run until discovery of the mistake or until it ought to have been discovered." 6 Pomeroy's Equity Jurisprudence (3 ed.), § 680.

It must also be borne in mind that to justify or authorize the reformation of the written instrument in such cases the proof must be clear, unequivocal and decisive. *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349; *Turner* v. *Todd,* 85 Ark. 63, where our earlier cases on the subject are collected.

We now come to the application of these principles of law to the facts of this case. We do not deem it necessary to abstract the testimony at length. It is sufficient to say that all the members of the levee board, and its attorneys, who rewrote the contract, plans and specifications after they had been finally agreed upon, testify that the contract as reformed by the court is the contract that was made between the parties; that the contract plans and specifications as rewritten before the same were signed were borrowed by P. J. Martin, the husband and agent of appellant's bondsmen; that he returned with what purported to be the copy furnished him, and that, relying upon his representations, they signed same. They did not discover that P. J. Martin had changed same until this suit was commenced. They are corroborated by the chief engineer of the board, who was present when the draft of the contract, plans and specifications were agreed upon. He says that he directed and supervised the construction of the levee under a copy of the contract, plans and specifications identical with that exhibited with the answer and cross complaint,

and never knew of the changes therein until this suit was brought; that P. J. Martin, who acted for appellant at all times, never made any claim during the construction of the levee that the contract was otherwise than as claimed by appellee.

Two or three copies of the contract, plans and specifications were made by Etter & Monroe. Etter testifies that the one exhibited with the answer, type, paper, etc., has every appearance of being the one rewritten by him; that he does not remember of having used any paper like that exhibited with the complaint as the copy of the contract, plans and specifications. Opposed to this is the testimony of P. J. Martin alone.

We are of the opinion that it is clearly and unequivocally established by the evidence that the contract, plans and specifications for constructing the levee were the same as that contained in the copy exhibited with the answer and cross complaint, and that the changes were not discovered by appellee until this suit was brought.

The chancellor found that, by reason of the failure of appellant to construct said levee according to contract, plans and specifications, appellee has been damaged as alleged in its counterclaim in a greater sum than the balance due appellant. We do not deem it necessary to make a detailed abstract in regard to this. We deem it sufficient to say that we have carefully considered the evidence, and believe that it sustains the finding of the chancellor.

We have carefully considered the record, and think the differences between the parties arose on account of the difference in the language used in the copy of the contract, plans and specifications exhibited with the complaint and in the copy exhibited with the answer and cross complaint, and we find that the copy of the contract, plans and specifications for the construction of the levee, exhibited with the answer and cross complaint, contains the agreement entered into between the parties to this suit.

The chancellor was right in not allowing the $1,000 claimed by appellant for appellee's alleged failure to comply with the contract. There is no proof that appellant was delayed in her work and damaged thereby. Indeed, appellant has abandoned that feature of the case.

The decree will be affirmed.

STRICKLIN v. MOORE.

Opinion delivered February 20, 1911.

1. PUBLIC LANDS—PRESUMPTION FROM ISSUANCE OF PATENT.—Where the complaint alleges that a patent from the State was issued to a certain person, the presumption will be indulged that the officers of the State issued the patent to the proper person. (Page 33.)
2. HUSBAND AND WIFE—EFFECT OF CONVEYANCE BETWEEN.—A conveyance of land from a husband to his wife carries merely an equitable title to the land, he retaining the legal title as her trustee. (Page 33.)
3. EJECTMENT—EQUITABLE TITLE.—An equitable title is not sufficient to maintain ejectment unless there is also a legal right to possession. (Page 33.)
4. SAME—TITLE BY ADVERSE POSSESSION.—Title by adverse possession is sufficient to maintain ejectment. (Page 33.)
5. ADVERSE POSSESSION—TITLE OF LIFE TENANT.—The possession of a life tenant or of one who holds under him is not adverse to those who hold the reversion. (Page 34.)
6. EJECTMENT—TITLE BY ADVERSE POSSESSION.—A complaint in ejectment which alleges that plaintiff's mother held adverse possession of the land for one year, and that thereafter their father remained in possession as tenant by the curtesy for five years, when the father's estate was sold under execution and purchased by defendant, who held for 13 years until the father's death, shows title in plaintiffs by adverse possession. (Page 34.)

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

D. L. King and *Richard M. Mann*, for appellants.

1. Proof of death while in possession of land is *prima facie* proof of seizin in fee. 33 Ark. 150; 31 Ark. 334; 21 Ark. 62; 40 Ark. 108; 62 Ark. 51; 64 Ark. 100; 65 Ark. 422; 15 Cyc. 38; 39 N. W. 980. A complaint which alleges that plaintiffs are owners of the land and entitled to immediate possession thereof, and that defendant is in wrongful possession thereof, states a cause of action. 107 Pac. (Mont.) 819; 15 Cyc. 91; 74 Ark. 417; 79 Ark. 532; 44 S. W. (Ky.) 424; 128 S. W. (Ky.) 325. Title by plaintiffs acquired by adverse possession would give them *prima facie* right to recover. 2 Enc. Pl. & Pr. 587. For effect of existence of estate for life and remainder, see *Id.* 480. Allegation in the complaint of right to possession on the theory of estoppel on the part of defendant to dispute plaintiff's title, accompanied by a statement of facts relative to the title consistent with that theory,

states a *prima facie* cause of action and right to recover possession. 12 S. W. 796; 10 S. E. 974; 42 Am. Dac. 628; 77 *Id.* 647. The assignee of a husband who holds as tenant by the curtesy becomes, upon the death of the husband, a tenant at sufferance and cannot dispute the title of the remaindermen except upon surrendering possession. 77 Am. Dec. 647; Wood, Landlord & Tenant, 22.

2. The *prima facie* right of the plaintiffs to recover is not defeated by the allegation in the complaint that defendant "claims" as a defense an outstanding conveyance by deed and patent from the common source to a third person, under which no claim has ever been asserted nor possession taken by the grantee therein, nor any one claiming under him, with which the defendant claims no connection and against which the land has been adversely held for thirty years. 15 Cyc. 68; 22 Ark. 79; 31 Pac. (Cal.) 936; 54 N. E. (Ill.) 149; 10 N. W. (Mich.) 347; 3 Am. Dec. (N. Y.) 500; 40 S. E. (W. Va.) 499; 6 Pet. 302, 8 Law. Ed. 406; 27 S. E. 255; 36 S. E. 367; 4 Am. Dec. 262; 38 Miss. 359; 77 Am. Dec. 646; 22 Ark. 79; 27 Mo. 405; 22 Ark. 51; 62 Ark. 51. Even if there were an outstanding title, the defendant in this case would be estopped from asserting it as a defense. As to title from common source, see rule as stated in 15 Cyc. 66; also 10 Am. & Eng. Enc. of L. (2 ed.) 491; 3 So. (Ala.) 618; 24 So. (Ala.) 888; 38 S. E. (Ga.) 44; 1 S. W. (Mo.) 88; 38 Miss. 359, 77 Am. Dec. 646; 49 Am. Dec. (N. C.) 379; 44 Ark. 517; 41 Ark. 17; 58 Am. Dec. (Ala.) 254. Defendant, as assignee of W. N. Stricklin, who held under plaintiffs, is estopped from disputing plaintiff's title. 10 S. E. 974; 42 Am. Dec. 628; 6 N. W. (Mich.) 868; 4 Am. Dec. (N. Y.) 262; 30 So. (Ala.) 618; 5 So. (Ala.) 154; 12 S. W. 796; 20 Ark. 547; 126 S. W. (Ark.) 384.

Henry Moore and *Henry Moore, Jr.,* for appellee.

1. Exhibits when filed become a part of the record, and wil. control the averments of the pleadings. Newman, Pl. & Pr. 252; 29 Ark. 444; 33 Ark. 722; 36 Ark. 456, 462; 68 Ark. 263; 91 Ark. 400.

2. From the facts presented in the complaint it is shown that Mary D. Stricklin did not die seized and possessed of the lands in question; and it also conclusively appears that she could

not have acquired title by adverse possession, and, such being the case, no title could vest in Wm. N. Stricklin as tenant by the curtesy. 47 Ark. 179.

3. In ejectment the plaintiff must recover upon the strength of his own title; and if the legal title is in another, that is sufficient to defeat the plaintiff. 171 U. S. 437; 19 Ark. 201; 36 Ark. 462; 47 Ark. 217; *Id.* 413; 65 Ark. 610; 76 Ark. 163; *Id.* 529; 77 Ark. 244; *Id.* 478.

McCULLOCH, C. J. The plaintiffs, Bryant L. Stricklin, W. W. Stricklin and Fuller Stricklin, instituted this action in the circuit court of Lafayette County against defendant Moore to recover possession of a quarter section of land alleged to be in the wrongful possession of said defendant. The court sustained a demurrer to the complaint as amended, and, the plaintiffs declining to plead further, judgment was rendered against them.

Plaintiffs alleged in their complaint that they were the children and only heirs at law of Mary D. Stricklin, deceased; that their father, W. N. Stricklin, conveyed the land by deed, dated February 24, 1879, to his wife, the said Mary D. Stricklin, who died August 22, 1880, in peaceable possession of said land, claiming to be the owner under said deed executed to her by her husband; that after the death of Mary D. Stricklin their father, W. N. Stricklin, remained in possession of said land as tenant by the curtesy; that defendant Moore caused said land to be sold under an execution against said W. N. Stricklin, and purchased same at the sale and received a sheriff's deed dated July 8, 1895, and has since held possession of the land. That W. N. Stricklin died November 11, 1908.

The plaintiffs further alleged that Mary D. Stricklin was, from the date of her deed, on February 24, 1879, in actual, peaceable, open and uninterrupted adverse possession of said land, claiming to be the owner under said deed, until the date of her death, and that from that date W. N. Stricklin remained in actual, open and uninterrupted adverse possession of said land, claiming the same as tenant by the curtesy of his deceased wife until July 8, 1895, a period of more than seven years, when defendant took possession of said land under said sheriff's deed executed to him.

The complaint contains the further allegation *that the defendant claims* that on March 23, 1880, said Mary D. Stricklin and

W. N. Stricklin conveyed said land to one S. B. LeMay by warranty deed, which had been duly recorded; that W. N. Stricklin assigned to said LeMay his certificate from the State of Arkansas on which said LeMay obtained from the State his patent to said lands April 1, 1880, but that said deed and certificate were never in fact delivered to LeMay, nor was possession of the land ever delivered to him, and that the latter never asserted any claim to said land.

It is not explained why the allegations last referred to were inserted in the complaint, but we presume that it was to anticipate the defense that the title is outstanding in LeMay.

Defendant invokes the well-settled rule that the plaintiff in ejectment must rely on the strength of his own title, and not on the weakness of his adversary's title. He insists that the plaintiffs show by the allegations of their complaint that the legal title is in LeMay, and that for that reason the demurrer was properly sustained. The alleged deed to LeMay is disposed of in the complaint by the counter allegation that the same was never delivered. It is also alleged that the W. N. Stricklin certificate was never delivered to LeMay, but it is not alleged that LeMay obtained possession of the certificate by fraud, and, according to the further allegations of the complaint, LeMay obtained a patent from the State. The presumption must be indulged that the officers of the State examined the facts and issued the patent to the proper person. *Osceola Land Co.* v. *Chicago Mill & Lumber Co.,* 84 Ark. 1.

The deed from W. N. Stricklin to his wife, Mary D., conveyed only the equitable title to the land, he retaining the legal title as her trustee. *Ogden* v. *Ogden,* 60 Ark. 70. If the assignment of the certificate by Stricklin to LeMay was subsequent to the deed to Mary D. Stricklin (the complaint being silent as to that date), the patent obtained thereunder passed the legal title to LeMay, subject to the equitable title of Mrs. Stricklin. An equitable title is not sufficient to maintain ejectment unless there is a legal right to possession. *Percifull* v. *Platt,* 36 Ark. 456. But the plaintiffs do not rely entirely on an equitable title, if it be conceded that the allegations are sufficient to set forth such title. They set forth title by adverse possession, which is sufficient to maintain ejectment. *Logan* v. *Jelks,* 34 Ark. 547; *Crease* v. *Law-*

rence, 48 Ark. 312; *Scott* v. *Mills,* 49 Ark. 266; *Hames* v. *Harris,* 50 Ark. 68.

The allegations of the complaint are that Mary D. Stricklin held the land adversely from the date of her deed in 1879 up to her death in August, 1880, and that her husband, W. N. Stricklin, held adversely as tenant by the curtesy from then until defendant became the purchaser of his title at the execution sale in 1895. The adverse possession of W. N. Stricklin as such tenant by the curtesy, coupled with the adverse possession of his wife, constituted an investiture of title in the heirs of Mary D. Stricklin, subject to the life tenancy of W. N. Stricklin. The possession of a life tenant cannot be adverse to those who hold the reversion *(Ogden* v. *Ogden, supra);* and, even though the adverse possession of Mary D. Stricklin had not ripened into title up to the time of her death, if her husband took and held possession as tenant by curtesy, he could not assert that his possession was adverse to the heirs so as to set the statute of limitations in motion against them. The title thus acquired by adverse possession became vested in the heirs, and not in him.

The same rule applies to the defendant, who was the purchaser of W. N. Stricklin's title; for, though the title became vested by limitation in the heirs, their right to the possession did not accrue until the expiration of the life estate of W. N. Stricklin, and the statute of limitation could not begin to run against them until then. *Griffin* v. *Sheffield,* 38 Miss. 359.

We are therefore of the opinion that the complaint stated a cause of action, and that the court erred in sustaining the demurrer. The judgment is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

OAK LEAF MILL COMPANY *v.* SMITH.

Opinion delivered February 20, 1911.

1. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE.—The duty resting upon the master to exercise ordinary care to provide his servant a reasonably safe place in which to work is one which cannot be delegated. (Page 37.)

2. SAME—LIABILITY FOR NEGLIGENCE OF VICE PRINCIPAL.—Regardless of the grade of the service and the character of the servant, any one impowered by the master to furnish his servant a safe place in which to work will be held a vice principal in the performance of this duty, and for a failure to perform such duty the master will be liable, in case of a resulting injury, to the same extent as if he had personally been guilty of a breach of duty. (Page 38.)

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

T. D. Wynne, for appellant.

The master is required to use ordinary care only to furnish safe and sufficient tools, appliances and instrumentalities with which the servant is to work. 80 Ark. 68; 35 Ark. 602; 46 Ark. 567; Labatt, on Master & Servant, 86. The testimony shows that the plank used was sufficient, in the location where it was placed, for the purpose intended, *i. e.,* to assist the oiler in oiling the machinery. 85 Ark. 60. Wherever the employee's means of information are equal to or greater than those of the employer, the latter is under no duty to give warning and point out defects. 58 Ga. 485; Beach on Contributory Negligence, 517; *Id.* (3 ed.) 53. See also 20 Am. & Eng. Enc. of L. 131; Bailey, Pers. Inj. 262. And where there is no notice to the master of defects and no blame imputable in not discovering them, he is not liable if injury results to the employee. 44 Ark. 529; 28 Vt. 59; 46 Ark. 555. One is not answerable in law for a failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated. 1 Labatt, M. & S. 303; 125 N. Y. 50; 68 Ill. 560; 86 Ark. 289; 35 Ark. 603.

John C. Ross, for appellee.

That there was a duty resting upon appellant not only to exercise ordinary care in the construction, but also in the maintenance, of the scaffold where appellee was injured, is primary law. 1 White, Personal Injuries, 315, § 255; 61 S. W. 978. The testimony shows that Turner was appellant's vice principal for the purpose, and having the duty of furnishing all the other employees a safe place to work. 1 White, Personal Injuries, § 246; Wood on Master & Servant, 860; *Id.* 906, § 454; 39 Ark. 17; 44 Ark. 531, 533; 87 Ark. 321, 324; 79 Ark. 437, 441. Appellant

was chargeable with notice of the defect, *i. e.*, the unfastened condition of the plank. 78 Ark. 505, 511.

T. D. Wynne and *T. D. Crawford,* for appellant in reply.

The unfastened condition of the board was not the proximate cause of the injury, which was caused by the accident of the slab being thrown by the conveyor, thereby causing appellee to dodge and throw his weight against the board, which slipped. Neither did the fact that his attention was not called to the board's unfastened condition contribute to his injury. The master is not liable where the accident is one that could not have been reasonably foreseen as likely to occur. 93 Ark. 155; 91 Ark. 260; 86 Ark. 289; 90 Tex. 223; 108 Va. 822; 211 Pa. 17; 69 Ill. App. 649; 62 Kan. 727; 124 Fed. 113; 85 N. E. 728; 109 Ill. App. 533; 67 Wis. 616.

McCULLOCH, C. J. This is an action instituted by B. H. Smith against the Oak Leaf Mill Company, a corporation, to recover damages for injuries sustained by the plaintiff while at work in the defendant's service on December 30, 1908. It is alleged in the complaint that plaintiff was at work as foreman, under the direction of the general manager, and that the defendant had in its employ a millwright and repair man, whose duty it was to keep the machinery and the places where the employees were to work in good repair; that in the construction of the mill defendant put a plank about eight or ten feet in length across the space between two beams, with the ends of the plank resting on the beams, and that the plank was four or five feet above a slab conveyor used in the operation of the machinery, and was about seven feet above the ground; that plaintiff and other employees used this plank by climbing upon it when it became necessary to oil the machinery at that place; that one end of the plank was nailed to the beam on which it rested, but that the other was not nailed or otherwise fastened, and that that end was directly under a trimmer, so that it was kept constantly covered with sawdust at least two inches deep, and that its unfastened condition was not open and apparent so that it could be ordinarily observed. It is further alleged that on the occasion mentioned the yoke on the eccentric box had slipped, so that it could not be made to pull the chain that conveyed the lumber to the trimmer saw, and that the

plaintiff in the discharge of his duty climbed upon the plank to readjust it, and that, while standing there doing this work, a slab, which was crosswise on the conveyor, was about to strike him, and that in dodging the slab the plank on which he was standing slipped, so that he fell four or five feet on to the sharp edge of the slab conveyor, sustaining serious bodily injury.

Negligence of the defendant is alleged in failing to inspect and discover the defective condition of the plank and in not nailing or otherwise fastening the end of the plank. In other words, negligence of the defendant is alleged in failing to exercise ordinary care to provide the plaintiff a reasonably safe place wherein to perform his work.

Defendant in its answer denied the allegations of negligence, and pleaded contributory negligence on the part of the plaintiff and also assumption of risk. The case was submitted to the jury on instructions to which no objections were made, and the jury returned a verdict in plaintiff's favor, assessing damages. The only contention here is that the evidence is not sufficient to sustain the verdict.

It is insisted that, according to the evidence, the plaintiff was the foreman in charge of the work, that it was his duty to make his own working place safe, and that there was no duty resting on the master to make the place safe for him.

There is a sharp conflict in the testimony. Plaintiff and some of his witnesses testified that, though he was the foreman, his duties were limited to those of superintending the work of the men on one of the floors of the mill; that he worked under the direction of the general manager, and that a millwright was employed whose duty it was to keep the machinery and working places in repair. There was abundant evidence tending to show that plaintiff was what the witnesses called a "straw boss," with authority only to direct the work of men under him, and that he had nothing to do with keeping the machinery and mill plant in repair; that this was done by the millwright, under the direction of the general manager.

The testimony adduced by the defendant contradicted this, but the jury has settled that conflict in favor of plaintiff's contention.

Though the plaintiff was a foreman over other employees,

and as to them may be deemed to have occupied the position of vice principal, yet he was a servant of the master, and, regardless of the grade of his service, the master owed him a duty of ordinary care to make his working place reasonably safe unless that fell within the line of his own duty. The duty resting upon the master to exercise ordinary care to provide a reasonably safe place is one which cannot be delegated so as to escape the master's responsibility to a servant to whom the duty is not delegated. *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 321. As said by the author in a recent work on the subject: "Regardless of the grade of the service or the character of the employee, any one empowered by the employer with the duty of performing any of these duties imposed by law upon the employer, in order to protect his employee from injuries, will be held to be a vice principal, in the performance of such duties, and for a failure to perform the duties imposed the employer will be liable, in case of a resulting injury, to the same extent as if he had personally been guilty of a breach of duty." 1 White on Personal Injuries, § 246.

The evidence was sufficient to warrant a finding that it was the duty of the master, through other employees, and not the plaintiff, to make repairs; that the defendant was guilty of negligence in this respect, and that under the circumstances of the case plaintiff was not guilty of contributory negligence and did not assume the risk of the danger created by the negligence of the other servants to whom the master had delegated the duty of keeping the place in repair. It being conceded that the instructions of the court were correct, it follows that the judgment must be affirmed, and it is so ordered.

SMITH v. DANDRIDGE.

Opinion delivered February 27, 1911.

SCHOOL DISTRICTS—VALIDITY OF CONTRACT WITH DIRECTOR.—While a school director cannot make a binding contract with the district to pay him an agreed sum for his services outside of his official duties, still if the district accepts the benefit of his services, it will be liable to make just compensation therefor.

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

Appellant *pro se.*

1. A director of a special school district can not lawfully receive pay out of the funds of the district for services as a member of the building committee of the school board in supervising the erection of a school building. Kirby's Dig. § § 7685, 7687, 7692.

2. Four directors, including the one who is to receive pay, can not legally pass on the claim authorizing the issuance of the warrant to him for such services by the president and secretary of the school board. Kirby's Dig. § § 7683; 7686; 78 Fed. 62; 56 Fed. 54; 24 S. W. 223; 89 Mo. 445; 130 Wis. 631; 109 N. W. 581; 110 N. W. 798; 95 Pac. 349; 61 Conn. 138; 81 Cal. 303; 57 Misc. Rep. (N. Y.) 392; 44 *Id.* 572; 68 Atl. 778; 133 N. Y. 887; 17 Misc. Rep. (N. Y.) 272; 40 N. Y. 366; 2 N. Y. Supp. 576.

Carmichael, Brooks & Powers, for appellee.

1. The statute providing that no member of a school board, except the secretary, shall receive compensation for his services, applies only to those duties which are enumerated by the statute or are impliedly required of the directors. Kirby's Dig. § 7687. The sections cited by appellant have no application, as it is not contended that the building of the schoolhouse was beyond the power of the board of directors. A contract between a public board and one of its members is not invalid by reason of the official relations existing. It is not void, but voidable. 15 L. R. A. 520; 135 Mass. 376; 141 Mass. 496; 168 Mass. 53. There is no allegation of fraud in the pleadings; and, while the action of the board in allowing the bill was voidable, any actual fraud or corruption is negatived by the finding of the lower court. 52 L. R. A. 518. The work was necessary, and it was not appellee's duty, under the statute, as a director to do it. He was in fact acting in this capacity as agent of the board, and is entitled to compensation on a *quantum meruit.* 58 Ark. 348; 61 Ark. 397.

2. Four members of a school board constitute a quorum for the transaction of business. Kirby's Dig., § 7683. When a quorum has met, it represents the whole body; and the majority

of the quorum may bind the corporation. 13 Am. St. Rep. 576; 16 *Id.* 633; 13 *Id.* 576; 144 U. S. 1; 95 U. S. 360; 12 Am. St. Rep. 53; 85 Am. Dec. 516; 32 *Id.* 243; 29 *Id.* 636; 16 Ia. 284; 85 Am. Dec. 516.

FRAUENTHAL, J. This was an action instituted by appellants, who were residents and taxpayers of the Special School District of Paris, against the treasurer of the county in which the school district is situated and G. G. Dandridge, to enjoin the payment of a school warrant which had been issued by the president and secretary of said school district to said Dandridge for work and labor alleged to have been performed by him for the school district. The Special School District of Paris had duly entered into a contract with certain contractors for the erection of a school building, and later it was deemed necessary to employ some one as superintendent to be present at the work and represent the school district to see that specifications as to the brick work were fully complied with. G. G. Dandridge was one of the directors of the school district, and at the request of a number of the other directors he performed the duties of superintending this work, and later presented his claim for such services to the board of directors. His claim, amounting to $172.50 for 69 days' work, was allowed by the directors at one of the regular meetings of the school board. At that meeting four directors were present, one of whom was said Dandridge, and the other three members voted in favor of the allowance of the claim.

It is not claimed that there was any fraud practiced either in the selection of Dandridge or in the allowance of his claim, or that services of the kind performed by him were not required. It appears that these services were deemed necessary, and were for the benefit of the school district, and were duly performed by Dandridge; and the amount of his claim was a fair and reasonable compensation therefor. It is urged that Dandridge was one of the school directors, and on that account he could not enter into a contract for his own employment by the school district; and it is also urged that his claim was allowed at a meeting where either his vote or his presence was necessary to constitute a quorum, and on that account its allowance was not legally made; and for these reasons it is contended that the warrant issued for

the payment of his claim is illegal, and its payment should be enjoined.

As a general rule, it is unlawful for a director to enter into a contract with the school district in which he has a personal and individual interest. His relation to the school district as a director thereof is of a confidential and fiduciary nature; he represents the school district, and is its agent. On this account he can not place himself in a position where his own personal interests might conflict with those of the school district which he must represent. The law and public policy forbid him from making a contract with the school district in which he has an individual interest; and a contract so made by a director will not be enforceable. The principle upon which this public policy is founded is that where one is acting in a fiduciary capacity for another he will not be permitted to make a contract with himself in his individual capacity relative to the subject-matter of such employment. *Pickett* v. *School District,* 25 Wis. 551; *People's Savings Bank* v. *Big Rock S. & C. Co.,* 81 Ark. 599; *Hoyle* v. *Plattsburgh & M. Rd. Co.,* 54 N. Y. 314; *Steele* v. *Gold Fissure Gold Mining Co.,* 95 Pac. 349. But a director is disabled from making a binding contract with the school district, not because the thing contracted for is itself illegal or tainted with moral turpitude, but because his personal relation to the district as its agent requires that he should have no self-interest antagonistic to that of the district in making a contract for it. The contract however in such case is not absolutely void, but it is simply not a binding agreement and may be avoided. If under such voidable contract the school district has accepted and retained benefits, it would still be liable to make just compensation therefor, not because of the contract but upon the principle that one ought to pay for valuable benefits received. This principle has been recognized and enforced in the case of *Spearman* v. *Texarkana,* 58 Ark. 348. In that case a physician was a member of the board of health of the city of Texarkana, and was employed by the board to render services on behalf of the city which were outside his duties as a member of the board. It was there held that while the physician could not enforce any contract made by him with the board of which he was a member, he still was entitled to recover compensation for what his services were reasonably worth.

Mr. Justice MANSFIELD, speaking for the court, said: "But the right to such recovery can not result from any contract to be implied from the request or direction of the board to render the service; for, as the plaintiff could have no express agreement with the board that would have been binding on the city, no binding agreement can arise by implication from anything that passed between him and the other members. His claim must be grounded solely on a contract created by the law in consideration of services shown to have benefited the city and for which it ought, therefore, in justice to pay." And in the same case the case of *Gardner* v. *Butler,* 30 N. J. Eq. 702, is cited with approval, wherein it was held that while the directors of a corporation could not make an agreement enforceable against the company to pay themselves a stipulated sum for their services, they could recover on a *quantum meruit* for such services as they had rendered and the benefit of which the company had received. In the case of *Frick* v. *Brinkley,* 61 Ark. 397, it was held that while a member of the council of a municipal corporation can not make a binding contract with it for the sale of drain tiles necessary for public improvement, still he was entitled to recover from the municipality what the tiles which it retained were reasonably worth. In that case it was said that the right of recovery did not rest upon any obligation growing out of the contract of purchase, but upon the principle of justice growing out of the obligation of every one, whether natural or artificial, to pay for the benefits which had been received. *Pickett* v. *School District, supra; Brown* v. *School District,* 55 Vt. 43; *Sylvester* v. *Webb,* 52 L. R. A. 518. From these authorities it will be seen that while a director of a corporation can not, on account of his fiduciary relations to it, make a contract with the corporation which will be enforceable, he will be entitled to recover a fair and reasonable compensation for property furnished to or services rendered for such corporation which were beneficial to the corporation and furnished or performed honestly and in good faith. The principle announced in the case of *People's Saving Bank* v. *Big Rock S. & C. Co.,* 81 Ark. 599, is not in conflict with this holding. In that case it was held that a mayor of a city could not take an assignment of the claim of a contractor against the city for the price of work which had been performed under a contract made with

the city, because of his fiduciary relation to the city. In that case it was said that the mayor as a member of the board of public affairs was required to determine whether or not the contractor had properly performed his work under the contract and was entitled to be paid the contract price. By the assignment to him of the contractor's claim against the city the mayor in effect stood in the place of the contractor, and thus obtained the contract with the city himself. Representing the city as mayor, he was required to inspect this work done under the contract for the payment of which he held the claim, and his individual interests would thus be antagonistic to his official duties. In effect, this case held that an officer of a municipal corporation could not by assignment obtain a contract made with the corporation which he could enforce, and thus indirectly enter into a binding contract with the corporation.

In the case at bar the appellee Dandridge is not endeavoring to recover under a contract made by him with the school district. As a director of the school district, he could not make a binding contract with it in which he was individually interested. It is not necessary to determine whether or not such a contract was made at a meeting of the school board organized with a legal quorum present because he could not enforce such a contract, even if all the other five directors had voted therefor at a legal meeting of the school board. His right to receive compensation from the school district is not based on the contract, but it is grounded solely on the principle that he has rendered necessary services from which the school district has received real benefits, and therefore should recover what those services are fairly and reasonably worth. This is not a suit brought by Dandridge to enforce any contract at law, but the appellants have by this action called upon a court of chancery for equitable relief. They can not in a court of conscience ask for a relief the effect of which would work injustice. The services which Dandridge performed, and for which he received the warrant as payment, were entirely outside of the duties of his office as a director; there is no claim made that there was any fraudulent dealing, either in selecting him to perform the services or in the amount of the claim therefor which he made; it is not claimed that the amount allowed him for the services is more than the services were fairly and reasonably

worth. Under these circumstances, we think that he is justly and equitably entitled to payment for such services.

Upon the trial of the case the chancellor entered a decree dismissing the complaint for the want of equity, and we think that in this action he was right.

The decree is affirmed.

HUNT v. DAVIS.

Opinion delivered February 27, 1911.

1. SALES OF CHATTELS—RESCISSION.—Equity has jurisdiction to annul a contract for the exchange of stock in two corporations which was procured by the false and fraudulent representations of one of the parties and to compel the restoration to the other party of the stock which he had exchanged. (Page 47.)
2. SAME—FRAUDULENT REPRESENTATIONS.—To vitiate an exchange of corporate stock, the fraudulent acts and false representations must be of such a nature as to constitute a fraud that is cognizable in law. (Page 47.)
3. SAME—RESCISSION.—Each party to a contract must act with care and diligence and seek the means of information relative to the subject-matter of sale that are open to both alike. (Page 47.)
4. SAME—RESCISSION FOR FRAUD.—In order to charge a seller with fraud, it must appear that he deceived the buyer relative to some matter material to the contract, either by statements known to be false or by acts, conduct or representations which suppress the truth and induce in the buyer a false impression. (Page 48.)
5. SAME—WHEN REPRESENTATIONS FRAUDULENT.—Representations, to be fraudulent in law, must be material, and must be made by one who either knows them to be false or else, not knowing, asserts them to be true of his personal knowledge, and made with intent to have the other party act upon them to his injury, and such must be their effect. (Page 48.)
6. SAME—FRAUDULENT REPRESENTATION.—Although a buyer must act with prudence in seeking the available means of ascertaining the truth, yet if the seller, having peculiar knowledge of the matter, by misrepresentation or artifice induces the buyer to rely upon his false statement, he cannot be heard to say that the buyer could have ascertained the truth. (Page 48.)
7. SAME—FRAUDULENT REPRESENTATION—VALUE OF STOCK.—False statements made of material facts relating to the property or conditions of a corporation which necessarily affect the value of its stock are not mere expressions of opinion upon which a purchaser of such stock

has no right to rely, but constitute fraud if thereby one is induced to buy such stock. (Page 48.)

8. SAME—FRAUD IN EXCHANGE OF BANK STOCK.—Defendant, who was a director in a bank, exchanged 124 shares of its stock for other stock owned by plaintiff, representing that the bank had declared a dividend of 15 per cent. in the previous year and would declare as large a dividend in the current year, and that the bank had only one bad debt. The bank had, in fact, been insolvent for a year; the 15 per cent. dividend was not earned, and was paid by issuing stock. Of the shares sold 37 were dividend stock so wrongfully issued, and of the remainder only 30 per cent. were paid up. The bank failed in a few days, having many bad debts. *Held* that defendant's representations were fraudulent, and that the sale should be rescinded. (Page 49.)

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

McKennon and *Sellers & Sellers,* for apellants.

An officer of a corporation selling his individual stock acts solely in his private capacity, and is bound only by the rules applicable to vendors of personal property. Hence the inquiry in this case is whether there were false and fraudulent representations with reference to material matters affecting the value of the stock transferred, unaffected by appellant's official connection with the bank. 53 N. J. L. 656; 53 L. R. A. 769.

There being no fiduciary relation between an officer of a corporation selling stock owned by him and the purchaser, failure of the seller to disclose facts affecting the value of the stock does not constitute fraud, unless he makes false representations or induces the purchaser not to make inquiries. And, in case of false representation by the seller, in order to entitle the purchaser to rescind or recover damages, the representations must have been fraudulent in fact, and made with knowledge of its falsity, or recklessly and without any knowledge of its truth or falsity; and they must have been relied upon so as to constitute an inducement for the purchase. Clark & Marshall, Priv. Corp. § 616b; 15 Am. Rep. 245; 147 N. Y. 124; 49 Am. St. Rep. 651; 47 Ark. 165.

The plaintiff must not only show that he was misled by a false representation concerning a material fact, but also that defendant knew at the time that it was false, or that, being ignorant

of its truth or falsity, he asserted that it was true, with intent to deceive. 71 Ark. 308; 31 Ark. 170; 38 Ark. 340.

Puffing on the part of the vendor, or giving an opinion as to future profits or dividends, does not constitute fraud. 6 Ark. 517; 1 Ark. 41. See also on the question of fraudulent representations, etc., 46 Ark. 250; 11 Ark. 66; 26 Ark. 30; 30 Ark. 686; 47 Ark. 164; 89 Ark. 315; 73 Ark. 572.

The burden is on the party alleging the fraud to establish all its elements by proof. 77 Ark. 355; 11 Ark. 378.

Webb Covington and *T. D. Crawford,* for appellee.

1. Appellee testified that Hunt told him that the bank had made 15 per cent. the year previous and would pay a like sum the year the sale was made, and that there was but one bad paper that he knew of, and he thought that would come all right. Appellee knew nothing of the condition of the bank, and relied on that statement. While appellant's testimony as to the transaction is somewhat different, the chancellor's finding is against him, and it can not be said that the preponderance is against appellee's testimony. It is clear from the testimony that the bank was insolvent for a year before Hunt parted with his stock.

2. Appellant, being an officer of the bank, was under the duty to exercise ordinary diligence to inform himself of its condition and business, and will be presumed to have known that which it was his duty to know. 97 Ky. 719; 79 Ia. 687. When he made assertions as to the bank's financial condition, appellee had a right to rely upon them.

3. The rule as to commendation or puffing applies only where the vendee has a full and fair opportunity to inspect the article to be sold and judge for himself. 45 Ark. 219. It has no application to this case. One may render himself liable for a false representation of the solvency of another, even though such representation was a mere expression of opinion, if the other elements of deceit are present. 1 Bigelow, Fraud, 481; 30 Ark. 362.

4. Appellee testifies that he was induced to enter into the contract by the representations of appellant; and, even if he was in part influenced by other causes, the law will afford a remedy. 30 Ark. 373.

FRAUENTHAL, J. This was an action instituted by R. S. Davis, the plaintiff below, to rescind a contract for the purchase and sale of certain shares of the capital stock of an incorporated bank into which it was alleged that he was induced to enter by reason of the fraud of defendant, W. R. Hunt. It was alleged in the complaint that on May 8, 1909, the defendant sold to plaintiff 124 shares of the capital stock of the Bank of Coal Hill, for which he paid to him shares of stock in an incorporated telephone company of the value of $2,050 and $125 in money; and that defendant induced him to purchase said bank stock by falsely and fraudulently representing that the bank had declared and paid a dividend of 15 per cent. the preceding year and would pay a like sum the current year, and that of its assets there was only one bad debt due the bank, thereby indicating that the bank was in a good financial condition, when as a matter of fact the bank was insolvent and the stock worthless. The plaintiff sought a cancellation of the sale of the stock and a recovery of the property he had paid therefor. The defendant denied that he had made any false or fraudulent representations, but claimed that he sold said bank stock honestly and in good faith. Upon the trial of the case the chancellor found that the contract of sale was entered into by reason of the false and fraudulent representations of the defendant, and made a detailed statement of his findings to that effect. He cancelled the contract of sale, and decreed in favor of plaintiff a recovery of the property which he had paid in consideration of the bank stock.

It is well settled that a court exercising equity jurisdiction has the power to annul a contract for the sale of property which has been procured by the false and fraudulent representations of the vendor and to restore to the vendee the consideration given by him therefor. Fraud vitiates such a contract, but the fraudulent acts and false representations complained of must be of such a nature as to constitute a fraud which is cognizable in law. Every false statement made by a vendor is not necessarily fraudulent in law, and the general rule is that the vendee must beware when he enters into a contract for the purchase of property. The law requires that each party to such a contract should act with care and diligence, and seek the means of information relative to the subject-matter of the sale that are open to both alike, for the

law can not act as a guardian of either party and relieve him from the consequences of his own want of prudence. The principles on the subject of fraud which are applicable to contracts for the sale of property generally apply likewise to contracts for the sale of shares of stock. In order to charge the seller with fraud, it must be shown that he has made an active attempt to deceive the buyer relative to some matter material to the contract, either by statements which he knows to be false or by acts, conduct or representations which suppress the truth and induce in the buyer a false impression. Representations which are considered fraudulent in law must be of a nature that are material to the contract, and "must be made by one who either knows them to be false or else, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect." *Louisiana Molasses Co., Ltd.,* v. *Fort Smith Gro. Co.,* 73 Ark. 542. If a representation is made by the seller which he knows to be false, it will constitute fraud, but a representation will also be fraudulent, even if he had no knowledge whatever, if it is made of a matter as truth of personal knowledge. *Cooper* v. *Schlesinger,* 111 U. S. 148; *Kountze* v. *Kennedy,* 147 N. Y. 124; *Cole* v. *Cassidy,* 138 Mass. 437.

Although a purchaser must act with prudence and diligence in seeking the available means of ascertaining the truth, yet if the seller, having peculiar knowledge of the matter, by any misrepresentation or artifice induces the buyer to rely on his false statement, then the seller will not be heard to say that the buyer could have ascertained the truth. The very representations relied upon may have caused the purchaser to forbear from making further inquiry. If the false representations are made with the intent to induce the other party to act thereon, ordinary prudence does not require the party to test the truth of such representations where they are within the knowledge of the party making them or where they are made to induce the other party to refrain from seeking further information. *Gammill* v. *Johnson,* 47 Ark. 335; *Graham* v. *Thompson,* 55 Ark. 296; *Stewart* v. *Fleming,* 96 Ark. 371; *Evatt* v. *Hudson,* 97 Ark. 265.

While, ordinarily, statements of the value of property are mere expressions of opinion upon which a purchaser is not en-

titled to rely, yet statements of fact which affect the value of the property, if false and made for the purpose of inducing the purchaser to rely thereon, are false representations which will constitute fraud in law. False statements made of material facts relating to the property or condition of a corporation which necessarily affect the value of the stock of such corporation are not mere expressions of opinion upon which a purchaser of such stock has no right to rely, but they are representations which will constitute fraud if by means of such misrepresentations the purchaser has been induced to buy such stock. Clark & Marshall, Private Corp. § 616 b; 20 Cyc. 60.

These principles of law, we think, are applicable to the state of case made by the evidence aduced upon the trial of this cause. and it is only necessary to determine whether or not this evidence is sufficient to prove that the contract for the sale of this bank stock was induced by false representations made by the defendant within the meaning of these principles.

It appears from the testimony that the Bank of Coal Hill was organized in March, 1902, with an authorized capital stock of $50,000, of which $47,750 was actually subscribed; and of this only 30 per cent., or $12,532.34, was actually paid in. The bank continued business until May 21, 1909, when it failed, and its affairs were placed in the hands of a receiver. At that time it was hopelessly insolvent, and owed a considerable sum in excess of its assets, so that its capital stock was entirely worthless. The chancellor found that this was the condition of the bank for at least one year prior to its suspension and failure, and we think that his finding is sustained by the evidence. The defendant was a stockholder and director of the bank at the date of its incorporation, and continued as such director until he sold his stock to the plaintiff, and was a member of the discount or loan board during a considerable portion of that time. He was president of the bank from 1904 to 1906. W. H. West was the president of the bank from the date of its organization until 1904, and also from 1906 until the date of its failure. H. T. Hackney was the cashier and a director of the bank from 1904 until May 8, 1908. It appears from the testimony that said West was indebted to the bank in the sum of $28,445.52 at the date of its failure, and that this indebtedness had existed for at least a year

prior to that time, and that for a number of years he was a large debtor of the bank. At the date of the failure he owed at least $90,000, and there is grave doubt whether any substantial part of his debt to the bank will ever be collected. The cashier, Hackney, owed the bank $14,055.53 at the date of its failure, and a large portion of this debt existed for several years prior to that time. He is totally insolvent, and left the bank and the town of Coal Hill on May 8, 1909. There were other large individual debtors of the bank who were insolvent and whose indebtedness existed for some years prior to its failure. The chancellor found (and his finding, we think, is fully sustained by the evidence) that the bank was in an insolvent condition for at least a year prior to its failure, if not longer. In 1905 a dividend was declared by the board of directors of this bank, and in September, 1908, a stock dividend of 15 per cent. was declared by the same board of which defendant was a member. At the time these dividends were declared the true condition of the bank did not justify this to be done. On May 8, 1909, defendant sold to the plaintiff 124 shares of the subscribed capital stock of the bank, 37 shares of which were stock dividends and of the remainder only 30 per cent. had been paid up. The plaintiff had never had any connection with the bank, and knew nothing of its affairs and condition, although he had been a depositor at some time. At the time defendant sold his bank stock to plaintiff he told him that it had declared a dividend of 15 per cent. the preceding year, and that it would pay a like sum the current year, and that there was only one piece of bad paper in the bank, and that he thought that would be finally paid. He also told him that he had been offered $2,250 for his stock by said West, and showed him a letter in which the cashier had written him that West, the president, had offered $2,250 for his stock. It appears that the plaintiff and defendant had been negotiating relative to the purchase and sale of said stock for about 10 days prior to May 8th, and that in the latter part of April, 1909, a correspondence was had between the defendant and said cashier, in which the cashier finally wrote that the above offer was made by the president, West. Upon being told by defendant of this offer, the plaintiff, before consummating the purchase, wrote to said West asking if he would give the $2,250 therefor. It would appear that West replied that

he would buy the stock at that price, and after plaintiff had acquired it he offered to give his notes therefor due in six and twelve months, but refused upon demand of plaintiff to allow the stock to remain as collateral therefor, and on this account the sale to him was not made. There were a number of other facts and circumstances adduced in evidence in this case tending to show that the affairs of this bank had been not only mismanaged but fraudulently operated, for a considerable time prior to its failure, by its officers, and also facts from which it could be reasonably inferred that defendant at least knew that it was not in a good financial condition if not insolvent. The defendant testified that he did not know the condition of the bank, and that he had on deposit therein at the time of its failure from $500 to $600. But he had been a director of that institution from its organization to its suspension and also a member of its board which passed on and made loans, and had been its president for two years. While he had the above sum on deposit at the time of the bank's failure, he also owed it a large sum for stock which had been subscribed for by him, but 70 per cent. of which had not been paid. While he also testified that he was not on friendly terms with West, the president, yet it appears that through the cashier he secured West to make an offer for the stock which came about the time he was negotiating with plaintiff for the sale thereof, and without endeavoring to close any deal with West he promptly told plaintiff of the offer. West was called as a witness in defendant's behalf, and his testimony was strongly in favor of defendant. He even went so far as to testify that he thought the bank was perfectly solvent when he knew that he, its president, had borrowed $28,000 of its funds, when its paid-up capital was only $12,000, and that his own financial condition was bad. It is possible that his offer to purchase this stock was made in good faith, but from the facts and circumstances we think that the chancellor was warranted in finding that this correspondence between the cashier, president and defendant relative to the purchase by West of his stock was inspired for the purpose of causing plaintiff to value the stock at the price thus offered, and had that effect when defendant told him of the offer. It is urged by defendant that he did not know the true condition of the bank, but the plaintiff had a right to believe that, as its director, he had given to the affairs of the

bank that measure of care, skill and diligence which the law demands; and that is such diligence which a reasonably prudent business man exercises in the conduct of his own affairs. The plaintiff had a right to rely upon his representations relative to its condition because these matters should be within his peculiar knowledge as a director thereof. When he represnted to the plaintiff that the bank had made and declared a dividend of 15 per cent. for the preceding year, and would in his opinion make and declare the same sum for the current year, he did not give a mere expression of opinion, but this was in effect a statement of fact that the bank was in prosperous financial condition. When he told him further that there was only one piece of bad paper among its assets, and that he thought it would be finally collected, he again made a representation of fact upon which plaintiff was warranted in relying. Whether he knew that these statements were false or whether he had no knowledge whatever relative to them, still by his words and conduct he made these representations as of personal knowledge, and these statements, being untrue, became in law false representations and fraudulent.

We think, therefore, that the finding of the chancellor that the plaintiff was induced to purchase the bank stock by reason of the false and fraudulent representations made by the defendant is sustained by the preponderance of the evidence, and that he was correct in holding that the sale thereof should be rescinded on account of such fraud.

The decree is accordingly affirmed.

McRAE v. WARMACK.

Opinion delivered February 27, 1911.

1. LIFE INSURANCE—WHEN A WAGERING CONTRACT.—The issuance of a policy of life insurance to one who has no insurable interest in the life of the insured, but who pays the premiums for the chance of collecting the policy, is invalid, as the contract is a wager and against public policy. (Page 56.)
2. SAME—WHEN ASSIGNMENT OF POLICY ILLEGAL.—The assignment of a policy of insurance to one having no insurable interest in the life of the insured, though issued to one having such interest, is invalid

if made in pursuance of an agreement made at the time of the issuance of the policy. (Page 57.)

3. SAME—INSURABLE INTEREST.—The relationship of uncle and nephew is not in itself sufficient to give to the one an insurable interest in the life of the other where there is no reasonable ground of expectation of support to be furnished by the assured to the other. (Page 57.)

4. SAME—ASSIGNMENT OF POLICY—EFFECT.—Where, under agreement made at the time of its issuance, a policy of life insurance was assigned absolutely to a creditor of the insured who had no other insurable interest in the insured's life, the assignee is entitled to recover merely the amount of his debt and the premiums which he paid on account of the contract. (Page 60.)

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

Thomas C. McRae, W. V. Tompkins and *D. L. McRae,* for appellant.

1. An uncle has no insurable interest in the life of a nephew. 116 S. W. (Mo.) 1; 25 Cyc. 705. A verbal contract entered into between an uncle and nephew that the latter should apply for a policy of life insurance, and upon the issuance thereof assign the same to the uncle, which contract was afterwards, on delivery of the policy, reduced to writing and signed by the parties, is invalid; and the assignment of the policy is void. 3 L. R. A. (N. S.) 934; *Id.* 946; 158 N. Y. 24; 44 L. R. A. 417; 15 Wall. 643; 104 U. S. 775; 122 Ky. 402, s. c. 21 Am. & Eng. Ann. Cas. 685; 97 Va. 74, s. c. 45 L. R. A. 245; 104 U. S. 779; 77 Ark. 60; 84 S. W. 1164; 112 Pa. 446; 18 L. R. A. (N. S.) 114; 131 Fed. 728, s. c. 65 C. C. A. 589; 125 Ga. 206; 122 Ky. 402.

2. Where a policy is valid in its inception, and the policy is pledged to the assignment for the payment of a debt, the assignee might recover; but this suit is not for that purpose, and it would have availed appellee nothing to have made such claim because he could not establish a right to the amount of his debt except by showing his illegal and void contract. 47 Ark. 378.

Hamby & Haynie, for appellee.

As to whether a contract in any given case is a wagering contract depends upon the facts and circumstances of that particular case, and the decision usually turns upon the good or bad

faith of the parties making the contract. The facts in this case present every element of good faith. It presents a case of one man, without means to pay premiums, who desired insurance on his life for the protection of his family, and his uncle, friend, creditor and business associate, who agreed to assist him in procuring the insurance by paying the first two annual premiums on two policies, one of which was assigned to him, doubtless for his own protection while carrying the policy for the benefit of the nephew's family. The transaction was legitimate. 138 Mass. 24; 67 Wis. 75; 58 Am. Rep. 848; 11 R. I. 439; 23 Am. Rep. 496; 94 U. S. 457; 25 L. R. A. 630; 69 U. S. 735; 95 Ark. 529.

FRAUENTHAL, J. This was an action instituted by L. M. Warmack, the plaintiff below, to recover the proceeds of the collection of an insurance policy issued on the life of Dozier L. Boswell, by reason of an alleged assignment thereof by said Boswell to him. Upon the death of said Boswell the company issuing the policy agreed to make payment thereof, but, the administrator of said Boswell and the plaintiff both claiming to be entitled to the payment, the company threatened to institute an action of interpleader, whereupon the parties agreed that payment of the policy might be made by it to the administrator without affecting any right that plaintiff might have thereto. The plaintiff then presented to the administrator his duly verified claim against the estate for $2,500, the amount of said policy, and instituted this suit for the recovery thereof against said administrator, The sole defenses made by the administrator against a recovery by plaintiff were, (1) that the assignment of the policy by Boswell to plaintiff was invalid because it was in the nature of wagering contract, and (2) that plaintiff had surrendered to Boswell prior to his death the policy and all his interest therein. Upon the trial of the case the court held that the assignment of the policy to plaintiff was not in the nature of a wagering contract but was valid, and submitted to the jury the sole question as to whether or not plaintiff had surrendered the policy and his interest therein to Boswell prior to his death. The jury answered said question in the negative, and thereupon the court rendered judgment in favor of plaintiff for the full amount of $2,500.

The testimony relative to the issuance and assignment of the policy is practically undisputed, and presents the following case:

In May, 1907, D. L. Boswell and plaintiff entered into a verbal contract whereby it was agreed that said Boswell should apply to the insurance company for two policies of $2,500 each upon his life, and that plaintiff should pay the two first premiums thereon and take an assignment of the policies with an understanding that one of the policies should be payable to plaintiff and the other to the estate of Boswell upon his death. In pursuance of the agreement application for the policies was made, and upon the receipt thereof the verbal agreement was reduced to writing and is as follows

"Bodcaw, Ark., July 2, 1907.

"This writing witnesses that Dozier L. Boswell, who has this day accepted from the State Mutual Life Insurance Company, of Rome, Ga., two policies of insurance, Nos 18811 and 18812, of $2,500 each on his life for his estate, does hereby assign unto Lawrence M. Warmack the above named and numbered policies. It also is agreed that Lawrence M. Warmack shall pay the first and second premiums on the above named and numbered policies. It is further agreed that Dozier L. Boswell may release from this assignment policy Number 18811 after two years by assuming the payments of the annual premiums on both of the above named and numbered policies. It is also agreed that, should Dozier L. Boswell fail to pay the third or any subsequent annual premium, policy No. 18811 reverts back to Lawrence M. Warmack. It is also agreed that, should the death of Dozier L. Boswell occur during the first two years after that time while the policies are being sustained by the insured, then $2,500 of the insurance or policy No. 18811 will be payable to the estate of the insured only.

(Signed) "D. L. Boswell,
"L. M. Warmack."

The policies were on the receipt thereof turned over by Boswell to plaintiff under the above written contract, and plaintiff paid the first two premiums on both policies, amounting to $262. Before the third premiums matured Boswell died. Shortly before his death the plaintiff turned over the policies to Boswell in order, as he claimed, that Boswell might show them to his wife, and they remained in his possession until his death. It appears that plaintiff was the uncle of Boswell, but in no way dependent upon him; and upon the trial of the issue as to whether or not he had

surrendered the policies to Boswell there was some testimony indicating that Boswell was indebted to him, but the testimony as to the nature and extent of the indebtedness was not fully developed; it was only introduced for the purpose of showing whether or not the plaintiff had surrendered the policies and released all his interest therein when he turned same over to Boswell.

It is urged by counsel for defendant that plaintiff had no insurable interest in the life of Boswell, and that the contract for the assignment of the policies to him was a mere wager by which he was directly interested, not in his life, but in his early death, and on this account such assignment was against public policy and invalid. The principle upon which life insurance is based is that one who has a reasonable expectation of benefits and advantages growing out of the continuance of the life of the assured has such an interest in his life that he may insure the same. But where one is not thus interested in the life of the assured, but by insuring such life is rather interested in his early death, the contract of insurance is a mere wager, and against a sound public policy. Such contracts, it has been thought, would, if upheld, result in a mere traffic in human life, and would lend a great incentive to one thus disinterested in the life but interested in the death of the assured to shorten that life. It is therefore well settled that the issue of a policy to one who has no insurable interest in the life of the insured but who pays the premiums for the chance of collecting the policy is invalid because it is a wagering contract and against a sound public policy. *Cammack* v. *Lewis,* 15 Wall. 643; *Connecticut Mut. L. Ins. Co.* v. *Schaefer,* 94 U. S. 457; *Warnock* v. *Davis,* 104 U. S. 775; *Gilbert* v. *Moose,* 104 Pa. 74; *Corson's Appeal,* 113 Pa. St. 438; *Deal* v. *Hainley,* 116 S. W. 1; *Bromley* v. *Washington L. Ins. Co.,* 122 Ky. 402; *Gordon* v. *Ware Nat. Bank,* 65 C. C. A. 580; *Metropolitan Life Ins. Co.* v. *Elison,* 72 Kan. 199, 3 L. R. A. (N. S.) 934, and note; *Ruse* v. *Mutual Benefit Life Ins. Co.,* 23 N. Y. 516; 1 Cooley's Briefs on Law of Ins. 246. And for the same reason it has been held by the great weight of authority that the assignment of a policy of insurance to one having no insurable interest in the life of the insured, though issued to one having such insurable interest, will be ineffective and invalid if such assignment was

made in pursuance of an agreement made at the time of the issuance of the policy. *Connecticut Mutual Life Ins. Co.* v. *Schaefer,* 94 U. S. 457; *Warnock* v. *Davis, supra; Gordon* v. *Ware Nat. Bank, supra.* See also cases cited in 1 Cooley's Briefs on Law of Insurance, 273.

In the case of *Warnock* v. *Davis,* 104 U. S. 775, it is said: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. * * * If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other."

There are a great many authorities which hold that a policy which is valid at its inception is assignable like any other chose in action, and one should be permitted to dispose of a valid policy of insurance effected in good faith upon his own life. See cases cited in *Gordon* v. *Ware Nat. Bank,* 65 C. C. A. 580 at page 583; and in 1 Cooley's Brief on Law of Insurance, 273. But even by these authorities it has been held that an assignment made in pursuance of an agreement to that effect at the time of the issuance of the policy to one who has no insurable interest in the insured and who agrees to pay the premiums is tainted with a wagering element and is invalid.

It is not necessary for the purposes of this case to discuss or determine the various relations and circumstances which will be sufficient to constitute an insurable interest in the life of another. It has been uniformly held that the relationship of uncle and nephew is not in itself sufficient to constitute such insurable interest where there is no reasonable ground of expectation of support to be furnished by the assured to the other. 2 Joyce on Ins. § 1069; *Corson's Appeal,* 113 Pa. St. 438; 25 Cyc. 705; *Singleton* v. *St. Louis Mutual Ins. Co.,* 66 Mo. 63; *Metropolitan L. Ins. Co.* v. *Elison, supra.*

It is not claimed by plaintiff that he had any expectation of support being furnished him by Boswell, or that he was in any way dependent on him, nor can such a claim be gathered from the

contract under which the assignment was made. The right to the policy and the validity of the assignment thereof must be determined by the contract under which it was made. The object and purpose of the assignment and the consideration therefor are plainly set forth in this contract. According to that agreement the assignment was not made in consideration of any debt that Boswell owed to the plaintiff, nor for the purpose of insuring any interest that plaintiff had as a creditor in his life, nor to insure the benefit that he would receive from any support from him. As alleged in the complaint, the sole reason why this assignment was made was that Boswell concluded to have his life insured, but was unable to pay the premiums therefor, and, in order to get the plaintiff to pay the premiums on both policies, he agreed that plaintiff should receive the proceeds of one of the policies upon his death.

It is urged that Boswell effected these policies himself upon his own life, in which he had an insurable interest, and that the policies were therefore valid at their issuance; and, being valid at their inception, it is insisted by counsel for plaintiff that a valid assignment of the policies could be made to one, although he had no insurable interest in the life of the insured. But, according to this contract, at the very inception of the purpose to apply for the policies and at and before the issuance thereof it was agreed that this assignment should be made to plaintiff. The policies, it is true, were issued in the name of and to the assured, who had an insurable interest in his own life, but immediately upon their issuance they were assigned pursuant to this previous agreement to the plaintiff, who had no insurable interest in the life of the insured. As has been seen above, such an assignment is as ineffective and invalid as if the policies had been made payable to plaintiff at their execution. Nor do the terms of the agreement, providing that one of the policies should go to Boswell's estate and the other only to plaintiff in consideration of the payment by plaintiff of the premiums on both policies, make this assignment any the less a wagering contract. *West* v. *Sanders,* 104 Ga. 727. As before stated, the theory upon which a contract of life insurance is based is that the person to whom the policy is payable is interested in the continuance of the life of the insured, whether such policy is made payable to him at its issuance

or becomes payable to him by assignment thereof. He must be so related to the assured that the continuance of the life of the assured will be an advantage to him. And it is this interest resulting from that benefit or advantage which he would lose by the death of the insured that he is permitted to insure. Because the estate of the insured would receive the proceeds of one of these policies upon the death of Boswell did not make the plaintiff interested in the continuance of his life; nor did it make such an assignment valid because the assured received some consideration therefor. The plaintiff was no more interested in the continuance of the life of Boswell, whether the assignment was made with or without price. His insurable interest in the life of Boswell could only be grounded upon his relation to him, pecuniary or of near kin, none of which he possessed. Without such insurable interest in Boswell's life, the plaintiff by the above contract simply agreed to pay the premiums of the policies upon the chance of making a profit upon the money thus invested. That profit would more quickly come to him by the early death of Boswell. By this contract he stood to make $2,500 upon the payment of two premiums if Boswell did not outlive him. The contract for the assignment of these policies was in the nature of a mere wager, under the terms of which the plaintiff was directly interested in the early death of Boswell, rather than in the continuance of his life. The assignment was therefore contrary to public policy, and was invalid.

But the contract for the assignment of the policies was not designed for the purpose of perpetrating a fraud upon any one, and its execution did not involve any moral turpitude, and the assignment made in pursuance thereof was not void for any of these reasons. The reason for holding the assignment invalid is that such a transaction is not only in the nature of a gaming contract, but that it is against public policy, because it creates an interest in the early death of the insured on the part of the assignee who has no corresponding interest in his life. The speculative or gaming feature of the contract of assignment consists in the assignee obtaining the full payment of the policy solely on the advancement of the premiums and with no further interest therein. If therefore this speculative feature of the transaction is eliminated, the reason for declaring such assignment invalid

would cease. To the extent that the assured was actually indebted to the assignee, and to the extent that he advanced the premiums on the policies, the assignee had an actual interest therein; above such sums only was the contract of assignment speculative. It was lawful for the plaintiff to advance the premiums on the policies as they became due to the company, and it was lawful for the assured to assign to plaintiff the policies as security for the payment of those advances and all indebtedness due by him to the plaintiff. By the reimbursement of plaintiff for these sums only any feature of the contract of assignment which otherwise might be of a wagering nature or against public policy would be eliminated. The plaintiff would thereby receive only the debt that was actually due to him, and would not receive any profit based upon a wager on human life. In the case of *Warnock* v. *Davis, supra,* the court, in speaking of an assignment of a policy made to one who had no insurable interest in the life of the insured but who paid the premiums thereon, said: "Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security. * * * The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums."

In the case of *First Nat. Bank* v. *Terry,* 99 Va. 194, it was held that an assignment of a life policy to a creditor who pays subsequent premiums entitled the assignee to the amount of his debt and the premiums paid, even if the assignment was absolute; and that to limit the recovery of the assignee to these sums would prevent any speculation in insurance on human life. *Helmetag* v. *Miller,* 76 Ala. 183; *Culver* v. *Guyer,* 129 Ala. 602; *Beard* v. *Sharp,* 100 Ky. 606; *Cawthon* v. *Perry,* 76 Tex. 383; *Tate* v. *Com. Bldg. Assn.,* 45 L. R. A. 243.

In the case at bar we think that the above contract for the

assignment of the policies was invalid in so far as it made an absolute transfer of the proceeds of the insurance policies, because to that extent it was a wagering contract; but we also think that the plaintiff is entitled to recover the amount which the assured actually owed to him and the premiums which he paid on account of the contract.

The court therefore erred in holding that the contract for the assignment of the policy of insurance to plaintiff was valid, and that thereby the plaintiff was entitled to recover the entire proceeds thereof. He is only entitled to recover of the estate the amount which Boswell actually owed to him and the premiums advanced by him.

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

DE QUEEN & EASTERN RAILWAY COMPANY v. THORNTON.

Opinion delivered February 27, 1911.

1. APPEAL AND ERROR—WHEN ADMISSION OF EVIDENCE HARMLESS.—The improper admission of evidence is not prejudicial if the fact it tended to prove is otherwise established by undisputed evidence. (Page 62.)
2. SAME—PRESUMPTION FROM FAILURE TO ABSTRACT EVIDENCE.—The refusal to give a certain instruction cannot be relied upon as error unless all of the instructions given are set out in appellant's abstract, as otherwise it will be presumed that the theory embraced in the refused instruction was fully covered by other instructions that were given. (Page 63.)
3. SAME—SUFFICIENCY OF APPELLANT'S ABSTRACT.—Appellant cannot insist upon appeal that the trial court erred in submitting a certain issue to the jury because it was not raised by the pleadings or evidence, where appellant fails to abstract the pleadings and evidence so that it can be seen what issues were properly before the jury. (Page 63.)

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

Sain & Sain and *John S. Kirkpatrick,* for appellant.

W. P. Feazel, for appellee.

There is no abstract of the pleadings, nor of the motion for new trial; only a portion of the evidence and only two of the

instructions. Without an exploration of the transcript the court can not determine whether or not prejudicial error was committed. The judgment should be affirmed for noncompliance with rule 9. 93 Ark. 85; *Id.* 426; 92 Ark. 41; *Id.* 144; 93 Ark. 213; 92 Ark. 245; 90 Ark. 230; 83 Ark. 359.

HART, J. Appellant has prosecuted this appeal to reverse a judgment rendered against it in favor of appellee for damages for injuries alleged to have been sustained by him while a passenger on one of appellant's trains on account of the negligence of appellant's servants in operating said train. Appellee asks that the judgment be affirmed because appellant has failed to comply with rule 9 of this court. It may be stated at the outset that we have uniformly enforced this rule where we have been asked to do so, and no sufficient excuse for noncompliance with it has been made. In the present case there is an excerpt from the complaint, some excerpts from the testimony of one witness, an instruction given and one refused, and some comments of counsel on the effect of the testimony. This is not a sufficient compliance with the rule. The rule contemplates that appellant shall file an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to the court for decision. Otherwise it would be necessary for each judge in turn, or all the judges together, to examine the transcript to obtain a correct understanding of the questions presented for our determination. Either method would cause much delay, and would greatly retard the work of the court. To illustrate, as applied to the present case, counsel assign as error the action of the court in admitting certain testimony, which they set out in their abstract. The other testimony in the case is not abstracted. Assuming the testimony complained of to be incompetent, it may be that the point sought to be established was proved by other evidence, which was competent and which was undisputed. We can not tell without exploring the transcript.

It is settled in this State that the improper admission of evidence is not prejudicial if the fact it tended to prove is otherwise established by the undisputed evidence. *Maxey* v. *State,* 76 Ark.

276; *Pace* v. *Crandell,* 74 Ark. 417; *Waters-Pierce Oil Co.* v. *Burrows,* 77 Ark. 74.

Counsel for appellant assign as error the action of the court in refusing a certain instruction, which they set out in their abstract. They contend that the refused instruction is not covered by any other instruction given. But they have not set out the other instructions, and the court might differ with them as to their construction of the omitted instructions. Under rule 9 counsel must abstract them, or we will assume that the theory embraced in the refused instruction was fully covered by the other instructions given which are not abstracted. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 78 Ark. 374.

Again, counsel say that the court erred in giving a certain instruction because they say the complaint does not allege any permanent injury to appellee; that there is nothing in the pleadings or evidence that would justify the court in submitting to the jury the question whether appellee would suffer physical and mental pain in the future. The abstract is so imperfect that we can not tell without exploring the transcript whether or not they are correct. Counsel cannot substitute their judgment for that of the court. *Wallace* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 356.

As applicable to the case at bar, we quote from the case of *Wallace* v. *St. Louis, I. M. & S. Ry. Co., supra,* as follows: "The abstract is so imperfect that we are not able to say without exploring the transcript, individually or collectively, that the judgment upon the whole case is erroneous."

The judgment is affirmed.

WATSON v. HENDERSON.

Opinion delivered February 27, 1911.

GUARDIAN AND WARD—SALE OF WARD'S LAND—JURISDICTION OF EQUITY.—The act of April 16, 1873, lodged in the circuit court all the jurisdiction that had formerly been possessed by probate courts, and gave to the former court exclusive jurisdiction thereof. The act of April 22, 1873, gave to guardians or curators power to sell the lands of wards for reinvestment. Const. 1874, art. 7, § 34, provides that "the judge of the county court shall be the judge of the court of probate,

and have such exclusive original jurisdiction in matters relative to the probate of wills, the estate of deceased persons, executors, administrators, guardians, persons of unsound mind and their estates as is now vested in the circuit court or may be hereafter prescribed by law." *Held,* that equity has no jurisdiction to order the sale of a minor's land for reinvestment, though it has jurisdiction to prevent waste of a minor's estate.

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

STATEMENT BY THE COURT.

L. H. Watson died in 1891, owning and occupying as his homestead the northeast quarter of the southeast quarter of section 13, township 4 north, range 3 west, in Monroe County, Arkansas. Mrs. Delia Watson, the widow of L. H. Watson and appellant, who was the minor son of L. H. and Mrs. Delia Watson, continued to reside on the land, or rented it, until 1899. The land was of the value of about $2,000, and rented for $200 per year.

In 1899 Mrs. Delia Watson (then Mrs. Simpson) and appellant, by his guardian, petitioned the chancery court of Monroe County for a sale of the land, setting up that "the land was without fencing or buildings, that they could no longer cultivate it, and that it ought to be sold and the proceeds invested in a home for them." The court granted their petition, and ordered the land sold at private sale by the guardian for the sum of $600. The land was sold to appellee, deeds were executed by Mrs. Simpson, and by the guardian of appellant. The sale as thus made was afterwards confirmed by the chancery court. Appellant became of age April 13, 1908, and on October 5, 1908, filed a bill of review, in which he alleged substantially the above facts, and further that the appellee was in possession of the land, and had been since 1899, enjoying the rents and profits amounting to $1,600. He further alleged the sum of $1,600 was sufficient to reimburse appellee his purchase money with interest and for all the improvements he had made, and taxes and interest. He averred that if, upon accounting, it should be shown that the annual rents were insufficient to fully reimburse appellee then appellant was ready to pay such additional sum as might be necessary. He prayed that the decree be set aside, and that the deed made by the former

guardian be set aside as a cloud upon appellant's title, and that appellant be given possession of his property.

Appellee demurred to the bill. The court sustained the demurrer, and dismissed the cause. Appellant duly prosecutes this appeal.

N. W. Norton and *C. F. Greenlee,* for appellant.

The chancery court was without jurisdiction to order a sale of a minor's property for reinvestment, because that power is expressly and exclusively given by the Constitution and statutes of this State to the probate courts. Art. 7, § 34, Const. 1874. The words *"exclusive original"* jurisdiction used in the foregoing section of the Constitution have a significant meaning, differing in this respect from the language employed in any former Constitution. See art. 6, § 10, Const. 1836; art. 6, § 12, Const. 1861; art. 7, § 12, Const. 1864. The acts of April 16, 1873, conferred "such" jurisdiction in all matters of probate and administration upon the circuit court, but in 1874 the present Constitution was established, containing the above article and section conferring exclusive original jurisdiction upon the probate court. See to the same effect, Kirby's Digest, § 1340, enacted in 1875; 33 Ark. 728, 734. Chancery courts may act as a shield to protect the property of a minor from the effects of fraud, accident or mistake, and for the prevention of irremediable mischief, and has jurisdiction for that purpose, but should not exceed that necessity. *Myrick* v. *Jacks,* 33 Ark. 425, is not against appellant's contention, because a *fraud* had been committed upon a child by a probate court. See also 40 Ark. 393, 401; 48 Ark. 544; 100 S. W. 1052, 1070; 42 N. E. 8.

Thomas & Lee, for appellee.

The chancery court had the power to order the sale of the land in question, and its jurisdiction coexists with that of the probate court. The same jurisdiction may exist in more than one tribunal, to be exercised by the one first acquiring it. 45 Ark. 46, 48; 53 Ark. 43; 33 Ark. 425. "The court of probate shall have power to appoint guardians for minors, and possesses the control and superintendence of them." Kirby's Dig. § 3753. But "the jurisdiction of a court of chancery extends to the care of the person of an infant so far as necessary for his protection and

education," etc. * * "and this jurisdiction is not taken away by the like power conferred by statute on the probate court." 38 Ark. 406. Where equity has original jurisdiction, it is not taken away by statute conferring jurisdiction in similar cases upon another court unless the statute expressly or by necessary implication excludes the equitable jurisdiction. The jurisdiction becomes concurrent or ancillary or auxiliary in the two courts. 55 Am. Dec. 74; 28 Ala. 629; 49 Ala. 99; 18 Ark. 583; 28 Ark. 19; 53 Ga. 36; 53 Ill. 214; 15 Mo. 662; 27 N. J. Eq. 408; 27 N. H. 513; 23 Miss. 236; 44 Miss. 805; 1 Phill. Eq. 69. That the chancery courts had jurisdiction over the persons and estates of minors under the Constitution of 1836 was never questioned; and "the Constitution of 1874 restored the probate system as it existed under the Constitution of 1836." 40 Ark. 434, 441; 33 Ark. 575; *Id.* 727; 34 Ark. 63; *Id.* 117; 36 Ark. 383. The act of April 22, 1873, conferring jurisdiction upon circuit courts (now chancery courts) has never been repealed, hence jurisdiction over a minor's business still remains in the chancery courts. Acts 1873, p. 120, § § 4, 33, 34. In this case the sale was not for the education and maintenance of the minor but for reinvestment in another home. The probate court has no jurisdiction to sell the homestead of a decedent during the minority of his children. 52 Ark. 213; 56 Ark. 563; 56 Ark. 574. Chancery jurisdiction, being auxiliary or ancillary and corrective, can be exercised where the relief afforded by the probate court is imperfect or inadequate, or where the proceedings have miscarried through fraud, accident or mistake. 23 Ark. 94; 16 S. W. 666; 48 Ark. 544; 34 Ark. 117; 45 Ark. 505; 27 Ark. 595; 26 Ark. 373; 49 Ark. 51; 16 Cyc. 96.

WOOD, J., (after stating the facts). The Constitutions of this State prior to the present one provide that the probate court shall "have such jurisdiction in matters relative to the estates of deceased persons as may be prescribed by law." Const. 1836, art. 6, § 10; Const. 1861, art. 6, § 12; Const. 1864, art. 7, § 12. See also Const. 1868, art. 7, § 5. As early as December 23, 1846, the Legislature gave to the probate court jurisdiction to order guardians "to sell lands belonging to any estate." Acts of December 23, 1846, p. 116; Gould's Digest, p. 134; *Reid* v. *Hart,* 45 Ark. 41. They continued to have such jurisdiction until the act of April 16, 1873, giving to the circuit court "exclusive original

jurisdiction of everything properly pertaining to matters cognizable in courts of probate, and all the powers and jurisdiction now possessed by courts of probate." At that time the jurisdiction of the probate court to sell the lands of wards was only concurrent with that of the equity court, which had always possessed such power in this State. *Shumard* v. *Phillips,* 53 Ark. 37, 44.

The act of April 16, 1873, *supra,* in express terms lodged all the jurisdiction that had been formerly possessed by courts of probate in the circuit courts, and gave to these courts, whether exercising their common law or equity powers, exclusive jurisdiction. The act of April 22, 1873, gave to guardians or curators power to sell the land of wards and to invest the proceeds in other land when it appeared to be for the benefit of the ward to do so. The sale could only be made, however, after obtaining an order from the circuit court. Acts of 1873, p. 194. Thus the law was written when the present Constitution was adopted, which provides: "The judge of the county court shall be the judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates as is now vested in the circuit court or may be hereafter prescribed by law." Art. 7, § 34.

Now, when the Legislature of 1873 took away from the probate courts the jurisdiction to sell the lands of wards, and invested the circuit court with exclusive jurisdiction to order the sale of such lands, the intention was that only the circuit courts should possess such jurisdiction. Likewise, when the framers of the present Constitution divested the circuit courts of such exclusive jurisdiction and invested it in the probate courts, the intention was that the latter courts should possess that jurisdiction to the exclusion of all other courts. The word exclusive means: "possessed to the exclusion of others." Webster's Unabridged Dict.; Century Dict., "Exclusive."

To support their contention that chancery courts have jurisdiction under the Constitution of 1874 to sell a minor's land for reinvestment, appellee relies upon the decision of this court in *Myrick* v. *Jacks,* 33 Ark. 425, where we said: "The general jurisdiction over the persons and property of minors belonged to

the chancery courts. Courts of probate have by statute limited power over the estates of minors in the hands of administrators and guardians, but the statute is the limit of their power, and their orders, not authorized by the statute, are void. They have no authority to direct an investment of a minor's funds in land."

This language was used in passing upon an order of the probate court made in 1865 authorizing the guardian of a minor to invest the proceeds of the sale of her land in other lands. Myrick was seeking to hold Jacks liable for moneys or securities received from her guardian during her minority as a result of the order of the probate court. She set up in the complaint the facts, and alleged that there was collusion upon the part of Jacks with her guardian by which the court was misled into making the order, and that Jacks had thereby perpetrated a fraud upon her, etc. In 1865, while the probate courts had jurisdiction to order a guardian to sell the land of his ward (act of Dec. 23, 1846, *supra*), they had no authority to authorize the guardian to sell such land and to invest the proceeds in the purchase of other lands. Therefore the language of the court above quoted, while applicable to the jurisdiction of probate courts in 1865, was not applicable to the jurisdiction of such courts in 1878, when the opinion in *Myrick* v. *Jacks* was rendered. Nor is it applicable in the present case. For, as we have shown above, the act of April 22, 1873, gave to the circuit courts jurisdiction to order guardians to make sale of the lands of their wards and to invest the proceeds in other real estate, and the Constitution of 1874 vested exclusively in the probate courts the jurisdiction "in matters relative to the estates of deceased persons, guardians," etc., that theretofore had been vested in the circuit courts.

Counsel for appellee also quotes from the opinion in *Hall* v. *Brewer*, 40 Ark. 433, 434, as follows:

"At the time of the adoption of this Constitution (1874) the probate courts had been abolished, and their jurisdiction had been transferred to the circuit court. The constitutional convention intended to restore the probate system as it existed under the Constitution of 1836 and to revest in them the same jurisdiction in matters pertaining to the administration of the estates which had formerly belonged to them, but which since their abolition was exercised by the circuit courts."

The question in the case was whether or not a creditor of an estate whose claim had been duly probated, but not paid, could proceed in equity against the executors and devisees to subject the lands of the estate to the payment of his debt, after all the personal property had been administered and the administration practically closed, and the lands of the estate had been surrendered to the devisees. The complaint presenting this question was dismissed in the lower court, upon demurrer, on the ground that the court of probate had exclusive original jurisdiction. This court, speaking in regard to matters of administration, used the language above quoted, and concluded by saying that the matter under consideration "was not a detail of administration but a matter of trust." It was strictly accurate for this court to say that the Constitution of 1874 intended to revest in probate courts "the same jurisdiction in matters pertaining to the administration of estates that had formerly belonged to them," for in matters purely of the administration of estates courts of probate, except during the short period between the act of April 16, 1873, and the adoption of the Constitution of 1874, when their jurisdiction was transferred to the circuit courts, had exercised exclusive jurisdiction. *Moren* v. *McCown,* 23 Ark. 93; *West* v. *Waddill,* 33 Ark. 575; *Reinhardt* v. *Gartrell,* 33 Ark. 727; *Mock* v. *Pleasants,* 34 Ark. 63.

In *Reinhardt* v. *Gartrell,* 33 Ark. 727, this court, speaking of the constitutional provision under consideration, said:

"Obviously, it was meant to relegate to the probate courts their old jurisdiction without restriction or qualification. The decisions of this court regarding their former power apply now. Their jurisdiction has been simply elevated from a statutory to a constitutional basis, being as to limits unchanged." The court further said: "The courts of chancery have no power to take such cases out of the probate courts for the purpose of proceeding with the administration." The language quoted had reference solely to the jurisdiction of the probate courts relative to matters of administration.

The question in the case was whether or not the settlements of an executor with the probate court could be reopened and he and his sureties made liable in equity for fraud in his settlements. The court held that, while for the purpose of proceeding with

the administration the probate court had exclusive jurisdiction, equity could intervene to correct and relieve against fraud.

The language of the court in the above cases to the effect that the Constitution of 1874 meant to restore to probate courts their old jurisdiction "as to limits unchanged" must be taken, of course, in connection with the question then at issue, the subject-matter under consideration. When so considered, it is clear that the court could have had no reference whatever to the jurisdiction of probate courts concerning the sale of real estate belonging to minors. It may be said, *en passant,* that the complaint in each of the cases above reviewed stated some special ground of equitable jurisdiction.

We do not find that this court has ever ruled upon the question as to whether the chancery court since the adoption of the Constitution of 1874 has concurrent jurisdiction with the probate court to order the sale of a minor's real estate for reinvestment. Judge COCKRILL in *Shumard* v. *Phillips, supra,* seems to have regarded it as an open question in this State at that time (1890), for he says: "What the effect of the grant of jurisdiction to the probate courts by that instrument (Const. 1874) is, it is not material now to consider." He would hardly have used this language had it been considered as settled by former decisions. We are therefore called upon for the first time to construe the provisions of art. 7, § 34, *supra,* of the Constitution with reference to the jurisdiction of the chancery court to order the sale of a minor's land for reinvestment, and our conclusion is that the chancery court has no such jurisdiction. The framers of the Constitution of 1874 were familiar with prior Constitutions and statutes. They knew that the act of April 22, 1873, had vested in the circuit courts jurisdiction to order guardians, under certain conditions, to sell the real estate of their wards, and to reinvest the proceeds in other real estate. Therefore when they vested this jurisdiction in the probate courts and made it *exclusive,* they meant what they said, and used the word "exclusive" advisedly. Their language was not to reinvest the probate courts with such jurisdiction as they had formerly exercised (which as to sale of lands was only concurrent), but to invest them with such exclusive original jurisdiction over the matters enumerated as was then vested in the circuit courts. The jurisdiction then vested

in the circuit courts was exclusive. The word "exclusive," as thus used, is too prominent to be ignored and too plain to be misunderstood.

But counsel for appellee contend that the Constitution did not vest jurisdiction "in a minor's business" in the probate courts, but left that in the circuit courts where it had been previously lodged by the act of April 16, 1873. A minor's business, unless his disabilities of nonage have been removed, can only be conducted through his guardian. The Constitution expressly vests "exclusive original jurisdiction in matters relative to the estates of deceased persons" and "guardians" in the probate courts. If a sale of the minor's land is contemplated, it must be done by the guardian after obtaining an order of the probate court. See act of April 22, 1873, *supra;* Kirby's Digest, § § 3801-3.

Counsel also contend that the chancery court had jurisdiction, if not concurrent, as "auxiliary or ancillary and corrective, and that it can be exercised where the relief afforded by the probate court is imperfect or inadequate, or where the proceedings have miscarried through fraud, accident or mistake"; and this is true. But no such grounds for the interposition of such equity jurisdiction are shown in this case. Where jurisdiction over a given subject-matter, the sale of lands for instance, is made exclusive in one court, no other court can exercise the same jurisdiction concurrently or in any other way. But it was not intended by the Constitution to take away from the chancery courts their ancient original jurisdiction over the persons and estates of minors, so far as such jurisdiction may be necessary for the protection of the infant or to protect his property from waste or spoliation through the carelessness, fraud, mistake, or imposition of his parents, guardians, or others. These are distinct grounds of equitable jurisdiction which have existed since the establishment of courts of chancery, and have been recognized in the jurisprudence of our English-speaking people for centuries. *State* v. *Grisby,* 38 Ark. 406, and authorities cited; *Myrick* v. *Jacks,* 33 Ark. 425.

But as is well expressed in a case similar to this: "Equity sits silent in the courts as long as the law is able to meet the demands of justice; it aids the law, but is not officious in its services." And again: "Equity distinguishes between the shield and

the sword. To protect the estate from a danger which the infant, because of his tender years, is unable to defend against is one thing; to commission some one to go into the field of trade, selling and buying on account of the infant, is another thing. Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and everything whatsoever with the estate of a minor, *quia* minor. The act to be valid must be based on some equitable principle." *Heady* v. *Crouse,* 100 S. W. Rep. 1052; *Losey* v. *Stanley,* 42 N. E. Rep. 8.

The same principles that govern courts of chancery in interfering with the proceedings and adjudications of courts of probate in the administration of estates of deceased persons should control them in interfering with the administration of the estates of minors in the hands of their guardians, because the original jurisdiction of probate courts in each case is exclusive. Judge EAKIN announced the rule for such interference as follows: "It may be safe, in general, to say that it should not exceed the necessity for the correction of fraud, accident and mistake, and for the prevention of irremediable mischief." *Reinhardt* v. *Gartrell, supra; Trimble* v. *James,* 40 Ark. 401; *Hankins* v. *Layne,* 48 Ark. 544; *McCracken* v. *McBee,* 96 Ark. 351.

The chancery court erred therefore in assuming jurisdiction to sell the land in controversy, and its judgment is reversed, and the cause is remanded with leave to take additional evidence on the accounting, if desired, and that accounting be had along the lines proposed in appellant's complaint, and after this that the sale be set aside, and appellant awarded possession, and for other proceedings not inconsistent with this opinion.

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

Opinion delivered February 27, 1911.

1. NEGLIGENCE—INTERVENING ACT OF CHILD.—Where an explosive is carelessly left where it is picked up by a child incapable of committing an act of negligence and carried to his companion who explodes it, and is injured, the causal connection of the original act of negligence in leaving the explosive is not broken by any intervening act of negligence and is the proximate cause of the injury. (Page 76.)

2. SAME—USE OF DANGEROUS SUBSTANCE.—The necessary use of a dangerous substance, such as an explosive, in a careful manner in the operation of a lawful business, does not constitute negligence. (Page 77.)

3. RAILROADS—NEGLIGENCE IN USE OF TRACK TORPEDO.—Where a railway employee placed a torpedo upon the track as the customary signal to an expected train, and a few minutes thereafter, before the train passed, a little boy picked it up, and his brother was injured by its explosion, no negligence on the part of the railway company was shown. (Page 80.)

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

W. F. Evans and *B. R. Davidson,* for appellant.

1. A railroad company's use of its right of way at all places other than public crossings is exclusive at all times and for all purposes. 49 Ark. 257, 263; 2 Am. & Eng. R. Cas. 4-6; 76 Am. St. Rep. 163; 20 S. W. 380; 7 Fed. 78; 45 Am. Rep. 365; 8 Am. & Eng. R. Cas. 217; 70 Atl. 826.

2. A railroad company owes no duty to a trespasser on its track and right of way except not to wantonly injure him after his presence has been discovered. 123 S. W. 1182; 69 Ark. 380; 64 Ark. 364; 62 Ark. 235. An infant may trespass as well as an adult, but the company owes to the infant no greater duty than it does to an adult. 36 Ark. 39; 15 S. W. 1057; 110 S. W. 329; 111 S. W. 712; 116 S. W. 557; 104 N. W. 827; 47 Fed. 689; 143 Fed. 260; 7 N. E. 866. A child on a railroad track is a trespasser, though not old enough to be guilty of contributory negligence. 37 S. E. 794; 81 S. W. 657; 4 Atl. 106; 44 Atl. 809; 70 Atl. 826. The "turn table case" is an exception to the rule that the landowner owes no duty to an infant trespasser other than that owed to an adult, but this exception does not extend to the use of torpedoes by railroads in the operation of their trains. In their use there must be proof that they were negligently placed, or a state of facts proved from which negligence might reasonably be inferred. 32 Am. & Eng. R. Cas. 37; 44 *Id.* 647; 51 Atl. 1070; 15 *Id.* 414, 19 S. C. 20; 70 S. W. 830.

3. The causal connection having been broken, the injury to the plaintiff was not the proximate result of the placing of the torpedo on the track. 87 Ark. 576; 21 Am. & Eng. R. Cas. (N. S.) 646. Appellant had the right to presume that appellee's

parents would discharge their duty by preventing their children from removing the torpedoes from the rail, and by warning them of their dangerous nature. 2 Am. & Eng. R. Cas. 4, 6; *Id.* 7; 44 Atl. 809; 70 Atl. 826; 110 S. W. 329; 111 S. W. 712; 116 S. W. 557. Their act in permitting the child to go unwarned broke the causal connection, as did also the act of the other boy in exploding the torpedo. 124 Fed. 113, 119, 120, and authorities cited; 43 Atl. 539; 113 Mass. 507.

4. The torpedo, under the allegations and evidence, was properly placed, and there was no allegation nor proof that it was an improper instrument, or that it was improper to use it on the rails of appellant at the place where it was used. Plaintiff had no right to search for imaginary grounds not contained in the complaint as a basis for recovery, and the court will not treat it as amended. 70 Ark. 232.

Sam R. Chew, for appellee.

The torpedo was placed, as the record shows, at a place where appellant knew that children were accustomed to assemble and play daily; and it knew also that these torpedoes were attractive to children and likely to be picked up by them, and that they were likely thereby to be injured. Persons using explosives are held to a high degree of care and caution, and they will be held to answer in damages for injuries resulting from the wrongful or careless handling of the same, where the injuries might reasonably be expected to flow from such wrongful or careless handling. 1 Thompson on Neg. § § 758, 759; Shearman & Redfield, Negligence, § 688; 45 O. St. 11; 87 Ark. 580.

2. The proximate cause of the injury was the placing and leaving the torpedo where it could be picked up by a child or other irresponsible person. Its being carried away and its ultimate explosion was what might have been reasonably expected. "Where the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause." Bishop, Noncontract Law, § 39; *Id.* § 45; 108 Pac. 140, 27 L. R. A. (N. S.) 884; 73 Ark. 112; 89 Ark. 581; 129 S. W. (Ark.) 78.

MCCULLOCH, C. J. The plaintiff, J. C. Williams, then 11 years of age, was injured by the explosion of a torpedo picked

up on the railroad track of defendant by his younger brother, Ellis Williams, and sues to recover damages. The boys lived with their parents a short distance from the railroad track in the city of Fayetteville, Ark. They saw the brakeman of a train place the torpedo on the track, and the younger one went out on the track, and picked it up, and carried it to plaintiff, requesting him to "mash it," which he proceeded to do, placing it on a rock and striking it with an axe. Some of the particles struck plaintiff in the eye and destroyed the sight.

There is no dispute as to the material facts. The defendant operates a branch line, known as the St. Paul branch, which runs east from the main line at Fayette Junction, about two miles south of the passenger station at Fayetteville. Another branch, called the O. & C., runs west, leaving the main line a short distance south of the station. The trains from these branches come in on the main track to reach the Fayetteville station, which is used by all of defendant's trains on the main line as well as on the branch lines. The track between Fayette Junction and the Fayetteville station has frequent curves, and there are obstructions which prevent a view up and down the track for any considerable distance.

When the trains come in from the branch lines, while using the main line at the station for discharging passengers, baggage, express, etc., it is necessary to protect them by the use of torpedoes from other trains likely to come in. The undisputed evidence shows that this has been the custom for many years, and that it is considered necessary by those who have been operating trains there. It is explained that where a brakeman gets off to protect a train with a flag it is necessary to use a torpedo for protection while he goes back to his train.

The track near the place where the plaintiff was injured was on a high dump, and is curved, so that it has always been found necessary to place a torpedo at that place. It is not a crossing, but there was testimony tending to show that people walk the track a good deal along there, and that children play on or about the track.

On the occasion in question the mixed train from the St. Paul branch came in, being due at 3:45 P. M., and when it came up the main line Raedles, a brakeman, got off and placed a tor-

pedo on the track as usual, leaving it there when he was called to his train as a signal to the other incoming trains. A train from the O. & C. branch was due at 3:55, and another train on the main line was due from the south at 4:10 P. M. It was always considered necessary to put a torpedo on the track at that place to protect the St. Paul train from those trains while it was discharging passengers, baggage, etc., at the station and getting back to the switch. Raedles used a torpedo of approved pattern commonly in use. It had a lead strip attached to it, by which it was fastened to the rail so that it would be exploded by the wheels of a passing train.

The boys saw Raedles put the torpedo on the track, and in a short time thereafter, about fifteen minutes, the younger boy, Ellis, went over and picked it up and carried it to his brother, who exploded it, as already stated. The injury occurred in a very unusual and unexpected manner. Witnesses stated that torpedoes had been placed along there for ten years or longer, and that an accident had never before happened on that account. The use of torpedoes in that way is shown to be customary in railroading, yet experienced railroad men testified that they had never heard of any one being injured as a result of that practice.

We need not spend any time in discussing the question of contributory negligence, or whether the negligence of defendant's servants, if there was any negligence, was the proximate cause of the injury. The question of negligence of the plaintiff in exploding the torpedo was properly submitted to the jury, and, considering the plaintiff's age and inexperience, we think the jury were justified in finding that he was not guilty of negligence. In the case of *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, the court distinctly recognized the principle that negligence in unnecessarily leaving an explosive exposed so that children could have access to it would be the proximate cause of an injury resulting therefrom under circumstances similar to the facts of this case; citing *Harriman* v. *Pittsburg, C. & St. L. R. Co.,* 45 O. St. 11, 12 N. E. 451. The court there held that where the explosive was picked up by a child incapable of committing an act of negligence, and he immediately carried it to his companion who exploded it, the causal connection with the original act of negligence in leaving the explosive exposed was not broken by an intervening act of

negligence, and it was a result to be reasonably anticipated, so as to make the injury the proximate result of the original act of negligence.

The real question with which we must deal in this case is whether or not there is any evidence of negligence on the part of defendant's servants in leaving the torpedo on the track. Did they violate any duty which they owed to children who might come on the track?

Cases may readily be found where it is held to be negligence to leave explosives or other dangerous substances exposed so that injury may result therefrom. These are cases, however, where the method of using the substance is found to be negligent, or where there is negligence in unnecessarily leaving the substance exposed. We are not aware that any court has ever held that the necessary use in a careful manner of a dangerous substance in the operation of a lawful business constitutes negligence. There are many legitimate enterprises, the operation of which is necessarily dangerous. This is especially true of the operation of a railroad, which is necessarily a place of danger at all times. The locomotives, standing cars, handcars, cattle guards, turntables, and numerous other things which could be mentioned are in a sense dangerous; yet they are necessary, and may be used without rendering the company liable for damages. It is only the negligent use, or use in a negligent manner, which is actionable when injury results.

Railroad companies have the right to the exclusive possession of their own premises, including the right-of-way, except at crossings or about stations where people have a right to go. The servants of the company are not required to anticipate the presence of trespassers except as to keeping a lookout in the operation of trains, which is now required by statute. Children may be trespassers the same as adults, and, except in the operation of trains where the lookout statute applies, servants of the company are not required to anticipate their presence where they have no right to be.

What is known as the doctrine of the "turntable cases" forms an exception to this rule, but that is where an owner permits to remain unguarded on his premises something dangerous which is attractive to children and from which an injury may reasonably

be anticipated. The doctrine is stated by the court in *Brinkley Car Co.* v. *Cooper,* 60 Ark. 545, as follows: "The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries to children trespassing upon his private grounds when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature, and exposed and open condition, of something thereon, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs."

The doctrine of those cases proceeds entirely on the theory of negligence in using, or unnecessarily leaving exposed, the dangerous substance or machinery. In the Cooper case just referred to, the charge of negligence was that the defendant allowed to remain unguarded on its premises, which were frequented by children, a pool of hot water concealed by trash and bark, and the plaintiff, a child six years old, unwittingly walked into it and was scalded. When the case came back to this court on second appeal (*Brinkley Car. Co.* v. *Cooper,* 70 Ark. 331), Judge RIDDICK, delivering the opinion, said: "We hold that if the company owning the premises had notice that children did frequent the place of this pool, or were from the nature of the surroundings likely to do so, and if it carelessly left a pool of hot water there concealed in such a way that one would reasonably expect it to occasion injury to such children, the company would be liable for damages to a boy who by reason of its concealed nature walked into the pool of hot water and was burned."

The doctrine was first announced by the Supreme Court of the United States in *Railroad Company* v. *Stout,* 17 Wall. 657, a case where a child six years of age got his foot mashed while playing with a turntable on the premises of a railroad company. The court stated the facts and the rule applicable thereto as follows:

"As it was in fact on this occasion, so it was to be expected, that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch.

This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff."

In *Catlett* v. *Railway Co.*, 57 Ark. 461, a boy sued for damages received while he was attempting to swing on the side of a moving train in the railroad yards at Wynne, Ark. The boys were accustomed to steal rides on the trains at that place, and this was well known to the trainmen, who took no steps to prevent it. Sometimes they paid no attention to boys riding, and sometimes they made them get off. The doctrine just referred to was urged by able counsel, but the court rejected it. Chief Justice COCKRILL, delivering the opinion of the court, said:

"The appellant argues that a slow moving train is dangerous machinery, alluring to boys; and that it is therefore negligent of the company to fail to take precaution to keep them off such trains. That is the argument made to sustain a class of cases known as the 'turntable cases,' the leading one of which is *Railroad Co.* v. *Stout,* 17 Wall. 657. Whatever its merits may be, it has never been extended to such length as to control a case like this. The youth of the person injured will sometimes excuse him from concurring negligence, but no amount of youthful recklessness can supply the place of proof of negligence on the part of a defendant sought to be charged on account of negligence." The point of that case undoubtedly is that there must have been some act of negligence in the use of the dangerous substance or machinery, or in leaving it unguarded when not in use. Other cases illustrate the doctrine in the same way. *Louisville & N. Rd. Co.* v. *Hart* (Ky.) 70 S. W. 830; *Pittsburg, C. & St. Louis*

Ry. Co. v. *Shields,* 44 Am. & Eng. R. Cas. 647; *Harriman* v. *Pittsburg, C. & St. L. Ry. Co., supra; Olson* v. *Gill Home Investment Co.* (Wash.), 108 Pac. 140, 27 L. R. A. (N. S.) 884.

In the Harriman case, above cited, which is strongly relied on by learned counsel for plaintiff, the trial court sustained a demurrer to the complaint, which alleged that the servants of the railway company "wantonly placed said torpedoes upon the track of its road in an exposed place where, if left undestroyed and unguarded, they would be likely to cause injury to others. That there was no reason for making use of said torpedoes at said time or place, nor was there any necessity of giving danger signals; but the same were used in mere wantonness and with a view that said train, on being moved forward, would pass over and explode the same. That said defendant, so using said torpedoes in the manner aforesaid, so carelessly and negligently conducted itself in the management and care of its road and management of its said train that it negligently and carelessly failed to explode and destroy all of said torpedoes so placed on its track, and negligently and carelessly left upon its road, exposed and unexploded and in plain view, one of said torpedoes at a point and place upon its road over which the inhabitants living along the line of said road, and other persons, were for years daily accustomed to travel and pass, and over which children were accustomed to go without hindrance; and all with the full knowledge of defendant. And that said defendant negligently, carelessly, and in wilful disregard of the safety of those whom the defendant well knew were in the daily habit of using said road as a pathway, permitted said unexploded torpedo to remain upon its road undestroyed and unguarded from the reach and observation of all passersby."

The Supreme Court held that the complaint stated a cause of action, and that the demurrer should have been overruled.

Now, applying the law announced in the foregoing cases to the facts of the present case, it is readily seen that no case of negligence has been made out against defendant. Its servants were using the torpedo in the customary way as a signal to an expected train. No negligence is shown in placing it there or in leaving it after the necessity for its use had ceased. The little boy Ellis picked up the torpedo a few minutes after it was placed there, and before the expected train came along to explode it.

To hold that under those circumstances the servants of the company were guilty of negligence would be to deny the company the right to use torpedoes at all. The undisputed evidence shows that it was necessary for the safety of trains to use them at the time and place named, and no negligence is shown in the method of using them or that they were left unguarded after the necessity for their use ceased.

The case should not have been submitted to the jury. The judgment must therefore be reversed; and, as the facts were fully developed in the trial, no useful purpose will be served in remanding for a new trial. Reversed and dismissed.

CEDAR RAPIDS NATIONAL BANK *v.* MCCORD.

Opinion delivered February 27, 1911.

SALE OF CHATTEL.—RIGHT TO COUNTERMAND ORDER.—Until accepted, an order for merchandise is a mere proposal which may be withdrawn, though it provides that it cannot be countermanded.

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

W. S. Chastain, for appellant.

Holland & Holland, for appellee.

MCCULLOCH, C. J. The plaintiff, Cedar Rapids National Bank, sued defendant Fred McCord, on a negotiable promissory note executed by the latter for the sum of $240 to the Barton-Parker Manufacturing Company, which note is alleged to have been assigned to plaintiffs for value before maturity. The note was attached to an order for a lot of jewelry, being on the same printed sheet with a perforated line between, so that the note could be detached, and the same was detached when assigned to plaintiff. The note was executed for the purchase price of the jewelry, and accompanied the order, which was taken by the traveling salesman of the vendor, the Barton-Parker Manufacturing Company, of Cedar Rapids, Iowa. Defendant was engaged in the mercantile business at Greenwood, Ark., and the goods were to be shipped to him at that place. The order contained

an itemized list of the goods, and concluded as follows: "Please ship at your earliest convenience the above goods upon terms and conditions herein specified, which I have found satisfactory." The following clause is also found in the order: "This order cannot be countermanded. Time is of the essence of this agreement. Salesmen have no authority to make any agreements except such as are written or printed hereon and approved by the Barton-Parker Manufacturing Company."

The defendant testified that about two hours after he gave the order to the salesman he went to the latter on the streets of Greenwood and countermanded the order; also that he wrote and mailed a letter to the Barton-Parker Manufacturing Company the next day countermanding the order; that the goods were shipped notwithstanding the countermand, but that he declined to accept them.

The cashier of the plaintiff bank testified that he purchased the note for his bank on September 20, 1907 (the date of the note being September 15, 1907), from the Barton-Parker Manufacturing Company, and paid therefor the sum of $144.36 in cash; that the officials of the bank knew nothing of any defect in or defense to the note, and that the purchase of the note was in the due course of business. The indorsement on the back of the note, as exhibited with the complaint and read in evidence, bears date of September 20, 1907.

J. W. Goolsby, an attorney at law, testified that he received the note for collection about a year and half subsequent to its date (which was after maturity); that he kept it in his possession several days and examined it closely, and that it contained no indorsement at that time.

The court submitted the case to the jury solely on the question whether or not plaintiff purchased the note for value before maturity in due course of business. The correctness of the instructions on that issue are not assailed here.

Counsel for plaintiff insists that he should have had a peremptory instruction telling the jury to find for the plaintiff. The court was correct, we think, in submitting the one issue to the jury, as that was the only disputed question of fact.

The order was countermanded before acceptance, and defendant was not liable except to an innocent holder for value to

whom it was assigned before maturity. The order was a mere proposal which, until acceptance, defendant had the right to withdraw, notwithstanding the provision therein to the contrary. *Merchants' Exchange* v. *Sanders,* 74 Ark. 16; *Toledo Computing Scale Co.* v. *Stephens,* 96 Ark. 606.

The traveling salesman who solicited and received the order is not shown to have had authority to accept it so as to bind the vendor; and the language of the order negatives such authority. He was a mere soliciting agent, and sent the order to his principal, after it was countermanded before he left town.

The evidence was sufficient to warrant the finding that plaintiff was not an innocent holder for value under assignment before maturity. The judgment is therefore affirmed.

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

Opinion delivered February 13, 1911.

1. TRIAL—IMPROPER ARGUMENT.—A statement by counsel for the plaintiff, in a personal injury suit by a passenger against a railway company, that the defendant "had treated the plaintiff worse than you would treat a dog" was not merely an expression of opinion, and not a statement of a fact not adduced in evidence; and, even if it were error, its prejudicial effect was removed by the instruction to the jury to disregard it. (Page 84.)
2. SAME—REMARKS OF COURT TO JURY.—Where, after the jury had been considering the case for some time, and had not agreed on a verdict, the judge recalled them and said: "Gentlemen, I do not understand why a case like this, where liability is admitted, that you can not agree. It is childish. I am not going to discharge you." *Held,* no error. (Page 86.)

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

W. E. Hemingway, E. B. Kinsworthy, W. V. Tompkins, H. S. Powell, James H. Stevenson, for appellant.

Hamby & Haynie, for appellee.

FRAUENTHAL, J. This was an action instituted by Mrs. Cleopatra Devaney, the plaintiff below, to recover damages for

personal injuries which she sustained while a passenger upon defendant's local freight train. She alleged that the defendant ran some lumber cars with great and unusual force and violence against the caboose in which she was riding as a passenger, and knocked her out of the seat in which she was sitting on to the floor, and thereby greatly and seriously injured her; that her arm was broken at the wrist, and her back and spine wrenched, and from these injuries she has sustained a well-defined and permanent case of neurasthenia. Upon a trial of the cause the jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed to this court.

It is not claimed by defendant that there was not sufficient evidence adduced upon the trial of the case to warrant the verdict of the jury in favor of the plaintiff; nor is it urged upon this appeal that the amount of the verdict returned by the jury is excessive. Upon this appeal the defendant urges two assignments of error as reasons why the judgment of the lower court should be reversed. One of these assignments of error relates to the argument of counsel for plaintiff, and the other to certain remarks of the trial judge made to the jury when they first made report of their inability to agree upon a verdict.

In his closing argument to the jury the attorney for the plaintiff made the following remarks: "Gentlemen of the jury, just think how this defendant treated this woman. She was a passenger. They left the caboose in which they knew she was riding on the main line, and then, without notice or warning to her, they at rapid speed hurled three cars heavily loaded with lumber against the caboose, knocking plaintiff off her seat, wounding her for life. Gentlemen, they treated her worse than you would have treated a dog." The defendant's attorney made objection to this argument, whereupon the plaintiff's attorney said to the jury: "All right, if they object, I withdraw it; but it is true all the same." Thereupon the court said to the jury: "Gentlemen of the jury, that kind of argument is not right, and the attorney should not have made it, and the jury will pay no attention to it."

It is urged by counsel for defendant that these remarks of plaintiff's attorney to the jury were improper and prejudicial to defendant's rights. We have repeatedly stated and called to the

attention of the lower court that the due and proper administration of justice demands that the remarks of the attorneys before the jury should be kept within the bounds of legitimate argument; but, as we have also said, there is no fixed and rigid test by which to determine what is and what is not legitimate argument. In the presentation of his client's case before the jury counsel has the right to fully argue relative to the testimony which has been adduced and also relative to every inference and effect which legitimately flows therefrom. He has no right to make statements of or to argue relative to matters of fact about which there has been no evidence introduced upon the trial of the case. But mere expressions of opinion relative to the effect of the testimony that has been adduced, although in the opinion of others not properly deducible therefrom, or mere words of embellishment or dramatic and rhetorical flights, which may be considered not in the best taste, do not make the argument of counsel wrongful or erroneous. The statement of the attorney in his argument in this case that the defendant "had treated the plaintiff worse than you would treat a dog" was only an expression of opinion at the most. The jury could not have understood thereby that counsel was making a statement relative to a fact not adduced in evidence on the trial. But, in addition to this, if it should be deemed that it was error for counsel to have made this character of argument, we think that any prejudicial effect that could possibly have arisen therefrom was dissipated by the court instructing the jury that such argument was not right, and that they should disregard it. Under such an admonition of the court we cannot see how any sensible men composing a jury could be influenced by such an argument in arriving at their verdict. The judgment of the court should not be set aside on account of these remarks of counsel. *Reese* v. *State,* 76 Ark. 39; *Stewart* v. *State,* 88 Ark. 602; *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 398; *Holt* v. *State,* 91 Ark. 576; *Derrick* v. *State,* 92 Ark. 237; *Gaston* v. *State,* 95 Ark. 233.

In the trial of the case and in his argument to the jury the attorney of defendant admitted that it was liable for the injuries which were sustained by the plaintiff. After the jury had retired to consider of their verdict and had remained for some time in consideration thereof the trial judge directed them to be brought

into court, and, learning from them that they had not agreed upon a verdict, he said to the jury: "Gentlemen, I do not understand why in a case like this, where liability is admitted, that you can not agree. It is childish. I am not going to discharge you." The jury then retired, and further considered of their verdict for some time, and later returned the verdict in favor of plaintiff.

It is urged by counsel for defendant that these remarks of the court tended to influence the jury in arriving at their verdict, and were calculated to coerce or induce the jurors to yield their individual opinions, and that on this account a free and untrammelled decision of the jury was not obtained. But we do not think that the remarks of the trial judge were of such a nature as to influence the jury as to the character of the verdict which they should return, or to coerce or induce any individual juror to yield his opinion. In the conduct of the trial of causes the trial court is necessarily and rightfully vested with a large discretion. And, unless there has been a clear abuse or unwise exercise of that discretion, the appellate court should not interfere therewith. The trial judge should not make any remark to or in the hearing of the jury which would indicate his opinion as to the merits of the case or as to any fact involved therein. But he may properly admonish the jury as to the importance or desirability of their agreeing on a verdict. He should not by any word or act intimate that they should arrive at a verdict which is not the result of their free and voluntary opinion, and which is not consistent with their consciences; but still it is proper for the trial court to impress upon the jury the duty resting upon them to arrive at a decision. This court has said: "It is entirely proper for a trial judge, at all stages of the deliberations of the jury, to make plain the obligation resting upon them, if possible, to agree upon a verdict consistent with the facts and the concurring individual convictions of each juror." *Bishop* v. *State,* 73 Ark. 568; *Collins* v. *Karatopsky,* 36 Ark. 316; 11 Enc. Plead. & Prac. 304.

By the above remarks the trial judge did not intimate to the jury that he had any opinion relative to the merits of the case or as to any fact or issue therein involved, except that the defendant was liable. Of this portion of the trial judge's remarks the de-

fendant does not complain, because in the trial it admitted its liability. Counsel for defendant only complain of that portion of the remarks of the trial judge which declares that the action of the jury was childish in not agreeing, and that he was not going to discharge them. The effect of these remarks, we think, was only to admonish the jury of the desirability of their agreeing upon a verdict and of the importance of their so doing. While it chided them for not agreeing, we do not think that the effect of the remarks was to induce any juror to yield unwillingly his opinion. Nor do we think that the effect of the remarks of the trial judge that he was not going to discharge the jury was to coerce or compel them to agree on a verdict. It was an admonition to them of the duty resting upon them to make every reasonable effort to agree on a verdict, rather than a coercion of them to unwillingly agree to one that was inconsistent with their opinions and consciences. We do not think that the court abused its legitimate discretion or committed an error in the remarks which it addressed to the jury. See *Allen* v. *Woodson,* 50 Ga. 53; *Niles* v. *Sprague,* 13 Iowa 198; *State* v. *Green,* 7 La. Ann. 518; *Hannon* v. *Grizzard,* 89 N. C. 115.

In addition to this, we have examined the testimony relative to the injuries sustained by the plaintiff, and we think that it fully justified the jury in the amount of the verdict which they returned. It does not appear therefore that any improper influence was exerted on them, either by the remarks of the attorneys or of the lower court; so that in no event do we think that the defendant was prejudiced thereby.

The judgment is accordingly affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* WEBB.

Opinion delivered February 13, 1911.

1. TELEGRAPH COMPANY—RULE AS TO FREE DELIVERY LIMIT.—A rule adopted by a telegraph company as to the limit for free delivery of messages is made for the benefit of the company, and may be waived by it. (Page 90.)

2. SAME—NEGLIGENCE IN DELIVERY OF TELEGRAM.—Evidence that a telegraph company accepted a message to be transmitted to one who lived beyond its free delivery limits, and that its custom had been to send

such messages by some one who resided near the addressee, and that if the company had exercised due care it could have in this way delivered the message to the addressee in time to enable him to attend his mother's funeral, is sufficient to sustain a finding of negligence. (Page 90.)

3. INSTRUCTION—WHEN SPECIFIC OBJECTION NECESSARY.—Objection to the phraseology of an instruction should be specific. (Page 92.)

4. DAMAGES—MENTAL SUFFERING—EXCESSIVENESS.—For failure to deliver a telegram, which, if promptly delivered, would have apprised the addressee of his mother's death and have enabled him to attend the funeral, an award of $625 was not excessive where the addressee entertained great affection for his mother, and was deprived of the privilege of being present and assisting in burying her. (Page 92.)

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

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

1. Since the addressees were not at Pioneer, the appellant could not have delivered the message to them there, and it owed appellee no duty to search for them at Floyd or other places. 95 Tex. 420, 67 S. W. 768; 22 S. W. 532; 67 Kan. 729; 107 Ky. 663; 81 Mo. App. 223.

2. Addressing the telegram to his brothers at Pioneer without making arrangements for sending the message from that place to Floyd, or notifying appellant of their home address, was such negligence as, to say the least of it, contributed to appellee's alleged damage. 81 Fed. 676; 60 S. W. 687; 103 Ind. 294.

3. The delay in delivering the message was not the proximate cause of appellee's failure to attend the funeral, but rather either the lateness of the train or his brother's want of care in proceeding with the funeral, under the expectation that appellee would be on the first train, and neglecting to inquire whether the train was on time or late.

4. The argument of counsel for appellee to the effect that appellant had "manufactured evidence which it has introduced here" which, upon appellant's objection, was excluded from consideration by the jury, was followed by counsel's statement, "I made that statement; yes, sir, and I stand upon the statement," and was *not* withdrawn by the court from the jury, nor the coun-

sel reprimanded, was prejudicial and reversible error. 75 Ark. 577; 70 Ark. 305; 71 Ark. 427; 76 Ark. 366.

George M. Chapline, Palmer Danaher, and *Vaughan & Akers,* for appellee.

1. The instructions of the court submitted to the jury two inconsistent theories, the one, on the part of appellant, that the delivery by Powers to B. K. Webb was a discharge of appellant's duty to exercise reasonable diligence to deliver the message to the addressee, and the other, on the part of appellee, that the telegram did not reach Pioneer at all during the forenoon of December 5, but was negligently delayed until at least 12:15 P. M. The verdict of the jury settles the case in favor of the latter theory. See statement of facts on first appeal. 94 Ark. 350.

2. Had the message been promptly delivered, it is undisputed that the funeral would have been postponed to await appellee's arrival. Appellant's contention that the failure to deliver was not the proximate cause of plaintiff's being deprived of this privilege is fully refuted by this court's opinion in the Griffin case, 92 Ark. 219, where the facts are almost identical with those of this case.

3. A general objection to an instruction which is so worded as to be susceptible of misconstruction by the jury is of no avail. It must be met by specific objection pointing out its defects. 65 Ark. 255; 66 Ark. 264; *Id.* 46; 76 Ark. 468; 78 Ark. 71; 78 Ark. 156; 82 Ark. 391; *Id.* 555; 84 Ark. 81; 87 Ark. 396; 89 Ark. 537; *Id.* 577; 90 Ark. 231; 93 Ark. 595; *Id.* 215.

4. As to whether or not this court will reverse on account of improper argument necessarily depends "upon the nature of the argument, *the circumstances under which it was made,* the action of the trial court, and the *probable effect of the argument upon the verdict.*" The argument of appellee's counsel was not prejudicial. 71 Ark. 434-5; 132 S. W. 648; 65 Ark. 475; 76 Ark. 39; *Id.* 286; 74 Ark. 356; *Id.* 298; *Id.* 489; *Id.* 604; 72 Ark. 614; 58 Ark. 473-493; 75 Ark. 67; *Id.* 246; *Id.* 347; 91 Ark. 576.

HART, J. The opinion in a former appeal of this case is reported in 94 Ark. 350 *(Western Union Tel. Co.* v. *Webb).* After the mandate of this court was filed in the circuit court, the complaint was amended, and the case was again tried before a

jury, which returned a verdict for $625 in favor of the plaintiff Sydney B. Webb. The defendant, Western Union Telegraph Company, by this appeal seeks to reverse the judgment rendered upon the verdict.

Reference is made to the opinion in the former appeal for a statement of the case. Additional facts will be stated or referred to in this opinion.

It is strongly urged by counsel for appellant that the verdict is not warranted by the evidence. They insist that the company owed no duty to deliver the message outside of its free delivery limits at Pioneer, and that because the addressee of the telegram resided outside of those limits and made no inquiry for the message at Pioneer, the negligence of appellant in transmitting and delivering the message, if established, was not the proximate cause of the injury. It is true that this is the general rule, as announced in *King* v. *Western Union Telegraph Co.,* 89 Ark. 402, but a particular state of facts may make an exception to the rule. This is recognized in the case of *Arkansas & La. Ry. Co.* v. *Stroude,* 82 Ark. 17. In that case the court said: "It was a question for the jury, under the evidence, which we have fully set forth in the statement, as to whether or not appellant exercised ordinary care in delivering the message to appellee. The court properly instructed the jury that the fact that appellee lived beyond the limits of the town at the time the message was received by appellant at Nashville could not avail appellant as a defense, provided appellant by the exercise of ordinary diligence could have delivered the message to the sendee within its delivery limits, *i. e.,* the corporate limits of the town of Nashville."

The operator at Pioneer testified that he delivered the message in question to B. K. Webb, a cousin of Sidney B. and Jesse Webb, about the middle of the forenoon of December 5, 1908; but the jury might have found against appellant on this issue; for it was shown by the testimony of appellee that at about 12 o'clock noon of that day the message was at the relay station of Eudora, and had not yet been transmitted to Pioneer. The operator at Pioneer admitted that he received the message from Eudora, a relay station. Then at the funeral in the afternoon B. K. Webb was present, and there was general comment among those present about the nonarrival of appellee, and B. K. Webb

said nothing about having received the message in question. Appellee met his brother coming from the funeral, and after they all reached Floyd, just after dark, the message was delivered to them by one Redmond. From these facts and circumstances the jury might have found that the operator was mistaken when he said he delivered the message to B. K. Webb, about the middle of that forenoon. Now, it will be noted that rules prescribing limits for the delivery of telegrams free of extra charge are made by the telegraph company, and are made for its benefit. If it sees fit, it may waive this rule, or abrogate or change it in whole or in part. Powers, the operator of the company at Pioneer, said that it was a small place of about 500 inhabitants. Floyd was about five miles distant, and had no telegraph station. The testimony of appellee showed that Floyd was only three or four miles from Pioneer; and was off the railroad. We quote from Powers's testimony, as brought out by appellant, as follows: "Q. Under the rules and regulations of that office were you required to deliver messages to any one living in Floyd when they were sent to Pioneer? A. No, sir. Q. What was the custom with regard to that? A. It was the custom to hand them over to residents of Floyd that I usually saw or else to deliver them to Ross Brothers' store, at which point most of the residents of Floyd called when they were in Pioneer. Q. This was the request of the people of Floyd? A. Yes, sir."

Appellee says Powers was slightly acquainted with him. Jesse Webb testified that he had lived at Floyd all his life, and was well acquainted with Powers. He further stated that he was well known by both the old residents of Pioneer and Floyd. As above stated, appellee stated that the message was delivered at Floyd about dark after the burial, by one Redmond. The jury by its verdict found that appellant negligently delayed the message at its relay station, Eudora. It can not be said as a matter of law that, had this negligence not occurred, the addressee of the telegram would not have received it in time to have delayed the burial until the arrival of appellee because he did not send to Pioneer for the message. It was a question for the jury to say, under the facts and circumstances stated above, if appellant's operator at Pioneer had observed the usual custom in regard to messages received at Pioneer for residents of Floyd,

whether or not Jesse Webb would have received the message in time to have delayed the burial. That is to say, the jury might have found, under the evidence detailed above, that if the operator had made inquiry, had he received the message in the morning of the 5th inst., he would have found at Pioneer some resident of Floyd who would have carried the message to Jesse Webb at Floyd in time for him to have postponed the burial until the arrival of his brother. *Louisiana & N. W. Rd. Co.* v. *Reeves,* 95 Ark. 214. See also *Rosser* v. *Western Union Tel. Co.,* 130 N. C. 251; *Western Union Tel. Co.* v. *Robinson* (Tenn.), 34 L. R. A. 431; *Western Union Tel. Co.* v. *Cain* (Tex. Civ. App) 40 S. W. 624. It will be noted that, while the burial was not delayed until the train on which appellee would have come arrived, the train was several hours late, and Jesse Webb did not expect appellee because he had not received a message from him, as he expected to do. He testified that he waited for the message until just in time to bury their mother before dark. He said that her body was embalmed, and was buried in a metal casket; that he certainly would have waited for his brother before burying their mother, had he received the message in question.

2. Counsel for appellant next urge us to reverse the judgment on account of certain instructions given. We do not deem it necessary to set out the instructions. It is sufficient to say that the objections came squarely within the rule laid down in *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255, where the court held (quoting from syllabus): "The giving of an instruction to the effect that it is the duty of a railroad company to keep its station platform in safe condition for the use of passengers is not cause for reversal where no specific objection was taken to the court's failure to limit or explain the meaning of the term safe."

3. Counsel for appellant also ask that the judgment be reversed because of certain remarks made by counsel for appellee in his address to the jury. Upon objection being made to the remarks, the court withdrew them from the consideration of the jury, and we think his action in that regard cured any prejudice that might have resulted to appellant.

4. We now come to the question of the verdict being excessive. It is shown that great affection existed between appel-

lee and his mother, and it is certain that as soon as he learned of her death he made every effort to be present and assist in burying her. It was his privilege, if not his duty, to bestow this last tribute of love and respect. He was denied this right, as shown by the verdict, on account of the negligence of appellant. While it is impossible to tell how great his suffering was on that account, yet it was the duty of the jury to measure it in dollars and cents, and we can not under the evidence say that it was overestimated.

The judgment will be affirmed.

KIRBY, J., dissents.

MARTIN v. MARTIN.

Opinion delivered February 20, 1911.

1. DESCENT AND DISTRIBUTION—ANCESTRAL ESTATE AND NEW ACQUISITION DISTINGUISHED.—Under Kirby's Digest, § 2645, regulating the descent of land according to whether it is ancestral or a new acquisition, an ancestral estate comes with no other consideration than that of blood, whether by gift or devise from father or mother or from any relative in either line; and all other lands, however acquired, constitute a new acquisition. (Page 98.)
2. SAME—NEW ACQUISITION.—Where an heir surrendered her interest in her deceased father's estate upon consideration of her mother conveying to her an interest in such mother's land, this interest was not an ancestral estate, but a new acquisition. (Page 100.)
3. FAMILY SETTLEMENTS—ENFORCEMENT.—Family settlements are encouraged, and will not be disturbed unless strong reasons exist to warrant interference on the part of a court of equity. (Page 102.)

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

Ratcliffe, Fletcher & Ratcliffe, for appellants.

1. The land in controversy came chiefly, if not entirely, by gift from the mother to Mrs. Thompson, and, on the death of the latter and her child, went back to the former as a maternal ancestral estate. 15 Ark. 588; 19 Ark. 401; 52 Atl. 172.

2. Plaintiff is estopped to claim an interest in the property in controversy. The division of the property of both the estates

and the execution of the will was in pursuance of a plan of family settlement, which the parties have acquiesced in and acted upon. 15 Ark. 275; 64 Ark. 19; 91 Am. Dec. 761; 42 *Id.* 447; 84 Ark. 610; 8 Cyc. 504-5.

J. W. House and *J. W. House, Jr.,* for appellee.

From the testimony, there can be no question that the property came to Mrs. Thompson as a new acquisition, that is, by purchase, or was received by her in consideration of her interest in the Jared C. Martin estate, and upon the death of Mrs. Mary Martin it descended to the brothers and sisters of Mrs. Thompson. 15 Ark. 555; 31 Ark. 103; 70 Ark. 371. Even if the conveyance from the mother to Mrs. Thompson be considered as an advancement, it is still a new acquisition. 52 Ark. 55. In order to constitute a family settlement, the parties interested must all agree to it. If appellants thought the land in question would revert to Mrs. Mary Martin at the death of Thompson, this was a mistake of law that could add nothing to appellant's case. 1 Wend. (N. Y.) 355; 19 Am. Dec. 508; 12 Wis. 125.

FRAUENTHAL, J. This was an ejectment suit instituted by Mary D. Martin, the plaintiff below, for the recovery of her interest as a tenant in common of a tract of land situated in Pulaski County. The plaintiff is a sister of the defendants, and she alleged that she and they were the owners in common of the land, and that they totally denied her right as a cotenant therein. She asserted title to the land as follows: She alleged that her maternal grandfather, John Douglass, died intestate in January, 1861, seized and possessed of the land, and left surviving him Mrs. Mary Martin, the mother of plaintiff, who inherited the property as his sole heir. Thereafter in 1861 Mrs. Mary Martin, the mother of plaintiff, conveyed said land for a valuable consideration to her daughter, Elizabeth A. Thompson, who died intestate in 1868, leaving surviving her a husband and one child as her sole heir, who died a few weeks later without issue. Her husband, Lee L. Thompson, remained in possession of said land as tenant by the curtesy until his death in 1905; and Mrs. Mary Martin, the mother, died in 1877. It was alleged that the plaintiff and the defendants were the sister and brothers of said Elizabeth A. Thompson, and that the land descended to them as her only heirs.

The defendants, J. C. Martin and H. G. Martin, filed an answer in which they alleged that the conveyance executed by Mrs. Mary Martin to said Elizabeth A. Thompson for the land in controversy was not made for a valuable consideration, but was a gift by the mother to the daughter, and thereby it became an ancestral estate which, upon the death of the daughter Elizabeth A. Thompson, intestate, and of her child without issue, ascended to the mother, Mrs. Mary Martin, who had, by will duly probated, devised said land to them. They also alleged that there had been a family settlement made by the plaintiff and defendants and their other brothers and sisters whereby the property which had been owned by their deceased father and the property which had been owned by their mother was by mutual consent divided between said brothers and sisters, and that by virtue of said family settlement the defendants became the owners of and entitled to the land in controversy. The answer was also made a cross complaint, asking the affirmative relief of quieting the title to the land in controversy in defendants. Upon the motion of the defendants the case was transferred to the chancery court, and upon the trial thereof the chancellor made a finding in favor of the plaintiff, and rendered a decree in her favor for the recovery of an undivided portion of the land and the rents thereof.

The controlling questions involved in this case are: First, was the land when it was acquired by Elizabeth A. Thompson by deed from her mother, Mrs. Mary Martin, an ancestral estate or was it a new acquisition? If it was an ancestral estate, then upon the death of Elizabeth A. Thompson intestate and of her sole child without issue, the land, subject to the curtesy estate, ascended to her mother, and, she having by will devised it to the defendants, they became thereby the owners thereof. If, on the other hand, the land was acquired by Elizabeth A. Thompson as a new acquisition, then the land under our statute of descent and distribution went to her brothers and sisters, upon the death of the mother. Kirby's Digest, § 2645; *McFarlane* v. *Grober*, 70 Ark. 371.

Second. If the land was a new acquisition when acquired by Elizabeth A. Thompson, the question then to be determined is, was there a family settlement made whereby the defendants became the owners of and entitled to the land in controversy? In

order to come to a conclusion as to these matters, it is necessary to consider the history of this family and the mutual relations of its members.

Jared C. Martin, the father of the plaintiff and defendants, died on November 7, 1853, and left surviving him his widow, Mrs. Mary Martin, and seven children, in the order of their ages, as follows: James A. Martin, Elizabeth A. Thompson, William A. Martin, Emma Quindley, Mary D. Martin, who is the plaintiff, and the defendants, J. C. Martin and H. G. Martin. The father, Jared C. Martin, died intestate, leaving a large amount of personal property and two tracts of land: one known as the "Arkansas River" farm, containing 333 acres, and the other known as the "Fourche" place, containing 818 acres. He owed a considerable amount of debts. His widow and eldest son were appointed administrators of his estate, and in their settlement thereof accounted for the disposition of the personal property, leaving the lands unsold and the property of the estate. John Douglass, the father of Mrs. Mary Martin, who was the mother of plaintiff and defendants, died in January, 1861, intestate, leaving two farms which were inherited by Mrs. Mary Martin as his sole heir. One of these farms was known as the "home" place, and contained 315 acres, and the other is the land in controversy, containing now about 273 acres. It appears from the testimony that Mrs. Mary Martin, the mother, was a woman of fine ability and good judgment; and she evinced an equal interest in and affection for all her children. From the testimony of the parties to this suit and from the divisions of the properties that were from time to time made between her children it appears that Mrs. Mary Martin conceived the purpose of dividing the farms that were left by her husband and the farms that were left by her father equally between all her children, except James A. Martin, the eldest. It appears that provision and advancement had been made for this child by the father in his lifetime which was equal to the interest that would come to each of the other children by a division of these lands between them. This intention on the part of the mother to thus divide the lands of these two estates is proved, we think, by numerous acts done by her, by divisions of the lands made by her from time to time, and by the very dealings had between the children at her request, as well as by the

testimony of the plaintiff and defendants to this effect. The defendants alleged this in their pleading, and in their evidence stated that this was her desire. The plaintiff testified that she "knew that it was her mother's purpose to divide her property as well as father's (Jared C. Martin) property among all the children and make it as equitable as possible." In pursuance of that object, she in April, 1861, conveyed to Elizabeth A. Thompson the land in controversy. In the deed it is stated that the consideration for the conveyance was $10,000, and that it was paid; and in a settlement made in the probate court by her and her son as administrators of Jared C. Martin's estate, three days after the execution of said deed, a credit is taken for $10,000, in which it is stated that it was for "amount paid L. L. and E. A. Thompson in full of their share in the estate." It is urged by counsel for plaintiff that Elizabeth A. Thompson thus purchased the land from her mother and paid $10,000 therefor. It is not claimed that this sum was paid in money, but it is claimed that it was paid by her surrender of her interest in her father's estate. On the other hand, it is claimed by counsel for defendants that the estate of Jared C. Martin was scarcely more than solvent, in event the widow had taken her dower therein, and that the credit of $10,000 was taken in the settlement for the purpose of closing up the administration of the estate. They contend that the land was the sole property of Mrs. Mary Martin, and that the amount named in the deed was only nominal. They urge that Elizabeth A. Thompson paid nothing for the land, but that it was a gift to her from her mother. We have carefully examined the testimony; and from the facts and circumstances adduced in evidence we do not think that the contention of either party is correct. Upon the one hand, we do not think that the interest of Elizabeth A. Thompson in the estate of her father was worth $10,000, or that this sum was named in the deed as the true consideration thereof; but this amount was arbitrarily placed in the deed for the purpose of naming it as a credit in the account filed in the probate court by the administrators in order to close up the administration of the estate. As a matter of fact, the administrators were not legally entitled to this credit in their settlement for the reason that all probated claims had not been paid when it was taken or when the administration was closed. Upon the other

hand, we find that the estate of Jared C. Martin was solvent, and that the interest of Elizabeth A. Thompson therein was of considerable value. This interest in the estate of her father she surrendered and sold as a part of the consideration of the deed; and therefore the conveyance was not entirely a gift. We think that the evidence clearly shows that it was the intention of Mrs. Mary Martin at that time to have all the lands of her husband's and of her father's estate divided equally among all her children except the eldest, James A. Martin, and that she steadily adhered to that purpose in the disposition of the property then made and of the remainder which was from time to time subsequently made. To carry out that object, she took into consideration the values of the property coming from both her husband and her father, and conveyed to Elizabeth A. Thompson the land in controversy, in order that she might obtain her equitable portion of all the property of both estates. To effect that object, it was necessary for Elizabeth A. Thompson to surrender her interest in her father's estate, so that it could be divided between the remaining children. The land that came from her husband was not owned by Mrs. Mary Martin, but it was the property of the children, and Elizabeth A. Thompson therefore owned a valuable interest therein. That interest Elizabeth A. Thompson surrendered and sold as a part of the consideration for the conveyance made by her mother to her of the land in controversy; and the value of the interest in her father's estate which she thus sold and surrendered was substantial in comparison with the value of the land she obtained by this deed, and was therefore a substantial part of the consideration for that conveyance. Under these circumstances, did the title to the land come to Elizabeth A. Thompson by deed of gift from her mother or by purchase? In other words, if the land came partly by gift and partly by a valuable consideration that amounted to a consideration portion of the entire consideration, was it ancestral or a new acquisition?

In the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, the construction of our statute of descent and distribution, creating ancestral estates and those by new acquisition, has been definitely determined. In that case it is said: "Land is to be considered as having come from or by or on the part of the father or mother when it comes by gift, devise, or descent, either mediately or im-

mediately, from them or from any person in their respective lines;" that is an ancestral estate. In the same case it is said, relative to a new acquisition, that "it is an estate derived from any source other than descent, devise or gift from father or mother or any relative in the paternal or maternal line. If the son should purchase land from the father or mother for a valuable consideration, it would be a new acquisition, and descend as such." The purpose of the statute creating ancestral estates was to keep such estates in the line of the blood from whence they came, and blood must be the only consideration by which they are acquired, whether by devise or gift. If the estate is obtained by any means other than descent, gift or gratuitous devise, then it is a new acquisition; in order for the estate to be ancestral, it must come from the ancestor and without price; it must come with no consideration other than that of blood. In Walker's American Law (4 ed.) p. 409, it is said: "By ancestral property is meant that realty which came to the intestate from his ancestor in consideration of blood and without a pecuniary equivalent, and which must have come either by descent or devise from a now dead ancestor or by deed of actual gift from a living one. And by nonancestral property is meant all * * * that realty which came to the intestate in any other way, whether by purchase from the ancestor or from a stranger for an equivalent paid or by actual gift from a stranger—so that consideration of blood is out of the question, for this makes the sole distinction." In speaking of this phase of the question relating to ancestral estates and those by new acquisition, the Supreme Court of Ohio in the case of *Brown* v. *Whaley*, 58 Ohio St. 654, says: "How, then, shall it be solved when the considerations are thus mixed? The title came either by deed of gift or by purchase. It could not come by both; and, legally speaking, it could not come partly by deed of gift and partly by purchase. * * * * To make ancestral property—title by deed of gift—there must be no other consideration than that of blood." We conclude that, in order to constitute a gift from a parent to a child an ancestral estate within the meaning of our statute, the conveyance must be made entirely in consideration of blood and without any consideration deemed valuable in law; and if such deed is executed partly for a valuable consideration, the estate acquired is a new acquisition.

When land descends to tenants in common, who then divide same between them by mutual consent, a new estate is not thereby acquired by either of them. The coparceners continue after partition in the same privity of estate as before, because it does not make any alteration in the estate which came to them by descent. Such partition by deed will not make in the coparceners an estate by new acquisition. 5 Comyns's Digest, 240; *Conklin* v. *Brown,* 8 Abb. Pr. (N. S.) 345; *Carter* v. *Day,* 59 Ohio St. 96; *Harrison* v. *Ray,* 108 N. C. 215; *Finley* v. *Cathcart,* 149 Ind. 470. But in the case at bar there was no partition or division of lands coming from the same line of title. The lands surrendered and sold by Elizabeth A. Thompson were lands inherited by her from her father and actually owned by her. The lands coming from the mother by this deed were not in the same privity of estate as those inherited from her father. When, therefore, she paid her interest in these lands owned by her in consideration of the land conveyed to her by her mother, she obtained the land thus deeded to her, not by gift, but from a consideration deemed valuable in law. The land which Elizabeth A. Thompson thus acquired from her mother was therefore a new acquisition. But we think that the evidence clearly shows that, in making the conveyance of the land in controversy to Elizabeth A. Thompson in the manner she did, it was the purpose of Mrs. Mary Martin to effect an equitable division between her children of the lands coming from her husband and the lands which she inherited; and that this conveyance to her daughter, Elizabeth A. Thompson, was the first step taken by her looking towards that division. All of her children, including the plaintiff and defendants, understood that this was her purpose, and all of them, relying upon her good judgment, acquiesced therein, and from time to time not only agreed to divisions of the lands of the two estates as suggested by her, but made and accepted conveyances based thereon. In speaking of this intention of her mother to thus secure a division of all these lands between her children, the plaintiff testified: "I knew that was her purpose in deeding to Mrs. Thompson the tract now in controversy." In order to carry out that object, divisions of the lands were made from time to time between the children. In 1867 the "Arkansas River" farm, which came from the father, Jared C. Martin, was divided between three of the children:

William A. Martin, Emma Quindley and Mrs. Mary D. Martin, the plaintiff; that tract contained 333 acres, and each of these children obtained 111 acres thereof. In order to effect that object, a petition was filed in the probate court to obtain an order sanctioning such division. At that time J. C. and H. G. Martin were minors, and the petition was signed by Mary Martin, their mother, and James A. Martin, as their guardians, and also by William A. Martin, Emma Quindley and Mary D. Martin, the plaintiff. At the same time, and as a part of the same transaction of dividing said lands, Mary Martin, the mother, conveyed to J. C. and H. G. Martin the "home" place, which she inherited from her father, and in the above petition it is stated, in effect, that she made that conveyance in lieu of the interest of these two children in the "Arkansas River" farm which came from the father and which was to be divided between the other three children above named. Obtaining sanction from the court, deeds were executed to these three children for their respective parts of this farm which came from the father. To carry out this same purpose of the mother to divide these lands among the children, a division was made in 1874 of the "Fourche" farm, containing 808 acres, which came from the father. Prior to that time Emma Quindley had died, leaving an infant child named Emily, and a husband. It was then agreed to divide this "Fourche" farm between William A. Martin, Emily Quindley and Mary D. Martin, the plaintiff. Prior to that time Elizabeth A. Thompson had died, and her only child had also died without issue, and her husband was in possession of the land in controversy as tenant by the curtesy. At that time the only lands which had belonged to said two estates which then remained undivided were the "Fourche" place, which came from the father, Jared C. Martin, and the land in controversy which had been inherited by the mother, Mary Martin, from her father, and which she had deeded to her daughter Elizabeth A. Thompson. Upon a consideration of the facts and circumstances adduced in evidence in this case and the acts and conduct of the mother and all the children before and after that date, we think it clearly appears that the mother, Mary Martin, understood and believed that the land in controversy, having been given by her to her daughter, Mrs. Thompson, came back to her upon the death of her daughter without lineal

descendants subject to the estate by the curtesy of her husband; and we are also of the opinion that all the children also understood that this land in controversy reverted to the mother for the same reason.

On September 25, 1874, Mrs. Mary Martin, the mother and all the children, except the plaintiff, met at the residence of the defendant J. C. Martin, where the mother then lived, for the purpose of dividing these two remaining tracts of the land which came from these two estates. We think that, according to the clear preponderance of the evidence, J. J. Martin, the husband of the plaintiff, was present at this meeting, and there represented his wife as her agent. The plaintiff testified that in all the transactions that were had relative to these lands her husband represented her as her agent, and her husband was offered as a witness upon the hearing of this case by the plaintiff to testify relative to these transactions because he was her agent; and on that account he was permitted to and did testify fully relative to all these matters; otherwise he was incompetent to testify as a witness in a case in which his wife was a party. In furtherance of her purpose to make division of the said lands between the remaining children, except James A. Martin, the mother, believing that she was the owner of the reversion in the land in controversy, told the defendants, J. C. and H. G. Martin, to convey their interest in the "Fourche" place, (which came from the father) to William A. Martin, Emily Quindley and Mary D. Martin, the plaintiff, and in lieu thereof she would devise to them the land in controversy. We think that, according to the clear preponderance of the evidence, it was stated at said meeting that the mother would devise the land in controversy to defendants in lieu of their interest in the "Fourche" place, and that defendants would convey their interest in the "Fourche" place to said William A. Martin, Emily Quindley and Mary D. Martin, the plaintiff, who would then divide said place between them, and that the husband of plaintiff was present, and as her agent acted for her and acquiesced in this division of said lands. In pursuance of that agreement, defendants executed a deed to said parties for the "Fourche" place, and received no consideration therefor, other than the understanding that their mother would devise to them the land in controversy, and the said parties, including the

plaintiff, accepted the deed so executed by them. It is urged by plaintiff that the defendants had received their entire interest in all the lands of both estates when their mother executed to them the deed for the "home" place in 1867, and that when they executed the deed to the "Fourche" place in 1874 they had received consideration therefor in obtaining the "home" place. There is a conflict in the testimony of the witnesses on this question, but we think that the petition that was filed in the probate court in 1867 when defendants obtained the "home" place and the will that was subsequently executed by the mother, Mary Martin, clearly proves that the contention of plaintiff as to this question of fact is not correct. The petition was signed, not only by the mother, but also by the adult children, including the plaintiff, and therein it is stated in effect that Mary Martin, the mother, had deeded the "home" place to defendants in lieu of their interest in the "Arkansas River" place which came from the father, and which was then divided between said William A. Martin, Emma Quindley and Mary D. Martin, the plaintiff. But we are also greatly influenced in our conclusion as to this question of fact by the will which was executed by the mother. That will was written and executed by her on September 26, 1874, the day following the above meeting when the final division of the lands was made. That will is as follows:

"September 26, 1874.

"Last Will and Testament of Mary Martin.

"My Will: I want Mary D. Martin, my daughter, to have my clothing. I want Jared C. Martin and Henry G. Martin to have the piece of land I gave to my daughter, Elizabeth Allen Thompson, deceased. When you sell the place, I want you to pay James Allen Martin five dollars for his part. I want Mary D. Martin to have five dollars paid to her for her part, and Emily Quindley to have five dollars for her part. I want William's children to have the fourth of what the place is worth. I don't want any disturbance about the place. I have done all in my power for you all; may the Lord bless you all is my prayer; for Christ's sake, Amen.

"Mary Martin."

By this will she attempted to devise the land in controversy which she had deeded to her daughter, Elizabeth A. Thompson.

This shows clearly that she understood that this land reverted to her, and therefore thought that she had a right to dispose of it. By this will she in effect devised all this land in controversy to the defendants, thus sustaining the contention of the defendants that at the meeting of the children and the plaintiff's husband as her agent it was understood and agreed that, in order to make a division of the remaining lands of the two estates, the defendants would convey to the other three children their interest in the "Fourche" place and their mother would devise to them the land in controversy. This was clearly the intention of the mother, as shown by this will. The plaintiff testified that her mother was a woman of fine judgment, and wanted to treat all her children as nearly alike as she could. She was always open with all her children in all the transactions she had with reference to these lands, and seemed equally devoted to all of them. Whenever any division of the lands was had, all the children, or their representatives, were present, and we are convinced from the facts and circumstances of this case that the remaining children, amongst whom was the plaintiff, agreed to the division made of these two remaining tracts of the land of the two estates under which the above three children became entitled to and obtained the "Fourche" place and the defendants became entitled to the land in controversy.

This was in effect a family settlement of the interests of these members of the family in these two remaining tracts of land which came from these two estates of the family. Courts of equity have uniformly upheld and sustained family arrangements in reference to property where no fraud or imposition was practiced. The motive in such cases is to preserve the peace and harmony of families. The consideration of the transaction and the strict legal rights of the parties are not closely scrutinized in such settlements, but equity is anxious to encourage and enforce them. As is said in the case of *Pate* v. *Johnson,* 15 Ark. 275: "Amicable and family settlements are to be encouraged, and when fairly made * * * * * strong reasons must exist to warrant interference on the part of a court of equity." *Turner* v. *Davis,* 41 Ark. 270; *Mooney* v. *Rowland,* 64 Ark. 19; *LaCotts* v. *Quertermous,* 84 Ark. 610; *Smith* v. *Smith,* 36 Ga. 184; *Smith* v. *Tanner,* 32 S. C. 259; *Good Fellows* v. *Campbell,* 17 R. I. 402.

We think that the evidence clearly shows that the plaintiff, represented by her husband, and the defendants and those interested in the lands then undivided, and which came from these two estates, entered into an arrangement by which they settled their respective interests and rights in these lands. By this settlement the defendants were to obtain and be entitled to the land in controversy, and the three remaining children, among whom was the plaintiff, were to obtain and be entitled to the "Fourche" place. This arrangement was then carried out on the part of defendants by the execution of deeds by them to the other children for their interest in the "Fourche" place, which was accepted by them. The plaintiff, having accepted the benefits of that settlement, should perform its corresponding obligation. By that settlement the defendants obtained the land in controversy, and are entitled to have their title thereto quieted, as against the plaintiff.

The decree of the chancery court is reversed, and this cause is remanded with directions to dismiss the plaintiff's complaint and to quiet the title to the land in controversy in the defendants, J. C. Martin and H. G. Martin, as against any claim of plaintiff.

JENNINGS v. BOULDIN.

Opinion delivered February 13, 1911.

1. APPEAL AND ERROR—REVERSAL—SUBSEQUENT PROCEEDINGS.—Where, upon a former appeal, it was adjudged that the trial court erred in directing a verdict for defendant, without determining the sufficiency of a demurrer to the answer, that question is not concluded upon a new trial. (Page 108.)
2. JUDGMENT—NECESSITY OF NOTICE OF LIS PENDENS.—One who purchases land from one in possession thereof without notice, either actual or constructive, of the pendency of an action against the seller to recover such land is not concluded by a judgment rendered therein against such seller. (Page 108.)

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

STATEMENT BY THE COURT.

This is the second appeal. The case is reported in 92 Ark. 299 *(Bouldin* v. *Jennings)*. It is an action of ejectment in which

appellees seek to recover the possession of certain land from appellants. The complaint and exhibits and parts of the answer are set out in the former opinion.

The appellees claim the land as the widow and children of James Tillman, who, they alleged, died seized and possessed of the land, and while occupying same as his homestead. The appellant claimed the land by virtue of a sale made by order of the probate court. The appellees here, who were appellants before, claimed on the former appeal that the order of the probate court directing a sale of the land was void because of imperfect description. We so held, saying: "The sale made described no land, the description in it not being sufficient to designate any." We further held that the attempt by the probate court to correct the description after the land had been sold under the insufficient description was void, saying: "The order amending the latter [the report of the administrator making the sale] was a new order, and was of no effect." The former opinion concluded as follows: "The court erred in directing the jury to return a verdict in favor of the defendant when the pleadings showed that he had no title to the land in controversy, but on the contrary it belonged to the plaintiff, and there was no evidence to the contrary." The cause was then reversed and remanded for new trial. On the second trial, C. A. Rankin was made a party, and he was permitted to answer and set up "that he purchased the lands sued for from W. S. Jennings as shown by copy of deeds hereto exhibited as exhibits, and after the judgment of the circuit court had been entered awarding the same to W. S. Jennings, and that he paid therefor the sum of ——— dollars; that his codefendant was in actual, open, adverse possession of the same, claiming to have an indefeasible title thereto. That no *lis pendens* or other notice as required by law had been filed with the clerk as required by law, and that he dealt with said Jennings without notice and as an innocent purchaser, and that, as between him and the plaintiffs, the proceedings had in this suit prior to the time he was served with notice of the pendency of said suit should not in any way affect his rights hereunder. He further answered, adopting substantially the answer of Jennings, and in addition denied that plaintiffs were the heirs of James Tillman, and that Tillman was the owner of the land, and denied that

the boundaries of the tract were laid with sufficient certainty to be located by a surveyor. The answer of Jennings, after setting out the proceedings in the probate court by which the lands were alleged to have been sold and claiming under that sale, then set up the five years statute of limitations for judicial sales and the seven years statute of limitations. He further set up "that these plaintiffs, after being fully advised of all the facts and circumstances in and about the sale, filed a suit in the circuit court of Lawrence County for its eastern district against B. A. Morris for the purchase money paid for the land sued for in this case, and defendant pleads such acts as an estoppel against plaintiffs in this suit."

A demurrer was interposed to these answers, general and special, which the court sustained, and appellants have duly prosecuted this appeal from final judgment entered in favor of appellees.

W. A. Cunningham, for appellant.

1. The answers both of Jennings and of Bouldin presented an issue for a jury in the denial that the land was the homestead of James Tillman in his lifetime. A jury issue was also raised by Rankin's answer, denying that plaintiffs are the heirs of Tillman and denying that he owned the land.

2. The five years statute runs in favor of the purchaser at a void judicial sale, when the sale is confirmed, and the court had jurisdiction over the parties. 76 Ark. 150.

3. When the plaintiffs began and prosecuted to final determination a suit against the administrator of Tillman's estate for the proceeds of sale of this land, they thereby elected to treat the sale as valid, and are estopped to claim that it was invalid. 65 Ark. 382; 64 Ark. 215; 84 Ark. 614; 1 Herman on Estoppel, 535.

4. Rankin's answer also raises the issue that he was an innocent purchaser for value while the judgment of the circuit court was standing and before an appeal was perfected, and that no *lis pendens* had been filed by the plaintiffs. Kirby's Dig. § 5149; Bennett on Lis Pendens, 372.

W. E. Beloate, for appellees.

1. The judgment of this court holding that the Tillman

heirs owned the land was not subject to review by the lower court. This was the only question in issue on the former appeal. 52 Ark. 473; 56 Ark. 170; 60 Ark. 50; 63 Ark. 141; 79 Ark. 185; 83 Ark. 545; 92 Ark. 557; 91 Ark. 397; 73 Ark. 513.

2. Rankin's answer does not claim that he was a purchaser without notice, either actual or constructive, nor that he paid the purchase money before he had knowledge. He cannot acquire title under the plea of *lis pendens*. 92 Ark. 185.

3. Jennings was neither misled nor injured by anything said or done by the Tillmans, as he purchased before they ever made any move; nor has Rankin claimed that he was misled by them. They must show these facts before they can invoke the doctrine of estoppel. 89 Ark. 349.

4. Confirmation does not cure jurisdictional defects. 74 Ark. 82. The five years statute could not apply.

WOOD, J., (after stating the facts). On the former appeal the only question decided by this court was that the order of the probate court directing a sale of the lands and the sale thereunder were void for want of sufficient description to designate any land. The petition for the sale containing such imperfect description gave the court no jurisdiction of the subject-matter, and the consequent order of sale and sale were void, and the new order attempting to correct the description was likewise void. The question was decided upon the undenied allegations of the complaint, as explained by the exhibits thereto. This court did not pass upon the sufficiency of the demurrer to the answer. It did not get to that. Although there was a demurrer to the answer on the first trial, which was overruled, and although the plaintiffs stood on their demurrer, and appealed from the judgment on a verdict directed in favor of the defendant, still when the cause reached us we only decided, as we have stated, that the probate court was without jurisdiction to confirm a sale of lands that was void by reason of an insufficient description of the land alleged to have been sold. We did not pass upon the demurrer to the answer then, and that is not *res judicata* now.

Moreover, the answer of Rankin presents the new issue of innocent purchaser from Jennings after the circuit court had rendered a judgment in his favor for the land in controversy. He alleged that no *lis pendens* or other notice had been filed

with the clerk as required by law, and that he dealt with said Jennings without notice and as an innocent purchaser. The allegations of the answer of Rankin that appellees had failed to comply with the *lis pendens* statute (section 5149, Kirby's Digest) and that he purchased the land from Jennings without notice state a defense, but state it imperfectly. The answer should have alleged that he purchased without notice, either actual or constructive, and that he paid the purchase money, setting up the facts, before getting any actual notice or any notice by a compliance on the part of appellees with the requirement of the statute *supra* as to notice of the *lis pendens.* One who purchases, having actual notice of the pendency of the suit, can not avail himself of the failure to give the *lis pendens* notice required by the statute. But the defects in the answer could and should have been reached by motion to make more specific and not by demurrer, for the answer did set up a defense, but one defectively stated. Jennings was in possession, and he could transfer that possession with what rights he had thereby in the land, if, any, to Rankin. *Wilson* v. *Rogers,* 97 Ark. 369. Whether he did so for value and without notice, actual or constructive, to Rankin of appellees' rights in the pending suit were questions of fact which were raised by the answer, and which should have been submitted to the jury. The denial also that the land claimed was the homestead of James Tillman in his lifetime presented an issue that should have gone to the jury.

The answer presented no defense on the five and seven years statutes of limitations as applicable to appellant Jennings. He purchased at a sale where the court did not have jurisdiction of the subject-matter by reason of the imperfect description of the land he claimed to have purchased. The confirmation for that reason was void, there being in fact no sale and no confirmation. This is not in conflict with *Nelson* v. *Cowling,* 77 Ark. 146, for in that case the court had jurisdiction of the parties and subject-matter—the portion of lands—but went beyond its jurisdictional limits in ordering part of the land sold for costs. The answer on its face shows its death wound, so far as the seven years statute of limitations is concerned as to Jennings. For the "defendant admits that at the January term of the court, 1901, the sale of the land under which he held possession was approved

and confirmed in January, 1901," and this suit was instituted in October, 1906. Seven years had not intervened between these dates.

For the error of the court in sustaining the demurrer in the particulars mentioned the judgment is reversed with directions, in these respects, to overrule the demurrer as to Rankin.

ROBINSON v. CROSS.

Opinion delivered February 13, 1911.

1. LEVEES—SALE FOR TAXES—PRESUMPTION.—One who purchases land under a sale pursuant to a decree enforcing a lien for levee taxes acquires at least a *prima facie* title which is good against all the world until overcome by one showing a better title. (Page 112.)
2. SAME—ESTOPPEL TO CLAIM LAND SOLD FOR TAXES.—Where a levee district owned a certain tract of land if the title was not in one B, and the district elected to treat the title as in B by suing him for levee taxes, the levee district will thereafter be estopped to claim the land as belonging to it. (Page 112.)

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

STATEMENT BY THE COURT.

This is an action by Ida Cross against defendants Robinson and Johnson to recover the northeast quarter of southeast quarter, section 2, township 15 north, range 12 east. It was an action of ejectment originally commenced in the circuit court, and then transferred to the chancery court upon motion of defendants to have their alleged title quieted.

The appellee deraigns title from the Government to the St. Francis Levee District. Then, in a suit by the Levee District against Charles Bowen, the land in controversy, with two other forties, was sold for taxes; George Cross was the purchaser, and by partition decree among his heirs the land in suit was allotted to appellee. She also set up title by adverse possession.

Appellants deny that appellee acquired any title by adverse possession. They stand on their possession, having no title themselves, and challenge appellee to show title. The documentary

and record evidence tended to prove the allegations of the complaint as to appellee's title.

The court rendered a decree quieting the title in appellee and directing the ouster of appellants if possession was not given to appellee within thirty days from the date of the decree. Appellants were granted an appeal by the clerk of this court, which they are duly prosecuting.

J. T. Coston, for appellants.

1. While it is true that possession of part of a tract of land, under color of title, is construed as possession of the whole tract, yet that doctrine does not extend to possession of a contiguous tract owned by some one else. 96 S. W. 756; 37 Am. Dec. 192; 147 Fed. 385; 84 S. W. 706.

2. To constitute adverse possession, the possession must be actual, open, visible, continuous, hostile, exclusive and adverse by the intent of the party holding, and the absence of either of these elements deprives the possession of its adverse character. 43 Ark. 486; 49 Ark. 274.

W. J. Lamb, for appellee.

Appellee's concession that "the land involved in this case forfeited to the State for nonpayment of taxes for the year 1870, which forfeiture was confirmed in the levee board in 1894 by decree of the chancery court," is an admission that the Levee District owned this land in 1894. Since title was originally in the Levee District, that title passed, by virtue of the decree of the chancery court and commissioner's sale thereunder, to Cross. Being a party to the suit, the Levee District's interest passed under the decree. 34 Ark. 291; 57 Ark. 97; *Id.* 227; 50 Ark. 551. It being conceded that the Levee District originally owned all three of the "forties" involved, possession of any part of the 120 acres was possession of the whole of it.

WOOD, J., (after stating the facts). The appellants admit that the Levee District obtained title to the land in controversy through tax forfeiture and decree of the chancery court in 1894. The appellants admit also that a decree was rendered in 1896 against Charles Bowen purporting to condemn the land in controversy to be sold for levee taxes. These admissions put appellants out of court. For it is alleged and not denied that appellee

obtained the title she here asserts through one who purchased at the sale under the decree of 1896.

A *bona fide* purchaser at the sale under that decree certainly procured at least a *prima facie* title, and one good against all the world until overcome by some one who could show a better title. It was such a title as would enable her to maintain a suit for possession as against one who had no title as affirmatively shown by his exhibits. The record shows that the Levee District by decree of chancery court in 1894 obtained title to the land under forfeiture of same for the taxes of 1870. Whether the Levee District after 1894 sold the land to Charles Bowen the record nowhere discloses. But the presumption is that it did, for the Levee District, as we have stated, proceeded against him to collect delinquent taxes, and had the land in controversy condemned and sold for the payment of these taxes. The Levee District thus treated the land as the land of Charles Bowen in 1896. The court in the decree found "that the land belonged to Charles Bowen." The decree was regular on its face. The court had jurisdiction to decree a sale of the lands of Charles Bowen for delinquent taxes. The Levee District could proceed by adversary suit against the owner to collect the taxes, and could have the taxes declared a lien on the land, and have same sold to satisfy such lien. See Acts of 1893, pp. 24, 31, 32, § § 11, 12, 13, amended by Acts of 1905, p. 88.

That was the proceeding, as appears from the undenied allegations of the complaint. The decree of the chancery court was not appealed from and has not been set aside by any direct proceeding. It cannot be impeached in the collateral way attempted by appellants.

Learned counsel contend that the decree of the chancery court in 1896 condemning the land to be sold as the lands of Charles Bowen for alleged delinquent taxes was but in effect an illegal and unauthorized sale of the land of the Levee District by the Levee Board. If learned counsel were correct, still appellee's title would be good except as against the Levee District or some one deraigning title through it. The Levee District is not complaining, even if it could do so, and appellants do not claim any title from it. While it is true that a sale in a personal action binds only the parties thereto and their privies (*Wilson* v. *Gay-*

lord, 77 Ark. 477-79), yet in this case the Levee District had the title if it was not in Bowen, and the Levee District elected to treat it as in Bowen, and that gives appellee the *prima facie* title, as we have shown, through the decree. But there is nothing in the record to warrant the above contention of counsel. The record shows that it was a proceeding to collect taxes on the lands of another, and not a sale of the land of the Levee District.

The decree is correct. Affirm.

MOORE *v.* BOARD OF DIRECTORS OF LONG PRAIRIE LEVEE DISTRICT.

Opinion delivered February 27, 1911.

1. LEVEES—LEGISLATIVE ASSESSMENT.—A legislative authorization of assessments for local improvements, such as a levee, based on the valuation of the property, will be upheld as a legislative determination that the benefits will accrue in proportion to such valuation. (Page 116.)
2. SAME—POWERS OF LEGISLATURE.—In the exercise of its powers, the Legislature may act directly in determining the area to be benefited by a proposed local improvement and the rate of apportionment and in levying the assessments, fixing the amounts and determining the benefits to accrue from the improvement; and the exercise of such power by the Legislature is subject to review by the courts only where there is an arbitrary and manifest abuse of power by the Legislature, and not where there is merely a mistake of judgment. (Page 117.)
3. SAME—LEGISLATIVE ASSESSMENT—VALIDITY.—A complaint seeking to enjoin a local assessment fixed by the Legislature which alleges in general terms that the assessment is "arbitrary, excessive and confiscatory," without alleging facts which show that the decision of the lawmakers was not merely erroneous, but was so manifestly outside the range of the facts as to amount to an arbitrary abuse of power, is insufficient. (Page 117.)

Appeal from Lafayette Chancery Court; *J. M. Barker,* Chancellor; affirmed.

Henry Moore, Jr., for appellants.

1. This court has power to review the constitutionality of an act of the General Assembly fixing the rate of tax to be collected by a levee district.

The General Assembly has no power to authorize an assessment of 10 per cent. per annum for levee purposes, irrespective of the benefits the lands assessed receive from the erection of the levee. Art. 2, § 8, Const. 1874; 14th Amendment, U. S. Const.; 172 U. S. 269; Gray, Limitation of Taxing Power and Public Indebtedness, 1017; Hamilton, Law of Special Assessments, § § 58, 61, 182, 234-239, 464, 477; 96 Ga. 381; 42 Neb. 120; 61 O. St. 15; 63 N. J. L. 202; 23 L. R. A. 427; 45 L. R. A. 291. Assessments can be levied only upon lands peculiarly benefited by reason of such assessments, and only to the extent of the benefits so conferred. 3 L. R. A. (N. S.) 820; 61 L. R. A. 436; 55 L. R. A. 817; Cooley on Taxation, (2 ed.) 606; 53 Mo. 33; 176 Mass. 247; 173 Mass. 350.

While the General Assembly has, within legislative limits, a discretion in providing a mode of assessment ascertaining the benefits, yet, even in the absence of express constitutional restriction, its power is not unlimited, and an assessment for a local improvement upon property not benefited would amount to a taking without due process of law. 2 Dillon, Mun. Corp. (4 ed.) § 809; 67 L. R. A. 408; 13 Ark. 198; 15 Ark. 49. See also 32 Ark. 31; 48 Ark. 382; 59 Ark. 536; 69 Ark. 77. The Coffman case, 83 Ark. 54, is conclusive on the question at issue here. See also 85 Ark. 19-23.

2. The fact that some benefit has been derived from the building of the levee does not take from the landowners the right to contest the validity of assessments in excess of such benefit.

Under the holding in the Coffman case, *supra,* if the complaint in this case had alleged that no benefits had been received from the building of the levee, a good cause of action would have been stated. It cannot reasonably be held that, though the assessment would be invalid if no benefit whatever had resulted from the building of the levee, yet, since the owner has received some benefit, the Legislature in its discretion may charge the owner any sum it may see fit for such benefit, and thus confiscate the land. 181 U. S. 394, dissenting opinion of Harlan, J.; 154 Ind. 467, 49 L. R. A. 797; 82 Ill. 557; 168 Ill. 221; 48 N. E. 155; 11 La. Ann. 338; 67 Neb. 426; 93 N. W. 734; 37 N. J. L. 415; 18

Am. Rep. 729; 65 Pa. St. 146; 3 Am. Rep. 615; 109 Fed. 34; 172 U. S. 269; 91 Ark. 358.

Searcy & Parks, for appellee.

1. The demurrer was properly sustained. That the Legislature has the power to establish a levee district, to determine what lands will be benefited and the extent of the benefits, and to fix the amount of the tax against the property, is no longer an open question in this State. 59 Ark. 528; 72 Ark. 119; 125 U. S. 345; 81 Ark. 562; 83 Ark. 54. On this question our court is in accord with the great weight of authority. See 182 U. S. 398; 181 U. S. 394; 97 U. S. 687; 140 Ala. 637; 76 Pac. 661; 80 Pac. 142; 115 Ia. 568; 89 N. W. 7; 78 Miss. 243; 28 So. 878; 47 Conn. 89; 37 Atl. 158; 96 Ga. 670; 23 S. E. 900; 46 N. E. 124; 59 L. R. A. 728.

2. Taking the legislative determination defining the levee district and assessing the lands benefited at 10 per cent. as conclusive, the complaint does not present a case of such arbitrary exercise of power as to work manifest injustice and come within the exception laid down in the case of *Coffman* v. *Drainage District,* 83 Ark. 54. 181 U. S. 371; 72 Ark. 478; 38 Ark. 519; 43 Ark. 315.

McCULLOCH, C. J. The General Assembly of 1905 passed an act creating the Long Prairie Levee District and authorizing the levy of annual assessments not exceeding four per cent. of the valuation of lands, tramroads and railroad tracks as assessed for State and county taxation, for the purpose of building, maintaining and repairing a levee for the protection of the lands, etc., in the district. Acts 1905, p. 267. The General Assembly of 1909 amended the act so as to authorize the levy of assessments not to exceed ten per cent. of the valuation of lands, etc. Acts 1909, p. 1001.

Appellants, Moore and others, who were landowners in the district, instituted this action in the chancery court of Lafayette County to restrain the collection by the board of directors of an assessment of ten per cent. on the valuation of the lands. They offer to pay an assessment of four per cent. on the valuation, and allege that any assessment in excess of that percentage is excessive. After setting forth the aforesaid acts of the Legislature concerning the authority of the board to levy assessments, the complaint contains the following paragraph:

"That said tax, over and above the sum of four per cent. on the assessed valuation of said lands, is arbitrary, excessive and confiscatory, and therefore is illegal, unconstitutional and void, and would amount to the taking of private property for public use without just compensation and be a confiscation of the lands of these plaintiffs, in contravention of the rights guarantied said plaintiffs under the Constitution of the State of Arkansas and the Constitution of the United States."

The court sustained a demurrer to the complaint.

This court has held in numerous recent cases that the Legislature may authorize assessments for local improvements based on the valuation of the property to be taxed, and that the courts will uphold them on the ground that it is a legislative determination that the benefits will accrue in proportion to such valuation, that being a method of assessing the benefits. *Kirst* v. *Improvement District,* 86 Ark. 1; *Alexander* v. *Board of Directors of Crawford County Levee District,* 97 Ark. 322.

This court has also held that in the exercise of its powers the Legislature may act directly, determining the area to be benefited and the rate of apportionment, or may levy the assessments directly, fixing the amounts and determining the benefits to accrue, and that the determination of the Legislature in these matters will be respected by the courts. *Sudberry* v. *Graves,* 83 Ark. 344; *St. Louis S. W. Ry. Co.* v. *Red River Levee Dist.,* 81 Ark. 562; *Coffman* v. *St. Francis Drainage Dist.,* 83 Ark. 54; *Alexander* v. *Board of Directors, supra.*

We have said in some cases that the legislative determination is not entirely beyond judicial review, where there is an attempt arbitrarily to levy assessments on property regardless of benefit, or where it is shown that no benefit can possibly accrue from the improvement to the property sought to be taxed. *St. Louis S. W. Ry. Co.* v. *Red River Levee Dist., supra; Coffman* v. *Levee Dist., supra.* It is on these decisions that appellants mainly rely in their attack on the present assessment.

In the Coffman case the complaint alleged that the lands in question, instead of receiving any benefits from the improvement, would be greatly injured, the facts showing the injury being specifically set forth; and Chief Justice HILL, speaking for the court, said: "Therefore the only question is whether the allega-

tions of this complaint show that the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of plaintiff's property without any benefit whatsoever. * * * There being a specific denial of benefit, the court is constrained to believe that it is safer and more consonant to the justice of the case to overrule the demurrer and let a hearing be had as to whether there has been an abuse of the legislative discretion in charging these plaintiffs with the expense of a public improvement which would not benefit them, but injure them, thereby amounting to a confiscation of their property." In the opinion on rehearing he added: "The sole judicial question is whether this power operates so arbitrarily against plaintiffs as to amount to a confiscation of their property, to assess and tax their lands for an improvement which does not benefit them, but which injures them."

It will be seen from this that the court held that only an arbitrary and manifest abuse of power by the Legislature would be reviewed, and not merely mistakes of judgment. To hold otherwise would be to take away from the lawmakers the powers committed to them and to substitute the judgment of the courts, requiring the latter to review every matter alleged to have been erroneously determined by the Legislature. It is only an arbitrary determination of the lawmakers, made without just and reasonable basis, that the courts should review. We said in *Louisiana & Ark. Ry. Co.* v. *State,* 85 Ark. 12: "The legislative determination should be and is conclusive, unless it is arbitrary and without any foundation in justice and reason."

Nor can the courts review merely on general allegations that the assessments are "arbitrary, excessive and confiscatory." Facts must be pleaded which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts.

We are of the opinion that the complaint does not set forth facts which show an arbitrary abuse of power so as to authorize a judicial review. The demurrer was properly sustained.

Affirmed.

McGUIRE v. COOK.

Opinion delivered March 6, 1911.

1. DOWER—SEISIN AT COMMON LAW.—In order to constitute seisin in the husband, which is essential to support dower at common law, it was necessary that there should have been an actual corporeal seisin or the immediate right to such seisin during coverture. (Page 121.)
2. DOWER UNDER THE STATUTE—NECESSITY OF SEISIN.—Under Kirby's Digest, § 2709, providing that "if a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband shall die seized," it is necessary that there should be an actual corporeal seisin in the husband during coverture to entitle the widow to such dower. Thus a widow is not entitled to dower in realty wherein her husband had only an estate in remainder or reversion unless the particular estate terminated during the coverture. (Page 122.)
3. MERGER—DISTINCT ESTATES.—The merger of two distinct estates will not occur if one is acquired by purchase and the other by right of the purchaser's wife since they are held in different rights. (Page 123.)
4. DOWER—SEISIN OF HUSBAND.—Where a husband died intestate and dower was assigned to his widow in certain lands, and subsequently upon her remarriage her second husband purchased the reversion in the dower lands, and died before the wife, the second husband never had seisin of the lands, such as would support the wife's claim of further dower as his widow. (Page 124.)

Appeal from Independence Chancery Court; *George T. Humphries,* Chancellor; affirmed.

Sam M. Casey, J. W. & J. M. Stayton, and *Morris M. Cohn,* for appellant.

Mrs. Ewing was entitled to an undivided half of all the real estate of her husband, and this included the land in controversy. Kirby's Dig. § 2709; 11 Ark. 212; 1 Pet. 585; 9 Cow. 73; 138 Cal. 69; 137 Cal. 354; 33 Ark. 436; 14 Ark. 489; 63 Ark. 625. The word "seizin" means ownership. 105 N. Y. 585; 16 Wall. 352; 12 R. I. 560; 15 R. I. 428. Dr. Ewing acquired the land by his marriage. 38 Ark. 91; 39 Ark. 434; 88 N. C. 312. And no one but Mrs. Ewing could complain. 33 Md. 85; 7 H. & N. 507. The claim is not barred by limitation. 30 Ark. 640; 45 Ark. 81; 48 Ark. 277; 65 Ark. 422.

McCaleb & Reeder and *Moore, Smith & Moore,* for appellee.

Dr. Ewing was not seized of the land in controversy. 46 N. E. 391; 34 N. E. 254; 22 N. E. 438. And Mrs. Ewing was

not entitled to dower. 64 N. E. 267; 55 N. E. 324; 23 S. W. 511; 23 S. W. 507; 66 S. W. 1043; 43 S. W. 655; 2 Atl. 884; 32 Am. D. 633. There was no merger. 4 Rich. Eq. 80; 29 Ga. 374; 74 Am. D. 68; 33 Am. D. 201; 7 Allen, 196; 83 Am. D. 676; 29 Pa. 260; 72 Am. D. 629; 53 Ark. 403; 22 Ark. 19; 44 Ark. 270; 59 Ark. 333. Rules of law affecting property rights should not be changed unless by the Legislature. 29 Ark. 660; 30 Ark. 414; 52 Ark. 341; 49 Ark. 411; 55 Ark. 192; 43 Ark. 513; 50 Ark. 333; 61 Ark. 42.

FRAUENTHAL, J. This was an action instituted by Laura C. Ewing, the original plaintiff below, to establish and quiet her title in fee simple to an undivided one-half of a block of land situated in the city of Batesville. She claimed title thereto as the widow of David C. Ewing, who had obtained title to a reversionary interest in the land as a new acquisition, and who had died without issue and without creditors. She died during the pendency of the suit, and the cause was revived in the names of her heirs. The defendant claimed title to the land by purchase from the collateral heirs of David C. Ewing. He alleged that David C. Ewing had obtained and only owned at the date of his death a reversionary interest in said land, and that he had never been seized thereof, and for that reason his widow was not entitled to an undivided one-half thereof in fee. The pleadings and testimony present the following facts: The land in controversy was originally owned by Thomas Cox, a former husband of Laura C. Ewing, who died intestate in 1871 the owner of the above and other lands. The land in controversy was duly set apart to his said widow as her dower interest in his lands by an order of court duly approved in 1875. On July 2, 1874, Laura C., the widow of Thomas Cox, married D. C. Ewing, and she and her said second husband lived upon and occupied said land as their joint homestead until his death on July 2, 1898; and she continued to occupy and reside on same until her death in 1909. It appears that letters of administration were taken out upon the estate of said Thomas Cox, and that soon after the land involved in this suit had been assigned and set apart to his widow as dower the reversionary interest therein was sold by the administrator of said estate in order to pay its debts. At such sale D. C. Ewing became the purchaser thereof; and upon confirmation of said

sale he obtained proper deed therefor. Under and by virtue of said sale the said administrator of Thomas Cox conveyed to D. C. Ewing "the reversionary interest" in said land. D. C. Ewing died intestate and without direct heirs, but leaving collateral heirs who in 1905 sold and conveyed said land to the defendant.

The question involved in this case is what interest accrued to Mrs. Laura C. Ewing in the above named land upon the death of her husband who had newly acquired in his life and at his death owned a reversionary interest therein. By section 2709 of Kirby's Digest it is provided:

"If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband shall die seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate absolutely and in her own right, as against collateral heirs, but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition, and not ancestral, and of one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate, she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors. Act March 24, 1891."

The title which the appellants, who were the plaintiffs below, claim that Mrs. Ewing had to the land is based upon rights thereto obtained by her as the widow of D. C. Ewing. The interest which the widow possesses in the lands of her deceased husband is known as dower. If he leaves children or creditors, then the widow "shall be endowed of a third part of all lands whereof her husband was seized of an estate of inheritance at any time during marriage." Kirby's Digest, § 2687. But if he leaves no children and no creditors, then the widow "shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition." Kirby's Digest, § 2709.

Provision is made for her by these statutes in the way of dower in the lands or real estate of her deceased husband under the contingencies of his leaving or not leaving children and creditors; under both contingencies she "shall be endowed" of the land or real estate, and those requisites that are necessary to

consummate a widow's right of dower are made applicable to the estate she obtains by these two provisions of the statutes in either contingency. In each case there must be a valid marriage, seisin of the husband and his death. In the one case he must be seized of an estate of inheritance during coverture; in the other contingency he must die seized of the real estate. The extent of her interest or estate in her deceased husband's land is only made different by virtue of these two provisions of the statute, but under each provision she obtains only an estate to the consummation of which the incidents that are requisite to constitute dower are necessary.

By this enactment we do not think the Legislature intended to create in the widow an estate in her deceased husband's lands different in any essential from the estate of dower known at the common law, except as therein expressly provided. At common law it was essential that the husband should have been seized in possession during coverture in order to entitle his widow to dower in his land. The seisin of her husband was an indispensable prerequisite to entitle the widow to such dower, and an outstanding freehold estate in another before marriage destroyed her claim. Mr. Washburn says: "The husband must have been seized of the premises at some time during coverture" (1 Washburn on Real Property, (6 ed.), § 390); and further he says that if the husband has only a reversion or remainder after a freehold estate in another, though it be a fee, it will not give to his wife a right of dower therein unless by the death of the intermediate freeholder or the surrender of his estate to the husband. 1 Washburn on Real Property, § 183. In order to constitute seisin, it was necessary that there should be an actual corporeal seisin or the right to make such immediate seisin in the husband during coverture to entitle the widow to dower. *Gentry* v. *Woodson,* 10 Mo. 224. Where there is a life tenant, and the husband has only a remainder or reversion in the land, the seisin is in the life tenant; and therefore dower does not attach to realty in which the husband has only an interest in remainder or reversion, unless the particular estate terminates during the coverture. 14 Cyc. 906; 10 Am. & Eng. Ency. Law 134; ***Eldredge* v.** *Forrestal,* 7 Mass. 253; *Baker* v. *Baker,* 46 N. E. 391; *Watson* v. *Watson,* 22 N. E. 438; *Young* v. *Morehead,* 23 S. W. 511; *Carter* v.

McDaniel, 23 S. W. 507; *Payne* v. *Payne* (Mo.) 24 S. W. 782.

The same character of seisin that was required by the common law in the husband is required by our statute in order to entitle the widow to dower. In *Tate* v. *Joy*, 31 Ark. 576, this court said: "Seisin is either in deed or in law; seisin in deed is actual possession; seisin in law, the right to immediate possession. Unless such seisin existed during coverture, there can be no dower because it is an indispensable requisite to her right to dower, so declared by statute."

It is urged that the provisions of section 2709 of Kirby's Digest upon which the claim of the widow to the land herein is based differ materially from the provisions applicable to common law dower and to the dower created by section 2687 of Kirby's Digest. It is conceded that under the provisions of section 2687 of Kirby's Digest seisin of the husband during coverture is necessary to entitle his widow to dower.

It is claimed that under the provisions of that section the widow is entitled to dower only in "lands whereof the husband was seized of an estate of inheritance at any time during marriage;" and the dower thus given is an estate only for life and of one-third; while under the provisions of section 2709 the widow is given one-half of his "real estate." It is contended that the term "real estate," as thus used in the latter section, is more comprehensive than the expression "lands whereof the husband was seized of an estate of inheritance," and includes every interest in land which the husband owned at the time of his death, and that it was the intention of the Legislature by this latter enactment not to create the technical common-law estate of dower, but to provide for the devolution and division of the entire real property owned by the decedent at the time of his death. And to sustain this contention we are cited to the cases of *Cate's Appeal*, 79 Pa. St. 235, and *Green* v. *Huntington*, 73 Conn. 106, construing respectively statutes of Pennsylvania and Connecticut which it is claimed contain provisions similar to section 2709 of Kirby's Digest. But we think the statutes of those States are quite dissimilar from our statute on this question. Those statutes either provide that the widow shall take a certain proportion of the deceased husband's land, without any qualification, or of such land of which the husband died possessed in his

own right. The statute in this State, on the other hand, provides that the widow "shall be endowed in fee simple" of a portion of the real estate, and also expressly limits same to the real estate "of which the husband shall die seized." We think that under these express provisions it was manifestly intended that the requisites necessary to constitute dower at common law were also necessary to constitute the estate created by this statute. In the case of *Tate* v. *Joy*, 31 Ark. 576, it was said that seisin was an indispensable requisite to entitle the widow to dower under the provisions of section 2687 of Kirby's Digest because it was so declared by that statute. Likewise, we think that seisin of the husband is a necessary requisite under section 2709 of Kirby's Digest to entitle the widow to the dower therein provided, because it is so declared by that statute, which says that she shall be endowed of a certain portion of the real estate "of which the husband shall die seized." *Watson* v. *Watson*, 22 N. E. 438; *Carter* v. *McDaniel*, 23 S. W. 507.

In the case at bar the husband was the owner of a reversionary interest in the land involved in this suit at the time of his death, and during his life another was the owner of a particular freehold estate therein. His right of possession of the land was postponed by this life estate until his death so that he did not have seisin thereof, either in fact or in law, and did die seized thereof. His widow was therefore not entitled in fee simple to one-half of this reversionary interest of the husband in the land.

It is next contended that David C. Ewing at the time of his marriage to Laura C. Cox on July 2, 1874, obtained a freehold interest in the land by virtue of his marital relation. It is urged that at the date of said marriage, which was prior to the adoption of the Constitution of 1874, he took all the rights which the common law gives a husband in the lands of his wife, and that at common law the husband by marriage acquired the right to possession and the rents and profits of his wife's land during coverture, which was a freehold estate. In this connection it is urged that the particular estate of a freehold character thus obtained by him in the land of his wife merged the title completely in himself when he thereupon obtained the reversion in fee to the land. But, in order to constitute a merger of two distinct estates, these estates must meet in one and the same person at the same

time and in the same right. Before there can be a merger of one estate in another, both estates must be owned not only by the same person but in the same right. The merger of the two estates will not occur if one is acquired by purchase and the other by right of the wife, because they are held in different rights. 3 Cruise, Dig., tit. 30, C 9, § 1; 16 Cyc. 667; *Johnson* v. *Johnson,* 7 Allen 196; *Pratt* v. *Bank of Bennington,* 10 Vt. 293; *Pool* v. *Morris,* 29 Ga. 374.

In the case at bar if David C. Ewing acquired any interest in the dower estate of his wife in the land by reason of his marriage to her, that interest would cease upon his death, and the dower estate of his wife would still exist if she outlived him. His interest in the land acquired by the marital relation, if any, was in a right entirely distinct from that which he acquired by purchase of the reversion. The two estates did not merge, but remained separate. If he had possession of the land by reason of any interest which he obtained by virtue of his marriage to the widow who owned the dower in the land, his possession would be solely attributable to and in that right, and it would not be a possession by virtue of his reversionary interest, and therefore would not be a seisin under that estate. But we do not think that Ewing obtained any interest or estate in his wife's land by reason of his marriage to her. The marriage of Ewing occurred subsequent to the passage of the married woman's enabling act, which was enacted on April 28, 1873. By that act it is provided that the property, both real and personal, of a married woman and the rents and profits of her land shall be and remain her sole and separate property free from the interference and control of the husband. Kirby's Digest, § 5213. This act abrogated the common-law rights of the husband in the wife's land during her life, and therefore Ewing did not, by virtue of his marriage in 1874, obtain any interest, of freehold or otherwise, in his wife's land. It follows that D. C. Ewing only owned a reversionary interest in the land involved in this case, and owned only that interest at the date of his death. During all the time he owned the reversionary interest, there was the interposition of a life estate which prevented that necessary seisin to entitle his widow to a dower therein. He did not die seized of the land, and his widow was not entitled for that reason to one half thereof in fee.

The chancellor entered a decree dismissing the complaint for the want of equity, and that decree is affirmed.

STATE v. ARKANSAS BRICK & MANUFACTURING COMPANY.

Opinion delivered March 6, 1911.

1. STATE—ACTION BY—DEFENSES.—The defendant in a suit by the State is entitled to avail himself of any defenses that he may have, except the statute of limitations, and, in a suit upon contract, may recoup any damages sustained by reason of the State having violated her contract. (Page 128.)
2. RECOUPMENT AND COUNTERCLAIM—HOW DISTINGUISHED.—A recoupment was allowed at common law, while a counterclaim was not; in the former the defendant loses the excess over the plaintiff's demand, while in the latter he recovers such excess; the former exists as long as the plaintiff's cause of action exists, while the latter must be a cause of action which could be enforced in a separate action, and therefore must not be barred by limitation. (Page 128.)
3. STATE—CONTRACT FOR HIRE OF CONVICTS—RECOUPMENT.—The State agreed to furnish the defendant 300 able-bodied convicts per day for ten years, but failed to furnish that number during the period of the contract; after expiration of this period the State furnished a number of convicts, without any new contract with defendant. In a suit by the State to recover for the labor of such convicts, *held* that defendant was entitled to recoup damages for the State's failure to comply with her contract against the State's claim for services of the convicts, both during the period of the contract and thereafter. (Page 129.)
4. STATUTES—ADOPTED CONSTRUCTION.—Where a State adopts a statute of another State, it will be held to have adopted previous constructions of such law by the latter State. (Page 130.)
5. STATE—POWER OF AUDITOR TO AUDIT CLAIMS.—Kirby's Digest, § 3404, authorizing the Auditor of State to audit claims against the State, does not authorize him to audit a claim for unliquidated damages. (Page 130.)

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

STATEMENT BY THE COURT.

This action was instituted by the State to recover from the defendant $17,726.55, claimed to be due from the defendant for convict labor.

On the 31st day of July, 1899, the State entered into a contract with the defendant, by which it agreed, for a term of ten years, beginning January 1, 1900, to furnish the defendant three hundred able-bodied men per day on demand. For this labor the defendant undertook to pay 50 cents per day for each convict. After the expiration of the ten years, a number of convicts were allowed to remain with the defendant for a short time, and the complaint states that, of the amount sued for, $12,898.65 was for a balance due for convicts furnished during the life of the contract, and $4,827.90 for such as were furnished after the expiration of the ten years mentioned in the contract. The charge by the State for the first of these items was at the contract price of fifty cents per day, but for the second item the charge was for the reasonable value of the services of the convicts.

The answer admits that after the 1st day of January, 1909, the date of the expiration of the contract, the labor of certain convicts was furnished to the defendant by the plaintiff; and the answer alleges that this labor was furnished under and pursuant to the contract, or as contended on the trial to make up in part for the failure to furnish the full number. The answer also denies the indebtedness, and by a counterclaim sets up damages sustained by reason of the failure of the State to furnish three hundred convicts per day. The damages claimed by the defendant in the counterclaim exceed the amount claimed by the State in the original complaint.

During the ten years, and until the last month or two before the expiration of the contract, the defendant paid the State each month what it owed for the convicts furnished. It is also shown that during the ten years the defendant, from time to time, demanded that the State should perform its undertaking and furnish convicts to the number of three hundred per day.

Hal L. Norwood, Attorney General, and *J. H. Harrod, F. T. Vaughan* and *George Vaughan,* for appellant.

The matter set up in defendant's answer does not constitute a cause of action. Kirby's Dig. § 6098; 30 Ark. 50; 71 Ark. 408. The defense set up is a counterclaim. 52 Ark. 117; 56 Ark. 450; 60 Ark. 151. And the State cannot be sued. 57 Ark. 474; 32 Ark. 45; 56 Ark. 365.

Coleman & Lewis, for appellee.

The suit should have been dismissed. Kirby's Dig., § 7779; 84 Ark. 537; 136 Fed. 232; 85 Pac. 417; 57 Tex. 314; 56 Tex. 493. When a contract is broken by both parties thereto, the damages sustained by one may be recouped in an action brought thereon by the other. 8 Mich. 349; 3 Mich. 382; 20 So. 514; 17 Ark. 245; 22 Ark. 248; 40 Ark. 78; 68 Am. D. 561; 46 Vt. 200; 14 Am. Rep. 620; 12 Ark. 702. The defense may be maintained in this suit. Kirby's Dig. § § 7784, 6101, 6231, 6245, 4682, 6109; 16 Ark. 97; 66 Ark. 93. The defense is not a suit against the State. 9 Bush 716; 54 Miss. 562; 10 Am. St. 715; 106 Ind. 463; 81 Ky. 572; 18 Ga. 658; 45 Ark. 88; 52 Ark. 157.

NORTON, SPECIAL JUDGE, (after stating the facts). It is not contended on the part of the State that it performed its agreement to furnish the three hundred convicts, but it is insisted for the State that by defendant's course of dealing—settling monthly for such number of convicts as it had—the defendant waived its right to full compliance by the State. It is also contended for the State that a cross demand of counterclaim or recoupment cannot be made against the State, as that would, in a sense, be permitting the State to be made a defendant; and it is further contended in behalf of the State that, even if counterclaim or recoupment can be allowed at all in this case, it must be confined to so much of the cause of action as is due for labor furnished under the contract, and that labor furnished after the expiration of the contract is not sufficiently connected with the plaintiff's cause of action to be made subject to the cross demand of counterclaim or recoupment.

The contention on the part of the State that defendant waived its right to the full number of men mentioned in the contract, we do not find supported by the testimony. While the defendant, with the exceptions mentioned, paid monthly for such convicts as were furnished, it is, on the other hand, proved that it at all times demanded the full number of men from the State. In this respect, as in others, the findings of fact by the chancellor are well supported by the testimony.

The findings of fact by the chancellor include the failure of the State to furnish the convicts as agreed, and a damage sus-

tained by the defendant in a sum in excess of the amount claimed by the State.

With the facts in this way determined, the remaining question is one of applying law.

That a counterclaim could not be maintained against the State for any balance the defendant might be entitled to over and above the amount of the State's claim is conceded. But counsel for the State go further and contend that even to allow recoupment to the amount of the State's claim is equally prohibited.

The right of the State to be held exempt from the recovery of judgments against it is no clearer than the right of a defendant, in a suit by the State, to avail himself of all and every character of defensive pleas, except limitation. (*State* v. *Morgan,* 52 Ark. 150.) He cannot by a cross action have an affirmative judgment against the State for any excess he may be entitled to over and above the State's claim; but this is the extent of his disadvantage from having dealt with the sovereign.

The law of recoupment requires some consideration, and a distinguishing of it from the idea usually conveyed by the word counterclaim. Counterclaim and recoupment are alike in the sense that each must grow out of, or be connected with, the transaction upon which the plaintiff sues. Recoupment was allowed at common law (*Desha* v. *Robinson,* 17 Ark. 245), but a counterclaim was not. Recoupment was considered a defense, and, prior to the adoption of the Code, if the defendant's cross demand against the plaintiff exceeded the plaintiff's demand, the defendant could use his demand in recoupment only by sustaining a loss of the excess. Hence, prior to the Code, the defendant could recover on his cross demand, to the full extent, only by an independent action. The Code, to prevent a multiplicity of suits, provided for the counterclaim, and that the defendant might recover on it, in the same suit, any balance that the plaintiff owed him over and above the plaintiff's demand. The counterclaim thus became an affirmative cross action, which ordinarily will cover all purposes of recoupment, but not always. A right left to the defendant to be worked out through the doctrine of recoupment, which could not be had through a counterclaim, is to use defensively a cause of action which as a counterclaim would be

barred by lapse of time. A counterclaim must be an existing cause of action, but recoupment is a right to reduce the plaintiff's claim, and this right exists as long as the plaintiff's cause of action exists. A breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes available to the defendant, so long as the plaintiff may sue upon any breach by defendant. *Williams* v. *Neely,* 134 Fed. 1; *Beecher* v. *Baldwin,* 55 Conn. 419, 12 Atl. 401; *C. Aultman & Co.* v. *Torrey,* 55 Minn. 492, 57 N. W. 211; Wood on Limitations, § 282, (3 ed.); *Conner* v. *Smith,* 88 Ala. 300, 7 South. 150; *Soudan Planting Co.* v. *Stevenson,* 94 Ark. 599.

We refer to this right to use barred cross demands, not because the question is involved in this case, but to show the defensive character of the plea of recoupment, and that it is a common-law right which the Code makers could not have intended to abolish or in any wise impair. The whole spirit and plan of the Code was to liberalize the procedure and to extend, instead of curtailing, remedial rights.

If express warrant for recoupment in the letter of the Code should be contended for, it can well be found in the right to plead "new matter constituting a defense." Kirby's Digest, § 6098, 3 subdivision.

The question which has most concerned the court is whether or not there is sufficient connection between the two claims made by the State—one under the contract, the other for labor furnished after the date of its expiration—to make both subject to the defendant's plea of recoupment.

The testimony shows that the convicts were simply allowed to remain. It is not claimed that any new contract was made about them; and the defendant considered they were allowed to remain to make up some of the State's deficit in men furnished. The chancellor found that all the men furnished by the State were furnished under the contract.

A majority of the court are of the opinion that the State's claim for labor furnished after the expiration of the contract cannot be separated from what had gone before, in a way to limit the defendant's plea of recoupment, which was sufficiently "connected with the subject of the action." *Wynnan* v. *Herard,* (Okla.) 59 Pac. 1009; *Tinsley* v. *Tinsley,* 15 B. Monroe, 454.

The case last cited comes with especial force, as it arose in Kentucky after her adoption of a Code which was subsequently adopted by Arkansas. When one State adopts the laws of another State, it is quite generally held that constructions of the adopted law go along with it. Without such aid, however, in this case, we would hold the law to be as here expressed.

The New York cases, to which our attention has been called, *People* v. *Denison,* 59 How. Prac. 157, and *People* v. *Denison,* 84 N. Y. 272, are to be distinguished from the case here. They deal with an affirmative judgment against the State on a counterclaim, and hold that it could not be allowed to stand. In the course of the opinions it can likely be gathered as the judgment of the court that, even for purely defensive purposes, a claim against the State could not be used unless first presented to the State Board of Audit. This was said, however, of a claim for work and materials furnished the State under contract. It is not likely that the State Board of Audit would have been held authorized to entertain a claim for unliquidated damages. In any event we are of the opinion that section 3404 of Kirby's Digest would not authorize the Auditor of the State of Arkansas to undertake the liquidation and settlement of a claim for damages. To illustrate: if in this case the brick company had exhibited its claim to the Auditor, and he had allowed it, his act would have been treated as idle.

We cannot hold that the right to recoup in this case was in any way affected by the failure of the brick company to first exhibit its claim to the Auditor of the State.

The decree of the lower court must be affirmed.

McCULLOCH, C. J., and FRAUENTHAL, J., concur in part of the judgment and dissent as to part.

McCULLOCH, C. J., (dissenting). This court held in the case of *McConnell* v. *Arkansas Brick & Manufacturing Co.,* 70 Ark. 568, that defendant's contract with the State was an enforceable one, and that decision is the law of this case with respect to defendant's rights under the contract—this though the McConnell case has since been overruled. (*Pitcock* v. *State,* 91 Ark. 527.)

I am of the opinion that the right of recoupment as a defense has not been abolished by the Code, and that it can be asserted in this case brought by the State to recover the amount due under

the contract. I reach that conclusion, however, on somewhat different reasons than that expressed in the opinion of the majority. The remedy of recoupment finds no express recognition in the Code, and one of the sections provides that "all statutes and laws heretofore in force in this State in any case provided for by the Code, and inconsistent with its provisions, are repealed and abrogated." (Section 7818, Kirby's Digest.) I have had grave doubts whether that section abolished the remedy of recoupment, but after some hesitation I have concluded that, as the Code was not designed to destroy rights or to alter principles of the law (Baylies, Code Pleading & Practice, p. 3), but only to formulate remedies, the provision in question should not be construed to repeal the law giving a remedy under circumstances where no other is provided under the Code. Recoupment is included in counterclaim, except that it is used only as a defense, but to that extent it is not provided for in the Code, and is not inconsistent therewith, so it is not abolished.

I concur with the majority, therefore, in holding that the decree should be affirmed so far as it concerns the State's claim for the price of convict labor furnished under the contract. I dissent from the view that defendant has a right to recoup against the claim for the price of labor furnished after the contract expired. Recoupment, like a counterclaim, must be a cause of action "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." The contract with the State, the alleged violation of which forms the basis of defendant's claim for damages, expired and was at an end. The State's suit to recover for the price of labor used after that time was not based on that contract. Therefore the claim for damages did not arise out of the contract or transaction set forth in the complaint. The fact that the two transactions closely approximated in point of time does not make them the same transaction. They are as distinct as though they had been far removed in point of time. I think this view is fully sustained by decisions of this court. *Barry-Wehmiller Mach. Co.* v. *Thompson,* 83 Ark. 283, and cases therein cited.

The following decisions of the New York courts also fully

sustain that view. *People* v. *Denison,* 59 How. Pr. 157; *People* v. *Denison,* 84 N. Y. 272.

The fact that the action is for the price of convict labor, the same as under the contract, does not make it "connected with the subject of the action," so as to allow recoupment. On the whole, I am of the opinion that the State should recover the fair value of the labor of the convicts after the expiration of the contract. Defendant received the benefit of the labor, and should be compelled to pay the State for it. Under principles which I think are well settled, defendant should not be permitted to recoup, so as to extinguish this item of the State's claim, damage alleged to have been sustained by reason of the failure to furnish the requisite number of convicts specified in the contract.

It is clear that the defendant had no right to hold and continue to work the convicts under the contract after the specified date of expiration. The fact that the board had failed to furnish the stipulated number of convicts did not serve to extend the period of the contract, for the contract was primarily one to provide for the convicts during a given period of time, and not merely to contract away the labor of the convicts like chattels or slaves. The specified period was therefore of the essence of the contract, and could not have been extended except by making a new contract in the manner provided by statute.

FRAUENTHAL, J., concurs.

METROPOLITAN LIFE INSURANCE COMPANY *v.* SHANE.

Opinion delivered March 6, 1911.

1. LIFE INSURANCE—WARRANTY—USE OF LIQUORS.—Where an application for life insurance, which was made a warranty, stated that the applicant did not "use" intoxicating liquors, it was not error to instruct the jury that the use contemplated was an habitual or customary use, and not an occasional or exceptional use. (Page 135.)

2. SAME—NONPAYMENT OF POLICY—PENALTY AND ATTORNEY'S FEE.—Where, upon the death of the assured, the administrator of the assured sent to the insurance company copies of his letters of administration and bond, and requested that blanks be furnished upon which proof of death could be made, and the company returned the

letters of administration and bond without statement relative to payment, and when sued denied any liability, a finding that demand for payment was made before suit, and that there was a refusal to make payment, was warranted, and the court was justified in assessing a penalty and attorney's fee under the Acts of 1905, p. 308. (Page 136.)

3. APPEAL AND ERROR—PRESUMPTION FROM SILENCE OF ABSTRACT.—Where complaint is made of the ruling of the lower court in refusing to give instructions, it is necessary that the instructions thus refused should be set out in the abstract; otherwise it will be presumed that the ruling of the court in rejecting same was not erroneous. (Page 137.)
4. SANITY—TEST.—One who kills another, knowing right from wrong, is held to be sane unless he acted from an irresistible impulse arising from a defect of will caused by the diseased condition of his mind, and not from mere anger or revenge. (Page 138.)
5. LIFE INSURANCE—BENEFICIARY SLAYING INSURED.—Where the beneficiary in a policy of life insurance intentionally kills the insured, public policy will deny his right to recover on the policy. (Page 138.)
6. TRIAL—ORDER OF ARGUMENT.—Where the plaintiff and an intervener both sought to recover in the same action upon a policy of life insurance, it was within the trial court's discretion to determine the order of the argument. (Page 138.)

Appeal from Clay Circuit Court, Eastern District; *Frank Smith,* Judge; affirmed.

L. Hunter, for appellant.

The insured made false answers as to his habits of drinking, and that avoids the policy. 58 Ark. 528; 71 Ark. 295; 72 Ark. 620; 74 Ark. 1; 62 L. R. A. 774; 134 Ill. App. 464; 35 Atl. 179; 81 N. W. 807.

Spence & Dudley, for appellant.

The right to open and close is not one of discretion under the law. Elliott, App. Prac. § 671; Thompson on Trials, vol. 1, § 231; 59 Ark. 140. The beneficiary took a vested interest in the policy as soon as it was issued. 31 L. R. A. 67.

J. H. Hill and *G. B. Oliver,* for appellee.

The ability to distinguish right from wrong is the test as to whether one is liable for homicide. 64 Ark. 523; 54 Ark. 588. A case should not be reversed for harmless error. 133 S. W. 168. The word *use* means *habitual* and *customary* use, not occasional use. 71 Ark. 295; 81 Ark. 205; 89 Ark. 230; 84 S. W. 656; 126

Fed. 360. But if the answer was false, it was not a warranty. Cooley's Briefs on Ins. p. 1931; 58 Ark. 533.

FRAUENTHAL, J. This was an action instituted by D. M. Shane as administrator of the estate of L. V. Shane, deceased, to recover upon a policy of insurance issued upon the life of said decedent. The policy was executed on July 29, 1909, and the wife of the insured, Louisiana Shane, was named as beneficiary therein. The insured was killed on August 29, 1909, by his said wife, who thereupon committed suicide. The suit was instituted against the Metropolitan Life Insurance Company, which issued the policy, and also against Z. B. Harrison, the administrator of the estate of said Louisiana Shane; and in the complaint it was alleged that said Louisiana Shane, the beneficiary named in the policy, had wilfully, unlawfully and feloniously killed said insured, and on that account the said beneficiary had forfeited all rights under the policy, and the estate of the insured was entitled to recover thereon.

The administrator of the estate of Louisiana Shane filed an answer and also an intervention in which he admitted that his decedent had killed the insured, but alleged that at the time she was insane, and on that account not legally liable for said act; and he sought a recovery on said policy because she was named as the beneficiary therein.

The Insurance Company denied all liability on the policy upon the ground that it had issued same by reason of certain false warranties made by the insured which avoided the policy.

The cause was submitted to a jury to determine whether or not the Insurance Company was liable on said policy and also to determine the respective rights of the plaintiff and the intervener to recover thereon in event the Insurance Company was liable. The jury returned a verdict finding that the Insurance Company was liable upon the policy, and also that said Louisiana Shane was sane when she killed the insured; and thereupon the court rendered a judgment in favor of the plaintiff and against the Insurance Company for the amount of the policy and also for the penalty and attorney's fee provided for by the statute. From that judgment both the Insurance Company and the intervener have appealed to this court.

The policy was issued on an application made by the insured

containing answers to questions propounded by the company's medical examiner which were material to the risk, and the truth of which we think was warranted by the assured. The Insurance Company alleged, and now urges, that the insured made certain answers to questions propounded relative to his habits as to the use of intoxicating liquors which were untrue. It claims that the truth of these answers was warranted, and that their falsity avoided the policy. The following are the said questions propounded to and the answers made by the insured: "Q. To what daily or other extent do you use tobacco? Answer. Twenty-five cents a week. Question. Opium or other narcotics? Answer. No. Q. Alcoholic stimulants? Ans. None. Wine or malt liquors? Ans. None." And to the question: "Have you ever used opium, or other narcotics, or ever used alcoholic stimulants, wine or malt liquors or tobacco to any excess? If so, when and for how long? Give particulars," the answer was, "No."

According to the evidence adduced upon the trial, the insured had lived for some years at or near Malden, Missouri, and about five or six years prior to his death he had moved to Rector, Arkansas.

The evidence on the part of the Insurance Company tended to prove that while living at or near Malden he often drank intoxicating liquor until he became under its influence, and that after he moved to Rector he sometimes drank intoxicants and was drunk. But the testimony on the part of the plaintiff tended to prove that while at Malden insured only drank intoxicating liquor occasionally, and that after he moved to Rector and for two years prior to his death he was never seen under the influence of intoxicants, and did not drink intoxicating liquors.

The court in its instructions submitted the question to the jury as to whether or not there had been a breach of the warranty by reason of the use by the insured of intoxicating liquors and of his use thereof to excess, and therein stated to the jury that "the word 'use' in the questions relative to intoxicating liquors means habitual or customary use, and the answers thereto would not be false and untrue if the proof shows only an occasional or exceptional use, even though at several times the assured became visibly intoxicated."

We think that the court committed no error in the instruction which it thus gave to the jury. The above questions and answers relative to the use by the insured of intoxicating liquors, we think, refer to the customary or habitual use thereof, and not merely to an occasional use thereof or an exceptional use to excess. The questions and answers as to his use of intoxicants manifestly refer to his habits in that regard. The habit of a person contemplates a course of conduct which is customary and shows that he has acquired a tendency to pursue that course of conduct from frequent repetitions of the same act. It does not contemplate occasional or exceptional acts.

From the language of the above questions and answers made by the insured in his application for this policy we do not think that it was contemplated that the policy should become void because of an occasional use of intoxicants or because of an occasional excessive use thereof, but only when such use or excess had become a habit by frequent repetitions.

This has been the construction adopted by this court of questions and answers made in applications for life insurance policies similar to those made in the application for the policy involved in this case. *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *Mutual Reserve Fund Life Assn.* v. *Cotter,* 81 Ark. 205; *Des Moines Life Ins. Co.* v. *Clay,* 89 Ark. 231. See also *Knickerbocker Life Ins. Co.* v. *Foley,* 105 U. S. 350; *Northwestern Mut. Life Ins. Co.* v. *Muskegon Nat. Bank,* 122 U. S. 501.

It is urged by counsel for the Insurance Company that the court erred in assessing against it a penalty and attorney's fees in pursuance of the statute enacted by the General Assembly of 1905 (Acts 1905, p. 308); and this contention is made upon the ground that no demand was made for the payment of the policy prior to institution of this suit. But we think that there was sufficient testimony adduced upon the trial from which the court was warranted in finding that such a demand was made, and that the Insurance Company did not pay the policy because it denied liability. The policy provided no specific time in which payment should be made after the death of the insured. It was therefore payable within a reasonable time thereafter. Immediately after the death of the insured and of his wife letters of administration were taken out on both estates. On September 6, 1909, both

administrators sent to the Insurance Company certified copies of the letters of administration and of their bonds, and requested that blanks be furnished upon which the proof of death could be made. The Insurance Company did not reply to the letters thus sent to it, and subsequently returned the copies of the letters of administration and the bonds without making any statement whatever relative to payment. After waiting for some time in order to hear further from the company and receiving no word from it, the plaintiff instituted this suit on November 26, 1909. Thereupon the Insurance Company made answer in which it denied all liability on the policy. It is not necessary that there should have been a formal demand for payment of the policy before the penalty for its nonpayment would attach. It is only necessary to show facts from which it can be reasonably inferred that the company understood that payment was demanded and that it refused to make same. When the Insurance Company received the certified copies of the letters of administration issued upon the estate of the insured and of the beneficiary, it understood that it was the intention of the administrators to thereby desire and demand payment of the policy. It did not claim that it would pay as soon as it could learn the rightful party to receive payment, but by its conduct in utterly failing to make reply and in subsequently making defense to the suit upon the ground that it was not liable on the policy it evinced that it refused to make payment. The court under these circumstances was warranted in finding that demand for payment was made before suit, and that there was a refusal to make payment by the Insurance Company.

It is contended by counsel for the administrator of the estate of Louisiana Shane that the court committed error prejudicial to the rights of the intervener by refusing to give certain instructions requested by him. These instructions we find from his brief relate to the question of the alleged insanity of Louisiana Shane at the time she killed her husband. But none of these instructions which it is claimed were refused has been set out in the intervener's abstract nor in any abstract of any of the parties. We have repeatedly held that where complaint is made of the ruling of the lower court in refusing to give instructions it is necessary that the instructions thus refused should be set out in

the abstract, otherwise it will be presumed that the ruling of the court in rejecting same was not erroneous.

Intervener also urges that the court erred in giving certain instructions upon the question of the sanity or insanity of Louisiana Shane. The court in effect instructed the jury that if Louisiana Shane at the time she killed the insured knew right from wrong and knew that it was wrong to kill him then she was sane unless at the time, even though she knew right from wrong, she acted from an irresistible impulse arising from a defect in will caused by the diseased condition of her mind and not from mere anger or revenge. The instructions, we think, fully and fairly stated the law relative to the question of the sanity of Louisiana Shane as applied to the testimony adduced on the trial. *Green* v. *State,* 64 Ark. 523; *Bolling* v. *State,* 54 Ark. 588.

There was a conflict in the testimony as to the mental condition of Louisiana Shane at the time of the killing; but we think that there was sufficient evidence to warrant the jury in finding that she was sane when she killed the insured, and that she killed him because he would not live with her.

The wilful, unlawful and felonious killing of the assured by the person named as beneficiary in a life policy forfeits all rights of such person therein. It is unnecessary that there should be an express exception in the contract of insurance forbidding a recovery in favor of such person in such event. On considerations of public policy the death of the insured, wilfully and intentionally caused by the beneficiary of the policy, is an excepted risk so far as the person thus causing the death is concerned. As is said in the case of *New York Life Mut. Insurance Company* v. *Armstrong,* 117 U. S. 591: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired." 4 Cooley's Briefs on Law of Insurance, p. 3153; *New York Life Ins. Co.* v. *Davis,* 96 Va. 737.

It is urged by counsel for the intervener that the court erred in not permitting him to open and close the argument. This contention is made upon the ground that the burden of proof was on him to show that Louisiana Shane was insane and

not legally responsible for her act at the time she killed the insured. But the court did permit the counsel for intervener to close the argument to the jury, and only allowed the plaintiff's counsel to make the opening statement in the case. In this case both the plaintiff and the intervener were seeking a recovery against the Insurance Company. Under the answer made by the Insurance Company the plaintiff was not entitled to recover without the introduction of testimony. As against the Insurance Company, the plaintiff and the intervener were equally plaintiffs, and each was a defendant against the other as to their rival claims for recovery against the Insurance Company. As each would be entitled to begin and close the argument equally with the other in their actions against the Insurance Company, it was within the sound discretion of the trial court to determine the order of the argument. 1 Thompson on Trials, § 242; 15 Ency. Plead. & Prac. 192. The intervener in this case was given the conclusion of the argument. This, under our statute, is considered more advantageous than the opening, for it is provided that when a party entitled to the opening and conclusion of the argument refuses upon demand of his adversary to open he should be refused the conclusion. Kirby's Digest, § 6196, sub. 6.

Upon an examination of the whole case, we fail to find that any prejudicial error was committed upon the trial of the cause.

The judgment is accordingly affirmed.

FORD v. STATE.

Opinion delivered March 6, 1911.

1. VENUE, CHANGE OF—DISCRETION OF COURT.—An order of the circuit court overruling a motion for a change of venue is conclusive on appeal unless it appears that the court abused its discretion. (Page 141.)
2. SAME—WHEN COURT'S DISCRETION ABUSED.—Where, on a petition for a change of venue in a criminal case, it appears from the affidavits and testimony of witnesses who appear to be acquainted throughout the county that defendants can not obtain a fair trial in the county, it was an abuse of discretion to deny the change. (Page 141.)

Appeal from Sevier Circuit Court; *Jeff T. Cowling*, Judge; reversed.

STATEMENT BY THE COURT.

John R. Ford and Lelia Ford were indicted for the crime of murder in the first degree, charged to have been committed by killing W. F. Nichols. The views we shall hereinafter express render it unnecessary to make a detailed statement of the facts and circumstances attending the killing. It is sufficient to state that John R. Ford and Lelia Ford are husband and wife, and were at the time of the killing. They were tenants of W. F. Nichols, and lived on his farm near Lockesburg in Sevier County, Arkansas. The testimony on the part of the State shows that for some time prior to the killing there existed ill feeling on the part of the defendants toward the deceased; that the killing occurred soon after dark on September 30, 1910, near the house where the Fords lived. The Fords came out of their house, and began to quarrel with Nichols about letting down the fence and driving through one of his fields, which they had rented. The killing was done by J. R. Ford cutting or stabbing Nichols with a barlow knife.

The defendant filed a motion for a change of venue, which was overruled by the court. The trial resulted in a verdict of guilty, and the defendants were sentenced to death. They have duly prosecuted an appeal to this court.

Spriggs & Hardison (of Oklahoma), for appellant.

1. It was error to refuse a change of venue. Kirby's Dig. § 2317; 54 Ark. 243; 25 *Id.* 444. The supporting affidavits were sufficient. Kirby's Digest, § 2318. 36 Ark. 286 and 54 Ark. 245 do not apply in this cause.

2. The evidence does not show murder. Kirby's Digest, § 1761; 37 Ark 238; 40 *Id.* 511. Premeditation must be shown. 36 Ark. 127.

3. Instruction No. 19 is not the law. 29 Ark. 248.

4. If one assails another with insulting words and blows and without the use of a weapon, and the assailed, without attempting to evade the fight, kills with a deadly weapon, he is only guilty of manslaughter. 16 Ark. 568.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. The motion for change of venue was properly overruled. (1) It does not appear that the statute was complied with relative to giving notice to the State's attorney and (2) an examination shows the supporting witnesses swore recklessly and without real knowledge of the facts. Kirby's Digest, § 2318; 76 Ark. 206; 85 Ark. 518; 83 *Id.* 336; 80 *Id.* 360; 76 *Id.* 276; 86 *Id.* 357; 91 *Id.* 65; 1 Wigmore on Ev. § § 105, 108.

2. The instructions were correct.

3. No error in refusal to grant new trial on account of affidavits of Glevis and Blackstock. 72 Ark. 158.

HART, J., (after stating the facts). The counsel for the defendants first assign as error the action of the court in overruling their motion for a change of venue. They petitioned for a change of venue on the ground that the minds of the inhabitants of Sevier County were so prejudiced against them that they could not obtain a fair and impartial trial therein.

The petition was supported by the affidavits of six persons. The court examined the affiants orally to test their credibility. This it had a right to do to ascertain whether they had sworn falsely or recklessly without sufficient information as to the state of mind of the inhabitants of the county as to the defendants. In such cases the order of the court overruling the motion for a change of venue is conclusive on appeal unless it appears that the court abused its discretion. *Bryant* v. *State,* 95 Ark. 239, and cases cited; *White* v. *State,* 83 Ark. 36; *Duckworth* v. *State,* 80 Ark. 360.

There are numerous decisions of this court upon this question, all of which are cited in the case of *Bryant* v. *State,* and the rule announced above is recognized in each of them. The proper application of the rule, however, depends upon the particular facts of each case. Where the examination of the affiants shows that their affidavits were based upon expressions of opinion by people in only one or two localities, or only in a few places in the county, as in the White and Duckworth cases, *supra,* and the trial court denies the motion for a change of venue, this court has held that there was no abuse of discretion. In the case at bar, however, the facts are essentially different. H. H. Darnell, one of the affiants, testified that he had lived in Sevier County for 11 years, and had lived in De Queen, the county seat, since the time

of the killing; that he had peddled all over the county, and was acquainted with people all over the county; that he had heard expressions from parties from De Queen, Lockesburg, Brownstown, Ben Lomond, and various other places; and that from these expressions he did not believe the defendants could obtain a fair and impartial trial.

H. H. Hunter in his affidavit swore that he had heard the case discussed by citizens from different portions of Sevier County, and from what he had heard in said discussions the defendants could not obtain a fair and impartial trial therein. In his oral examination before the court, he testified that he had lived at Gilham about 13 months; that it is about 25 miles from the scene of the killing, which was near Lockesburg; that he was born in the county, moved out of it, returned and had been living in it for the past ten or twelve years; that he knew a good many people scattered over the county; that people from all the townships surrounding Gilham go there to trade and sell their cotton; that he believed the people had heard too much, had formed opinions, and that the defendants could not obtain a fair and impartial trial in the county, and that he based his opinion on the expressions of people from various parts of the county.

Their oral examination appears in the record in the form of questions and answers, and for that reason is too long to be set out *in extenso.* They were qualified electors, and were not of kin to the defendants. Their examination shows them to be impartial and to be endeavoring to tell the truth. They were acquainted with the people throughout the county, and the expressions of opinion they had heard were not confined to people in a few localities. While they remember the names of but few people they heard talking about the case, this is natural unless they had gone about for the express purpose of finding out the sentiment of the people in regard to the matter, or had been directly interested in the result of the case.

From the affidavits of these two persons, taken in connection with the facts and circumstances detailed by them in their oral examination before the court, we think it fairly deducible that the defendants could not at that time obtain a fair and impartial trial in Sevier County, and we hold that the court abused its discretion in overruling the motion for a change of venue.

With much force counsel for defendants urge that the evidence is not sufficient to support the verdict; but we refrain from passing upon that question for the reason that upon a new trial other evidence may be introduced.

Objections are also urged to certain instructions given; but the instructions complained of are instructions based upon a concrete application of the law to the evidence; and, in as much as they may be given in a different form on a new trial, to be applied to the evidence as it then exists, we do not deem it advisable to discuss them.

For the error in refusing to grant a change of venue, the judgment is reversed, and the cause remanded for a new trial.

BAXTER COUNTY BANK v. OZARK INSURANCE COMPANY.

Opinion delivered March 6, 1911.

PRINCIPAL AND SURETY—CONCLUSIVENESS OF JUDGMENT AGAINST PRINCIPAL.—A judgment against an insurance company, in the absence of fraud or collusion, is *prima facie* evidence against the suretv in a bond executed by the company for the benefit of its policy holders.

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

STATEMENT BY THE COURT.

T. M. Montgomery brought suit against the Ozark Insurance Company to recover upon a policy of fire insurance issued by it to him, and recovered judgment. He caused an execution to be issued against the Insurance Company, which was returned *nulla bona.* Subsequently Montgomery sold and transferred his judgment against the Insurance Company to the Baxter County Bank.

The present suit was instituted by the Baxter County Bank and T. M. Montgomery against the Insurance Company and the sureties on its bond. At the trial the plaintiffs introduced in evidence the policy of insurance, a certified copy of the judgment of T. M. Montgomery against the Ozark Insurance Company and a copy of the bond of the Insurance Company. The bond was executed on July 18, 1905. After the introduction of this evi-

dence it was agreed in open court and admitted before the jury: "That the insurance policy filed as an exhibit to plaintiff's complaint was duly executed by the Ozark Insurance Company on the 5th day of June, 1905, and that the property described in said policy was destroyed by fire on the 5th day of September, 1905, and that the defendants filed and executed the bond sued on, being the bond filed as exhibit 'F' to plaintiff's complaint—the bond above referred to."

The court instructed the jury that the sureties were not liable on the bond and directed the jury to return a verdict for the defendants, which was accordingly done.

From the judgment rendered the plaintiffs have appealed.

Horton & South and *W. S. Chastain,* for appellant.

Copies of judgments and executions, when properly certified, prove themselves. 14 Ark. 9; 34 Ark. 645. The judgment obtained against the insurance company is conclusive as to it, and *prima facie* as to its sureties. 89 Ark. 378; 53 Ark. 333; 51 Ark. 211; 39 Ark. 174; 20 Ark. 85; 39 Ark. 485. The bond in force at the time of the loss is responsible for the loss. 92 Ark. 43; 76 Ark. 410. The statute requiring the bond is a part of the contract. 16 Ark. 270; 40 Ark. 427; 76 Ark. 415; 28 Ark. 394.

C. E. & H. P. Warner, for appellees.

Appellees are not liable because their bond was not in force when the policy in question was issued. 76 Ark. 410. The sureties are bound only by the strict letter of their contract. 89 Ark. 394; 52 Ark. 201; 92 Ind. 240; 87 Ind. 541; 9 Wheat. 703; 24 How. 315; 6 Ill. 582; 158 Pa. St. 392; 48 Ark. 442; 41 Mich. 227; 16 Ia. 85; 22 Ia. 362; 5 Pet. 389; 195 Ill. 451; 40 Pac. 472; 163 Ill. 467; 15 Ind. App. 575; 91 Fed. 476.

HART, J., (after stating the facts). The judgment of T. M. Montgomery against the Ozark Insurance Company was regular on its face, and no evidence was introduced by defendants to impeach it. "As a general rule, a judgment against an insurance company, if no fraud or collusion is shown, is evidence against the surety, in a bond executed by the company for the benefit of the policy holders." *Ingle* v. *Batesville Grocery Co.,* 89 Ark. 378.

The bond in this case is precisely similar in its terms to that in the case of *Crawford* v. *Ozark Insurance Co.,* 97 Ark. 549,

and this case is ruled by it. It is not necessary to repeat what was said there. The facts are the same, and this case is therefore controlled by it. It follows that the judgment must be reversed, and judgment will be entered here for the plaintiffs for the amount sued for.

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

Opinion delivered March 6, 1911.

1. MASTER AND SERVANT—ASSUMED RISK.—The negligence of the master or of a fellow servant (under the statute making the master responsible for the negligent act of a fellow servant) in failing to furnish a safe place to work, where the servant is unaware of the negligence, will not be held to have been assumed by such servant. (Page 148.)
2. SAME—NEGLIGENCE—EVIDENCE.—In an action by a locomotive fireman to recover damages for personal injuries caused by a large lump of coal rolling down from the tender on his foot, it was competent to prove the contract between the railway company and its firemen as to the size of the coal, upon the issue whether the tender was improperly loaded, and whether plaintiff was negligent in getting too near the coal pile. (Page 150.)

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

W. E. Hemingway, E. B. Kinsworthy, Bridges, Wooldridge & Gantt, and *James H. Stevenson,* for appellant.

Appellee assumed the risk of the danger. 89 Ark. 50; 82 Ark. 11; 161 Mass. 153; 93 Ark. 140; 56 Ark. 232; 23 Ark. L. R. 42; *Id.* 442; *Id.* 628. The injury was the result of an unavoidable accident for which the defendant is not liable. 86 Ark. 289; 94 U. S. 469; 105 U. S. 249; 69 Ark. 402; 55 Ark. 163; 120 S. W. 984; 62 Kan. 727; 64 Pac. 605; 54 L. R. A. 402; 95 Pa. St. 287; 40 Am. R. 649; 124 Fed. 113; 63 L. R. A. 416; 108 Va. 822; 62 S. E. 972; 85 N. E. 728; 109 Ill. App. 533; 67 Wis. 616; 31 N. W. 321; 58 Am. R. 881; 24 Am. & Eng. Ry. Cas. 404. The evidence fails to show negligence on the part of the defendant. 87 Ark. 52; 93 Ark. 140. The court erred in permitting plaintiff to testify as to the contract between the company and the fire-

men's organization regarding the breaking of coal before placing it on the tender. 2 Ark. 512; 7 Ark. 470; 5 Ark. 66; 39 Ark. 340; 57 Ark. 512; *Id.* 595; 6 Ark. 112; 65 Ark. 422; 67 Ark. 426; 91 Ark. 292; 70 Ark. 232.

Trimble, Robinson & Trimble and *Robertson & DeMers,* for appellee.

The question of assumption of risk is one for the jury. 77 Ark. 367; 88 Ark. 549; 79 Ark. 53; 87 Ark. 396; 205 U. S. 1. The evidence does not show that plaintiff's injury was the result of an accident for which the defendant is not liable. 8 Wend. 473; 50 Ga. 509; 61 Fed. 490; 86 Ky. 565; 53 Pa. St. 436; 97 S. W. 910; 206 Ill. 145; 94 U. S. 469; 54 Ark. 209; 57 Ark. 429; 18 L. R. A. (N. S.), 1185; 20 L. R. A. 698; 120 Wis. 254; 78 N. Y. App. Div. 163; 78 N. Y. S. 919; 32 N. Y. S. 59. The evidence is sufficient to sustain the jury's finding of negligence. 23 Ark. 115; 50 Ark. 477; 76 Ark. 88; *Id.* 538; 77 Ark. 458; *Id.* 367; 87 Ark. 443; 89 Ark. 424; *Id.* 522; 90 Ark. 223; *Id.* 555; 91 Ark. 343; *Id.* 388; 92 Ark. 102; 93 Ark. 564; 96 Ark. 32; 21 L. R. A. (N. S.) 138; 37 La. Ann. 650. There was no prejudicial error in permitting plaintiff to testify as to the rule requiring the company to load the tender with coal of furnace size. 74 Ark. 417; 73 Ark. 407; 76 Ark. 276; 45 Ark. 539; 55 Ark. 163; 58 Ark. 125; *Id.* 374; *Id.* 446; 65 Ark. 422; 91 Ark. 292. The employer must furnish a safe place to work. 87 Ark. 443; 82 Ark. 11; 87 Neb. 217. A servant does not assume the risk of danger from the master's negligence. 93 Ark. 564; 92 Ark. 102; 90 Ark. 223; 89 Ark. 424; 88 Ark. 243; 70 Ark. 295; 48 Ark. 333; 77 Ark. 367.

McCULLOCH, C. J. The plaintiff sues his former employer, the St. Louis, Iron Mountain & Southern Railway Company, to recover damages on account of personal injuries received while in the latter's service. He was a locomotive fireman, and was called at Argenta, Ark., to go out on an extra west-bound engine on the night of February 27, 1908. In response to the summons of the caller, he went over to the yard about 10:30 o'clock P. M. and got on the engine, which was then in charge of a hostler. While he was getting ready to begin his work, the hostler started to back the engine up to the train station, the engineer in the

meantime having come on the engine. As soon as the train station was reached, the hostler left the engine in charge of the engineer and fireman, and the engineer at once got off to examine the engine and to oil it up. Plaintiff, in order to get ready for his work, proceeded to change his clothes. There were no lights in the engine at that time. When he finished putting on his train clothes, he got a lamp or oil torch and stepped down on the deck, in front of the coal gate of the tender, for the purpose of filling his lamp preparatory to lighting it, and while in the act of doing this a large lump of coal, weighing from thirty to fifty pounds, suddenly rolled down from the tender on the deck and struck his foot, inflicting serious injury. A disease of the bone subsequently developed, and after treatment for nearly a year, it became necessary to amputate the foot and a portion of the leg.

It is alleged in the complaint that the defendant and its servants were negligent in "improperly loading and overloading the tender of plaintiff's engine, and thereby rendering the plaintiff's place of work unsafe, resulting in injury as heretofore stated." The answer contained denials of each and every allegation of the complaint, it being the contention of the defendant in the first place that the plaintiff received no injuries at all; and that its servants were not guilty of any negligent act which caused any injury. Contributory negligence and assumption of risk were also pleaded.

The evidence adduced by plaintiff tended to show that it was the duty of other employees of the company to prepare the engine for the trip by filling the tender with coal; that, according to the contract between the company and its firemen, it was the duty of the company to have all coal broken ready for use in the furnace before being placed upon the tender, it being understood that the lumps were to be not larger than a man's double fist; that the tender was not filled with coal under the supervision of the fireman, but was ready when the fireman was called. A short time before this an improved coal chute was installed, and the method of filling the tender with coal was to run the engine to the chute and drop an apron, which guided the coal into the tender, so that when the door or barrier was raised the pressure of the coal forced it down until the tender was filled.

It was the duty of the fireman, before starting on a trip, to

see that his engine had been properly supplied with coal. The defendant adduced testimony tending to show that plaintiff received no injury at the time or in the manner of which he complains. The jury returned a verdict in favor of the plaintiff, and the defendant has appealed.

It is insisted that the verdict is not sustained by the evidence, in that there is no proof of negligence on the part of defendant's servants, and that according to the undisputed facts the plaintiff must be deemed to have assumed the risk of the danger. We think the evidence was sufficient to warrant a finding of negligence on the part of the hostler and herders, as they are called, whose duty it was to take the engine to the coal chute and load it with coal. There was evidence to the effect that it was too heavily loaded, and also that it was improperly loaded by having lumps larger than called for in the contract with the fireman.

There is a sharp conflict in the testimony as to whether the tender was overloaded. Some of the witnesses introduced by defendant testified, not only that it was not overloaded, but that it was impossible to overload the tender, one of them stating that it was like filling a vessel with water—when it is full, the surplus will run over. We think this presented a question for the determination of the jury as to whether the tender was overloaded. The comparison made by the witness of coal with water is not an apt one, for while water will overflow a vessel, a hard substance like coal can be piled up.

Attention is called in plaintiff's testimony to the fact that the lump of coal rolled down while the engine was standing perfectly still, and this fact is urged as a reason why plaintiff's version of the matter should not be accepted. Conceding that it is unusual for a lump of coal to roll down from a pile that is perfectly still at the time, yet we are not prepared to say that this is impossible, so as to demand a rejection of the statement. Where the coal had been loosely dumped down into the tender and piled high, perhaps forming an apex, it is not unreasonable to suppose that there would be some settling for a little while, and that a large lump at or near the top might be so delicately poised that the slightest jar or vibration would cause it to roll down.

Nor do we think that it can be said as a matter of undisputed fact that plaintiff assumed the risk. It is true that it was his

duty to inspect the pile of coal to ascertain whether his engine was properly supplied for the trip. He had other duties to perform, in the way of examination of the appliances which he was to use in the performance of his duties. Though it was his duty in a measure to make some examination to see that his working place was safe, yet it was not his duty primarily to make the place safe. That was the duty of the master. There are instances where the master owes no duty to his servants to make the working place safe, and where that duty devolves upon the servant himself. Those are cases where the servant is called to work in a place of known danger for the purpose of repairing defects, and where the nature of the service is such as to exclude the implication of any duty on the part of the master to make the place safe. *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140.

There are also instances where the servant in the discharge of his duty is required to constantly change the condition of the working place, the nature of the work making the place more or less dangerous. *Grayson-McLeod Lumber Co.* v. *Carter,* 76 Ark. 69; *Arkansas Cotton Oil Co.* v. *Carr,* 89 Ark. 50; *Chicago, R. I. & P. Ry. Co.* v. *Grubbs,* 97 Ark. 486.

But this is not such an instance, and the cases referred to above do not apply here. Though, as just said, it was the duty of plaintiff to make some examination of the place to see that it was safe, yet he had the right to assume that those who had prepared the place for him had exercised ordinary care in that respect; and if in beginning to discharge his duties he was injured before he had had an opportunity to exercise the precaution imposed upon him, he cannot be held to have assumed the risk of the danger created by the negligence of other servants. The evidence in this case shows that the plaintiff was putting oil in his lamp for the purpose of commencing the performance of his duties when the lump of coal rolled down on him. It was dark, and he had had no opportunity to inspect the pile of coal on the tender. To hold that under these circumstances he assumed the risk of this danger would be to make him the absolute insurer of his own safety when he started in the performance of his duties, regardless of the negligence of others who owed him the duty of ordinary care to make his working place safe. The well-

established rule is that the negligence of the master, or the negligence of a fellow servant (under the statute making the master responsible for the negligent act of a fellow servant), is not an ordinary incident of the service, so that a servant is deemed to have assumed the risk of the danger. *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367. It is only where the servant is aware of the defect and voluntarily exposes himself to the danger that he can be said to have assumed such risk.

We are therefore of the opinion that the evidence was sufficient to warrant a submission of the question of negligence on the part of defendant's servants, and of the assumption of risk and contributory negligence on the part of plaintiff. These questions were properly submitted to the jury, and the verdict is conclusive upon us.

It is insisted that the court erred in permitting the plaintiff to prove the contract between the company and its firemen as to the condition of the coal to be placed on the tender, in regard to the size of the lumps, it being contended that there was no allegation in the complaint charging breach of duty in this respect. We think, however, that the charge of negligence in the improper loading of the tender was sufficiently broad to cover the charge of loading with coal of over-sized lumps. Loading coal in lumps too large amounted to improper loading. Besides this, we think it was proper, under the issues made by the pleadings, for the plaintiff to show that there was a contract regulating the size of the lumps, which had been violated. This was proper, for the jury might well have considered that in determining whether or not plaintiff was guilty of negligence in getting too near the coal pile. He had the right, to some extent, to assume that the tender had been equipped with coal of the size lumps called for in the contract. The jury could consider that in determining whether he was guilty of negligence in standing near the pile before he had examined it. If the size of the lumps had not exceeded the specifications of the contract, then no danger could possibly arise from standing too near the pile.

The instructions given by the court are not inconsistent with the views herein expressed, and it may be stated, without entering into a full discussion of the instructions, that none of them are found to be incorrect. Numerous instructions requested by

the defendant were all given by the court, and the case went to the jury upon instructions as favorable as defendant could ask. We conclude therefore that there is no error in the record, and the judgment is affirmed.

GLASSCOCK v. GLASSCOCK.

Opinion delivered March 6, 1911.

1. PARTITION—AUTHORITY TO SELL.—A chancery court is authorized to order a sale of lands in a partition suit if it appears from a report of the commissioners or from other evidence heard by the court that the lands were not susceptible of division among the owners without great prejudice to their interests. (Page 154.)
2. SAME—ORDER OF SALE—VALIDITY.—Though the chancery court erred in its reasons for ordering a sale of the lands in a partition suit, the sale would not thereby be avoided, as this would only be an error in the proceeding to be taken advantage of in a direct attack. (Page 155.)
3. APPEAL AND ERROR—WHAT SHOULD APPEAR OF RECORD.—It is the duty of one seeking to vacate a decree to bring it before the court so that it can be seen whether or not the decree is valid. (Page 155.)
4. JUDICIAL SALE—IRREGULARITIES—EFFECT OF CONFIRMATION.—Confirmation of a judicial sale of lands cures such irregularities as a failure to advertise the lands or a sale of the lands *en masse*. (Page 155.)
5. INFANCY—RELIEF AGAINST JUDGMENT.—The statutes authorizing a minor to show cause against a judgment or decree after coming of age (Kirby's Digest, § § 4431, 6248) afford no relief to an infant plaintiff. (Page 155.)
6. SAME—SALE OF LAND TO STRANGER—VALIDITY.—A purchase of land by a stranger at a sale under an erroneous but not void decree will be protected, even though the decree be afterwards set aside, and though the defendant was an infant when the decree was rendered. (Page 155.)

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

Johnson & Burr, for appellants.

1. If the errors in the decrees ordering the sale of the lands and confirming the same were such as would cause a reversal thereof on appeal, it was the duty of the chancellor to vacate them in this suit. 25 Fla. 927; 14 Ill. 206; 3 Enc. Pl. & Pr. 571, note 1. The report of the commissioners in partition does not

show facts sufficient to authorize the court to order the lands sold. 90 Ark. 500. Having no jurisdiction, independently of the statute, to order a sale of lands under partition proceedings, the chancery court in ordering a sale in such case is bound by the provisions of the statute. See Kirby's Dig., § 5785; 76 Ark. 146, 150; 77 Ark. 320.

Unless the commissioners' report shows that the lands "are so situated" that partition cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it is not authorized to order a sale. The sole duty of the commissioners was to report upon the physical condition of the lands, upon which alone the court could legally base an order of sale. 49 Ark. 104, 109.

The report must affirmatively show jurisdiction to make the order of sale; otherwise such order is void. 76 Ark. 146, 151.

2. The sale of the lands is void for want of notice, and also because of gross inadequacy of price for which the same were sold; and the decree confirming such sale is void. 3 Md. Ch. 514; 3 Mo. App. 33; 96 N. W. 230; 73 Ark. 37; 59 Ark. 460; 26 Ark. 227; 67 Ark. 80; 86 Ark. 443; Kirby's Dig., § § 5786, 5787.

3. The complaint states a cause of action in favor of the Hays heirs, they having been defendants in the original suit, and this being an application on their part to vacate the same within one year after arriving at full age. Kirby's Dig., § § 4431 sub. 8, and 6248; 81 Ark. 441; 79 Ark. 194; 70 Ark. 418.

4. The complaint is a direct attack both upon the decrees and the sale. 119 S. W. (Mo.) 369.

That part of the lands have passed to persons other than the purchaser at the sale is no defense to the complaint. They are chargeable with notice of defects appearing on the face of the record. 50 Ark. 322; 70 Ark. 415; 81 Ark. 441.

Block & Kirsch and *Huddleston & Taylor,* for appellees.

1. The decree in the partition suit is as binding and conclusive upon appellants as upon persons *sui juris.* 55 Ark. 29; 110 U. S. 317.

2. All the alleged errors set out in the complaint appear in the record, and proceedings to reverse or modify the decree should have been by appeal. Kirby's Dig., § § 4427, 4428.

3. The power of the chancery court to entertain a bill of review is limited to cases other than those "for errors appearing in the record." Kirby's Dig., § 4428.

If the complaint is in the nature of a bill of review, it is not sufficient because it does not set out the proceedings now being attacked.

4. The complaint shows on its face that this proceeding is a collateral attack upon the original decree. A bill in equity to set aside a judgment becomes a collateral attack when it seeks to affect a *bona fide* purchaser under the judgment or a stranger to the record. Van Fleet on Collateral Attack, 4, note 2; *Id.* 5; 49 Ark. 417; 54 Mo. 577; 73 Ill. 422; Freeman on Judgments, § 513; 1 Black on Judgments, § 194; 100 Mo. 30; 31 Cal. 272; 40 Ark. 42.

McCULLOCH, C. J. The chancellor sustained a demurrer to the complaint in this case, and the plaintiffs appealed from the final decree dismissing the complaint. It is alleged in the complaint that plaintiffs, some of whom are minors, and the defendant A. H. Glasscock, and certain other heirs at law of H. W. Glasscock, deceased, were the owners as tenants in common of a large body of unimproved lands in Greene County, Arkansas (containing about 22,000 acres); and this proceeding was instituted to set aside the sale of said lands under a former decree of the chancery court of Greene County directing the sale thereof for a division of the proceeds. The record of the former proceedings has not been brought into the record of the present case; but according to the allegations of this complaint the court in said former proceedings first appointed commissioners to partition the lands, but, after the commissioners made report in writing stating that the lands could not be so partitioned without great prejudice to the owners, the court then ordered a sale by a commissioner. The report of the commissioners appointed to make the partition is set forth in the complaint, and it is contended that the reasons given by them why partition in kind could not be made were insufficient to justify the court in ordering the sale of the land. The report of the commissioners, as set forth in the complaint, is in part as follows:

"They find the most valuable tracts, and those upon which there are any improvements, are in most instances in the posses-

sion of parties claiming title adversely to the Glasscock estate, and from appearances, and from our information, they have had possession in many instances for sufficient length of time under the statute of limitations to ripen their claims, or at least to endanger the title of the Glasscock estate.

"That, while they have not made a personal inspection of the land lying east of Paragould, they are informed and believe that the same conditions prevail as to this land, and that perhaps even a larger per cent. of improved lands are in possession of parties claiming adversely to the Glasscock estate. That the unimproved lands are scattered over a wide territory, and to a great extent lying in small bodies, are swampy, low and wet, and in many instances are covered with water, and that sloughs and ponds are scattered promiscuously over all the lands lying in the bottom, from such land the valuable timber had been cut and removed. As to some of the tracts of land, we were simply informed, and believe, that there are other claimants to the title, claiming adversely to the Glasscock estate.

"Wherefore your commissioners beg to report that partition of the lands above described can not be made without great prejudice to the owners, and great uncertainty as to the title to the lands which would be assigned to each heir. They state that they and Mr. Newsom were occupied four days each in the discharge of their duties herein."

It is also alleged in the attack on the validity of the sale that the lands were sold *en masse* for a gross sum, and not in separate tracts or subdivisions; that the price was inadequate; and that some of the lands were not embraced in the advertisement of sale. The lands were bid off at the sale by defendant A. H. Glasscock, but he assigned the certificate of purchase to the Sachs Realty Company, a corporation, to which the sale was confirmed and the deed executed, pursuant to the orders of court. Said corporation was made a party defendant to this action as well as certain other parties claiming an interest in the land

Counsel for plaintiff present the case here as a bill to review the former decree of the chancery court for errors alleged to be apparent upon the record thereof.

The court had jurisdiction to order a sale of the lands for partition, and it was proper to do so when it appeared from the

report of the commissioners, or from other evidence heard by the court, that the lands were not susceptible of division among the owners without great prejudice to their interests. *Moore* v. *Willey,* 77 Ark. 317. Even if it be conceded that the reasons stated by the commissioners were insufficient to justify a sale of the lands, that would not avoid the sale, the court having jurisdiction to order it. It would be only an error in the proceeding, to be taken advantage of in a direct attack. *Delatour* v. *Woodall,* 43 Ark. 521; In re *Simmons,* 55 Ark. 485. Besides, there is nothing to show, according to the allegations of the complaint, that the court based the decision ordering a sale entirely on the report of the commissioners. For aught that appears in this record, the court may have heard other evidence. It is the duty of one seeking to vacate a decree to bring it before the court so that it can be seen whether or not the decree was valid. *Killion* v. *Killion, ante* p. 15.

There is, therefore, nothing in the allegations of the complaint to show that there was error of the court apparent upon the record of the former decree. The alleged defects in the sale as to the advertisement and the sale *en masse* were mere irregularities which did not avoid the sale and were cured by the confirmation. *Bell* v. *Green,* 38 Ark. 78; *Apel* v. *Kelsey,* 47 Ark. 413.

Are plaintiffs entitled to any relief under the statute (Kirby's Digest, § § 4431 and 6248), giving an infant the right, within twelve months after coming of age, to show cause against a judgment or decree? All of the plaintiffs were minors when the former decree was rendered. Some of them were plaintiffs in that action, and, being moving parties in the proceedings, the statute affords them no relief, even if the case was one which fell within the terms of the statute. *Woodall* v. *Moore,* 55 Ark. 22.

A purchase of land by a stranger at a sale under a decree which is erroneous but not void will be upheld, even though the decree be afterwards set aside. This is true whether the defendant be an adult or an infant when the judgment was rendered. *Moore* v. *Woodall,* 40 Ark. 42; *Woodall* v. *Delatour, supra;* In re *Simmons, supra; Boyd* v. *Roane,* 49 Ark. 397. It is otherwise, of course, where the decree is void. *Rankin* v. *Schofield,* 81 Ark. 440.

It follows that the complaint stated no cause of action, and the demurrer was properly sustained.

Affirmed.

HELENA v. WOOTEN.

Opinion delivered March 13, 1911.

1. MUNICIPAL CORPORATIONS—ENCROACHMENT ON SIDEWALK—AWNING.—Under the power given by Kirby's Digest, § 5648, to municipal corporations to prevent or remove encroachments or obstructions upon any of the streets or sidewalks, a city is authorized to require wooden awnings over sidewalks to be removed, although they are in good repair, and were erected in compliance with the terms of an ordinance then in force. (Page 158.)
2. SAME—NOTICE TO REMOVE ENCROACHMENT.—An ordinance requiring the removal of stationary awnings over sidewalks is not invalid because it fails to require that notice shall be given to the owner of the building to remove the awning. (Page 159.)

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

W. G. Dinning, for appellant.

The ordinance is a valid exercise of the powers granted by statute to the city council. Kirby's Dig. § 5648. It is not unreasonable. 88 Ark. 263; 52 Ark. 301; 64 Ark. 152; 146 N. C. 527; 60 S. E. 413; 20 L. R. A. (N. S.) 145; 26 L. R. A. 340, 343; 53 Atl. 202; 55 Atl. 1132; 57 Atl. 267; 50 N. E. 256; 14 N. E. 451. It is clearly a police regulation and within the powers vested by law in the municipality. The fact that the awning was erected in accordance with the provisions of a former ordinance does not take away from the city the power to act under the later ordinance. A municipality cannot divest itself of its police powers. 72 Ark. 556, 564, 565; 202 Mo. 690; 100 S. W. 627.

Moore & Vineyard, for appellee.

1. The authority given under the statute upon which appellant relies is to prevent or remove obstructions upon the streets, sidewalks, etc., of a city, and the evident intention of the Legislature was to provide for the removal of any such encroachments or obstructions erected in violation of an ordinance prohibiting

the same. Kirby's Dig., § 5648, subdiv. 3. The latter part of the section, "* * * or to punish for its continuance, after an order has been made by the city council or the police court *for its removal or abatement,*" clearly shows the legislative intention. The ordinance in question does not require the removal of the awning in controversy, and there was no order by the city council or police court for its removal or abatement as required by statute.

2. The encroachments and obstructions prohibited by the statute are "* * * buildings, fences or structures of any kind, posts, trees or any other matter or thing whatever * * *." The latter clause, "or any other matter or thing whatever," under the well-established rule of statutory construction, refers to matters and things similar to those enumerated preceding said clause, and evidently refers to obstructions and encroachments which rest upon or are attached to the street or sidewalk. 17 N. W. (Mich.) 272; 15 Mich. 54; 4 Dillon, Mun. Corp. 730.

3. The awning was not a nuisance. "The power of regulation of real estate proprietors in the use and improvement of their property extends only to erection, alteration and repair." 28 Cyc. 736; 13 L. R. A. 481; 134 N. Y. 163; 69 N. J. 182.

4. The ordinance is unreasonable. It does not provide for the removal of awnings erected prior to its passage, neither does it provide for any notice to property owners who had previously, under authority of the former ordinance, erected awnings to remove the same.

HART, J. G. A. Wooten was convicted in the police court of the city of Helena for "failure to remove awning as provided by ordinance No. 1426" of said city. He appealed to the circuit court, and on a trial *de novo* was acquitted. The city prosecutes this appeal to reverse the judgment rendered. The facts are agreed upon, and are substantially as follows: Wooten owns a brick building in that part of the city of Helena wherein it is made unlawful by the ordinance under which this prosecution was commenced to maintain or continue to use other than folding and adjustable awnings made of cloth or like material upon frames of wood or iron. There is now attached to the front of said building an awning that is not adjustable, and which is not such an awning as is required by said ordinance. The awning extends over a portion of Cherry Street within the district cov-

ered by said ordinance. At the time said awning was constructed there was an ordinance of the city making it lawful to construct same in the manner and of the materials of which said awning was constructed. Said awning was at the time of the commencement of the prosecution and is now in a good and safe condition. It is also admitted that in the event a fire should occur in the second story of said building, the awning might and probably would, to some extent, interfere with the work of the firemen in their effort to extinguish the flames. The chief of the fire department of the city testified that he had had many years' experience in that department, and knew that an awning such as the one now being used by Wooten on the building on Cherry Street interferes materially with the work of the fire department in its efforts to extinguish fires.

It is also agreed that Wooten was duly notified to remove the awning, but failed and refused to do so. The ordinance which he was charged with violating was passed under the power given the council by the third subdivision of section 5648 of Kirby's Digest, which reads as follows: "To punish, prevent or remove encroachments or obstructions upon any of the streets, sidewalks, wharves or other public grounds of such city, by buildings, fences or structures of any kind, posts, trees, or any other matter or thing whatsoever, and no statute of limitation or lapse of time that any such obstruction or encroachment may have existed, or been continued, shall be permitted as a bar or defense against any proceedings or action to remove or abate the same, or to punish for its continuance, after an order has been made by the city council or the police court for its removal or abatement."

This section contemplates that municipalities shall have control over their streets. An awning is a structure which extends in whole or in part over the sidewalk, and, being constructed for private purposes, if unauthorized, it is an encroachment on the street. Hence the common council of a city is authorized, on account of their liability to fall, to forbid the erection of wooden awnings, whether supported by posts or not, and to remove the same. *Fox* v. *Winona*, 23 Minn. 10.

In the case of *Hibbard* v. *Chicago*, 173 Ill. 91, 40 L. R. A. 621, the court said: "The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right

to encroach thereon by the erection of a permanent structure. The streets are held in trust by the municipality, and this fact prevents the municipality from authorizing any encroachment on or obstruction of them by such structure." In that case the court held that the awning was an encroachment on the street of the city.

In the case of *Small* v. *Edenton,* 146 N. C. 527, 20 L. R. A. (N. S.) 145, the court held: "1. A municipal ordinance requiring the removal of stationary awnings from over its sidewalks is reasonable. 2. The court, and not the jury, must determine the question of the reasonableness of a municipal ordinance requiring the removal of stationary awnings from over the sidewalks where the question of the good faith of the municipality is not involved."

It is true the agreed statement of facts shows that Wooten had a stationary awning supported by braces or brackets, and that it was in good repair; but it can not be said that the ordinance requiring the removal of awnings of that kind was needlessly or capriciously passed; for the chief of the fire department testified that the awning would interfere materially with the work of the fire department in extinguishing fires. Besides, while the awning was erected in compliance with the terms of an ordinance then in force, the evidence does not show how long the awning had been erected, and the presumption in such cases, as stated in *Small* v. *Edenton, supra,* is "that the owners of the awnings erected have been fully compensated by the use and enjoyment of same for all expenditures made upon the faith of the permission or license obtained from the city."

Again, it is objected that no notice was provided in the ordinance to be given the owner of the building to remove the awning. But the agreed statement of facts shows that Wooten was "duly notified to remove said awning" and refused to remove the same. We hold that the ordinance was expressly authorized by the statute, and is valid.

It follows that the judgment must be reversed, and the cause remanded for a new trial.

PLUNKETT v. WINCHESTER.

Opinion delivered March 6, 1911.

1. MECHANICS' LIEN—JURISDICTION TO ENFORCE.—A mechanics' lien may be enforced in the circuit court. (Page 165.)
2. CONTRACTS—ENTIRETY.—A contract for the sale of several lots, reciting a single consideration, should be construed as an entire contract. (Page 165.)
3. SAME—BREACH—REMEDY.—Where one party to a contract commits the first substantial breach of it, the other is authorized to regard it at an end and bring suit for the balance due under the contract. (Page 165.)
4. MECHANICS' LIEN—ENFORCEMENT.—Where a party furnished materials for the construction of a building under an agreement that the owner thereof by way of payment would convey certain lots at an agreed price, and such owner was unable to convey part of the land, the party is entitled to enforce his mechanics' lien. (Page 166.)

Appeal from Pulaski Circuit Court; *F. Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was brought by appellees for the balance due for work done in the construction of a house on lot 1, block 7, Plunkett's Second Addition to the city of Little Rock.

It was alleged that under a contract made on the 22d day of June, 1908, the plaintiffs agreed to erect a building on lot 1, block 7, of Plunkett's Second Addition to the city of Little Rock, Ark., for the total sum of $938; that they did work upon the building to the amount of $450 and were to be paid part in money and part in lots, towit: lots 1 and 2, block 4, in Plunkett's First Addition, "but that the said defendants are unable to deliver possession of said lots, and that there is still due and unpaid to the plaintiffs the sum of $388; that within the time required by law they filed their lien upon the above described property as demanded by their contract, but the defendants failed and refused to comply with their part of the contract, and that they are unable, and have failed and refused, to deliver to them lots 1 and 2, block 4, in Plunkett's First Addition, and state the facts to be that another than the plaintiff, one A. Clinton, is in possession of and claims the property and refuses to deliver the possession of same. Prayed judgment for the $388 and a lien upon the property.

A demurrer to the complaint was filed and overruled. Defendants then filed an answer and a motion to transfer the cause to the chancery court, which being overruled they filed amended and substituted answer and cross complaint, stating:

They admitted that they entered into the contract with the plaintiffs for the construction of the buildings on the site mentioned, but denied that the contract price was $938, and that plaintiffs did work upon the building amounting to $450. They denied that plaintiffs were to receive, as compensation for the construction of the building, part money and part lots, but stated that plaintiffs agreed to purchase five certain lots from the trustee of defendants, and that the money due them for the construction of said building was to be credited on the purchase price of the lots and advanced to enable said plaintiff to carry out their contract; denied the contract to deliver to plaintiffs at any specified time said lots 1 and 2 in block 4; alleged that plaintiffs knew that these lots were in the possession of adverse claimant at the date of contract, and that the title to same was in litigation; denied any indebtedness whatever to plaintiffs and their right to a lien upon the property. They stated further that appellees contracted to pay a debt of $250 due by the defendants to the Ladies' Building & Loan Association, which was to have been added to the amount due from appellants to plaintiffs for the construction of the building, and the whole amount credited upon the purchase price of the lots plaintiffs contracted to purchase; that plaintiffs failed and refused to pay said debt of $250; that they paid to plaintiffs the sum of $300 on the contract price of $688 for the construction of the building, leaving a balance of $388 to be credited on the purchase price of the lots. They offered to deed to appellees lots 3, 4 and 5 for the purchase price of $675, and, after the settlement of litigation pending with reference to lots 1 and 2 and the payment by said appellee of the said sum of $250 to the Ladies' Building & Loan Association, to convey to them said lots 1 and 2. Prayer for dissolution of the lien; that defendants, upon tender of deed to lots 3, 4 and 5, have judgment for the sum of $287, the difference between the purchase price of said lots 3, 4 and 5, towit: $675, and the balance due said plaintiffs for the construction of the building, towit, $388, and that defendants have a lien upon said lots for the stated sum of $287 and for costs.

The contract between the parties, although referred to in both, was not made an exhibit to either the complaint or answer and cross complaint, and it and the receipts marked as exhibits were introduced in evidence by agreement of counsel, and read to the jury, as follows:

"Done at Little Rock,

"State of Arkansas.

"This indenture, made this twenty-second day of June, 1908, by and between Ray DeWitt Plunkett, party of the first part, and W. H. Winchester and J. L. Winchester, party of the second part,

"Witnesseth, That the said party of the first part agrees to pay to the party of the second part the following sums of money for the construction of a house on West Third Street, on lot 1, block 7, Plunkett's Second Addition to the city of Little Rock, Arkansas:

For carpenter work	$450.00
For painting	60.00
For plastering	60.00
For lathing	14.00
For foundation	20.00
For canvassing and papering	35.00
For digging foundation	20.00
For flues and brick columns	25.00
For extra work	4.00
"Total	$688.00

"In addition to the work herein mentioned, said party of the second part assumes and agrees to pay a debt of $250 in the Ladies' Building & Loan Association, which makes the amount:

	$688.00
	250.00
"Total	$938.00

"The party of the first part agrees to pay, as the work progresses, the sum of $300 in cash to the party of the second part. It is further agreed and understood that the party of the second part is to buy from James Coates, as trustee, five lots in Plunkett's First Addition and to pay the prices hereinafter mentioned, from

which prices the work hereinbefore mentioned shall be deducted and the remainder to be paid in four equal installments, annually.

Lots 1 and 2, block 4, for the sum of	$450.00
Lots 3, 4 and 5, for the sum of	675.00
Cash to be paid as the work progresses	300.00
	$1425.00
"Balance	938.00
"Balance	$487.00

"In favor of the said Ray DeWitt Plunkett, which is to be paid in four equal installments, annually, $121.75 each.

"Witness our hands and seals the day and year first above written.

"Ray D. Plunkett,
"W. H. Winchester,
"J. L. Winchester,
"R. D. Plunkett, Agent.

"This contract is made in triplicate."

The receipt, marked "Exhibit A" to appellant's answer, and which was considered in evidence at the trial, is as follows:

"EXHIBIT A."

"Little Rock, Ark., Sept. 21, 1908.

"W. A. Winchester and J. L. Winchester, Drs. to Ray D. Plunkett.

1908.

July 2.	Cash to bricklayer	$ 2.00
July 2.	Cash by R. D. Plunkett, Agent	45.00
July 4.	Cash to darkey laborer	.75
July 6.	Cash by R. D. P.	20.00
July 11.	Cash by R. D. P.	34.00
July 23.	Cash by R. D. P.	101.00
Aug. 15.	Cash, R. D. P.	20.00
Aug. 15.	Six thousand lathes, per darkey	1.20
Sept. 5.	Cash R. D. P.	25.00
Sept. 19.	Cash per Ray D. P.	7.50
		$256.45
		6.50
"Total		$262.95

$300.00
262.95

$37.05 Balance due Winchester Bros. O. K. A. A. Winchester, Sept. 23, 1908. Witness: I. S. Humbert.

(Reverse Side.)

"Little Rock, Ark., Sept. 23, 1908.

"The within statement is correct, and the house is hereby turned over to Ray D. Plunkett, with a balance due Winchester Bros. of $37.05, for which the said Winchester Bros. have accepted a due bill on the said Ray D. Plunkett. It is further stated that all claims for labor done on the house has been paid.

"Sept. 26, 1908. This claim of $37.05 has this day been paid by Ray D. Plunkett's check for said amount and the house stands free of any claim whatsoever for labor done, etc., by Winchester Bros., or any one under them.

[Signed by] "A. A. Winchester,
"W. A. Winchester."

"Witness: I. S. Humbert."

(Appended to this instrument is a check.)

"Little Rock Trust Co.

"Little Rock, Ark., Sept. 26, 1908.

"Book No. 8701.

"Pay to the order of A. A. Winchester $37.05 (thirty-seven 05-100 dollars.

"O. K. now—9-26-08. Ray D. Plunkett.

Indorsed—"A. A. Winchester."

After these instruments were read to the jury, the court upon its own motion, after asking defendants if they desired to amend their answer or stand upon the pleadings, and being advised that they elected to stand on the pleadings, over their objection, instructed the jury to return a verdict in favor of plaintiffs in the sum of $388, which was done, and from the judgment rendered thereon this appeal is prosecuted.

Manning & Emerson, and *I. S. Humbert,* for appellants.

B. D. Brickhouse, Carmichael, Brooks & Powers, for appellees.

KIRBY, J., (after stating the facts). It is insisted, first, that the court erred in refusing to transfer the case to the chancery court; and, second, in instructing the verdict.

The suit was not brought upon the contract, and no relief was asked under its terms. The complaint stated a cause of action cognizable at law, and the court committed no error in overruling the demurrer. Neither was there error committed in overruling the motion to transfer made upon the filing of the answer, which asked for no equitable relief.

No motion to transfer was made upon the filing of the amended answer and cross complaint, and from the views hereinafter expressed it will be seen that no error was committed by the cause not being transferred upon the court's own motion.

It is contended further that the contract was severable or apportionable, and that appellants had the right to a specific performance of that part of same relating to the conveyance of the three lots about the title of which there was no dispute, since the price on them had been fixed in the contract separately at $675; and this without regard to their refusal and inability to perform the contract and convey the other two lots agreed to be conveyed. The work done for which the suit was brought, the consideration to be paid, was single and entire, and reached to the whole contract, as expressed by its terms, "to pay the prices hereinafter mentioned, from which prices the work hereinbefore mentioned shall be deducted, the remainder to be paid in four equal installments annually." By its terms it must be considered an entire contract. 2 Parsons on Contract, page 676; Ex parte *Hodges,* 24 Ark. 201; 3 Page on Contracts, 2295.

The complaint alleged the breach of the contract by appellant's refusal, not being able to perform all of it and convey the two lots purchased, the title thereto being held adversely to them by one A. Clinton, and the answer admitted these allegations and their inability to perform the contract. The first substantial breach of it having been committed by appellants, appellees were authorized to regard it at an end and bring suit for the balance due for the construction of the building, which was admitted by the answer to be $388, the amount claimed in the complaint. *Haney* v. *Caldwell,* 43 Ark. 193; *National Surety Co.* v. *Long,* 79 Ark. 528; *Eastern Ark. Hedge Fence Co.* v. *Tanner,* 67 Ark. 156.

It is true, the receipt in evidence shows that there were no liens against the house for work done by others, and the payment of the amounts shown that were by the contract to be applied to certain items, with a balance due appellees of $37.05, and the receipt for this $37.05 does state that "the house stands free of any claim whatsoever for labor done, etc., by Winchester Bros. or any one under them," but this could not be held a waiver by them of the lien given by law for the work done in building the house, there being no consideration for such statement and the labor not having been paid for. "If the labor has been performed or material furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has the right to resort to the security furnished by law, unless the rights of a third person intervene," etc. *McMurray* v. *Brown*, 91 U. S. 257.

It is also true, no denial of the allegations of the answer were made by reply, but the complaint alleged that there was a balance due of $388 for the construction of the building, and that defendants had refused and failed to pay for the same by the conveyance of the lots in accordance with the terms of the contract, and could not do so, being without title, and these allegations were admitted by the answer.

The admitted facts showing plaintiffs entitled to the relief sought, there was no question for the jury, and the verdict was properly directed.

The judgment is affirmed.

PEOPLE'S MUTUAL LIFE, ACCIDENT & HEALTH INSURANCE COMPANY v. POWELL.

Opinion delivered March 6, 1911.

INSURANCE—BINDING RECEIPT—AUTHORITY OF AGENT.—One who sues an insurance company upon a receipt issued by a soliciting agent and purporting to bind the company in advance of the issuance of a policy assumes the burden of proving that such agent had actual or apparent authority to issue such receipt.

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

Downie, Rouse & Streepey, for appellant.

A failure of the minds of the parties to meet in any essential vitiates the contract. 5 L. R. A. (N. S.) 407. An agent cannot bind his company by a parol contract of insurance. 100 Ga. 330; 34 N. Y. S. 872; 87 Fed. 71; 20 Ind. App. 206; 66 U. S. 548. The burden was on appellee to show authority in Claiborne. 62 Ark. 33; 39 Atl. 910. Apparent authority is not sufficient. 49 W. Va. 437; 54 Ark. 75; 85 Ark. 345. A reformation will be decreed only where the evidence is clear and decisive. 71 Ark. 614; 75 Ark. 72.

W. F. Pace and *Troy Pace,* for appellee.

A contract of insurance can rest in parol. 66 Ark. 621. A reformation of the policy may be had before or after loss so as to make it conform to the real agreement of the parties. 77 Ark. 48; 73 Ark. 119. The principal is bound by whatever is done by his agent within the scope of his apparent power. 49 Ark. 320. The recovery is not excessive. 58 Ark. 621.

McCULLOCH, C. J. The plaintiff, Worthy Powell, instituted this action in the chancery court of Boone County against the People's Mutual Life, Accident & Health Insurance Company to reform an alleged contract of accident insurance and to recover an amount alleged to be due thereon by reason of an accident to plaintiff. He alleges that one of the defendant's agents, W. C. Claiborne, solicited him to apply for a policy in the company, and executed to him a binding slip or receipt putting said policy immediately into effect, and that said agent orally agreed with him that the contract should take effect on November 1, 1909, the receipt being given on October 26, 1909. The receipt is in the following form:

"Policy fee receipt. October 26, 1909. Received of..... an application for a policy in the People's Mutual Life, Accident & Health Insurance Company, and the sum of five dollars, being payment in advance of the policy fee upon the policy so applied for; and, should said company decline to issue a policy thereon within twenty days from date hereof, I agree that the amount of payment actually paid shall be returned to said applicant by the person signing this receipt. Applicant will please notify the company at Little Rock, Ark., should policy not be received within ten days from date hereof.

(Signed) "W. C. Claiborne."

It is alleged that Claiborne inadvertently wrote his own name in the blank space instead of plaintiff's name as he should have done, and it is in this particular that the receipt is sought to be reformed.

Claiborne forwarded to the company at Little Rock an application on a printed form, purporting to have been signed by plaintiff. This was received at defendant's office in Little Rock on November 4, 1909, and the policy was issued and mailed to plaintiff on that day. The accident which caused his injury occurred November 1, 1909. The application contained the following clause: "I understand and agree that under no circumstances shall this application be binding on the company, nor shall the policy hereby applied for be in force or this company incur any liability whatever, until * * * the policy has actually been issued by the proper officers of the company at its home office at Little Rock, Ark., and that the company shall not be bound by any statements made by me or the solicitor of this application. * * * I understand that the authority of the agent is limited to soliciting and forwarding this application and collecting the policy fee."

Counsel for plaintiff concede that, if plaintiff signed the application, it became a part of the contract, and that in that event he can assert no claim by reason of the accident, which occurred before the issuance of the policy. *Cooksey* v. *Mutual Life Ins. Co.*, 73 Ark. 117. But the plaintiff claims that he did not sign the application, and he so testified at the trial below. The question arises then as to the authority of the agent. Claiborne was not called as a witness, and no testimony was introduced as to the extent of his authority. The burden was on plaintiff to prove that the soliciting agent had authority, or that it was within the apparent scope of his authority, to issue a receipt binding the company to the insurance in advance of the issuance of the policy. *American Ins. Co.* v. *Hornbarger*, 85 Ark. 337; *City Electric Street Ry. Co.* v. *National Exchange Bank*, 62 Ark. 33; *American Ins. Co.* v. *Hampton*, 54 Ark. 75; *Todd* v. *Insurance Co.*, 34 La. Ann. 63; *Agricultural Insurance Co.* v. *Fritz*, 61 N. J. L. 211, 39 Atl. 910.

The company issued the policy on the faith of the application, which showed that the agent had no authority except to forward applications and collect the fees, and which contained

the stipulation that the company should not be bound until the policy was issued.

It is unnecessary, therefore, for us to pass on the disputed question of fact whether or not plaintiff signed the application. Nor is it necessary to discuss other questions in the case as to whether the written receipt amounted to a contract for immediate insurance, and, if not, whether it would be varying the terms of the writing to prove a contract by oral testimony. We are of the opinion that the plaintiff failed to make out a case by proof of the soliciting agent's authority, and the decree in his favor is erroneous.

Reversed and dismissed.

WOOD, J., not participating.

DARDANELLE & RUSSELLVILLE RAILWAY COMPANY v. BRIGHAM.

Opinion delivered February 27, 1911.

1. MASTER AND SERVANT—DEATH OF SERVANT—INSTRUCTION.—In a suit to recover damages for the killing of a fireman on defendant's engine in collision with the train of another railway company it was error to instruct the jury upon the theory that defendant was liable if its engine was wrongfully upon the other's track where there was no evidence to that effect. (Page 177.)
2. SAME—LIABILITY FOR NEGLIGENCE OF FELLOW SERVANT.—Evidence tending to prove that defendant's engineer discovered the approach of the train of another railway company in time to avoid the collision in which the plaintiff's intestate was killed, or in time to warn intestate so that he could escape, will support a finding that defendant was negligent. (Page 178.)
3. SAME—LIABILITY OF MASTER FOR ACTS OF STRANGER.—In an action against a railway company for the negligent killing of plaintiff's intestate in collision with the train of another railway company using a joint track, defendant's liability depends upon the negligence of its own servants and not upon the negligence of the other company. (Page 178.)
4. JOINT TORT—EFFECT OF RELEASE OF ONE TORTFEASOR.—A covenant not to sue one of two joint tortfeasors does not release the other from liability. *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329, followed. (Page 178.)

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

J. W. & M. House and *J. W. House, Jr.*, for appellant.

1. The proof does not show any negligence on the part of the defendant company. Under the rules and under the law as imposed by statute, each company was required to keep its trains under control while within the yard limits, and to keep a constant lookout. Appellant had the right to assume that these rules and statutes would be obeyed by the other company, and that the engineer of the local freight would observe the rules imposed upon him. There was therefore no reason why appellant should have expected a collision under the circumstances and conditions under which it did occur; and negligence on the part of appellant will not be presumed.

2. If it be conceded that appellant was guilty of negligence, such negligence was not the proximate cause of the accident. In order to be a proximate cause, it must be an independent cause, which is adequate to and does bring about an accident or injury. It supersedes any remote cause. 57 Am. & Eng. Ry. Cases (N. S.) 71.

Where a responsible agent intervenes between the original negligence and the injury, the line of causation is thereby cut off, and the originally negligent party is relieved from liability. Hence, even if appellant was negligent, the conduct of the engineer of the St. Louis, Iron Mountain & Southern Railway Company was an independent act which produced the injury and became the proximate cause thereof, relieving appellant from liability. 49 Am. St. Rep. 199; 27 *Id.* 753; 23 *Id.* 220; 117 Mass. 533; 24 R. I. 292; 96 Am. St. Rep. 713; 66 Ark. 68, 70; 92 Ark. 138; 39 Am. St. Rep. 251; 124 S. W. 543; 83 Ill. 56.

3. If it be conceded that appellant was a joint tort feasor with the St. Louis, Iron Mountain & Southern Railway Company, the settlement between appellee and the latter company on June 21, 1909, constituted a complete bar to this action. 73 Ark. 14; 15 Am. Dec. 536; 32 N. E. 273; 41 Am. Dec. 371; 17 Atl. 338; 36 Am. Rep. 833; 37 Cal. 216; 136 Mich. 175; 8 Bacon's Abridgment, Bouvier's Ed., tit. "Release," p. 227; 34 Vt. 390; 20 Ia. 317; 113 Cal. 426; 28 Wash. 428; 92 Am. St. Rep. 864 and note at p. 872; 4 Pac. 1165, 1167; Cooley on Torts 139; 15 Am. Dec. 536.

4. The foregoing authorities are applicable in all cases

where two or more parties are guilty of a tort whether they joined in the commission of the tort or not. But the elements are wanting that would constitute the two companies joint tort feasors. In order to constitute this relation, two or more parties guilty of a tort must have acted in concert for a common purpose and common end; but here the parties were acting independently. Hence, under these conditions, when the person injured makes a settlement or compromise with the party who was the active moving cause of the injury, the other tort feasor is discharged. 126 N. C. 701; 78 Am. St. Rep. 677; 59 S. W. 920; Cooley on Torts 166-168; 30 Am. St. Rep. 685; 5 Am. Rep. 368; 40 *Id.* 430; 57 Am. St. Rep. 713.

J. T. Bullock and *R. B. Wilson,* for appellee.

1. Authorities cited by appellant in support of the contention that the proof fails to show any negligence on its part would be applicable to issues which might arise if this were a suit between it and the other company. But that is not the issue here. The question is, did the master discharge its duty to the servant under the circumstances of this case? If it did not, it should respond in damages, and it is no defense to appellant that some one else was also negligent. Smith's Whittaker on Negligence, 38, and authorities cited; 29 Cyc. 496; *Id.* 498; 61 Ark. 381; 129 Am. St. Rep. 663; 84 *Id.* 295.

2. The agreement entered into by appellee with the St. Louis, Iron Mountain & Southern Railway Company was not a settlement and satisfaction of her claim for damages against appellant. It is not claimed that appellee was paid in full nor that she gave indemnity to the former company from further liability; but, on the contrary, she expressly reserved in the contract the right to proceed against both companies. 2 Ark. 57; *Id.* 222-3; 4 Ark. 203, 207; 70 Ark. 197; 12 Ark. 164; 7 Ark. 332; 45 Ark. 290; 1 Parsons on Cont. 23, 162; 1 Wharton on Cont. § 1037; 1 Lindley, Part. 433; Addison on Cont. 107; 34 Me. 296; 29 Ia. 448; 86 Ark. 329; 88 Ark. 473; 129 Fed. 203, 63 C. C. A. 361; 122 N. W. 499; 83 S. W. 258; 93 S. W. 166; 173 N. Y. 455, 66 N. E. 133; 98 Pac. (Kan.) 784.

This is a case of concurrent negligence, resulting in the injury and death of appellant's intestate. The act of one of

these joint contributors to the accident was the act of both, and they are jointly and severally liable for resulting injuries. As to the appellant, the acts of its engineer were the acts of a vice principal, or master. 87 Ark. 587; 89 Ark. 522. And deceased did not assume the risk of negligence on the part of the master. 90 Ark. 223; 34 Am. St. Rep. (Ill.) 52. In order to render a party liable for injury resulting from negligence, it is sufficient if that party's negligence, concurring with one or more efficient causes other than the injured party's fault, is the proximate cause of the injury. 73 Ark. 116; 106 U. S. 700; 36 Am. St. Rep. 655 and note. Neither did he assume the risk of injury from the negligence of the other company. 38 N. Y. 260; 64 N. Y. 138; 39 Minn. 328; 78 Cal. 454; 73 Ark. 116.

J. W. House and *J. W. House, Jr.,* in reply for appellant.

1. It is well settled that an "accord and satisfaction" may be had upon the payment of any sum agreed upon, or upon the execution of an agreement to pay a sum agreed upon, as was done in this case. 114 S. W. 451; 31 Am. Rep. 47. See also 72 Pac. 875; 62 L. R. A. 760; 24 Conn. 613, 621; 6 Wend. (N. Y.) 390-391; 66 N. W. 606-614; 53 Pac. 229; 11 Col. App. 384; 13 Pac. 198-201; 65 Mo. App. 55-59; 53 Pac. 229; 71 Pac. 885; 11 N. Y. App. Div. 93-96.

Where, in the discharge of one joint tort feasor, it is stipulated that his release shall not discharge the other or others, the weight of authority is that such a release discharges all the tort feasors, notwithstanding the stipulation to the contrary. 45 Md. 60; 25 Hun 543; 35 Hun 94; 66 N. Y. Supp. 1066; 72 *Id.* 1084; 2 Ohio 89; 2 Hen. & M. (Va.) 38; 92 Am. St. Rep. 872, 876, note, 864; 32 Fed. 338; 150 Fed. 559; 125 Pa. St. 397; 66 Cal. 163.

2. Where the servant has equal opportunity as the master to know the character of the services he is to perform, and undertakes to perform the same, he assumes the risk in the performance thereof. 139 N. Y. 369; 12 S. W. 172; 110 Wis. 307. And where the servant's means of knowledge, or opportunity to know, is equal to the master's, he assumes the risk. 1 Labatt, M. & S. § 404; 29 Conn. 548; 71 Hun 127; 59 N. W. 217; 68 Fed. 630.

McCULLOCH, C. J. Appellee's intestate, J. L. Brigham, while working for appellant as a locomotive fireman, was killed in

a collision of his engine with one of the St. Louis, Iron Mountain & Southern Railway Company on the main line of the latter's track at Russellville, Ark. Appellant operates a short line of railroad between Russellville, a station on the St. Louis, Iron Mountain & Southern Railway, and Dardanelle. Its railroad is connected with the Iron Mountain line with a "Y" a short distance east of the station at Russellville. The west leg of the "Y" runs parallel with the main line of the Iron Mountain for some distance in the direction of the station, and connects with the main line of that road about 1,200 feet east of the station. All of the side tracks and switches there are owned by the St. Louis, Iron Mountain & Southern Railway Company, and constitute a part of its yardage. One is a house track, which runs off from the south side of the main line from a point between the depot and appellant's connection with the main line to the freight house. The other side tracks are on the north side of the main line of the Iron Mountain road, the first one being a passing track, and three others known in their order as Nos. 1, 2 and 3. There is a connecting switch between the main track and the passing track a short distance west of the station, and the only other connection with the main track and the other tracks on the north side thereof is about a half-mile east of the station. The result of this is that, in switching cars from the track of appellant's road to the side tracks on the north side of the Iron Mountain main line track, or *vice versa,* it is necessary to travel along the Iron Mountain main track a distance of something like a fourth of a mile. Appellant's road has no connection except with the St. Louis, Iron Mountain & Southern, and necessarily receives all of its through freight from that road.

On May 2, 1904, the two companies (appellant and the St. Louis, Iron Mountain & Southern Railway Company) entered into a written contract covering traffic arrangements between them, in consideration of certain mutual undertakings and the payment by appellant to the other company of a monthly rental of $35 whereby appellant was required to do the switching and was allowed to use the tracks and station of the other company. Two clauses of the contract which are material read as follows:

"5. The parties of the first part hereby grant to the party of the second part the right to connect the west leg of the "Y"

at Russellville with the track of the said parties of the first part at the point indicated by the letter G on the blue print map hereto attached, and to operate its trains and cars with its own motive power over, along and upon the track of said parties of the first part, between the point indicated by the letters G and E upon the blue print map hereto attached, and over and along and upon the track proposed to be constructed by the party of the second part between the points indicated by the letters E and F upon said blue print map, as hereinbefore provided; but the party of the second part shall only operate its trains, engines and cars upon the right of way of the parties of the first part under the direction and supervision of the proper officer of said parties of the first part, and in such manner as not to interfere with the business of said parties of the first part, or either of them.

"6. The parties of the first part further grant said party of the second part the right to joint use of station facilities at Russellville, Arkansas, and said parties of the first part will, through their servants and agents at the station at Russellville, attend to the business of the party of the second part at that point, including telephone service, but, while so attending to the business of the party of the second part, such servants and agents shall be considered to be the sole servants and agents of said party of the second part; but it is expressly understood and agreed that the party of the second part shall perform all switching service between the Dardanelle & Russellville Railway Company and the Little Rock & Fort Smith Railway free of charge, and that the parties of the first part shall have free use of the "Y" at Russellville, but in such manner as not to interfere with the business of the second party."

Appellant had been allowed the use of the tracks under a similar contract for a number of years before the occasion in question, making in all about fifteen years that the tracks had been so used. The train with which Brigham's engine collided was a local freight train, which reached Russellville from the west somewhere about noon or shortly thereafter. The collision occurred at 2:15 P. M. on January 12, 1909. Appellant's engine, with Brigham as fireman and Charles Shuttle as engineer, was switching at the time, and it became necessary to go over on one of the tracks north of the main line after four cars to weigh them.

After getting these cars, the engine was run down to the west end of the yards to get a couple of coal cars on the passing track, and after getting them it was backed down to the east end of the yards. About this time the engine of the local freight train, which was then at the station headed towards the east, came down the main track near the end of the passing track to drop a car where appellant's engine was then standing waiting on the passing track. After dropping the car, the Iron Mountain engine backed down the main line toward the station, and appellant's engine backed out on to the main track and headed down the track following the other engine, the two facing each other. In doing this appellant's engine was making its way to the connecting switch of its line with the main track of the Iron Mountain. It passed this switch far enough for it to be opened, and the brakeman dropped off to open the switch. About this time the Iron Mountain engine, having been connected with the train which had been left standing near the station, gave a start signal of two blasts of the whistle and started down the track toward appellant's engine, which was then backing through the switch on to its own line. Shuttle, the engineer, testified that he thought the other engine was coming down the track for the purpose of backing in on the house track, and that, as soon as it approached close enough for him to decide that it was not coming for that purpose, he blew a stop whistle, to which no attention was paid, and that he blew a second time. The Iron Mountain train came on, and collided with the appellant's engine, and Brigham's death resulted therefrom.

Appellee first instituted an action against the Iron Mountain to recover the damages sustained, alleging that the collision was caused by the negligent act of the engineer of that company. The complaint alleged that Shuttle, by a blast from his engine whistle, signalled the local freight train to stop, but that the servants in charge of the local freight train refused to give any heed to the said signal, and that the same was repeated, and that again the servants in charge of the local freight train refused to recognize or in any way give heed to said signal; and that, while appellant's train was backing on to its track, and before it could get its train completely on its track and re-throw the switch, the engineer in charge of the local freight train negligently, recklessly, wantonly,

wilfully and without any regard for the safety of persons or property on either of said trains ran the local freight train on to and collided with appellant's train. On motion of defendant, appellant was made a party defendant, and appellee, after appellant was made a party, amended her complaint by alleging that the collision occurred by reason of the concurring negligence of the engineer and conductor of appellant's train with the trainmen of the other defendant, the St. Louis, Iron Mountain & Southern Railway Company.

Subsequently, the latter company entered into a written contract with appellee whereby it conceded its negligence in the particular named, and its liability for the damage, and agreed, in substance, that if appellee would prosecute her suit solely against appellant and dismiss the action against the Iron Mountain company, and that if appellee failed to recover damages from appellant, the other company would within thirty days from the final result of the trial of the cause pay to appellee the sum of $7,500 and the costs of the action; and that in the event of a recovery from appellant of less than $10,000, said company would pay to appellee a sum sufficient to amount in the aggregate to $10,000. It was further agreed in the contract that the Iron Mountain company should at once pay to appellee the sum of one thousand dollars, which was to be credited on the total amount to be paid under the contract, should there be any further liability thereon. Thereupon, the action against the Iron Mountain was dismissed by appellee, and the action was prosecuted alone against appellant. The trial resulted in a verdict against appellant, the damages being assessed at $10,000; and the court ordered the one thousand dollars paid by the Iron Mountain company to be credited thereon.

Appellant, in addition to denying the allegations of negligence on the part of its servants, pleaded the contract between appellee and the Iron Mountain company as a satisfaction of the claim for damages. The court submitted the case to the jury on instructions requested by appellee to the effect that if appellant's engine was on the main track of the Iron Mountain in violation of the rules of that company, or in violation of the contract between the two companies, appellant would be liable for the injury, even if the servants of the other company were

negligent in running the engine into appellant's engine. We think these instructions were erroneous, and that the case should not have been submitted to the jury on that theory. It is conceded that the servants of the Iron Mountain were guilty of negligence which caused the injury, and that that company is liable for the damages. It is clear that, according to the undisputed evidence in the case, even that of the engineer of the Iron Mountain engine, that company is responsible for the injury.

It is true that the contract between the two companies specified that appellant, in doing the switching in the yards, must do so "in such manner as not to interfere with the business" of the other company. There is also a rule of the Iron Mountain company which made appellant's train an inferior one, in the sense that it was the duty of the trainmen to keep out of the way of superior trains. Whatever may be construed to be the effect of the contract and the rule referred to, the undisputed evidence in the case shows that appellant had been permitted to do switching in the yards and over the main line of the other road for fifteen years precisely in the manner in which it was being done at the time this collision occurred. The witnesses all state, without contradiction, that the local freight train of the Iron Mountain road frequently remained at the station and in the yards several hours, and that it was an unbroken custom for appellant's train to continue its switching during that time, using the main track for that purpose. The only duty recognized was that it should get out of the way of the Iron Mountain trains when necessary.

In doing the switching in accordance with the unbroken custom of many years standing, appellant's trainmen were not guilty of negligence merely in going in on the main track. If, in the discharge of their duty while on that track, they failed to keep out of the way of the Iron Mountain trains, then they are chargeable with negligence, but not merely on account of being on the track where, according to custom, they had the right to be. The Iron Mountain trainmen were bound to have known that appellant's engine was on the main track, for the switching was being done at the time that the Iron Mountain engine was backed down the main line for the purpose of coupling on to the train, appellant's engine following it down the track and stopping only a few hundred yards in front of it and in full view. We say,

therefore, that there was no negligence in being on the main track under those circumstances, and the court was in error in submitting this to the jury as an act of concurring negligence. For this error the judgment must be reversed.

The only theory upon which the appellee could recover damages of appellant is the one that the engineer, Shuttle, was guilty of negligence in failing to give a stop signal as soon as the Iron Mountain engine started down the track towards him. The fireman was at that time, according to some of the testimony, at work shoveling coal and did not see the approaching engine. The duty, therefore, of avoiding the injury devolved entirely upon the engineer; and if he discovered the approaching engine in time to have avoided a collision, or in time to have warned the fireman so that he could escape before the collision, and failed in his duty, then appellant is responsible for his negligence in that respect. It appears from the great preponderance of the evidence that, as soon as the engineer realized that the other engine was not coming to the house track, he gave a stop signal and did all that he could reasonably do to avoid a collision. Still, the evidence shows that when the Iron Mountain engine started it gave a start signal, which meant that it was about to resume its journey, and there was room to find that appellant's engineer should have taken cognizance of the fact that there was danger of a collision, and that the trainmen on the other engine were unconscious of his presence, and should have given a stop signal earlier than he did. The evidence tends to show that the engineer on the Iron Mountain engine was reading his orders and did not look to see the other engine ahead of him. If this be true, an earlier signal might have attracted his attention—at least, the jury might have so found.

It is contended that, on account of the joint use of the track by the two companies under the aforesaid contract, each is liable for damage caused by negligence of the other. We hold that appellant, when its own servants were free from any charge of negligence, is not liable for damage caused by negligence of the other company. *St. Louis S. W. Ry. Co.* v. *Heintz*, 82 Ark. 459. It may be different where a passenger is injured.

Learned counsel for appellant insist with much earnestness that the effect of the contract entered into by appellee with the

Iron Mountain road was a satisfaction of the claim for damages, even conceding that appellant and the other company were jointly liable; and that the contract operated as a release of appellant from liability. We deem it proper to dispose of that question in view of another trial. The contract was, as we construe it, merely a covenant not to sue the other company, and did not operate as a satisfaction of the claim. *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329. Counsel cite many cases bearing on this question, but, without reviewing them, we entertain no doubt that such is the effect of the contract, and appellant can claim nothing under it.

For the error in instructing the jury as heretofore indicated, the judgment is reversed, and the cause is remanded for a new trial.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* STATE.

Opinion delivered March 13, 1911.

1. CRIMINAL LAW—WAIVER OF OBJECTION TO PROCESS.—Where warrants of arrest in ten criminal cases against a railway company was served by reading the warrants to the company's station agent, and the railway company entered its appearance by asking a continuance in each case, and subsequently pleaded guilty in four of the cases, the other six being dismissed at its cost, the company can not, on a motion to retax the costs, raise the objection that the railway company could not be brought into court by a warrant of arrest. (Page 181.)
2. WITNESSES—CLAIM FOR ATTENDANCE—SIGNING.—Kirby's Digest, § 3524, providing that "every account for attendance of a witness shall be sworn to," does not require such account to be signed by the witness nor that he make affidavit to it. (Page 181.)
3. SAME—CLAIM OF ATTENDANCE.—Where witnesses in attendance upon the circuit court went before the clerk and swore to their claims of attendance in a case, the failure of the clerk to attach his jurat and signature to the affidavits, if necessary, will not invalidate such claims, as such omission is amendable. (Page 183.)
4. COSTS—MOTION TO RETAX—EVIDENCE.—It was not error, upon a motion to retax costs, to permit the witnesses in the cause to testify that they had attended court as witnesses in accordance with the subpoena the number of days shown on the record of their proof of attendance, as such testimony did not tend to contradict or vary such record or proof of attendance. (Page 183.)

Appeal from Polk Circuit Court; *J. T. Cowling,* Judge; affirmed.

Read & McDonough, for appellant.

1. The *accounts* were not sworn to according to law. Kirby's Digest, § 3524; 91 Ark. 600; 64 Ark. 148. An *account* is a formal statement in detail of transaction—a list or statement of monetary or property transactions or detailed statement. 88 Me. 108; 10 West. Law Journal, 145; 38 Me. 149; 45 Mo. 573; 102 Mich. 462; 79 Miss. 220; 53 Mo. 423; 128 Ala. 505; 64 Ark. 148; 91 Ark. 600. A statement merely showing a total sum or balance is not an account. 16 Atl. 138.

2. The witnesses were not *legally* summoned. A bench warrant is not a summons. A corporation cannot be arrested. Kirby's Digest, § § 2109, 2225, 2256, 2261-2-3-4, 2309, 2254. The return is invalid. *Id.* 6045, 6042.

3. An allowance of fees to these witnesses without authority of law would be a violation of § 14, art. 1, Constitution of U. S.; Kirby's Digest, § § 3520 to 3526.

KIRBY, J. This appeal is brought from the judgment of the Polk Circuit Court overruling appellant's motion to retax the costs in each of ten cases that were in said court upon indictments returned against it at the October, 1909, term, charging violations of section 6634 of Kirby's Digest for failure to provide drinking water, keep separate waiting rooms, water closets, etc.

The circuit court convened in regular session on October 17, the indictments were returned on the 22d. Bench warrants were issued on that day on each of the ten indictments, and the sheriff returned them duly served on that day "by reading to D. Salee and H. Ravenscraft, agents of the K. C. S." The return on each warrant was the same, and the record shows the cases were placed upon the docket, and on November 15, the last day of court, by an order continued until the next term. It was not shown that the warrants were directed, issued, or the cases put upon the docket by any order of the court. The clerk testified that during the term a telegram was received from the attorney of the road asking that the cases be continued to the next term because of his inability to be present at the term. At the April term the railroad company entered pleas of guilty in four of the cases, and

the others, numbered 1047 to 1058, were at the same time dismissed, each by an order as follows: "Now, on this day it is ordered by the court that this cause be and the same is hereby dismissed, and that the defendant pay all costs in this cause expended."

The costs complained of were fees of appellees Thorington, Connell and Shrewsbury for attendance as witnesses in said cases at said October term of court. Each of them was in each case subpoenaed "to appear before the Polk Circuit Court on the ——— day of its next term, which will be on the 25th day of October, 1909, and testify," etc., by subpoena regularly issued and duly served on 22d day of October, 1909, and claimed seven days' attendance in each case. It is contended, first, that no costs could have been legally incurred at the October term of court, at which the indictments were returned, because the defendant could not be required to answer them before the next term of court, and could not be brought into court at all by bench warrant, and, second, that said witnesses did not prove up their claims as required by law.

The purpose of the warrant and summons was to bring the defendant into court, or notify it to come, to answer the indictment. It is not possible to arrest a railroad company and produce it in court, and the warrant could only have the effect of a summons to give notice of the pendency of the indictment, but we do not regard it necessary to decide that it was a proper method of bringing the railroad company into court since its attorney asked continuances of the cases for the term because he could not be present, and at the following term on April 25, 1910, it entered pleas of guilty in four of them, and the others were dismissed at its cost at the same time without objection by it to the service. Such objection on a motion to retax the costs comes too late.

2. These witnesses attended the October term of said court in said cases in pursuance to said subpoena as shown by the testimony, and it is objected that they are not entitled to fees because they failed to prove their attendance as the law requires. Sec. 3524, Kirby's Digest, provides: "Every account for attendance of a witness shall be sworn to, and shall state that he was summoned to attend as a witness in the cause upon which the

charge is made, and the number of days he attended, and, if summoned without the limits of the county, the number of miles he traveled in consequence of the summons."

These witnesses went before the clerk and signed the witness' claim record at the October, 1909, term of court, as shown by it, in the column of the page designated "signature." This record book had printed at the top of each page, *Witness' Claims,* ——— Term, 190—," and the following oath: "I do solemnly swear that I was duly subpoenaed as a witness in the cause wherein I have claimed attendance, and that in obedience to said subpoena I have served as such witness as set forth opposite my name." The page was ruled into columns designated: "No. of Case: Plaintiff: Defendant: For Whom: County: Days: Miles: Amount, Dollars: Cents: Signature." The style of the case was given in columns under "Plaintiff" and "Defendant," "State of Arkansas v. K. C. S. Ry. Co." then followed the numbers of the indictments or cases in which fees were claimed, the figure 7 under "Days;" $10.50 with "each" written above it in column "Amount," and the witness' name on the same line in "Signature" column. There was no jurat, nor was the clerk's name signed upon the page. He testified it was his custom to call the attention of witnesses proving attendance to the oath and show them where to sign and swear them, and that he was unable to remember whether he had sworn them when they signed the claim record. It was not his custom to attach his signature and jurat to the page. They each testified that they were served with subpoena and the return of the officer on the subpoena showed this fact, and attended court in obedience thereto, J. C. Thorington and S. D. Shrewsbury seven days each in four cases, and J. A. Connell seven days in six cases, the number of days claimed on the said records; that they made their claims of attendance and signed the claim record at said term of court, and understood at the time that they were making oath thereto before the clerk, and one testified that he held up his hand and was sworn by the clerk. One of the appellees stated that the clerk signed his (witness') name on the claim record at his request. The statute does not require that the witness shall sign his statement of account, nor make an affidavit to it in proving up his attendance before the clerk, but only that it "shall be sworn to." The clerk

is allowed a fee as part of the costs of the case "for swearing witnesses to attendance." *Logan Co.* v. *Trimm,* 57 Ark. 489; *Trimble* v. *Ry. Co.,* 56 Ark. 249. If his signature and jurat were necessary to witnesses' proof of attendance, it was his duty to attach them, and the claim will not be invalidated because he failed to perform his duty. Such omission is amendable, and he could have attached them at the hearing of the motion. *Guy* v. *Walker,* 35 Ark. 212; *Fortenheim* v. *Claflin,* 47 Ark. 49.

The court committed no error in permitting the witnesses to testify that they had attended court as witnesses in the cases in accordance with the subpoena the number of days shown on the record of their proof of attendance at that term, and were entitled to the amounts then and there claimed, for such testimony did not tend to contradict or vary said record or proof of attendance. The court found that J. C. Thorington, J. A. Connell and S. D. Shrewsbury attended court as witnesses at the October term, 1909, after being summoned, the number of days claimed in said cases and proved up their attendance at said term and taxed the amount of their claim for fees as costs in said cases, and his findings are sustained.

The judgment is affirmed.

MORTIMORE *v.* ATKINS.

Opinion delivered March 13, 1911.

1. APPEAL AND ERROR—CONCLUSIVENESS OF MASTER'S FINDINGS.—Findings of fact made by a master appointed by consent are as conclusive as the verdict of a jury, and will not be disturbed if they are supported by legally sufficient testimony. (Page 189.)
2. PARTNERSHIP—POWER OF PARTNER TO PAY DEBTS.—The members of a partnership are authorized to settle and adjust claims against the partnership. (Page 192.)

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

STATEMENT BY THE COURT.

This action involves the settlement of the partnership affairs of Mortimore & Co., a firm engaged in buying and selling cotton

at Van Buren, Arkansas, and composed of W. C. and R. W. Mortimore, J. C. Atkins and W. H. McMurray. W. C. and R. W. Mortimore resided at Greenville, Texas, and composed the firm of Mortimore & Company, engaged in the cotton business at that place. W. H. McMurray was also a member of the firm of W. H. McMurray & Company, engaged in the cotton business at Little Rock, Arkansas. J. E. Atkins resided at Van Buren, and had the immediate charge of the business of the partnership; and bought all the cotton for the firm. There was a written contract of partnership executed on September 10, 1909. By the terms thereof it was agreed that J. E. Atkins should be active manager of the business, and should devote his time to the best interest of the business; that Mortimore & Company of Greenville, Texas, and W. H. McMurray of Little Rock, Ark., should furnish the new firm all of their correspondents in Europe and America, and should sell all the cotton possible for the new firm without charge for personal services; that neither Mortimore & Company nor W. H. McMurray should charge the new firm for any office work done at Greenville, Texas, or Little Rock, Arkansas; that if the profits are less than $5,000 they shall be divided; one third to Mortimore & Company of Greenville, one third to J. E. Atkins and one third to W. H. McMurray. The profits did not amount to over that sum, and it is not necessary to state how they should be divided if they exceeded $5,000. The losses were to be borne in the same proportion. In November, 1909, a disagreement arose between the partners over the way the business had been conducted, and the firm ceased buying cotton. They were unable to agree upon a settlement of the partnership affairs. W. C. and R. W. Mortimore instituted this suit in the chancery court against J. E. Atkins and W. H. McMurray for the purpose of settling the partnership affairs. They prayed that a receiver be appointed to take charge of the assets of the firm; that a master be appointed to state an account between the partners. That upon final hearing the partnership be dissolved, its affairs settled, and the profits divided between the partners according to their respective interests. A receiver was appointed by the court; but, as no exceptions have been made to his reports, no further reference need be made to him.

By consent of parties, a master was appointed to take proof

and state the account between the parties. His report is as follows: "Now comes the master in the above-entitled cause and presents the following to this honorable chancery court as his report to said court as master in the above entitled cause.

"At the November term, 1909, of this honorable court I was appointed master by said court to take and hear proof in this action on all claims that might be offered against the firm of Mortimore & Company, of Van Buren, Arkansas, and to take an account of said claims, and of the partnership business of said firm of Mortimore & Company, of Van Buren, Arkansas, and to report my findings in this behalf to this court.

"I respectfully state that on the 20th day of April, 1910, personally appeared before me W. C. Mortimore, of the firm of Mortimore & Company, of Greenville, Texas, and of Mortimore & Company, of Van Buren, Arkansas, and personally appeared before me J. E. Atkins and W. H. McMurray, of the firm of Mortimore & Company, of Van Buren, Arkansas, and also appeared E. L. Matlock and R. R. Neyland, attorneys for Mortimore & Company, of Greenville, Texas, and Sam R. Chew, attorney for Atkins & McMurray, when I proceeded to take and hear testimony upon the condition of the partnership business of Mortimore & Company, of Van Buren, Arkansas, and upon the validity, justness and correctness of the claims of Mortimore & Company of Greenville, Texas, against the firm of Mortimore & Company, of Van Buren, Arkansas.

"The testimony of all witnesses was, by agreement of said parties, taken in shorthand and afterwards written out by typewriter. Each of the testifying witnesses were by me duly sworn that the evidence they and each of them should give before me in the above entitled cause should be the whole truth as they should answer unto God. The signatures of the said witnesses to their respective evidence so given before me was by all of said parties waived. I therefore proceeded on said 20th day of April and from time to time upon agreement of all parties until the 2d day of May, 1910, to so take and hear evidence upon said claims of Mortimore & Company, of Greenville, Texas, and upon the condition of the said partnership business of Mortimore & Company, of Van Buren, Arkansas.

"I find from the evidence that W. C. and R. W. Mortimore

are partners, and as such compose the firm of Mortimore & Company, of Greenville, Texas. I further find from the evidence that the firm of Mortimore & Company, of Van Buren, Arkansas, is composed of W. C. Mortimore, R. W. Mortimore, W. H. McMurray and J. E. Atkins. I find from the evidence that the entire assets of Mortimore & Company, of Van Buren, Arkansas, consist solely of the following items, towit: moneys in the hands of George R. Wood, of Van Buren, Arkansas, as receiver of the property of Mortimore & Company, of Van Buren, Arkansas, which is held by the said George R. Wood subject to the order of this court, to be $4,022.32. I find $500 of this amount to be part of the proceeds of the sale of 100 bales of cotton marked "OPET," said sale being made by R. W. Mortimore on the 10th day of November, 1909, and that said cotton was the property of Mortimore & Company, of Van Buren, Arkansas. I find further that there is now in the hands of George R. Wood, as receiver, bagging used for patches, that is the sole property of Mortimore & Company, of Van Buren, Arkansas, of the value of $747.15. I find the total assets of Mortimore & Company, of Van Buren, Arkansas, to be $4,769.47. I find from the evidence that Mortimore & Company, of Van Buren, Arkansas, is indebted to Mortimore & Company, of Greenville, Texas, in the sum of $2,534.24. In arriving at said finding I allowed the following claims of Mortimore & Company, of Greenville, Texas, $313.61, 285.53, 241.64, 189.94, 433.56, 82.08, 25.45, 230.08, 255.00, 66.30, 250.00, 150.00, as set forth in exhibits B, C, D, E, F, G, H, I, J, K, L and M.

"I find from the evidence that Mortimore & Company, of Greenville, Texas, are indebted to Hagedoon & Company, of New York, in the sum of $1,462.30 for insurance upon cotton belonging to Mortimore & Company, of Van Buren, Arkansas; that there is now pending in the Crawford Circuit Court a suit by Hagedoon & Company against Mortimore & Company, of Greenville, Texas, for said insurance, but I find further in charging Mortimore & Company, of Van Buren, Arkansas, with said amount of insurance, that Mortimore & Company, of Greenville, Texas, is indebted to Mortimore & Company, of Van Buren, Arkansas, in the sum of $1,451.25, this being part of the proceeds from the sale of 204 bales of cotton that Mortimore & Company,

of Greenville, Texas, sold for Mortimore & Company, of Van Buren, Arkansas, leaving still a balance of $11.15 due Mortimore & Company, of Greenville, Texas, from Mortimore & Company, of Van Buren, Arkansas.

"I find from the evidence that Mortimore & Company, of Greenville, Texas, sold practically one-half as much cotton for Mortimore & Company, of Van Buren, Arkansas, as was sold for Mortimore & Company, of Greenville, Texas, and, in accordance with said finding, plaintiff's claim for $344.02, as set forth in exhibit "J," is by me reduced to $255.00, which practically is one-third of $762.03, the total cable account of Mortimore & Company, of Greenville, Texas, and Mortimore & Company, of Van Buren, Arkansas.

"I find that the item amounting to $3,082.10, claimed by Mortimore & Company, of Greenville, Texas, to be due them by Mortimore & Company, of Van Buren, Arkansas, was derived from cotton belonging to Mortimore & Company, of Van Buren, Arkansas, that was sold and handled by Mortimore & Company, of Greenville, Texas, and the same is by me disallowed, as I find no legal liability of Mortimore & Company, of Van Buren, Arkansas, for said amount.

"Finally I report the statement of the account of Mortimore & Company, of Van Buren, Arkansas, as I find it to be from the evidence, as follows:

Total assets $4,769.47
From which must be deducted 2,534.24
being the amount Mortimore & Company, of Van Buren, Arkansas, is indebted to Mortimore & Company, of Greenville, Texas, leaving a balance of $2,235.13 to be divided as follows: One-third to Mortimore & Company, of Greenville, Texas; one-third to W. H. McMurray, and one-third to J. E. Atkins, less the costs and expenses of the above entitled cause.

"I respectfully ask the court to fix some sum of money as compensation for my services rendered herein to be paid out of the assets herein accounted for and to allow me the sum of $62.50 for services rendered by W. Morse, as stenographer and typewriter, in taking down the testimony herein and for an order of this court directing the payment of said sum before making

final distribution to the members of the firm of Mortimore & Company, of Van Buren, Arkansas.

"Having fully reported herein the manner in which I have discharged my duties as master of this court, I respectfully submit this, my report, and beg that it be received and confirmed by the court and that I be discharged from further duty herein."

Mortimore & Company, of Van Buren, handled 4,077 bales of cotton during the existence of the partnership. Atkins bought nearly all the cotton for the firm. W. C. Mortimore bought two or three small lists, probably 50 bales. Mortimore & Company, of Greenville, sold 2,486 bales of the cotton. The claims of Mortimore & Company, of Greenville, amounting in the aggregate to $2,534.24 and allowed by the master, grew out of the sale of these 2,486 bales. McMurray and Atkins sold the balance of the cotton except 200 bales, which were sold by McMurray, Atkins and R. W. Mortimore; and the proceeds of sale were deposited to the credit of Mortimore & Company, of Van Buren, in the Citizens Bank of that place.

The chancellor in all things set aside and dismissed the report of the master, and made findings of his own, and entered a decree accordingly. Because the views we shall hereinafter express sustain the findings and report of the master, it will be unnecessary to set out in full the findings and decree of the chancellor, but reference will be made in the opinion to such portions as are deemed necessary. Such facts as are not stated above, which are necessary for a proper determination of the issues involved, will also be stated or referred to in the opinion. The case is here on appeal.

E. L. Matlock and *Dan W. Jones,* for appellants; *Neyland & Neyland,* of counsel.

1. The master having been appointed on the motion of and by consent of the parties, his findings of facts are as conclusive as the verdict of a jury. 74 Ark. 336; 85 Ark. 414; 91 Ark. 292; 92 Ark. 359; 96 Ark. 480.

2. The findings and conclusions of the master upon questions of law are not conclusive, and are subject to review by this court. The court erred in holding that the "covering" transactions were gambling contracts. 67 Ark. 172.

Sam R. Chew, for appellee.

1. Partners in handling and dealing with partnership property and funds are held to the utmost good faith. 1 Bates on Partnership, § § 303, 313; 18 Beav. 75; 57 Barb. 127; 29 Ala. 379; 4 Sandf. Ch. 223; 13 Ark. 609; 53 Ark. 152.

2. The findings of a master appointed by consent will not be taken as conclusive unless such findings are supported by legally sufficient evidence. 74 Ark. 336.

HART, J., (after stating the facts). It is conceded that under the appointment all questions of fact were referred to the master, and, the appointment having been made by consent of the parties and on their motion, his findings and conclusions upon questions of fact are as conclusive and binding as the verdict of a jury; and where there is testimony legally sufficient to support such findings, they will not be disturbed. Such is the effect of the following decisions, cited by counsel in their briefs. *Greenhaw* v. *Combs,* 74 Ark. 336; *Paepcke-Leicht Lbr. Co.* v. *Collins,* 85 Ark. 414; *Griffin* v. *Anderson-Tully Co.,* 91 Ark. 292; *Carr* v. *Fair,* 92 Ark. 359; *McVeigh* v. *Chicago Mill & Lbr. Co.,* 96 Ark. 480.

The plaintiffs, W. C. and R. W. Mortimore, claim credit for $3,082.10, designated in the proof as "covers" or "hedges." The master disallowed the claim, finding "no legal liability of Mortimore & Company, of Van Buren, Arkansas, for said amount."

The chancellor disallowed this claim of the plaintiffs on the ground that it was "a ruse and an attempted fraud upon their part upon the rights of defendants, J. E. Atkins and W. H. McMurray, in the partnership business of Mortimore & Company, of Van Buren, Arkansas." The ground on which plaintiffs make this claim is that subsequently to the execution of the written contract they made another and different contract with the defendants in regard to the sale of cotton to the firm. It will be noted that the firm of Mortimore & Company, of Greenville, composed of W. C. and R. W. Mortimore, the plaintiffs, sold 2,486 bales of cotton for Mortimore & Company, of Van Buren. This cotton was shipped to foreign customers, and the money actually received on the sale as each lot was shipped was deposited to the credit of Mortimore & Company, of Van Buren, in the Citizens' Bank of that place. In regard to the sale of this cotton, W. C. Mortimore testifies that, by a special or new agreement made sub-

sequent to the original contract of partnership, the firm of Mortimore & Company, of Greenville, was to cover the daily cotton purchases of Mortimore & Company, of Van Buren, by applying same upon contracts for the sale of spot cotton, which the firm of Mortimore & Company, of Greenville, had, to protect the Van Buren firm against possible loss, occasioned by the fluctuation in the market value of cotton so purchased by the Van Buren firm. That by the terms of this new agreement all cotton bought by the Van Buren firm was reported by wire to the Greenville firm that it might be covered, and the Greenville firm undertook to cover all Van Buren purchases daily. That as the quality bought was unknown until samples arrived (usually 14 days after the date of purchase was reported), and as the lots purchased were also too irregular in quantity to be sold separately, the Van Buren purchases, according to a general custom of the cotton business, were absorbed into the Greenville purchases, and the whole covered by a general sale. That, on arrival of the cotton samples and re-weights, the cotton was applied indiscriminately to any open contract on the Greenville firm's books without reference to price or date or cover. That on this account Van Buren purchases were applied to sales made before and after the date its purchase was reported and covered as the quality happened to suit contracts open on the Greenville firm's books. That the cotton bought by Mortimore & Company, of Van Buren, was bought on the basis of January future quotations, and was sold that way. That, for the sake of clearness and fairness, the "closing price of January in New York" was used as the basis in each and every case, both for purchase and sale. In short, according to his testimony, the new agreement was made for the purpose of protecting Mortimore & Company, of Van Buren, from loss in buying and selling cotton, and the Van Buren firm bought the cotton and sold it to the Greenville firm on the basis of January future quotations; and that the Van Buren firm in consequence was not interested in the price for which the Greenville firm re-sold the cotton—whether such re-sale resulted in loss or gain. The cotton was shipped by the Greenville firm to its customers, and the price received for it was deposited in the Citizens' Bank at Van Buren to the credit of the Van Buren firm, leaving the differences in price at which the Greenville firm took it and at which it actually

sold it to be later adjusted between the two firms. According to Mortimore's testimony, the Greenville firm sold these 2,486 bales of cotton for $3,082.10 more than it agreed to allow the Van Buren firm for them. This is the item which the master did not allow for the reason that he found that there was no legal liability of the Van Buren firm for this amount. The chancellor found that this method of dealing as testified to by W. C. Mortimore was an attempted fraud upon the rights of Atkins and McMurray, and disallowed the claim on that ground. As we view the matter, the question of fraud need not be considered. Both McMurray and Atkins testified that they made no such agreement as testified to by W. C. Mortimore. It is urged by counsel for plaintiffs that their testimony in this respect is contradicted by their own letters to the plaintiffs in which they recognized that all cottons purchased by the Van Buren firm were being covered by plaintiffs, and that they preferred that all cotton be kept covered at all times. Both Atkins and McMurray testify that they understood that plaintiffs meant hedging or covering by buying futures, and in this way protecting themselves from loss, and that this is what they referred to in their letters to plaintiffs. Mortimore himself admits that he bought no cotton futures on account of the Van Buren firm. Hence this leaves the question one of fact; and it is, did plaintiffs and defendants make the new agreement testified to by W. C. Mortimore? If they did not, then plaintiffs sold the cotton under the original contract of partnership, and defendants are entitled to their share of the proceeds of sale. The master found that no such agreement as testified to by W. C. Mortimore was made. This is the effect of his finding that there was no legal liability of Mortimore & Company, of Van Buren, for said amount. His finding in that respect has evidence legally sufficient to sustain it, and under the rule above announced the chancellor erred in setting it aside.

The master allowed the claims of plaintiffs set out in exhibits B, C, D, E, F, G, H, I, J, K, L and M. It is not necessary to set them out *in extenso*. Most of them are for reclamations on account of loss of weights and undergrade of cotton sold by plaintiffs for Mortimore & Company, of Van Buren. The chancellor found that there was no legal proof to sustain these claims for reclamation, but we think he erred in so holding.

W. C. Mortimore testified (and his testimony is not attempted to be contradicted) that all the cotton sold by plaintiffs for Mortimore & Company, of Van Buren, was to customers in foreign countries or to cotton manufacturers in the United States; that in either case the seller must guaranty the weights, the grade and the staple; that the shipments are subject to reclamation against the seller if the weights are deficient; that the seller must make good the difference in staple and grade; that, according to the rule of the cotton trade, when a claim for reclamation is made by the buyer, the seller must pay it as made, or have the claims submitted to arbitration and then pay whatever award is made; that the claims are based on awards made by the board of arbitrators, and were paid by plaintiffs in good faith. It is contended that this evidence is incompetent. Counsel for plaintiffs insist that plaintiffs had no personal knowledge that there was a loss in weight or a deficiency in the grade or staple of the cotton, and contend that such loss must be established by persons who have actual knowledge of those facts. We can not agree with this contention. The cotton was sold by plaintiffs for the firm of Mortimore & Company, of Van Buren, and the adjustment of the claims for reclamation was a part of the transaction. The plaintiffs were members of the firm and were its agents. The adjustment was made in good faith and in accordance with the custom of the cotton business in such cases. The power of the plaintiffs as members of the firm to settle the partnership claims resulted from their agency for the firm; and the testimony of W. C. Mortimore that he had settled or adjusted the claims was competent. 30 Cyc. pp. 477 and 500; Bates on Partnership, § 384; George on Partnership, pp. 216-220. It follows that the finding of the master should not have been disturbed.

One of the items embraced in the exhibits was for telephone and telegraph charges in regard to business of the firm. Mortimore testified that, while he kept no separate account of the amounts so expended by the Greenville and Van Buren firms, each firm had about the same amount expended for telegraph and telephone service, and that the expense should be shared equally. He gave a statement of the amount expended for both offices, and the master charged the Van Buren office with half of it. His finding should not be disturbed.

Hagedoon & Company of New York filed an intervention in the cause, and the amount claimed by it for insurance on cotton was by agreement of the parties allowed and paid. This amount was due on insurance on the firm's cotton, and was properly allowed. A consideration of the whole case leads us to the conclusion that the findings of the master have evidence legally sufficient to support them; and, the submission to him having been made by consent of the parties, the chancellor erred in setting them aside.

It follows that the decree must be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with the findings of the master.

McCONNELL v. McCONNELL.

Opinion delivered March 13, 1911.

1. HUSBAND AND WIFE—SEPARATION AGREEMENT—VALIDITY.—Covenants and promises in deeds of separation relating to the property and the maintenance of the wife are generally upheld if they are based upon sufficient consideration, are fair and equal, are reasonable in their terms, are not the result of fraud or coercion, and the separation has actually taken place when the agreement is entered into or immediately follows. (Page 196.)
2. DIVORCE—SEPARATION—REASONABLENESS OF SETTLEMENT.—Where the defendant in a suit for divorce and alimony had property worth from $15,000 to $60,000, while plaintiff had no property of her own, a prior agreement between plaintiff and defendant whereby plaintiff was to receive $500 in lieu of her claims on her husband's property was not a fair and reasonable settlement, and will not be enforced by the court. (Page 197.)
3. SAME—ALIMONY—MODIFICATION.—The allowance of alimony is always subject to modification by the court to meet the changed situation and condition of the parties in interest. (Page 198.)
4. SAME—ABANDONMENT.—Where no cause for granting a divorce exists, but the parties are living apart, if in the future either party manifest a *bona fide* intention to return to the other, and after a reasonable time his or her efforts at reconciliation are refused, such refusal will amount to abandonment. (Page 198.)
5. SAME—ATTORNEY'S FEE—CONTRACT.—An agreement by a wife to pay her attorney in a suit for divorce and alimony against her husband a

certain per cent. of such sums as the court may award her for alimony is void as against public policy. (Page 198.)

6. SAME—DISCRETION AS TO ALLOWING ALIMONY.—The allowance of alimony is within the sound discretion of the trial court. (Page 199.)

7. SAME—ALLOWANCE OF ATTORNEY'S FEE.—It was not error in a divorce suit for the chancellor to make a separate allowance to the wife of an attorney's fee, though she had agreed to pay the attorney a certain per cent. of her recovery of alimony, as it will be presumed that such illegal contract will not be enforced. (Page 199.)

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

J. D. Block and *Huddleston & Taylor,* for appellant.

1. The original complaint states no statutory ground of divorce. Oral amendment is not permissible. Kirby's Dig. § 6085; 58 Ark. 446; 72 Ark. 478. Where the ground of demurrer is that no cause of action is stated, pleading over after demurrer is overruled is not an abandonment of the demurrer. 8 Ark. 74; 44 Ark. 202; 49 Ark. 277.

2. No allowance of an attorney's fee should be made where the defendant is not seeking a divorce, and where the proof shows that the plaintiff has already, by valid contract, secured the services of counsel—especially not when the attorney for the plaintiff has agreed with her to give his services for a contingent fee. 24 Pac. (Col.) 1030; 16 Pac. (Col.) 345; 33 Pac. (Col.) 114; 14 Cyc. 763; Nelson on Div. & Sep. § 881; 25 So. (Ala.) 751; 105 Pac. 956-957.

3. Where the wife abandons the home of the husband without cause, she is entitled to no support from the husband. Alimony is allowable only where the husband is at fault. 56 Atl. (N. J. Eq.) 736; Schouler's Dom. Rel. (3 ed.) § 66, p. 102; 8 N. J. Eq. 563; 81 Ill. 251; 3 Head 527; 4 Dana 307, 309; 42 Barb. 515; 25 So. (Ala.) 751; 18 N. W. (Mich.) 551; 105 Ill. App. 182; 39 Pac. (Kan.) 725; 32 N. J. Eq. 547; 34 Ore. 1; 80 Mo. App. 274; 82 Mo. 79; 34 Mo. 214; 19 Mo. 355; 17 Mo. App. 390; 44 *Id.* 229; 68 *Id.* 205.

S. R. Simpson, for appellee.

1. A complaint may be amended, especially where this is done by permission of the court, and interlined in writing.

2. Appellee is entitled to an allowance of alimony—such allowance out of the community estate as may be necessary to maintain her rights; and an attorney has the right to deal with a destitute wife for a contingent fee coming from property or money gained by litigation. Kirby's Dig. § 2679; 90 Ark. 40; 86 Ark. 471; 80 Ark. 454; 87 Ark. 175; 81 Ark. 504; 82 Ark. 278.

3. This is a clear case of a deserving wife being forced to leave the home of her husband by reason of the intermeddling of a prejudiced and ill-tempered sister of the husband whose avowed purpose was to separate the two so that the wife could not "get any of Hugh's (the husband's) money," accompanied by such cruel, cold and contemptuous treatment on the part of the husband as to render her life with him and this sister intolerable, the husband being dominated and influenced by the fear that the sister would take from him the management of their joint estate. No desire for a reconciliation was shown nor expressed by the appellant until after this suit was brought, but on the contrary all previous efforts towards a reconciliation were treated with evasions or silent contempt. 14 Cyc. 618.

4. The contract of separation which McConnell prevailed upon his wife to sign was unjust, unconscionable and inequitable. Appellee did not know that she was to accept $500 in full payment for all her rights in her husband's property; and she was *not* given a copy of the contract. She did not read it, but on the contrary it was read to her by a stranger at a time when overwhelmed with grief; she was not capable of giving attention to nor understanding the meaning of any kind of contract. 31 Ark. 678; 67 Ark. 15; 75 Ark. 240; 71 Ark. 565; 80 Ark. 42; 87 Ark. 184; 88 Ark. 56, 61; 21 Cyc. 1293; 88 Ark. 302, 308; 21 Cyc. 1301, 1592; 14 Cyc. 770; 9 Cyc. 519.

5. Appellee is entitled to a decree of divorce, one-third of the husband's property and a reasonable attorney's fee. 14 Cyc. 766-7; 90 Ark. 40; 44 Ark. 46; 80 Ark. 481; *Id.* 454; 87 Ark. 175; 63 Ark. 128; 18 L. R. A. (Ala.) 95, 99; 14 Cyc. 611, 612, 613, 764, 769, 770, 772, 773; 82 Ark. 278; 62 Ark. 613.

HART, J. This is an action for divorce and alimony instituted by Erphie McConnell against Hugh McConnell. Plaintiff and defendant were married in Missouri on August 12, 1906, and soon afterwards came to defendant's home at Paragould,

Arkansas, and lived there until their separation on April 9, 1908. At the time of their marriage, plaintiff was 23, and defendant was 50 years old. Defendant was a man of considerable property, and plaintiff had nothing. When they separated, they executed a written agreement whereby plaintiff was to receive $500 in lieu of all her claims or interest of any kind whatever in her husband's property. When they separated, plaintiff went to her mother, and has not lived in the State of Arkansas since that time. She alleged in her complaint that her husband drove her from his home, and refused to live with her for more than one year before she instituted the action. She also alleged matters which if true amounted to such indignities as to render her condition in life intolerable. The suit was commenced in the fall of 1909.

The defendant denied the allegations of the complaint. During the pendency of the suit, the court allowed plaintiff temporary alimony and also an attorney's fee in the sum of $100. On final hearing, the chancellor found that plaintiff was not entitled to a divorce; but that she was entitled to alimony. A decree was entered dismissing her complaint for divorce for want of equity, and allowing her permanent alimony in the sum of $50 per month, and setting aside the agreement of the parties in regard to the rights and interest of the wife in her husband's property made at the time of their separation. The court also refused to allow any additional attorney's fee. The case is here on appeal.

On the whole case, we think the decision of the chancellor was correct. In cases of this sort, we do not think any useful purpose can be served by setting out in detail the evidence or making extended comments on it.

We deem it sufficient to say that a careful consideration of the testimony leads us to the conclusion that there is no sufficient reason why the parties to this suit should not keep the vows made by them at the marriage altar and live together as husband and wife. No charge of immoral conduct is made by either. Neither appears to have any settled hatred or antipathy for the other. It appears that they had no marital troubles until in October, 1907, when a sister of the defendant came to live with them. She had an equal share in her brother's residence, and they owned other property in common. She seems to have had a desire to take charge of the household, and the plaintiff naturally resented her

actions in this regard. The defendant became involved in the trouble and jealousy thus engendered, and participated in the quarrels. The quarrels between plaintiff and defendant grew more frequent and more violent, and finally culminated in their separation, which, as above stated, occurred on April 9, 1908. Shortly after their separation, plaintiff brought suit against Mollie McConnell, the sister of the defendant, alleging that she had alienated her husband's affections from her. Plaintiff dismissed this suit, and subsequently the sister of defendant died. It appears that the parties to the suit, during its pendency, have at different times sought a reconciliation; but it seems that they have never been of that mind at the same time, and it is difficult for us to determine whether such efforts have been made in good faith, or for the purpose of obtaining some benefit in the trial of this case. We are inclined to the latter opinion. However, we are of the opinion that the plaintiff failed to establish her grounds for divorce, and that the decision of the chancellor in dismissing her complaint for divorce was correct. But it does not follow, as contended by counsel for defendant, that he erred either in setting aside their separation agreement or in allowing her permanent alimony payable in monthly installments. The facts in this case are not like those in either the case of *Prior* v. *Prior,* 88 Ark. 302, or those of *Shirey* v. *Shirey,* 87 Ark. 184. In the Prior case, the agreement was made during the pendency of the suit for divorce, and by consent of parties was made part of the decree, and was found to be fair and reasonable. The contract in the Shirey case was an antenuptial one, and the court held that it was not characterized by fairness and good faith. Contracts like the one in question are controlled by the principles announced in the case of *Bowers* v. *Hutchinson,* 67 Ark. 15. The court said: "In this country the courts, as a general rule, have enforced covenants and promises in deeds of separation relating to the maintenance of the wife and property, provided they are based upon a sufficient consideration, are fair and equal, are reasonable in their terms, and are not the result of fraud or coercion, and the separation has actually taken place when the agreement is entered into, or immediately follows." In the case at bar the contract was made when the separation took place. The record does not definitely show what defendant is worth, but his property is

variously estimated from $15,000 to $60,000. It is conceded that plaintiff has nothing. At the time of their separation when the agreement under consideration was made, plaintiff was in great distress and far away from any one whom she could look to for advice, and it seems that she trusted entirely to her husband's sense of fairness in the matter. The agreement was made at his request, and, when all these matters are considered in connection with the amount and value of the defendant's estate, we do not think that the provisions made for the plaintiff in the contract were fair and just. Therefore the chancellor was right in setting it aside.

While, as above stated, the evidence was not sufficient to justify the chancellor in entering a decree of divorce for the plaintiff, we think it does show that the defendant was more to blame for the separation than the plaintiff. It was his duty to cleave to his wife in preference to his sister. It is also the duty of the husband to support his wife, and, under the facts and circumstances of this case, we hold that the allowance of alimony made by the chancellor in the final decree should not now be disturbed. *Shirey* v. *Shirey,* 87 Ark. 175. The allowance of alimony is always subject to modification by the chancellor to meet the changed situation and condition of the parties in interest. We have already expressed the view that there are no insurmountable obstacles to prevent these parties from again living together happily; and if in future either party manifests a *bona fide* intention to return to the other, and if, after a reasonable time, his or her efforts at reconciliation are refused, such refusal will amount to wilful abandonment, and the chancellor will be justified in so treating it.

We now come to the question of attorney's fees. It is shown that the plaintiff made an agreement with her attorney that he should receive a portion of whatever property, real or personal, should be awarded her out of her husband's estate. An agreement by a wife to pay her attorney in a suit for divorce and alimony against her husband a certain per cent. of such sums as the court should award her for alimony is void as against public policy. 2 Nelson on Divorce and Separation, § 88; 14 Cyc. 763; *Van Vleck* v. *Van Vleck,* 47 N. Y. Sup. 470; *Jordan* v. *Westerman,* 62 Mich. 170. In the last case, the court said (quoting from

syllabus): "Public policy is interested in maintaining the family relation, the interests of society requiring that such relation be not lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible; and, for these reasons, a contract which tends to prevent such a reconciliation is void."

Now, it is contended by counsel for defendant that, although such contract is void, there is no presumption that the wife will not fulfil it; and that where her attorney has faithfully and satisfactorily acted for her in pursuance of an agreement for a contingent interest in the result of the litigation, there is no necessity entitling her to an allowance for attorney's fees; and contend that the court erred in allowing the sum of $100 for her counsel fees. They rely upon the cases of *White* v. *White,* 86 Cal. 212, 24 Pac. 1030, and *Sharon* v. *Sharon,* 75 Cal. 1, 16 Pac. 345. We do not agree with their contention. It appears that the attorney made the agreement for a contingent fee in this case in good faith, and doubtless when he made it he believed it was a valid contract. The allowance of alimony is within the sound discretion of the court, and the chancellor is entitled to know all the facts which would influence him in fixing the amount. The chancellor made no special findings of fact in this case. We will not assume that he made an allowance of alimony and also of counsel fees to be paid by the husband, knowing that the wife had contracted to pay a percentage of the alimony awarded her to her solicitor. On the contrary, we will presume that, before the allowance was made, the parties to the contract had ascertained that the contract for a contingent fee was void as against public policy, and that it was treated by them and by the court as having no binding force whatever when the application for alimony and counsel fees was heard and granted.

The decree will be affirmed.

JORDAN v. HARRIS.

Opinion delivered March 13, 1911.

1. RECEIVER—POWERS.—The receiver of an insolvent corporation stands in the place of the corporation, and has only such rights as it had, so that the rights of third parties are not increased, diminished or varied by his appointment. (Page 201.)
2. BILLS AND NOTES—ACCOMMODATION INDORSEMENT—EFFECT.—As between himself and the party accommodated, an accomodation indorser is in effect a surety, and his right to recourse against the party accommodated is that of surety against principal. (Page 202.)
3. SAME—ACCOMMODATION INDORSEMENT—PROOF.—That a note was indorsed for accommodation may be proved by parol evidence. (Page 202.)

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

S. A. Jones and *Carmichael, Brooks & Powers*, for appellant.

Appellant was purely an indorser for accommodation, from which he received no benefit; the same was without consideration, and the note is not enforcible against him. 1 Am. & Eng. Enc. of L., 2 ed., 335; 57 Ark. 437; 65 S. W. (Mo.) 303. Parol evidence is admissible to prove want of consideration, in cases like this. 24 Me. 363; 153 N. Y. 130; 1 Daniel, Neg. Inst. 3 ed., 605, § 679; 35 N. Y. Sup. 944; 21 Ind. 110; 24 Me. 274; 55 Fed. 906; 93 Ark. 112.

Ratcliffe, Fletcher & Ratcliffe, for appellee.

Every presumption is in favor of the bank; King, the cashier, was acting for himself and not for the bank; and even if the indorsements were procured by fraud on the part of King, the bank would not be chargeable with notice of such fraud. 92 Fed. 274; 12 Ala. 502; 178 Fed. 53; 180 Fed. 685; 170 U. S. 133, 42 Law. Ed. 977.

HART, J. Insolvency proceedings were instituted in the Pulaski Chancery Court against the Capital City Savings Bank, a corporation doing a banking business in the city of Little Rock, Ark., and Marvin Harris was appointed receiver. Scipio A. Jordan was a depositor in the bank at the time of its failure, and was allowed to file intervention by which he sought to recover from the receiver his *pro rata* part of said deposit. Upon the

hearing, the chancellor held that he was not entitled to recover, and Jordan has appealed to this court.

It may be stated at the outset that the receiver stands in the place of the bank which he represents, and has only such rights as it had, "so that the rights of third parties are not increased, diminished or varied by his appointment." 5 Pomeroy's Equity Jurisprudence, § 186; 34 Cyc. 191 *et seq.*

The testimony in this case is practically undisputed. At the time the insolvency proceedings were instituted and the receiver was appointed, Scipio A. Jordan had on deposit in said bank the sum of $2,340.72. At and prior to the time of the bank's failure, C. B. King was its cashier. King testified that in February, 1908, the bank was in financial distress and needed money; that it had on hand a lot of unsold stock; that on February 27, 1908, in order to accommodate the bank and to enable it to borrow money, he had $5,000 of said stock issued to himself, and executed his note for that sum payable to the bank due 180 days after date; that he carried said note and stock attached thereto as collateral to another bank to pledge the same in order to borrow money for the accommodation of the Capital City Savings Bank, but that he failed to obtain a loan; that subsequently he procured Scipio Jordan and J. P. Robinson to indorse said note; that they were merely accommodation indorsers, and only indorsed the note for the purpose of enabling the bank to borrow money on it; that he failed to secure a loan for the bank with their indorsements, and gave as a reason why the note and stock were not cancelled and the note handed back to the indorsers was because he, as cashier, did not want to have any irregularities on the books of the bank.

Scipio A. Jordan testified that he indorsed the note some time in March, 1908, at the request of King, the cashier, for the benefit of the bank; that King told him that the bank would need that amount of money at an early date on account of some pressing matters; that he knew nothing in regard to the issuance of the stock to King, and that he was to receive nothing for his indorsement nor any interest in said stock.

The receiver testified that he found the note among the papers of the bank when he took charge of it.

This testimony leads us to the conclusion that Jordan indorsed the note merely for the accommodation of the bank.

"As between himself and the party accommodated, the accommodation party is in effect a surety, and his right to recourse against the party accommodated is that of surety against the principal debtor." 7 Cyc. 725. For the purpose of determining this question, we may consider parol evidence. Daniel on Negotiable Instruments, 3 ed., § 679; *Morehead* v. *Citizens' Deposit Bank,* 113 S. W. (Ky.) 501. See also *Agricultural Bank* v. *Robinson,* 24 Me. 274, 41 Am. Dec. 385, where the court held that to enable a banking corporation to maintain an action on a note made to it there must be a consideration at the time of making the contract. It follows that the chancellor erred in holding that Jordan was liable to the receiver on the note. The decree will be reversed, and the cause remanded with directions to the chancery court to enter a decree in accordance with this opinion.

FLETCHER v. FREEMAN-SMITH LUMBER COMPANY.

Opinion delivered March 13, 1911.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—In a suit by a railway brakeman for injuries received while making a coupling, an instruction that if there were two ways in which the plaintiff could have acted in making the coupling, one to stand on the outside and signal the engineer and the other to go between the cars without signalling from the outside, and if the latter was the more dangerous way, and plaintiff chose the latter way, then the verdict must be for defendant, was erroneous as invading the province of the jury, and as making the plaintiff the insurer of his own safety. (Page 205.)
2. APPEAL AND ERROR—HARMLESS ERROR.—The exclusion of testimony tending to prove an alleged defect in the brake of the engine was not material where the engineer never saw plaintiff's signal to stop and where therefore the defective condition of the engine was not the cause of the injury. (Page 205.)
3. MASTER AND SERVANT—DUTY OF TRAINMEN TO KEEP LOOKOUT.—The lookout statute is not applicable to co-servants engaged in the operation of a train. (Page 206.)
4. SAME—PRESUMPTION OF NEGLIGENCE.—As between co-servants operating the same train, there is no presumption from the happening of the injury. (Page 206.)

5. SAME—ASSUMED RISK.—Where a brakeman received injuries at his accustomed place of work, the risk of danger from the steepness of the grade, being open to his observation when he took service, was assumed by him. (Page 206.)

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

J. S. McKnight and *Carmichael, Brooks & Powers,* for appellant.

1. The court erred in excluding the testimony of the machinist, Farnsworth. The rule admitting the declarations of an agent as binding upon the principal should govern as to this testimony. 1 Greenleaf on Evidence (15 ed.) 173, § 114. See also 100 S. W. 162; 102 S. W. 755; 67 Ark. 306.

2. The court erred in giving instruction numbered 1, wherein it is stated not only that negligence could not be presumed against the defendant, but also in effect that the burden was upon the plaintiff to prove that he was injured as a direct result of some negligent act of defendant alleged in the complaint, etc. Proof of injury by the operation of a train makes a *prima facie* case, and the burden is then upon the defendant to prove that it was not negligent. Kirby's Dig. § 6773; 88 Ark. 204; 87 Ark. 581; *Id.* 308; 83 Ark. 217.

3. Instruction No. 4, given at appellee's request, is not the law. It is a clear invasion of the right of the jury to say whether or not, under the evidence, the appellant acted as a reasonably prudent person should act under the circumstances, and whether or not his method of proceeding contributed to his injury.

4. The court erred in amending the fourth instruction requested by appellant by striking out the clause relative to the negligent building of appellee's railroad. There is no proof that appellant knew of such negligent construction or that he appreciated the danger thereof. And it was also error in the court to refuse to charge the jury with reference to appellee's duty to keep a constant lookout for the safety of others while performing the duties of their employment. Kirby's Dig. § 6607; 88 Ark. 204; 83 Ark. 68; 80 Ark. 528.

Gaughan & Sifford, for appellee.

1. The testimony of the witness, Farnsworth, was properly excluded. Slow-working or defective brakes on the engine had

nothing to do with the accident. Moreover, his information was derived from Christian's report, who was present and testified.

2. There is no presumption of negligence against appellee arising from the fact of injury to the appellant, and the jury were properly instructed that before he could recover he must allege and prove that he was injured as a direct result of some negligent act on the part of the defendant. 79 Ark. 81; 90 Ark. 331.

McCULLOCH, C. J. The plaintiff was employed by defendant to assist in the operation of a log train by which defendant's logs were transported. He was a brakeman, and it was a part of his duties to couple cars. While performing that particular service, he received personal injuries, alleged to have been caused by negligence of other employees of defendant, and he sues to recover damages. The injury occurred on a spur track in the woods near a log camp. The engine was backing in on the spur to take out some log cars. Plaintiff was on the engine, and when it got in about twenty-five yards of the car to be coupled he got down from the engine and ran ahead to make the coupling. He testified that when he reached the car the engine was about eight feet distant, coming at the rate of about six miles per hour; that he went in between the engine and the car and raised the pin preparatory to making the coupling, but discovered that the car was too high for the reach of the engine; that he did not have time to change the reach or to get out, and he signalled the engineer to stop, but that the engineer failed to stop and ran the engine against him, mashing him between the tender and the ends of the logs on the car. He testified further that if the engineer had been in his proper place on the engine he could have seen the signal in time to stop.

It is alleged in the complaint that the brake of the engine was so defective that when backing down a steep grade it would not hold, and that the injury was caused either on account of the negligence of defendant in allowing the engine to get out of repair in that particular, or on account of the negligence of the engineer in failing to stop the engine. It is also alleged in the complaint that defendant was guilty of negligence in building the spur on the side of a hill where the grade was so steep.

The defendant in its answer denied the charges of negli-

gence, and pleaded contributory negligence of plaintiff. The trial before jury resulted in a verdict in defendant's favor, and the plaintiff appealed.

The court gave the following instruction over plaintiff's objection:

"4. The jury are instructed that if you believe from the evidence that the engineer backed the engine down to the coupling under control, and that there were two ways in which the plaintiff could have acted in making the coupling, one to stand on the outside and signal the engineer to stop or slow down, and that this was the safer way, and that the other way was to go in and attempt to make the coupling between the cars without having first from the outside done such signaling, and that the latter was the more dangerous way, and that plaintiff chose the latter way, then your verdict must be for the defendant."

This instruction was erroneous, and should not have been given. It made the plaintiff the insurer of his own safety. The jury should have been allowed to say whether or not it constituted negligence for plaintiff to attempt to make the coupling in the way he did. *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11; *Kansas City S. Ry. Co.* v. *Henrie,* 87 Ark. 443; *Headrick* v. *H. D. Williams Cooperage Co.,* 97 Ark. 553.

Error of the court is assigned in excluding the testimony of witness Farnsworth as to the alleged defect in the brake of the engine. We need not discuss that assignment for the reason that the exclusion of the testimony on that point was not prejudicial. There was no testimony tending to show that the engineer saw the signal, or that he attempted to stop the engine. On the contrary, the evidence is undisputed that the engineer did not see the signal, if plaintiff gave one. The defective condition of the engine was not the cause of the injury.

Plaintiff was, however, entitled to go to the jury on correct instructions submitting the question of alleged negligence on the part of the engineer in failing to discover plaintiff's signal and stop the engine after the latter's position became perilous. The lookout statute is not applicable to co-employees engaged in the operation of a train, but the court correctly instructed the jury as to the duty of the engineer, and there can be no just complaint of the court's ruling in that respect.

The court gave an instruction to the effect that there is no presumption of negligence on the part of defendant's servants, and that it devolved on the plaintiff to prove the alleged acts of negligence. This was correct. As between co-employees operating the same train, there is no presumption of negligence. *Fordyce* v. *Key,* 74 Ark. 19; *St. Louis, I. M. & S. Ry. Co.* v. *Hill,* 79 Ark. 76; *Chicago Mill & Lumber Co.* v. *Cooper,* 90 Ark. 326.

It was not error to modify the fourth instruction requested by plaintiff as to assumption of risk of danger by reason of alleged negligence in building the track on the steep grade. The spur track where plaintiff received injury was his accustomed place of work, and the grade was open to his observation when he took service. He assumed the risk of all danger from that source. *Davis* v. *Railway,* 53 Ark. 117; *Choctaw, O. & G. Rd. Co.* v. *Thompson, supra; York* v. *St. Louis, I. M. & S. Ry. Co.,* 86 Ark. 244; *Arkansas Midland Ry. Co.* v. *Worden,* 90 Ark. 407.

For the error in giving the aforementioned instruction on the subject of contributory negligence, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

DICKERSON *v.* OKOLONA.

Opinion delivered March 13, 1911.

MUNICIPAL CORPORATIONS—LOWERING GRADE OF STREET—DAMAGE TO PROPERTY.—The owner of property abutting on a street in a city or incorporated town is entitled to recover compensation for damage done to the property in lowering the grade of the street, under Const. 1874, art. 2, § 22, providing that "private property shall not be taken, appropriated or damaged for public use without just compensation therefor."

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

Hardage & Wilson, for appellant.

The appellee is liable for the damage to appellant's property by lowering the grade of the street on which the property abuts; otherwise the words "appropriate or damage" used in our present

Constitution, art. 2, § 22, would be meaningless. Compare Const. 1868, art. 1, § 15. See also 15 Cyc. 662; 56 Am. Rep. 109.

Hamby & Haynie, for appellee.

The complaint does not state a cause of action. There is no allegation that the grading of the street was negligently or unskillfully done, nor there was any malice toward the owner of the property. 93 Ark. 250; 49 Ark. 139; 53 Am. Dec. 357 and note; 56 Am. Rep. 109; 28 Cyc. 1257; 34 Ark. 105; 49 Ark. 139; 73 Ark. 447; 74 Ark. 519; 30 Am. St. Rep. 373 and note; 66 Am. 434.

McCULLOCH, C. J. Plaintiff, who owns a lot in the incorporated town of Okolona on which is situated a dwelling house, barn and other outhouses, instituted this action against said incorporated town to recover damages to the property by reason of lowering the grading of a street.

The complaint, as far as necessary to copy, reads as follows:

"That said dwelling house and other buildings and improvements on said premises were erected with reference to the grade for Gurdon Street, as then adopted by the defendant, and before the time hereafter complained of. That the defendant by its officers and agents did, in the latter part of the year 1909, lower and change the grade of said Gurdon Street along the front of plaintiff's said property, and thereby made it very inconvenient of ingress and egress; and left said street in such condition that it washes very badly in the time of heavy rains, and caused a large ditch to be cut and washed along the front of plaintiff's property, thereby making it difficult to get into plaintiff's premises, or off of them, and caused plaintiff's lots next to said street and deep ditch to cave off into said ditch and be washed away in time of heavy rains, and causing a diminution in the market value thereof to the amount of $225. That, in accordance with sections 5495 to 5497 of Kirby's Digest of the statutes of Arkansas, plaintiff appointed an arbitrator and notified the defendant in writing of the same on the ——— day of December, 1909; that the defendant ignored said notice, and has failed and neglected to comply with the provisions of said sections in said digest."

The circuit court sustained a demurrer to the complaint, and the plaintiff appealed.

The question presented is whether, under the Constitution and statutes of the State, the owner of property abutting on a street in a city or incorporated town may demand and recover compensation for damage done to the property in the grading of the street.

The Constitution declares that "private property shall not be taken, appropriated or damaged for public use without just compensation therefor." Art. 2, § 22.

A statute on the subject reads as follows:

"Sec. 5495. In all cases where any municipal corporation shall be liable for the payment of damages to the owner or occupant of any lots or grounds by reason of the grading of any streets or alleys, or public grounds, or part thereof, the said damages shall be ascertained and assessed by three disinterested reputable freeholders of said city, appointed, one by the city or town council, one by the owner of the property injured, and the persons thus appointed shall choose the third person."

"Sec. 5497. If any person shall neglect or refuse to accept the amount so assessed, as herein provided, and shall prosecute the city, and if by suit for damages he or they shall not recover more than the amount allowed by the assessors, such party so prosecuting shall pay all costs of suit. No claimant for damages shall commence any suit for damages on account of such grading or improvement until he shall have filed a claim for greater damages with the city clerk at least thirty days before the commencement of the suit. Nor shall any suit be commenced until after the assessors shall have been appointed and made return of their assessment as herein provided, nor for thirty days thereafter. The city or town council shall, within three days after the claimant shall have notified them in writing that he has appointed his assessor, appoint one assessor on the part of the city, and they shall, within five days thereafter, select the third assessor, and qualify as herein before provided. Act March 9, 1875."

This court has repeatedly held that a municipal corporation is not responsible in damages for negligent or tortious acts of its officers and agents. *Arkadelphia* v. *Windham,* 49 Ark. 139; *Collier* v. *Fort Smith,* 73 Ark. 447; *Gray* v. *Batesville,* 74 Ark. 519; *Franks* v. *Holly Grove,* 93 Ark. 250; *York* v. *Fort Smith,* 52 Ark. 84.

The authorities on that question are divided, but this court has steadily adhered to its position, without considering where the weight of authority rests.

In the case of *Simmons* v. *Camden,* 26 Ark. 276, this court held (quoting from the syllabus) that "cities and towns have authority to lay out, open, grade and keep in good repair the streets, and a suit will not lie at the instance of an individual for damages resulting from injuries to private property from the lawful exercise of this authority by the incorporation, where there has been no negligence, want of care or skill in its exercise."

That decision was rendered in 1871, when there was no statute authorizing the recovery of compensation in such cases.

The Constitution of 1868 then in force, unlike the language of the present Constitution, provided only that "private property shall not be taken for public use without just compensation therefor." The change in the present Constitution is significant, and some force must be given to the altered language.

The Legislature of 1875, which assembled shortly after the adoption of the present Constitution, and which contained many members who had been members of the constitutional convention, enacted the statute quoted, which clearly recognized the force of the constitutional mandate and provided a remedy for assessing damages done to abutting property by grading a street.

This remedy is manifestly not exclusive, for the right to maintain an action for compensation where the proper amount has not been allowed is clearly recognized in the statute.

The Supreme Court of California, in *Reordon* v. *San Francisco,* 66 Cal. 492, 56 Am. Rep. 109, construing a provision of the Constitution of that State identical in language with ours, held that a municipality was liable for damage done to abutting property. The court said:

"As the clause now stands, private property cannot be damaged for public use without just compensation having been first made or paid as prescribed. To what kind of damage does this word 'damaged' refer? We think it refers to something more than a direct or immediate damage to private property, such as the invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking. If it did not refer

to more than the damage above mentioned, the word 'damaged' in the cause relied on would be superfluous. It seems to us that the direct invasions spoken of would come within the clause as it stood in the Constitution of 1849. If the word 'damaged' only embraced physical invasions of property, the right secured by this word would add nothing to the guaranty as it formerly stood."

That court in a later case reaffirmed the doctrine of the former case. *Eachus* v. *Los Angeles,* 130 Cal. 492. It is worthy of notice that the California court is one that had previously taken position similar to that taken by this court on the question of nonliability of a municipal corporation for negligence.

The same conclusion has been reached by numerous other courts, and in most of the cases the distinction is made, as in the California cases cited above, between the effect of a constitutional provision that private property shall not be taken or damaged for public use without compensation therefor, and one merely that private property shall not be taken for public use without compensation therefor. *Atlanta* v. *Green,* 67 Ga. 386; *Moore* v. *Atlanta,* 70 Ga. 611; *People* v. *McRoberts,* 62 Ill. 38; *Bloomington* v. *Pollock,* 141 Ill. 346; *Werth* v. *Springfield,* 78 Mo. 107; *Searle* v. *Lead,* 10 So. D. 312; *Texarkana* v. *Talbot,* 7 Tex. Civ. App. 202; *Cooper* v. *Dallas,* 83 Tex. 239; *Harman* v. *Omaha,* 17 Neb. 548; *Johnson* v. *Parkersburg,* 16 W. Va. 402; *O'Brien* v. *Philadelphia,* 150 Pa. St. 589.

The only conflicting authority is a decision of the Colorado Supreme Court (*Leiper* v. *Denver,* 36 Col. 110) where it is held that under a similar constitutional provision the owner of abutting property cannot recover compensation for injury from lowering or raising the grade of a street from the natural surface to a grade established. That court had previously held in another case that where a permanent grade of a street is established by a city, and the owner of an abutting lot improves his property in conformity therewith, the city is liable in damages to such owner occasioned by a subsequent change of the grade. *Denver* v. *Bonesteel,* 30 Col. 107.

The allegations of the complaint in the present case bring it even within the doctrine of the Colorado court.

We are of the opinion that the authorities thoroughly establish the doctrine that under a constitutional provision guaranteying compensation to the owner of private property damaged for public use, a municipality is liable for damage done by raising or lowering the grade of a street; otherwise the language of the Constitution would be meaningless. Of course, the resulting injury must be direct and peculiar to that property, and not such as is shared by the general public. The fact, however, that other property similarly situated sustains injury in like manner would not prevent recovery of compensation.

Reversed and remanded with directions to overrule the demurrer.

A. L. CLARK LUMBER COMPANY v. JOHNS.

Opinion delivered March 13, 1911.

1. PLEADING—COMPLAINT—ANTICIPATING DEFENSE.—A complaint in an action by a servant for personal injuries alleged to be due to the master's negligence need not negative the defense of assumed risk. (Page 214.)
2. SAME—NECESSITY OF REPLY.—Under Kirby's Digest, § 6108, providing "that there shall be no reply except upon the allegation of a counterclaim or set-off in the answer," the plaintiff is not called upon to make a reply to an answer setting up the defenses of assumed risk. (Page 215.)
3. MASTER AND SERVANT—INSTRUCTION—GENERAL OBJECTION.—In a suit by a servant to recover for injuries caused by the master's negligence a general objection to an instruction is insufficient to point out that it fails to include the defense of assumed risk where that defense is correctly stated in another instruction. (Page 216.)
4. SAME—WHEN CONTRIBUTORY NEGLIGENCE AND ASSUMED RISK OVERLAP.—Where a servant is aware of a defect in the place where he is employed to work, and the danger therefrom is so obvious that a person of ordinary prudence would not continue in the work, he not only assumes the risk but is guilty of contributory negligence. (Page 217.)
5. SAME—DUTY TO INSTRUCT AS TO CONTRIBUTORY NEGLIGENCE AND ASSUMED RISK.—Where the two defenses of contributory negligence and assumed risk overlap, the error of failing to instruct upon one of them is necessarily harmless if a proper instruction upon the other is given. (Page 217.)

6. SAME—ASSUMED RISK—INSTRUCTION.—Where a servant, on discovering a defect in the place in which he was employed to work, notified the master to make repairs, which the master promised to do as soon as the mill shut down, and the servant was injured on the following day, an instruction to the effect that the servant had a right to continue at work in reliance upon the master's promise was not so defective in that it failed to limit the right to rely upon such promise to a reasonable time that the defect could be reached by a general objection. (Page 217.)

7. SAME—ASSUMED RISK—INSTRUCTION.—It was not error to refuse a prayer for instruction to the effect that if the servant knew of the danger he assumed the risk where such prayer ignored the question whether the master had promised to remove the danger. (Page 218.)

8. INSTRUCTIONS—REPETITION.—It is unnecessary to repeat instructions upon the same subject. (Page 219.)

9. DAMAGES—EXCESSIVENESS.—The evidence tends to show that plaintiff was injured from the small of his back to the top of his head, a cog wheel cutting into the flesh between his shoulder blades one-half to three-fourths of an inch, that he was rendered unconscious for a while by the shock, was confined to his bed for two or three weeks, and was unable to work for nearly two months, that the injury caused a running sore, which lasted for nearly three months and the muscles of the back were injured and gave pain for a year, which might be permanent. *Held,* that a verdict of $2,500 was not excessive. (Page 219.)

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

T. D. Wynne and *W. V. Tompkins,* for appellant.

1. The court in permitting the plaintiff to introduce evidence to the effect that on the day before the accident occurred he had made complaint to the millwright, and the latter promised to repair the alleged defective condition of the cog and gearing, so as to make the same safe, thereby permitted a new issue to be injected into the case, and erred in refusing appellant a continuance in order to meet this proof. 67 Ark. 142; 71 Ark. 197; 55 Ark. 568; 31 S. W. 401; 28 Tex. 241; 27 Tex. 455; 26 Tex. 95; 20 S. E. 494; 4 Enc. Pl. & Pr. 863.

2. A servant who knowingly consents to work in a place of danger, will be held to have assumed the risk incident thereto. 68 Ark. 316; 65 Ark. 98; 77 Ark. 367; 95 Ark. 560; Labatt on Master & Servant, 259. Instructions 1 and 3 were erroneous. Whether or not appellee assumed the risk after the

promise to make repairs, was a question to be determined by the jury. 71 Ark. 518; *Id.* 510. See also 1 Labatt, Master & Servant, § 425; 81 Ala. 200; 60 Am. Rep. 152; 187 Ill. 333.

3. The sixth instruction requested by appellant should have been given. Had it been given, the jury might have found that, notwithstanding the promise to repair, appellee was guilty of contributory negligence in failing to observe the patent dangers he was about to encounter.

4. The verdict is so excessive as to evidence passion and prejudice on the part of the jury.

W. P. Feazel, for appellee.

Appellee was properly permitted to testify to the fact of having complained to the millwright as to the condition of the cog, and the latter's promise to repair it. It was clearly admissible under the allegations of the complaint that the defendant knew of the defective condition and failed to repair it. A servant on entering upon the service of the master assumes only such risks as are ordinarily incident to the work—not extra or unusual risks, not those resulting from negligence of the master or other servants. 20 Am. St. Rep. 37; 40 Mich. 420. Moreover, the testimony as to the promise to repair was admissible in order to rebut testimony tending to show assumption of the risk and contributory negligence by appellee. Kirby's Dig. § § 6091, 6098, 6108; 78 Cal. 430; 76 Ark. 525; 29 Ark. 386; 33 Ark. 737; 44 Ark. 293.

2. Appellant will not be heard to object to certain instructions without furnishing an abstract of all the instructions given by the trial court. 92 Ark. 245; 90 Ark. 163.

3. The verdict is not excessive.

McCULLOCH, C. J. The plaintiff sues to recover damages on account of personal injuries received while working in the service of defendant, and alleges that the injuries were caused by negligence of the defendant in failing to provide a safe place for him to work.

He was employed by defendant to oil the machinery in the sawmill, and in performing his duties it was necessary for him to crawl under the log deck and along the line shaft upon which

were placed cog wheels about two and a half feet apart, and these cog wheels were connected with other parts of the machinery which moved the rollers that carried lumber from the saws. All of the cog wheels save one were covered, and the cover of this had been broken off so that the cogs were exposed. While passing under the cog wheel, his clothing was caught in the gearing, and was wound up around his shoulders and neck, drawing him into the gearing so that the cogs ate into his neck and tore out flesh.

He alleged in his complaint that the defendant "had negligently left uncovered one of the cog wheels, and that the coupling which connected the other parts of the machinery with said cog wheels had been loosened to such an extent that it would fly upward; that the plaintiff, in performing his duties as oiler, had to pass underneath the floor of said sawmill upon a scaffold along the line shaft, and that, by reason of the construction of the premises where he was oiling, there was not sufficient light for him to see how to perform his duties."

The defendant denied the charge of negligence, and pleaded contributory negligence and assumption of risk. Plaintiff's testimony tended to sustain all the allegations of the complaint, and was sufficient to warrant a verdict in his favor. He also testified that the day before he was injured he made complaint to the two millwrights, Prewitt and Scott, about the defective condition of the machinery with respect to the broken covering and the exposed condition of the cog wheel, and that they promised to fix it the first time the mill was shut down. There was other testimony to the effect that it was the duty of the millwrights to keep the machinery in repair.

Defendant objected to the testimony as to the complaint to the millwrights and their promise to repair, on the ground that the pleadings contained no allegations of those facts. The court overruled the objection, and defendant asked for a continuance in order to procure the attendance of Prewitt, the other one, Scott, being present. The court denied the request for continuance. It is insisted now that the court erred in these rulings.

Assumption of risk by the plaintiff, being based on an implied contract, was a matter of defense to be pleaded by the defendant, and the plaintiff was not bound to anticipate in his complaint

any defense which could be offered. It was only necessary for him to set forth the charge of negligence on which he relied for a recovery, and when the defense of assumed risk was brought forward he had the right to meet it with proof of facts which excluded the implication that he had agreed to assume the risk. "A complaint need not negative matters of defense." *Rozell* v. *Chicago M. & L. Co.*, 76 Ark. 525.

It was therefore the duty of the defendant to prepare for the defense which it expected to offer and to anticipate any proof which the plaintiff might make in avoidance of the plea. No reply of the plaintiff was required under the Code. Kirby's Dig., § 6108.

The court gave the following instructions at plaintiff's request:

"1. You are instructed that it was the duty of the defendant in this case to exercise ordinary care in providing and furnishing the plaintiff with a reasonably safe place in which he was required to work and to exercise ordinary care in discovering and repairing defects in same, and the plaintiff, while acting in due care himself, had a right to presume that the defendant had discharged its duty in this respect; therefore if you believe from the evidence that the defendant had carelessly and negligently permitted its machinery where plaintiff was required to work to get out of repair, so as to make it more dangerous to the plaintiff while discharging his duties, and that the defendant or its foreman knew that said machinery was out of repair, or by the exercise of ordinary care could have known the same, and after said knowledge or notice it failed to repair same, and that the plaintiff while in the exercise of due care himself was thereby injured, you will find for the plaintiff.

"2. You are instructed that, while the plaintiff, by entering the services of the defendant as an oiler of its machinery, assumed all the risks ordinarily incident to that employment, he did not assume the risks arising from the negligence of the master himself, or any one whom the master may see fit to intrust his superintending authority, unless it be further shown that he was aware of said negligence and appreciated the danger therefrom, to which he was thereby exposed.

"3. If you believe from the evidence that the plaintiff had

notice or knowledge that the covering over the cogs in which he was caught and injured was out of repair, and that he thereafter continued in his work as such oiler without complaint, then he assumed the risks arising from the failure of the defendant to make such necessary and proper repairs as would remove the danger; but if you find that he made complaint to the defendant or its agent whose duty it was to keep defendant's machinery in repair, and that said agent told or promised him that he would make necessary and proper repairs on said machinery, and the plaintiff continued in his work, relying upon said promise, then you are instructed that he did not assume the risks arising from the failure of the defendant to make necessary and proper repairs.

"4. Although you may find from the evidence that the plaintiff knew that the covering on the cogs was broken or gone, and thereafter continued with his work, still if you should further find that he complained to the foreman whose duty it was to repair said covering, and that thereupon the said foreman promised the plaintiff that he would repair said defect, and that, relying on such promise, the plaintiff continued in the work for which he was employed, and that the danger arising from the condition of said cogs was not so obvious, imminent or glaring that an ordinarily prudent person would not have continued in the work, then it is for you to say under all the facts and circumstances of the case whether or not the plaintiff was guilty of such contributory negligence in continuing his work after the promise to make said repairs as would preclude him from recovering in this case."

Defendant objected to instructions numbered one and three. No specific objection was made to the first on the ground that it failed to include the claim of assumed risk. The second instruction fully and correctly covered the question of assumption of risk by plaintiff, and, in the absence of a specific objection, defendant can not now complain that it was not embraced in the first instruction. *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564.

The third instruction was incorrect in failing to embrace the qualification that, notwithstanding the promise to repair, etc., if the danger was so imminent and obvious that a person of ordinary prudence would not have continued in the work, the plaintiff

assumed the risk. But we are of the opinion, in view of the other instructions and the verdict of the jury in passing thereon, that the omission was harmless.

Where the servant is aware of the defect, and the danger is so imminent and obvious that a person of ordinary prudence would not continue in the work, he not only assumes the risk, but is guilty of contributory negligence. This is where the doctrine of contributory negligence and of assumed risk approximate so that they are indistinguishable. *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367; *Mammoth Vein Coal Co.* v. *Bubliss,* 83 Ark. 567; *St. Louis, I. M. & S. Ry. Co.* v. *Mangan,* 86 Ark. 507; *Johnson* v. *Mammoth Vein Coal Co.,* 88 Ark. 243; *St. Louis, I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 555.

Now, in the fourth instruction copied above, as well as in other instructions which we have not deemed it necessary to copy, the question of contributory negligence was fully and correctly submitted, and the plaintiff's right to recover made to depend on his freedom from that charge, and the jury necessarily found that he was not guilty of negligence. Therefore, if he was not guilty of negligence, he did not, while at work, in reliance on the promise of the master to repair the defect, assume the risk of the danger from the defect which the master had promised to repair.

We do not mean to say that in all cases it is sufficient to give an instruction on contributory negligence, and that that includes assumption of risk. On the contrary, it may be said that a servant often is held to have assumed the risk of a danger, though he is not guilty of contributory negligence, for, in the absence of a promise on the part of the master to repair a defect, if the servant is aware of the defect and appreciates the danger therefrom, he assumes the risk by proceeding with the work, even though to do so might not be an act of negligence on his part. Assumption of the risk being a matter of implied contract, the servant may be held to have assumed it, though his own act in proceeding in the face of danger did not constitute negligence on his part. But the master's promise to repair the defect operates as a suspension of the servant's implied contract to bear the risk and puts the obligation on the master to bear the risk during the

period covered by his promise. In such case, the master being impliedly under contract to bear the risk of the danger, the servant does not assume it unless the danger is so imminent and obvious that a person of ordinary prudence would not proceed. This, too, constitutes contributory negligence; and when the two questions thus approximate, a submission of one is a submission of both. The third instruction submitted the question of the promise to repair, and the fourth submitted the question of contributory negligence. The verdict being necessarily a finding in plaintiff's favor on both issues, therefore no error was committed in failing to submit both questions in the same instruction.

It is also insisted that the third instruction is erroneous in failing to contain the qualification that plaintiff had the right to rely, for a reasonable length of time, on the promise to repair. Now, the testimony shows that the promise was made, if made at all, the day before the injury occurred, and was to the effect that the defect would be repaired as soon as the mill was shut down. Whether that meant as soon as the mill was shut down for repairs or merely for the night is not explained. There is no evidence that it had been shut down when the injury occurred, though plaintiff testified that, until he reached the uncovered box while crawling along the line shaft in the dim light, he supposed that it had been repaired. The time being so short since the promise had been made, it is doubtful whether it called for a submission of the question whether or not the time for compliance with the promise had expired; but, if defendant believed that the third instruction was defective in failing to embrace that question, the court's attention should have been called to it by a specific objection. Not having done that, it is too late now to complain.

Error of the court is assigned in refusing to give the following instruction:

"No. 6. You are instructed that if you believe from the evidence that the plaintiff knew the rollers or cogs were open, and were dangerous, and apprehended the danger, he assumed the risk. If he did not know it, but you believe the danger was open, patent and visible, he was guilty of contributory negligence in not knowing it, and in either event your verdict should be for the defendant."

The instruction was properly refused, for the first sentence was incorrect in ignoring the alleged promise to repair; and the last sentence was not applicable to the facts of the case. Plaintiff admitted that he knew of the defect and appreciated the danger of proceeding, but that he relied on the promise to repair. The court in other instructions correctly submitted the question of contributory negligence, as we have already seen, and the evidence was sufficient to warrant a finding that plaintiff was not negligent.

Lastly, it is contended that the assessment of damages in the sum of $2,500 was excessive. The testimony tends to show that plaintiff was injured from the small of his back to the top of his head, the cogs cutting into the flesh between his shoulder blades one-half to three-fourths of an inch. He was rendered unconscious for a while by the shock, and was confined to his bed for two or three weeks—was unable to work for nearly two months, and the injury caused a running sore which lasted for nearly three months. The muscles of the back were injured and continued to give pain for about a year. There was some testimony also to the effect that the injury to the muscles of the back would, to a slight degree, be permanent.

In this state of the proof we are not sure that the assessment of damages was excessive.

Affirmed.

KILGORE LUMBER COMPANY *v.* THOMAS.

Opinion delivered March 13, 1911.

CONTRACT—RELEASE—CONSIDERATION.—Mutual obligations imposed by a contract form a sufficient consideration for entering into it, and the reciprocal release from those obligations form a sufficient consideration for rescission of the contract.

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

McMillan & McMillan, for appellant.

Hardage & Wilson and *John H. Crawford,* for appellees.

McCULLOCH, C. J. Appellant sued appellees to recover the sum of $500 stipulated damages for alleged breach of a written contract, the material part of which contract is as follows:

"Whereas, the Kilgore Lumber Company, party of the first part, agrees to let Thomas & Hammonds, party of the second part, cut all the merchantable pine timber 12 inches and up at the stump being and standing on one parcel of land, towit: west half of northeast quarter, east half of northwest quarter, west half of southeast quarter, east half of southwest quarter, containing in all 320 acres, more or less, and further agrees to pay said Thomas & Hammonds $9.25 for all lumber F. O. B. cars (board measure), including No. 2 common and better; said Thomas & Hammonds shall cut, grade and load said lumber as the Kilgore Lumber Company shall direct; the Kilgore Lumber Company shall pay to Thomas & Hammonds 85 per cent. cash on receipt of the bill of lading and invoice, balance 15 per cent. when cars are unloaded. In case the said Thomas & Hammonds shall fail to cut part of it and quit, they shall pay to the Kilgore Lumber Company $500 as damages; and if they comply with the entire part of this contract, and the Kilgore Lumber Company should stop them from cutting, the Kilgore Lumber Company shall pay them $500. Said timber must be removed within two years from June 2, 1907."

It is alleged in the complaint that appellees had cut only a small part of the timber mentioned in said contract, and then stopped and refused to cut any more, and that appellant had offered to perform the contract.

It is also alleged in the complaint that appellees had previously sued appellant before a justice of the peace on the contract for $219, the price of two carloads of lumber delivered under the contract, and had recovered judgment for that sum; that in that action appellant had pleaded as a counterclaim the $500 liquidated damages for breach of the contract, but that the circuit court on appeal had adjudged that the justice of the peace had no jurisdiction of the subject-matter of the counterclaim, the amount being beyond the jurisdiction of a justice of the peace.

Appellees, in their amended answer, denied that they had broken the contract. They alleged that appellant did not have any title to the lands or timber described in the contract, and that, after they (appellees) had cut a part of said timber, they were notified by the true owners, the Bartons, to stop cutting, which they did, and that they entered into a further agreement with appellant for a rescission of the contract.

The case was tried below solely on the issue as to the alleged rescission of the contract, and the jury returned a verdict in favor of appellees. There was sufficient evidence to sustain the verdict.

Error of the court is assigned in refusing the following instruction:

"And you are instructed that, even though you should find from the evidence that plaintiffs promised that, if defendants would ship in the lumber already cut, plaintiffs would pay for it, that would not be a consideration for the release, for the reason that under the written contract the defendants were already bound to ship in that lumber; and the plaintiffs were bound to pay for it."

Also in giving the following at request of appellees:

"If the jury find from the evidence that the plaintiffs and defendants entered into an agreement by the terms of which the defendants agreed to ship to plaintiffs two cars of lumber, and in consideration of that shipment the plaintiffs and defendants agreed to swap contracts or cancel the contract sued upon, and that the lumber was shipped to plaintiffs under that agreement, then and in that event your verdict should be for the defendants, Thomas & Hammonds."

The mutual obligations imposed by the contract formed sufficient consideration for entering into it, and the reciprocal release from those obligations likewise formed sufficient consideration for the rescission. 9 Cyc. 323, 597; 1 Page on Contracts, § 317. There was no error, therefore, in the instruction.

It is insisted that the position taken by appellees in the former action to recover the price of the two carloads of lumber estopped them to assert in the present action that the contract had been rescinded. An appeal was prosecuted to this court in the former action, and the opinion is reported in 95 Ark. 43 *(Kilgore Lumber Co.* v. *Thomas)*. Appellees sued on the con-

tract to recover the price of the two carloads of lumber which had been delivered; but, as they had a right to recover the price of lumber already delivered whether the contract was subsequently rescinded or not, they were not put to an election, and their positions in the two cases are not inconsistent. It is said, though, that the court's denial to appellant of the right to counterclaim in the former action on the ground that the time for performing the contract had not expired estops appellees to assert in this action a rescission of the contract. In that case the lower court and this court held that the justice of the peace had no jurisdiction to entertain the counterclaim for $500. The court went further in the opinion, and gave, as an additional reason why appellant could not use the amount sought to be counterclaimed as a defense by remitting the balance over the jurisdiction of the court, that the time for completing performance of the contract had not expired, and that the claim was premature. This was merely an additional reason given by this court for the correctness of its decision. Appellees had only questioned the jurisdiction of the court, and the question of rescission of the contract had not been reached in the court below. Appellees did not assert that the contract had been rescinded, and it was not important to do so. If there had been a rescission of the contract, appellees were not liable for a breach; and if there had not been a rescission, the time for performance had not expired, and appellees were not in default.

Upon the whole, we conclude that the case was fairly tried on conflicting testimony on the issue presented, and that the verdict should be sustained.

Affirmed.

HART, J., dissenting.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. ADAMS.

Opinion delivered February 27, 1911.

1. RAILROADS—FAILURE TO KEEP LOOKOUT—LIABILITY.—Kirby's Digest, § 6607, requiring persons running trains to keep a lookout for persons and property on the track, makes a railroad company responsible for damages caused by its failure to keep such lookout to all persons who are not guilty of contributory negligence. (Page 225.)

2. SAME—FAILURE TO KEEP LOOKOUT—INFANT.—Where trainmen negligently failed to keep a lookout and injured a child upon the track, the question whether, in view of his age and intelligence, the child was negligent in being on the track was properly submitted to the jury. (Page 225.)

3. SAME—INSTRUCTION—NEGLIGENCE OF INFANT.—An instruction to the effect that a child of eleven years should not be charged with negligence in going on a railroad track, even though he was capable of appreciating the danger therefrom, was erroneous. (Page 225.)

4. SAME—INSTRUCTION—INVASION OF JURY'S PROVINCE.—An instruction to the effect that the plaintiff, in going on defendant's tracks, had a right to fix his attention exclusively on the part of the train from which he most expected danger was improper as invading the jury's province to determine whether plaintiff was negligent in going on the track. (Page 226.)

5. SAME—INSTRUCTION—DIVIDED ATTENTION.—An instruction that the plaintiff had a right to fix his attention exclusively on the part of the track from which he most expected danger was improper where there was no question of divided attention involved in the case. (Page 226.)

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

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

1. There was nothing to divert appellee's attention, nothing to prevent him from seeing the cars from the time he left the passing track 33 feet away until he was injured. They could not have escaped his attention, and his statement that he looked north but had no time to look south for danger is disproved by the known facts. 22 Ark. 390; *Id.* 555; 19 Ark. 627; 54 Ark. 431; 79 Ark. 608. Appellee was guilty of contributory negligence. There was nothing to excuse a failure to see the car, and the facts do not bring this case within any of the exceptions pointed out by this court in 78 Ark. 55; 57 Ark. 461; 56 Ark. 216, etc.

2. An instruction given by the court which was calculated to lead the jury to believe that appellee was a child of tender years without capacity to appreciate the danger of stepping on the track, etc., was erroneous, without proof to show that the danger was not apparent to him for the want of discretion. 20 Am. & Eng. R. Cas. (N. S.) 38; 82 Ill. 464; 29 N. E. 196; 31 N. W. 180.

3. The sixth instruction was erroneous. 88 Ark. 454, 94 Ark. 524; 15 Am. & Eng. R. Cas. (N. S.) 594; *Id.* 660; *Id.* 705; 20 *Id.* 316; *Id.* 216.

H. A. Parker, for appellee.

McCULLOCH, C. J. The plaintiff, who is a minor and sues by next friend, instituted this action against defendant railway company to recover damages on account of personal injuries sustained by reason of alleged negligent acts of servants of the railway company. He alleges that he was engaged in driving some calves across the tracks in the railroad yards at Clarendon, Arkansas, and that while he was passing over the tracks he was struck by a loose car which had, by means of a flying switch, been shunted or kicked in on the main line. The car struck him and inflicted bodily injuries for which the jury assessed damages in the sum of $500.

The plaintiff at the time of his injury was about eleven years of age, and, as alleged in his complaint, was driving some calves from one side of the railroad to the other. A local freight train came in, and, after having uncoupled the engine from the main portion of the train, a car loaded with logs was picked up in front of the engine. This was carried beyond the place of the injury, and the engine, with one car attached behind, was backed towards the switch of the side track for the purpose of throwing the log car back on the main line while the engine with the car attached backed in on the side track. The plaintiff, according to his own testimony, was on the outside of the side track when he saw the cars coming. He says that he saw the backing engine with the box car attached coming down on the switch, and that in attempting to get out of the way of that he ran up on the main line and started to cross, but did not see the log car until it struck him. There was a space of about thirty-three feet between the tracks, so the plaintiff must have crossed the side track in front of the backing engine and then traveled the space between the tracks before he reached the point where the log car struck him. There was some evidence adduced to the effect that the plaintiff when injured was trying to climb up on the car.

The evidence tends to show that no lookout was kept, either on the box car or on the car of logs which was kicked in on the main line, and that no signals were given by bell or whistle. The

question whether signals were given from the engine is unimportant, for the plaintiff himself testified that he saw the box car and engine coming down the track. He was not struck by this car, but was struck by the log car over on the main track. It was error for the court to give instructions as to signals from the engine; but, according to the undisputed testimony, the servants of the defendant were guilty of negligence in kicking the log car on to the main track without keeping a lookout to prevent injury being done by that car.

The plaintiff was on the track at a place where he had no right to be; but, notwithstanding that fact, if by reason of his age and lack of intelligence he was not guilty of negligence, the defendant is liable for the damages resulting from the negligence of its servants in failing to keep a lookout. The lookout statute (Kirby's Dig., § 6607) applies so as to make a railroad company responsible for damages to persons except in case of contributory negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Leathers,* 62 Ark. 235; *St. Louis S. W. Ry. Co.* v. *Dingman,* 62 Ark. 245; *St. Louis, I. M. & S. Ry. Co.* v. *Denty,* 63 Ark. 177; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 64 Ark. 364; *St. Louis, I. M. & S. Ry. Co.* v. *Jordan,* 65 Ark. 429; *St. Louis S. W. Ry. Co.* v. *Cochran,* 77 Ark. 398.

It was a question for the jury to determine, under all the circumstances—considering the plaintiff's age and the peculiar circumstances under which he was situated with reference to the approach of the engine and the box car on the side track—whether or not he was guilty of negligence in going on the track and in failing to discover the approach of the log car. *St. Louis, I. M. & S. Ry. Co.* v. *Sparks,* 81 Ark. 187. This would be true whether he went on the track at a crossing, where he had a right to go, or at some other place. Though a child has no right to go upon a railroad track, any more than an adult, yet if he does not possess the same capacity for self-preservation, he is not held to the same degree of prudence that an adult should exercise under the same circumstances; and this must be considered in determining whether or not a child in going on a railroad track is guilty of negligence, for a child without sufficient capacity to discern the danger would not be guilty of negligence, even though he was without right.

The court over defendant's objection gave the following instruction: "6. The court instructs the jury that if they find from the testimony in this case that the plaintiff was a child of tender age, and was at the time of the injury, or a few minutes prior thereto, trying to drive some calves from the track of the defendant company, and that, while endeavoring to do so, some box cars with the engine backed down on the switch by or near to a seed house on said track, if you find there was a seed house there, and, as it appeared to the plaintiff at that time, that, in order to protect himself from said moving cars and engine, he tried to cross the main track, at which time he was caught and injured by a log car, which said log car was at the time detached from the main train, and was being kicked up the main track or forced up the main track by virtue of a 'drop switch' or flying switch, then the plaintiff had a right to watch whichever train or part of train he at the moment thought most dangerous to him, and therefore a momentary relaxation of vigilance in one direction would be excusable, while he gave attention to the direction from which he might reasonably have expected the greatest danger."

This instruction, we conclude, was erroneous and prejudicial. In the first place, it was too vague in stating what a child of tender age had a right to do under the circumstances described, without reference to his age or degree of intelligence. According to the testimony in the case, plaintiff's age and degree of intelligence was such as to have warranted the jury in finding that he was culpably negligent in going on the railroad track. The jury might, however, have understood from this instruction that if he was only eleven years of age he should not be charged with negligence, even though he was capable of appreciating the danger of going on the track.

In the next place, the instruction was erroneous in stating as a matter of law that the plaintiff had the right to fix his attention exclusively on the part of the train from which he most expected danger, and relax his vigilance as to the other part of the train. This invaded the province of the jury and took away the duty of the jury to determine as a question of fact whether or not plaintiff was guilty of negligence in going on the track. Moreover, there was no question involved in the case as to the

concentration upon expected danger in one direction, so as to justify a relaxation of vigilance in another direction. The plaintiff was not in a position to expect danger from two directions at the same time, for the tracks were thirty-three feet apart; and when he passed the danger point of one track, he should have confined his attention to the danger from the next track upon which he was about to enter. There was no question of divided attention presented at all, and the only thing which should have been submitted to the jury was whether the plaintiff, considering his age, capacity, etc., was guilty of negligence in attempting to cross the track in front of the approaching log car.

The instruction quoted above could only have served to mislead the jury and divert them from the real issue in the case. For this error the judgment is reversed, and the cause remanded for new trial.

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

Opinion delivered March 6, 1911.

1. MASTER AND SERVANT—ASSUMED RISKS—MASTER'S NEGLIGENCE.—While a servant assumes all the ordinary risks incident to the service in which he is employed, he does not assume any risk caused by the master's negligence, and may act upon the presumption that the master has exercised due care for his protection. (Page 231.)
2. SAME—ASSUMED RISKS—NEGLIGENCE OF FELLOW SERVANT.—Under the act of March 8, 1907, making the master responsible to a servant who, while exercising ordinary care, is injured by the negligent act of a fellow servant "the same as if the negligence was that of the master," a servant does not ordinarily assume the risk of the negligence of a fellow servant, but may act upon the presumption that the fellow servant will exercise due care. (Page 231.)
3. SAME—ASSUMED RISKS—NEGLIGENCE OF FELLOW SERVANTS.—It cannot be said, as a matter of law, that a locomotive fireman who, in discharge of his duties, got down from his seat and was engaged in coaling the engine while the engine was backing at high speed, assumed the risk of the negligence of fellow servants, causing a collision and injuring the fireman. (Page 232.)
4. SAME—CONTRIBUTORY NEGLIGENCE.—Though it is ordinarily the duty of a locomotive fireman to be in his seat when a coupling is being

made in order that he may receive signals, yet it was not contributory negligence for him to be engaged elsewhere in coaling the engine where it was necessary and in accordance with the rules for him to do so. (Page 232.)

5. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—Where a locomotive fireman was injured while engaged in coaling his engine, at the time a coupling was being made, an instruction to the effect that if it was his duty to keep a lookout and receive signals when a coupling was about to be made, and if his failure to do so contributed to his injury then he "was guilty of contributory negligence and can not recover" was properly modified by adding: "unless you find that he was at the time engaged in other duties which made it impossible for him to keep such lookout, and was exercising due care and caution to avoid injury." (Page 233.)

6. INSTRUCTIONS—SPECIFIC OBJECTION.—An objection to the particular language of an instruction should be specific, in order to call the court's attention to the defect objected to. (Page 234.)

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

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews and *James H. Stevenson.*

Plaintiff was guilty of contributory negligence, and the court should have instructed a verdict for defendant. 91 Ark. 86; 41 Ark. 542; 70 Ark. 603; 79 Me. 397; 38 W. Va. 206; 27 Minn. 137; 6 N. W. 553; 98 Ill. 481; 5 Am. & Eng. Ry. Cas. 651; 37 W. Va. 180; 16 S. E. 457; 106 Ia. 253; 76 N. W. 670. The risk of injury was assumed by plaintiff. 88 Ark. 548; 77 Ark. 367; 79 Ark. 53; 89 Ark. 588; 87 Ark. 396. Misleading and contradictory instructions should not be given. 72 Ark. 31; 74 Ark. 437; 64 Ark. 332; 89 Ark. 213; 92 Ark. 6. The negligence of the master may be assumed. 77 Ark. 367; 79 Ark. 53; 88 Ark. 548; 89 Ark. 508; 87 Ark. 396.

S. Brundidge, Jr., and *Harry Neelly,* for appellee.

Plaintiff had the right to assume that the master would not subject him to abnormal risks. 80 Minn. 400; 83 N. W. 440; 112 Ind. 166; 11 N. E. 322; 67 Ark. 377; 55 S. W. 165; 43 Minn. 42; 44 N. W. 522; 89 Tex. 635; 35 S. W. 1058; 60 O. St. 487; 54 N. E. 475; 107 Tenn. 340; 64 S. W. 1; 56 Kan. 228; 42 Pac. 724; 104 Ia. 139; 73 N. W. 614; 98 Wis. 348; 74 N. W. 212; 23 N. E. 675; 102 Ill. App. 428; 66 N. E. 829; 93 Ga. 259; 159

Mass. 532; 67 Ark. 377; 64 Ia. 613; 92 N. Y. 639; 16 L. R. A. 189. The risk of injury was not assumed. 77 Ark. 367; *Id.* 458; 76 Ark. 184; 80 S. W. 387; 70 Ark. 295; 89 S. W. 370.

FRAUENTHAL, J. This is an action instituted by William Booth, the plaintiff below, to recover damages for personal injuries which he alleged he sustained while in the service of defendant. The plaintiff was a fireman on one of defendant's freight trains, and he alleged that he received the injuries complained of by reason of the negligence of other employees of defendant in carelessly backing the engine and cars attached with great and unusual force against other cars of the trains, so that he was thrown with great violence against the gate chains across the tender and injured thereby to such an extent that it caused the paralysis of his lower limbs. The defendant denied all allegations of negligence contained in the complaint, and pleaded that any injury which plaintiff sustained was caused by his own contributory negligence or resulted from a risk which he assumed by his employment. It further alleged that plaintiff had, by written contract duly executed by him, in consideration of re-employment released defendant from all liability by reason of said injuries. The plaintiff denied the execution of said alleged release; and the defendant virtually abandoned that defense by failing to introduce any evidence to sustain that plea and by failing to ask any instruction presenting that issue to the jury. The testimony on the part of the plaintiff tended to establish the following facts: On the early morning of September 12, 1909, while it was yet dark, the plaintiff was engaged in the discharge of his duties as a fireman on one of defendant's freight trains, and while at the station of Kensett it became necessary to attach to the train two stock cars which were standing on a switch. The engine was detached from the main body of the freight train, which was left on the main line, and proceeded on said switch and attached the two stock cars to the rear of the engine. The engine with the cars attached then entered on the main line at a distance of about one-half mile from the main cars of the train and proceeded backward in order to couple thereto. When the engine began backing on the main line, it was going at a rate of speed of about six to eight miles per hour, and the engineer directed the plaintiff to light a lamp at the water glass, which reg-

isters the water in the boiler, and which had been blown out, and also to put coal in the engine so as to get the fire in proper condition. The plaintiff lighted the lamp, which took a short time on account of the wind, and then proceeded to shovel the coal in the engine. He had taken up the scoop and was bent over in the act of opening the door of the engine when the engine and two cars were backed at such a rate of speed that they were thrown against the portion of the train on the main track with such great and unusual force and violence that it knocked plaintiff off his feet and threw him on the iron chains across the tender. It threw him with his back against these chains with such force that it bent him double and injured him very severely. He was unable to move himself, and was placed upon a cot and carried on a passenger train to Little Rock. The testimony tended to prove that at the time the coupling was attempted to be made the engine was going at a rate of speed of six to eight miles per hour, which was an unusual and dangerous rate of speed at which to go in making a coupling, and that this was due either to the negligence of the engineer or to the negligence of the brakeman in failing to give the engineer the slow up signal. The testimony tended further to prove that in the proper discharge of his duties the fireman of a freight train should ordinarily occupy a seat in the cab while the train is backing to make a coupling, but that it is also his duty to obey the directions of the engineer and to put coal in the engine at any time that it may be needed, even though it is backing.

The plaintiff testified that when the engine entered on the main track and proceeded back towards the balance of the train in order to couple to it he knew the engine was going at a rate of speed of from six to eight miles an hour, and that this was an unusual and dangerous rate of speed at which to go in making a coupling; but he also testified that he thought the engineer would slacken the speed before the balance of the train was reached. At that time the engine was nearly one-half mile from the balance of the train, and the plaintiff left the seat in the cab and proceeded to light the lamp and fire the engine, standing in the deck of the engine. The engineer denied that he had directed the plaintiff to light the lamp or fire the engine, and testified that plaintiff at his own instance was standing on the iron bridge between the engine and

tender rolling a cigarette, and that he was in that attitude when the impact of the cars came at the time of the coupling. He also testified that the engine was only going at the rate of three or four miles an hour at the time of the coupling, which was a safe and ordinary rate of speed for that purpose. The jury, however, made a finding sustaining the testimony given on the part of the plaintiff, and upon this controverted question of fact we must be bound by their determination. The jury returned a verdict in favor of the plaintiff, and the defendant prosecutes this appeal.

It is urged by counsel for defendant that the plaintiff is not entitled to recover, under his own testimony, because the injury which he received was due to a risk which he assumed. It is insisted that the plaintiff, when he left the seat in the cab, which was a safe place, and stood in the deck of the engine, knew the high rate of speed at which the engine was backing and that it was dangerous to make a coupling at that rate of speed, and therefore assumed the risk of any injury occurring therefrom. It is, of course, well settled, indeed, so well settled that it is now considered almost elementary, that a servant assumes all the ordinary and usual risks and perils that are incident to the service in which he is engaged; but it is equally well settled that he does not assume any risk of danger caused by the negligence of the master. The result of that principle is that the servant has the right to assume that the master has exercised and will exercise due care and diligence, and he has the right, while exercising ordinary care for his own safety, to act upon the presumption that the master has exercised and will exercise that care and diligence 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.

Now, by the act of the General Assembly approved March 8, 1907 (Acts 1907, p. 162), a railroad company is made responsible for the injuries to its servant caused by the negligence of a fellow servant. By virtue of that act the master is made responsible to his servant who, while exercising ordinary care, is injured by the negligent act of a fellow servant, "the same as if the

negligence was that of the master." The servant of a railroad company does not therefore ordinarily assume the dangers or perils that arise from or which are consequent upon the negligence of a fellow servant. The servant has the right to assume that a fellow servant will exercise due care in the performance of the duties imposed upon him, and has a right, while in the exercise of ordinary care himself, to act upon the presumption that he will exercise that care and diligence for his protection. *St. Louis, I. M. & S. Ry. Co.* v. *Ledford,* 90 Ark. 543; *St. Louis, S. W. Ry. Co.* v. *Burdg,* 93 Ark. 88.

Now, according to the testimony adduced upon the part of the plaintiff, it appears that, at the time he proceeded to take his place in the deck of the engine and to prepare to put coal in the engine, the engine, although backing at a high rate of speed, was at a sufficient distance from the balance of the train so that by the exercise of ordinary care and diligence the speed could have been slackened to such an extent that the coupling could have been made with the ordinary impact and with safety to the plaintiff. According to the testimony, if the brakeman had not been negligent in failing to give the slow-up signal, or if the engineer had not been negligent, if he received such signal, in not slackening the speed of the engine, the coupling would have been made with safety to the plaintiff in the position where he was. The plaintiff had a right, while he was discharging the duties imposed upon him in firing the engine, to presume that these fellow servants would exercise due care and diligence in the performance of their respective duties and to act upon that presumption. It cannot be said therefore, as a matter of law, that he assumed the risk of the danger that was thus caused by the negligence of one of these fellow servants. He was not aware of the negligence of these fellow servants which did not occur when plaintiff proceeded to stand in the deck of the engine, but which actually occurred when the engine made its close approach to the balance of the train.

The defendant urges that plaintiff was guilty of an act of negligence which contributed to cause his injury by going down into the engine while the coupling was being made, instead of remaining in the safe place upon the seat in the cab. It is insisted that, according to the customary rules, the fireman was

required to be in his seat in the cab to receive signals from brakemen when a coupling was being made. While that was ordinarily the rule of the company, yet the evidence shows that, when directed by the engineer to fire the engine, it was necessary and in accordance with the rules for the fireman to go down in the deck of the engine to perform that duty. He could not be said, therefore, to be guilty of contributory negligence if under these circumstances he was performing that duty in the deck of the engine. That question was, we think, fairly submitted to the jury by instruction No. 5 asked by the defendant and as modified by the court. The instruction is as follows, the modification made by the court consisting of the words in italics added to the instruction as asked by the defendant:

"5. If you find from the evidence in this case that it was the duty of the plaintiff, while engaged in the performance of his duties as a locomotive fireman, to receive from the brakeman on said train signals indicating that cars were about to be coupled on to the locomotive on which plaintiff was when he was injured, and find that plaintiff negligently failed to keep a proper lookout for such signals and to receive the same; and further find that if plaintiff had been in his proper position on said locomotive in time to have permitted plaintiff to take such position as would have prevented his injury; and further find that this negligent and careless conduct of the plaintiff was the cause of, or that it contributed in any manner, or to any extent, or to any degree, to his injury, then plaintiff was guilty of contributory negligence, and can not recover in this action, and your verdict must be for the defendant, *unless you find that he was at the time engaged in other duties which made it impossible for him to keep such a lookout, and was exercising due care and caution to avoid injury.*"

It is urged by counsel for the defendant that this modification was erroneous for the reason that the instruction, as modified, fails to submit to the jury the question as to whether or not the plaintiff did the proper thing in going down in the deck of the engine, and as to whether or not he was negligent in not being in his seat in the cab. But, under the evidence, we think that the jury was warranted in finding that he was not negligent in failing to remain in the seat in the cab if his duties at the time required him to be engaged in the deck of the engine. We think,

therefore, that the question as to whether or not the plaintiff was negligent in not being or remaining in the seat in the cab was properly submitted to the jury by this instruction as modified and given by the court, under the testimony adduced upon the trial of the case. The court did not err in modifying the instruction.

The defendant contends that the court erred in giving the following instruction at the instance of the plaintiff: "5. The jury are instructed that, when the plaintiff entered the service of the defendant railway company, he assumed all the risks incident to the service he entered, but he did not assume a risk created by the negligent act or acts of the employees of said company and only such risks that he knows to exist, or may know of by exercise of ordinary care."

It is urged that by this instruction the court told the jury that the plaintiff assumed all the risks incident to the service but only such risks that he knew to exist or might have known by the exercise of ordinary care, and that he did not assume a risk created by the negligent act of the employees of the company, even though he was aware of such negligence. We do not think that this is the true meaning of this instruction. We think that it fairly means that the plaintiff assumed all the risks incident to the service he entered, but he did not assume risks created by the negligent act or acts of the employees of the company, and that he did assume the risk of such acts of negligence which he knew to exist or might know by the exercise of ordinary care. If the language of this instruction, in the opinion of the defendant, was ambiguous, it was its duty to call to the attention of the trial court the specific objection thereto which it now urges. If it had done that, the court no doubt would have corrected the verbiage so as to express its meaning more plainly. The defendant did not request that the verbiage of the instruction be changed, nor did it call to the attention of the court the specific objection which it now makes. It cannot, therefore, now complain of this instruction.

The defendant has not urged upon this appeal that the amount of the verdict returned by the jury is excessive. It has urged that other errors were committed, but we do not think that it would serve any useful purpose to detail or to discuss them. We have carefully examined the alleged errors which it urges,

but we do not think that its contention is well founded as to any of them.

The judgment is accordingly affirmed.

DUNLAP v. MOOSE.

Opinion delivered March 6, 1911.

LANDLORD AND TENANT—ESTOPPEL TO DISPUTE LANDLORD'S TITLE.—In an action of unlawful detainer the tenant is estopped to deny the landlord's title, though, after having surrendered possession, the tenant may bring ejectment to recover possession.

Appeal from Perry Circuit Court; *F. Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

Wm. L. Moose and J. W. Massey brought an action of unlawful detainer against A. L. B. Dunlap for possession of certain lands in Perry County, describing them, and alleged:

"That, being the owners of said lands, on January 27, 1909, plaintiffs rented and leased the same to the defendant, A. L. B. Dunlap, for the remainder of the year 1909, and the defendant went into possession thereof and occupied and cultivated said lands as tenant of the planitiffs, and paid to plaintiffs the amount of rent for said premises which he had contracted to pay. Plaintiffs state further that the defendant refused to deliver possession of said premises at the end of the year, 1909, and still refuses to vacate them, although duly notified to quit and deliver up possession thereof.

"Wherefore plaintiffs pray for judgment," etc.

To this complaint appellant filed the following answer and cross complaint and motion to transfer to equity:

"Comes the defendant, A. L. B. Dunlap, and for answer to the complaint of plaintiffs says that he did not rent said lands from plaintiffs, Moose and Massey, for the year 1909; and says that the truth is as follows: That said Moose and Massey are not the owners of said lands, or any part thereof; says they did not own it in 1909; says that he purchased said lands from one Doc Williams, now deceased, and said Williams executed to him,

prior to 1900, a deed to said lands, and in 1909, he was the lawful owner of said lands; and that he has had continuous, adverse, peaceable possession of said lands for more than ten years, up to the bringing of this suit; and says that he left with Martin & Horton his said deed to said lands, and that plaintiffs got said deed from them, and has it at this time; and that he never had said deed recorded, for which reason he cannot attach a copy hereto; and that said Moose and Massey have not at any time been the rightful owners of said lands. Says that on the 23d day of January, 1909, he was owing at that time a debt to Martin & Horton; that they claimed to be $850, for which Martin & Horton held a mortgage against said lands; and defendant says that he didn't believe that it amounted to as much as $850; and that he got plaintiffs to advance and loan to him the sum of $750 to settle and pay off said claim and mortgage to Martin & Horton; and says that said Moose and Massey did loan him the sum of $750, and did with said $750 pay off the debt that Martin & Horton claimed that he owed them; and, to secure the payment of said $750, he offered to execute a mortgage to Moose and Massey upon said lands; and they refused to take an ordinary mortgage, and had him execute a deed to said lands to them, reciting the purchase of said lands for the sum of $850; copy of said deed is attached hereto, as 'Exhibit No. 1,' and made a part hereof; and at the same time said Moose and Massey made a written contract and delivered it to defendant in words and figures as follows: 'Having purchased from A. L. B. Dunlap his home place, consisting of 26½ acres, in Union Township, Perry County, Arkansas, for $850, and received their warranty deed therefor. Now, if said Dunlap shall pay November 1, 1909, one-half of said sum with 10 per cent. interest per annum thereon, and shall also pay to us the amount of any advances in money or supplies that we may furnish him this year, with lawful interest thereon, and all taxes or other lawful assessment we may pay on said lands, the same to be due November 1, 1909, and shall pay us November 1, 1910, the remaining half of said purchase money with ten per cent. interest thereon, together with the amount of any advances we may make him for the year 1910, then we will reconvey to him said land. But time is of essence of this agreement; and if said Dunlap shall fail from any cause to pay the

amount that may be due November 1, 1909, and 1910, in full, on or before said day in each of said years, this contract shall be null and void and of no legal effect; and said Dunlap hereby accepts this contract with conditions thereof.

" 'January 23, 1909.

" 'W. L. Moose and J. W. Massey.

" 'A. L. B. Dunlap.'

"Copy of the above contract as set forth is made 'Exhibit No. 2' and a part hereof.

"Defendant says that said deed 'Exhibit 1' and said written contract 'Exhibit 2' were executed at the same time, and are one and the same agreement—and says that plaintiffs, not being satisfied with the description set forth in 'Exhibit 1,' wrote out another pretended deed, and had him and his wife execute same to them on January 27, 1909; copy of same is attached hereto as 'Exhibit 3,' and made a part of this answer.

"Defendant says that said pretended deeds Exhibits 1 and 3, and said written contract, 'Exhibit 2,' were all one and the same agreement. Says that at the time said pretended deed made 'Exhibit 1,' and said written contract made 'Exhibit 2,' were executed, the said Moose and Massey required him to execute to them a chattel mortgage on his crops to be grown on his said lands for the year 1909 in the sum of $135, which was to cover and secure the rent and profits from said lands for the year 1909, together with any supplies they might furnish him; and that the said chattel mortgage was due and payable November 1, 1909; and was duly recorded in Perry County, Arkansas, in record book G, page 170. A copy of said chattel mortgage is also attached hereto and made 'Exhibit 4.' Says that pretended deeds made Exhibits 1 and 3, and said written contract made Exhibit 2, and said chattel mortgage made 'Exhibit No. 4,' are all one and the same agreement. Defendant says that said pretended deeds and written contract were and are only a mortgage, intended to secure the payment of the sum of $850, set forth in said deed and written contract, and denies that plaintiffs ever paid him the said sum of $850 for the execution of said deeds; and denies that he paid him the sum of $850 for the purchase of said lands, or any part thereof, at the time he executed said pretended deeds, but says some time before they had loaned to him $750 by paying

Martin & Horton $750 for him; and then, to wrap up and conceal the usury exacted in said loan, they added $100 to the $750, and took a pretended deed from him for the $750 and $100, making $850; and says that the said $100 was added in as interest, and was and is usury charged for the use of only $750 as per written contract, and says that the interest at ten per cent. charged upon the $100 from the dates of said written contract is also usury upon usury.

"Defendant says that said chattel mortgage made 'Exhibit 4,' being a part of the usurious contract set forth in the pretended deed and written contract, was without any consideration, and made to beat and cheat him out of the rents and profits from said lands; and to better enable them to force him to pay the said usury in the sum of $100, with the interest thereon; and says there was no consideration for the execution of said chattel mortgage as aforesaid, and now pleads want of consideration as to said chattel mortgage. Defendant says that said deeds, said written contract and said chattel mortgage were each and all executed for the fraudulent purpose of covering up and concealing the usury charged in said contract in the sum of $100, and interest thereon. Defendant says that he was forced to pay off said chattel mortgage in the sum of $135, and now says that said plaintiffs are due him $135 for the same as money had and received belonging to him, with interest at six per cent. per annum thereon from November 1, 1909. Defendant says that this suit was brought against him on March 14, 1910, and within ten days thereafter he was put out of possession of said lands by the sheriff of Perry County under the order of this court; and says that said suit was wrongfully sued out by the plaintiffs, and the said order should never have been made and served, and says that plaintiffs have damaged him in the sum of $200 by the wrongful bringing of this suit and having him put out of possession of said lands. Wherefore defendant prays that this be taken as his answer and cross complaint against the plaintiffs; and that it also be taken as a motion to transfer to equity, and that this cause be transferred to equity, and that upon final hearing said loan be declared usurious, and that both of said pretended deeds be set aside and held to be null and void, and removed as a cloud from his title to said lands; and that he have and recover the sum

of $135 with interest thereon for the wrongful taking of said sum under said chattel mortgage; and that he recover $200 damages for the wrongful suing out of this suit and putting him out of possession of said lands, and that he have possession of said lands and for other relief."

Copies of both deeds were filed as exhibits 1 and 3 to the answer, the first reciting in the description "and being the same land which is under mortgage to Martin & Horton to secure certain indebtedness due from us;" the second, made four days thereafter, containing a more definite description of the land and leaving out said recital contained in the first.

Plaintiffs filed a motion to strike out all the answer except the first sentence. The defendant demurred to the motion to strike, the demurrer was overruled, the motion sustained, and all the answer ordered stricken out except said first sentence, viz:

"Comes the defendant, A. L. B. Dunlap, and in answer to the complaint of plaintiff, says that he did not rent the said land from plaintiffs, Moose and Massey, for the year 1910, and says the truth is as follows."

The defendant excepted to this ruling of the court, and conceded that, under the court's ruling on the only point left in issue by the answer, the plaintiffs would be entitled to recover possession of the lands.

The court rendered judgment for plaintiffs and defendant appealed.

P. H. Prince, for appellant.

The court erred in sustaining demurrer to defendant's answer. 60 Ark. 606. The answer set out a good defense and should have been sustained. 55 Ark. 270; 47 Ark. 287; 36 Ark. 248. A conveyance based upon a usurious contract passes no title. 52 Ark. 373; 53 Ark. 345; 54 Ark. 155; 55 Ark. 318. Defendant must plead all defenses, both legal and equitable. Kirby's Dig. § 6098; 70 Ark. 505; 57 Ark. 500; 71 Ark. 487. The case should have been transferred to chancery. Kirby's Dig. § 5995. Action of unlawful detainer can only be maintained when the relation of landlord and tenant exists. 10 Ark. 43; 44 Ark. 444; 55 Ark. 318.

Wm. L. Moose, for appellees.

Title to the land is not involved in an action of unlawful detainer. Kirby's Dig., § 3648; 40 Ark. 192; 38 Ark. 587. Tenant cannot dispute landlord's title. 84 Ark. 220. There was no usury in the transaction. 25 Ark. 258; 41 Ark. 351; 55 Ark. 268; 91 Ark. 461.

KIRBY, J., (after stating the facts). The action of unlawful detainer is only to decide the right to the immediate possession of lands and tenements, and not to determine the right or title of the parties to or in them. A tenant cannot dispute the title of his landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title, but must first surrender possession and bring his action. *Washington* v. *Moore,* 84 Ark. 220.

The portion of the defendant's answer stricken out might have been, if true, a defense to an action of ejectment for the lands, and he is not precluded by judgment against him in unlawful detainer for the possession from setting up such facts in a proper suit, if they constitute a cause of action. The court committed no error in striking out that portion of the answer. The paragraph of the answer not stricken out put in issue the right to the possession, and appellant conceded plaintiff's right to recover thereon, under the facts.

The judgment is affirmed.

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

Opinion delivered February 27, 1911.

1. MASTER AND SERVANT—FEDERAL EMPLOYER'S LIABILITY ACT—JURISDICTION OF STATE COURTS.—State courts are authorized to enforce the rights declared or created by the Federal Employers' Liability Act of April 22, 1908, since that act does not expressly or by necessary implication confer exclusive jurisdiction on the Federal courts. (Page 252.)
2. SAME—FEDERAL EMPLOYERS' LIABILITY ACT—PLEADING.—While it is not necessary to plead a Federal statute, yet allegations constituting a cause of action or defense thereunder must be made in order to have the benefit thereof. (Page 252.)

3. SAME—CONSTRUCTION OF FEDERAL ACT.—The Federal Employers' Liability Act is limited in its application to railroad carriers while engaged in commerce between any of the States or Territories, and to any person suffering injury while he is employed by such carrier in such commerce, or to his or her personal representative. (Page 253.)

4. SAME—FEDERAL ACT—EFFECT ON STATE LAWS.—The Federal Employers' Liability Act of April 22, 1908, creating a remedy in favor of one who is injured while employed by a carrier in interstate commerce, did not supersede or suspend the laws of the States relating to or incidentally affecting the same subject-matter, such as a law of a State providing for survival of a cause of action for the death of an employee killed by the employer's negligence. (Page 254.)

5. DEATH—LIABILITY—LEX LOCI.—In actions of tort based on negligence resulting in death or personal injury, the right of recovery must be determined by the law of the State where the injury was inflicted. (Page 256.)

6. SAME—OKLAHOMA STATUTES.—Under Snyder's Comp. Laws of Okla., § § 5493, 5495, the administrator of a railway employee killed by the wrongful act of the railway company is entitled to bring two actions, one under the State law for the pain and suffering and mental anguish of the deceased, and the other for the pecuniary loss sustained by his next of kin under either the Federal or the State law, or under both. (Page 256.)

7. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—In an action for the death of a brakeman caused by his falling through a car having a hopper bottom, an instruction that if he knew of the defective condition of the hopper doors and appreciated the danger he cannot recover, but if the fastenings were known to him to be defective but he did not appreciate the danger therefrom, he did not assume the risk, was properly refused. (Page 257.)

8. SAME—LATENT DEFECTS.—It was not error to instruct the jury that a servant is not required to search for latent defects in the appliances of the business in which he is employed, but that he has a right to rely upon the master to perform his duty in furnishing safe appliances. (Page 257.)

9. APPEAL AND ERROR—EXCESSIVE DAMAGES—REMITTITUR.—Where plaintiff's intestate suffered great pain, after he was injured, and survived his injuries five hours, an award of $10,000 for his injuries will be affirmed upon remittitur of one-half of that sum. (Page 258.)

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

STATEMENT BY THE COURT.

This suit was brought by the administrator of the estate of Wm. B. Hesterly, deceased, to recover damages for the benefit

of the estate and the next of kin on account of an injury to deceased which resulted in his death about five hours afterwards.

The complaint was in two paragraphs. It alleged that the defendant was operating a line of railroad as a common carrier of freight and passengers in the State of Oklahoma, and that deceased was a brakeman on defendant's said line in Oklahoma, and that while he was engaged at Wagoner assisting in switching certain cars onto a side track it was necessary for him to pass over them in order to set the brakes; that while doing so the bottom fell from a car on which he was walking, the deceased fell through, and four cars ran over his lower limbs, severing them from his body; that the injury was caused by the negligence of the defendant in moving a dump bottom coal car in the train at a time when it knew that the fastenings of the bottom were unsafe, likely to give way and dump the contents of the car upon the ground, and that the brakeman on the train in the discharge of their duties would be required to pass over the car and thus be subject to the hazard of injury if the bottom fell. That deceased was 22 years old, had an earning capacity of $100 per month, and left his father and mother as his next of kin; that he would probably have contributed to them during his life expectancy $25 per month. Damages in the sum of $5,000 are asked for their benefit.

The second paragraph sets out the same allegations as to the employment of deceased and his injury, and, in addition, that deceased was taken from under the cars and left lying on the ground without proper medical attention for a space of more than three hours; that during that time he suffered intense physical pain and mental distress as the result of his injuries; that such pain was continuous from the time that he fell through the car and was injured until about 5 o'clock the next morning, when he died. Damages on this account are asked for the benefit of the estate.

The answer denied all the material allegations of the complaint, and further alleged that if deceased was injured his injury resulted from his own negligence in failing to exercise proper care to protect himself against injury, and that a recovery was barred by his contributory negligence; and further that his injury

resulted from a risk which he assumed, and that on account of his assumption of risk no recovery could be had.

The testimony tended to show that deceased was rear brakeman on appellant's freight train, between Van Buren, Ark., and Coffeyville, Kans.; that he left Van Buren on the train about four or five o'clock in the afternoon of August 25, 1909, reaching Wagoner, Okla., about 12:15 or 12:20 at night; that some six or eight cars were to be set out there; that the engineer switching the cars stopped the train at the "passing track switch," letting the cars go down the passing track, having some to set on the Y and some to set on the rip tracks; that the switch on which the cars were to be placed was opened by the head brakeman on the train; that it was the deceased's duty to ride the cars in, and that he did ride them in, and they were expected to stop just in the clear of the train. The engine was stopped in the clear of the cars, and they passed it going two or three miles an hour; deceased was at the time on the top of a box car, near the engine. The cars went about fifteen car lengths further down the switch track than the engineer expected them to, and he called to the head brakeman who threw the switch, and he backed up the main track and started to head in on the passing track to catch the cars. As he went down on the passing track, the fireman said: "There lies the brakeman." The head brakeman was on the right hand side of the pilot, and gave the signal to stop, and the engine was stopped. The head brakeman, Hall, came back to the gangway and said: "There lies Billy; he is cut all to pieces." He was told to see if he could do anything for him, and he got a torch and went to him. When he got there deceased told him how he was hurt. He told him to look on the first iron coal car and find a door open. He said: "I fell through that."

The engine had moved eight or ten car lengths on the passing track when the fireman discovered deceased. The fireman and the brakeman Hall went together. When deceased saw witness (the engineer), he called him; he was then lying between the passing track and the rip track, his body just outside the rail toward the rip track, with one leg cut off and the other one mashed. He talked of his mother and father, some one by the name of Uncle Will, and about a young lady at Fort Smith to

whom he said he was engaged to be married, and left messages for them.

The injury occurred between 12:15 and 12:20. A doctor was telephoned for, but it was an hour or an hour and a half before he came. Deceased was conscious all the time and appeared to be in great pain, complained about his legs hurting him and wanted them to straighten them out. He was placed on a cushion out of the caboose in the first section of the freight train, and remained there from an hour and thirty minutes to an hour and forty-five minutes. It was something like two hours before they moved him. He was first moved to the waiting room at the depot and then into the caboose. That was between three and four o'clock in the morning. They started with him to Van Buren, and when they had got about forty-five miles he died, about 5:30 o'clock. One of the doctors was on the train with him, returning.

It was the duty of deceased to cut off the engine, let the cars loose, get on top of them, ride them in, apply the brakes and stop them. This he was doing. It was found after the injury that on the first three cars going north—a box car and two coal cars loaded with cinders—the brakes were set. The box car was the one next to the engine, and the brakes on it were set, as were the brakes on the two cinder cars next to it. The third cinder car was the one with the hopper door down, and the brakes on it were not set. The brake was at the far end of the car from the box car on which deceased rode in to the switch. An examination disclosed that one of the hopper doors on this cinder car had fallen down out of place, one end of the chain attached to the door and the other end loose from the iron that should have held it up. The door swung down and left an opening. One of the chains to the door that was down was entirely gone, and the other was attached to the door but its attachment to the shaft which held it in place was broken. The chain did not appear to be broken, but the bolt that was connected with it and goes through the edge of the door and fastens it was, and the car inspector that examined the car early the next morning could not tell how long it had been broken. No rope or wire was found attached to that door. The bolts on both doors were broken. One door was down, the other in place and fastened with a wire

instead of a bolt. It was a Missouri Pacific car made of iron. There are four hoppers in one of these cars, two in each end of it. A center rib about a foot wide flush with the floor runs through the whole length of the car, and the hoppers are at either end across this rib from each other. They are slightly below the level of the floor, of which they form a part when closed, each making a hollow place from eight inches to a foot deep, a kind of pocket in the floor. The hoppers are about four feet square, and each has two doors that swing up from the bottom of the car crosswise, and from the corner there is a chain that goes to a shaft which runs across the body of the car. The shaft is wound from the outside with a wrench, and winding that shaft draws the doors to a closed position when they are latched on the inside with a ratchet.

The cars were loaded with cinders to within three or four inches at the top, and were about four feet deep, and the fastenings of the doors could not be observed or discovered while the car was loaded.

No cinders were found where deceased fell, nor any that were apparently spilled on the ties or track. There were 36 cars in the train when it left Van Buren; these four loaded with cinders had come up from Argenta. One of the brakemen, after leaving Van Buren, at the third station out from Wagoner, where the train had been sidetracked for another train to pass, sat down on the main track opposite his train and observed the running gear as it pulled out of the side track, and saw nothing wrong—no drop bottoms out of place. The car through which deceased fell was the fourth car from the engine when in the train, and 31 cars from the caboose.

One witness stated that he inspected this car after the injury, about 1:30 o'clock; noticed the drop door open and cinders had caved through, caved entirely out on one side, and left a space on the other side. Saw on the top of the cinders where it looked like a man had stepped over and about the length of his foot had caved in beyond the length of this circle where it had caved in. The drop was not there. There were no fastenings to the drop door that was down. Saw no wire or piece of rope about those fastenings, and no chain. The lever was there, but there was nothing to show where the chain had been severed from the door.

It was gone. Cinders had leaked out through this hopper door, and about two feet on the other side, just the same as if the car was loaded, only it had caved in on one side; a funnel shape right over the hopper door; on the opposite side they were still there. There was no running board over the top of the car, and in going over the car it was necessary for the brakeman to walk on top of the cinders which were about the color of the car. These cars are in frequent use. The brake staff on this class of cars is always on the end and near the center.

Hall, the head brakeman, opened the switch when Hesterly cut the cars off, and rode them in on the side track. They headed in afterward with the engine to catch the cars and got a little way in on the passing track, and he saw Hesterly rise up and give a stop signal. He was lying between the passing track and the rip track. That was probably twelve or fourteen cars, something like that, from the track through which the cars headed in. He was five or six cars from Hesterly when he first saw him. The engine headed in, and the headlight disclosed his presence. He called to the engineer, and they went to deceased.

This witness did not examine the car at Van Buren, but noticed it on the way to Wagoner. This was at the Frisco crossing at Van Buren. He dropped off at the crossing, and when he got back on the train and went over this car to the engine, he noticed that the cinders were all out around the pocket The trap door was closed; it had been wired up. He noticed the chain wrapped up over the rod that goes through there, and there is a wrench on the outside that screws them up, and the wire was wrapped around the chain. The cinders had wasted out, and this door was fastened up as described. The cinders were about a foot deep over the other door, the north door the way the train was going.

Witness next noticed this door at Fort Gibson, about 12 miles from Wagoner. The cinders were then about like they were when he first noticed them. Hesterly was the rear brakeman, and Hall told him about this car at Hanson. He was at that time getting the number of a car to set out at Fort Gibson. He thinks Hesterly was about the fifth car from the engine when he told him. The crippled car was the fourth car from the engine. When he told Hesterly about the car, he had a list, and

was telling the witness they had to drop them in at Wagoner, the four cinder cars. Witness did not examine the cinder car at Wagoner nor report to the conductor. He passed over this car four times; does not remember Hesterly passing over it except once, between Wagoner and Rex. Saw Hesterly, after they had dropped the cars on the passing track, on the head car with his lantern burning. Witness and Hesterly were standing by the fifth car from the engine when he told Hesterly about the car. He told Hesterly that the cinders were out from around the pocket, and he noticed the door was wired. Told him how the cinders were in the car and how they sloped back each way. Hesterly did not go on the car then. He just looked at the car. This witness also stated it was not necessary to set the brakes on the front car, which the proof shows Hesterly was attempting to do when injured by the defective fastening of the trap door giving way and dropping him through on to the track, but the undisputed facts are that the cars moved many car lengths further than the engineer and head brakeman thought they should with the brakes all set on the first three cars.

The car inspector at Argenta where the car was loaded made an outside inspection; did not inspect the shafts that held the door up and could not see the chains and fastenings on account of the load. The one at Van Buren said the doors were in place, that he did not examine the fastenings, that it was impossible to do that with a loaded car.

Deceased's father was shown to be 67 years old with an expectancy of ten years and his mother 60 with fourteen years' expectancy; the earning capacity of deceased was about $100 per month, his expectancy of life forty years, and his contributions to the family were anywhere from $15 to $40 per month. Deceased had been in the railroad service about five years, and he was familiar with Rule 401, which is as follows:

"Trainmen must examine and know for themselves that the brakeshafts, attachments, ladders, running boards, steps, handholds and other mechanical appliances which they are required to use are in proper condition; if not, report them to the proper authority that they may be put in order before using." All brakemen receive a copy of the book of rules, containing this among others.

The court, among others, gave the following instructions which were excepted to:

"VIII. If Hesterly knew of the defective condition of the hopper door fastenings in question, if such fastenings were in fact defective, and appreciated the danger to himself therefrom in passing over said car, and with such knowledge and appreciation of danger passed over the hopper or attempted to do so, and fell through and was injured, he by such conduct assumed the risk himself, and plaintiff cannot recover. But, if the fastenings were defective and unsafe, and Hesterly knew this, but did not appreciate the danger to himself therefrom in passing over the car, and passed over the hopper or attempted to do so, and fell through, and was injured, he did not assume the risk.

"IX. A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing them, will not preclude him from a recovery unless he did in fact know them, or in the exercise of ordinary care ought to have known them. He is not bound to make an examination to find the defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for dangers, except those risks that are patent to ordinary observation. He has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty toward him."

The jury returned a verdict on the first count of the complaint for the benefit of the next of kin in the sum of $2,000, and for the estate the sum of $10,000 on the second count. Judgment was rendered accordingly, and defendant prosecutes this appeal.

W. E. Hemingway, for appellant.

The employers' liability act, passed by Congress April 22, 1908, does not authorize a recovery for pain and suffering, and the trial court erred in permitting appellee to recover on the second count of the complaint. While it was competent for the Legislature of Arkansas or of Oklahoma to enact laws fixing a

liability, and providing a remedy, for injuries received by an employee in conducting interstate commerce, it was primarily a matter within the power of Congress; and when Congress legislated with respect to it, the acts of the Legislature were suspended and were no longer of any effect. Under the ruling in *Covington Bridge Co.* v. *Ky.*, 154 U. S. 204-209, the most that can be claimed by appellee in this case is that the State statutes were valid as falling within the second class enumerated in that case; and, this being true, they are valid only in the *absence of legislation by Congress.* See also 93 U. S. 99-104; 128 U. S. 96-99; 158 U. S. 98-105. The power to regulate the relation between employer and employee engaged in interstate commerce was conferred on Congress by the Constitution. 207 U. S. 463, 494, 540, 541; 167 Fed. 660; 175 Fed. 307; 67 S. E. 20; 124 S. W. 984; 111 S. W. 500; 117 N. W. 686. As evidence that both the statutes of Oklahoma and the employers' liability act regulate the same subject-matter, compare Snyder's Comp. Laws of Oklahoma, § § 5943 to 5946, inclusive, with the liability act, approved April 22, 1908.

2. The verdict on the first count for the benefit of the next of kin was excessive. It appears from the testimony of the father, who was the only witness on the question of contributions, that the contributions made by deceased were to his mother and sister during the time he took his meals and lodged at his father's home and was not required to pay board; that he was engaged to be married, but had postponed marriage because of his financial condition; that he had saved no money because work had been so dull he could hardly make expenses. The witness' memory as to when deceased was at home, when he left, when he last made contribution, when he was employed at profitable wages and when not employed, is too vague and indefinite to call for a verdict of $2,000, especially in view of the fact that the evidence does not warrant an inference that the contributions could reasonably be expected to continue.

3. If any verdict at all for pain and suffering was proper, a verdict of $10,000 was excessive. 57 Ark. 386; 42 N. W. 237; 178 Fed. 749.

4. The court erred in its charge on the question of assumed risk. Deceased was informed only a short time before the acci-

dent of the condition of the car, and under the rules of appellant it was his duty to inspect the defective part and, if necessary, report it. He assumed the risk of being injured by continuing to use the car as it was.

5. The ninth instruction is erroneous. Deceased's attention had been called to the defect. It was his duty, in the exercise of ordinary prudence, to make an inspection.

Hill, Brizzolara & Fitzhugh, for appellee.

1. Appellant itself ignored the employers' liability act in the lower court by availing itself of defenses authorized by the State law which were eliminated by said act. Having suffered defeat there on issues tendered by it, it will not be permitted to avail itself of a different theory of defense in this court. The Oklahoma statutes cited by appellant were statutes of the Territory prior to statehood, and were continued as statutes of the State, subject to such changes as the Constitution worked upon them. As bearing upon this question, see art. 9, § 36, art. 23, § § 6 and 7, Const. Oklahoma. Sec. 5943, Snyder's Code, is in effect the same as § 6285, Kirby's Digest, in providing for a survival of actions for injuries to person, and that action may be brought notwithstanding the death of the party injured, or liable for same. Likewise, § 5945 of the former Code, corresponds with § § 6289 and 6290 of Kirby's Digest, in creating a cause of action in favor the widow and children or next of kin.

In the absence of a decision by the Oklahoma Supreme Court to the contrary, this court will give to those statutes the construction placed on our similar statutes in the case of *Davis* v. *Railway,* 53 Ark. 117. It is unimportant just what construction will be placed on that section of the Oklahoma Constitution making the defense of contributory negligence and assumed risk always a jury question; it is enough that they are recognized as defenses under the Oklahoma law. Under the liability act, § 3, contributory negligence is not a bar to recovery in this class of cases, but serves only to diminish the damages in proportion to the amount of the employee's negligence contributing to the injury.

In section 4 of said act it is provided that the defense of assumed risk shall apply where there was a violation by the carrier of any statute enacted for the safety of the employee. Appellant's answer does not allege that deceased was injured while

appellant was engaged in interstate business, but instead pleads contributory negligence and assumed risk. The testimony it introduced, and the instructions it requested, were in support of and based upon this theory. There was no instruction asked nor ruling invited on the proposition that the Federal Employers' Liability Act applied. Its fourth instruction to the effect that plaintiff is not entitled to recover on account of deceased's physical or mental suffering was too general to raise the point. 101 Ind. 416; 17 Misc. Rep. (N. Y.), 138. See further on the question that the case should not be heard here on a different theory from that on which it was tried below: 58 Pac. 509; 44 N. Y. 415; 51 N. Y. 78; 162 N. Y. 42; 193 Mo. 286; 51 Ark. 441; 64 Ark. 253; 2 Cyc. 671; *Id.* 670, and notes 90 and 91.

2. If the complaint and answer in this case had made such allegations as would bring it within the Federal Employers' Liability Act, and if the evidence had sustained those allegations, there would be no jurisdictional reasons why the State court should not enforce the statutory liability given by the Federal act where applicable. In suits brought in one jurisdiction upon the statute of another, the court enforces the statute according to the *lex loci,* but applies its own law so far as the remedies are concerned. 154 U. S. 958. Hesterly would have had a right of action for pain and suffering, had he lived. The question then is whether the general statute of survivorship of personal actions would be applied as a part of the *lex fori.* The Davis case, 53 Ark. 117, is decisive of the point that the survivorship statute would be read into and made a part of the Federal statute.

3. The evidence justifies an estimate of an average monthly contribution by deceased to his parents of $25. This, taken in connection with the evidence as to his age, and that of his father and mother, and his earnings, without allowing for increase of earnings, warranted the verdict in favor of the next of kin.

4. How can this court say that the verdict for pain and suffering was excessive? Citation of individual cases is of no value.

"In actions for personal injuries * * * where there is no fixed rule of compensation * * * the decision of the jury is conclusive, unless they have been misled or their verdict has been influenced by corruption, passion or prejudice. Unless the verdict * * *

finds an amount of damages so out of proportion to the actual injury as to evince such misleading, or the presence of some malign influence, it will be sustained, although it may materially differ from the judgment of the court." 3 Sutherland on Damages (3 ed.), § 953.

W. E. Hemingway, for appellant in reply.

There is nothing to show that the defense that no recovery could be had for pain and suffering because of the Federal Employers' Liability Act was not interposed in the court below. Moreover, this objection was included in the proposition embodied in the fourth instruction asked by appellant to the effect that plaintiff was not entitled to recover damages on account of physical or mental suffering on count 2 of the complaint. It is not necessary to plead laws, but facts only; neither is it necessary to prove laws, since the court knows them. 116 Fed. 867; 94 Ark. 394; 91 Ark. 97.

KIRBY, J., (after stating the facts). It is contended that this case is controlled by the Federal Employers' Liability Act of April 22, 1908, which, it is claimed, does not permit a recovery for pain and suffering for deceased's estate. No mention is made in this statute of the jurisdiction of courts to enforce the rights declared or created by it, and it is well settled that State courts may exercise concurrent jurisdiction with the Federal courts in all cases arising under the Constitution, laws and treaties of the United States unless exclusive jurisdiction has been conferred expressly or by necessary implication on the Federal courts. *Claflin* v. *Houseman,* 93 U. S. 130, 23 L. Ed. 833; *Defiance Water Co.* v. *Defiance,* 191 U. S. 194, 48 L. Ed. 144; 11 Cyc. 996; *Raisler* v. *Oliver,* 97 Ala. 714, 12 South. 238; *Wilcox* v. *Luco,* 118 Cal. 642, 45 Pac. 676, 50 Pac. 758, 45 L. R. A. 582; *Schuyler National Bank* v. *Bolling,* 24 Neb. 825, 40 N. W. 414; *Bletz* v. *Columbia Nat. Bank,* 87 Pa. 92; *People* v. *Welch,* 141 N. Y. 273, 36 N. E. 328, 24 L. R. A. 117; *Bradbury* v. *Chicago, R. I. & P. Ry. Co.,* 128 N. W. (Iowa), 1.

It is true, as appellant says, that it is not necessary to plead a Federal statute, but allegations constituting a cause of action or defense thereunder must be made in order to have the benefit thereof. *Bradbury* v. *Choctaw, R. I. & P. Ry. Co.,* 128 N. W.

(Iowa) 1; *Smith* v. *Detroit & T. S. L. Co.*, 175 Fed. 506; *Defiance Water Co.* v. *Defiance*, 191 U. S. 194, 48 L. Ed. 143.

The complaint alleges "that the defendant, St. Louis, Iron Mountain & Southern Railway Company, is, and was on the date hereinafter mentioned, a railroad corporation operating a line of railroad in the State of Oklahoma, and was in said State of Oklahoma a common carrier of freight and passengers for hire." There was no allegation that the carrier was engaging in interstate commerce, nor that deceased was injured while employed by such carrier in such commerce, and, for aught that appears to the contrary in the pleadings, the negligence and injury was purely local to the State of Oklahoma, and the action an ordinary one at common law. Appellant pleaded contributory negligence and assumption of risk, as it could do under the laws of that State, in bar of appellee's right to recover. It is unquestionably true that the suit was not brought under nor based upon said act.

It is also true, however, that it developed in the testimony that the run of the train on which deceased was injured was from Van Buren, Ark., to Coffeyville, Kansas, and it was not disclosed whether it engaged in or hauled intrastate commerce on the trip. Appellant asked a peremptory instruction that plaintiff was not entitled in any event to recover on the second count of the complaint for the pain and suffering of deceased for the benefit of his estate. This being sufficient to raise the question under said Federal Employers' Liability Act, what is the effect of it? See Act of Congress approved April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stat. Supp. 1909, p. 1171.

This statute is limited to interstate commerce, to railroad carriers "while engaging in commerce between any of the States or Territories," and to "any person suffering injury while he is employed by such carrier in such commerce," or his or her personal representative, for it was without the power of Congress to enact it otherwise. *Howard* v. *Illinois Cent. Rd. Co.*, 207 U. S. 463.

Congress has plenary and exclusive power to regulate commerce between the States, and each State has like power to regulate commerce purely intrastate, and it is most difficult to separate such commerce, has not been attempted and can not be done except at a cost and inconvenience entirely disproportionate to

and beyond any possible benefit likely to accrue from such separation, for rarely does a train proceed that does not engage in commerce both interstate and intrastate before its destination is reached.

It is insisted that this law supersedes and suspends the operation of all State laws relating to or incidentally affecting the subject, and particularly that the remedy for the right declared or created by it is exclusive.

In *Covington & Cinn. Bridge Company* v. *Kentucky,* 154 U. S. 204, 209, the court said: "The adjudications of this court with respect to the power of the State over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all."

In *Sherlock* v. *Alling,* 93 U. S. 99, 104, that court said: "And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In *Smith* v. *Alabama,* 124 U. S. 465, 31 L. Ed. 508, the court quoted in the opinion the above language of the Alling case, and held valid a statute of Alabama prescribing the qualifications for locomotive engineers, saying: "The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. * * * Considered in themselves, they are parts of that body of the local law, which, as we have already seen, properly govern the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express

enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State, or in commerce among the States."

From these authorities it appears that the State may act within the doctrine of the second class of cases designated in *Covington & Cinn. Bridge Co.* v. *Kentucky, supra,* in the absence of controlling and exclusive legislation by Congress. Of course, if a State statute covers matters within the powers of Congress and necessarily conflicting with a statute enacted by Congress, it will be superseded by and must give way to the Federal statute. But it must be remembered that this statute of the State which it is claimed is superseded by the Federal Employers' Liability Act is not one regulating nor attempting to regulate the relations of employers and employees engaged in interstate commerce by railroads, is not directed against commerce or any of its regulations, and relates only to the rights, duties and liabilities of persons, and can but indirectly and remotely affect the operations of commerce, if at all.

It is a general statute providing that a cause of action for an injury to the person, which was also a cause of action at the common law, shall survive and not perish with the death of the person injured, as it did at the common law. It did not create a right, but only preserved to the injured person's estate one that otherwise would have ceased to exist at his death. *Davis* v. *Railway,* 53 Ark. 117.

From the terms of the Federal statute no intention is disclosed to limit or take from employees any right theretofore existing by which they were entitled to a more extended remedy than that conferred upon them by the act, and it was evidently the purpose of Congress in passing it to extend further protection and enlarge the remedy provided by law to employees engaged in interstate commerce in case of death or injury to them while engaged in such service. It may be that this statute does not give a right of action for the injury to the person that survives his death, as some courts have held, but it is not in conflict with the State law giving or preserving such right, which we hold is

not superseded by it, and that the remedy it provides is not exclusive of that under the State law permitting a recovery upon said surviving right of action.

We are not unaware of the decision in *Fulgham* v. *Midland Valley R. Co.*, 167 Fed. 660, nor of other decisions of some of the State courts taking a contrary view of the law nor of its amendment by Congress since the occurrence of this injury.

2. As between the States of Arkansas and Oklahoma, the testimony shows that the injury occurred within the State of Oklahoma, and its laws would govern, the rule being that in actions of tort based on negligence resulting in death or personal injury the right of recovery must be determined by the law of the State where the injury was inflicted. *St. Louis, I. M. & S. Ry. Co.* v. *Brown*, 67 Ark. 295; *Northern Pac. R. Co.* v. *Babcock*, 154 U. S. 190, 38 L. Ed. 958; *Slater* v. *Mex. Nat. R. Co.*, 194 U. S. 120, 48 L. Ed. 900; 26 Cyc. 1079.

The cause of action which accrued to the injured party by the common law survived after his death to his administrator under section 5493, Snyder's Comp. Laws of Oklahoma, 1909. By section 5945, *Id.*, a right of action is created in favor of the personal representative for the death of one caused by a wrongful act, the recovery to inure to the exclusive benefit of the widow or next of kin, as is also provided by said Federal Employers' Liability Act relative to one employed in interstate commerce.

By sec. 36, art. 9, of the Constitution of Oklahoma, the common-law doctrine of fellow servant is abrogated as to employees of railroad companies, and an injured employee is given a right to recover for every injury suffered by him; "and when death, whether instantaneous or not, results to such employee from any injury for which he could have recovered, * * * had not death occurred, then his legal or personal representative, surviving consort or relative, * * * shall have the same rights and remedies with respect thereto as if death had been caused by the negligence of the master."

Sec. 7, art. 23, of its Constitution, provides: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

We are not able to ascertain that the courts of that jurisdic-

tion have construed these provisions of the law, but they are the same in effect as the laws of this State upon the subject. Secs. 6285, 6289 and 6290 of Kirby's Digest of the Statutes of Arkansas.

Our laws have been construed in a well considered and able opinion by Judge COCKRILL in *Davis* v. *Railway*, 53 Ark. 117, holding that deceased's cause of action in his lifetime survives, and the right given by this other statute, modeled after Lord Campbell's Act, results from and accrues on the death of the injured party, and that both actions may be prosecuted in the name of the personal representative. "One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent; * * * the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin occasioned by the death alone. The death is the end of the period of recovery in one case, and the beginning in the other. In one case the administrator sues as legal representative of the estate for what belonged to the deceased; in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them."

We hold this also a reasonable and fair construction of the laws of that State, and that appellee herein was entitled to recover damages for the pain and suffering and mental anguish of the deceased thereunder, and for the pecuniary loss sustained by his next of kin by reason of his wrongful death under either or both the Federal and State law.

3. We do not think error was committed in the giving of instruction No. 8, which fairly submitted to the jury the question of assumption of risk by deceased. The testimony did tend to show that he had been advised that one of the doors on this car appeared to be wired up, that some of the cinders had fallen through from over it; but it was not this door through which deceased fell, and the most danger that could have been anticipated from its condition was the unevenness of the cinders by reason of the depression over this door, across which he could step, which might have caused him to fall within the car on the cinders in the performance of his duty, and nothing more.

Instruction No. 9, objected to, was not an incorrect statement of the law in this case, for under rule No. 401 read in evi-

dence, and with which deceased was shown to be familiar, it was his duty to make inspection only of certain appliances—brake beams, running boards, etc., apparatus with which he came in contact by his service—and report defects therein. It was shown that the only inspections made of this trap door, which fastened on the inside, by persons whose duty it was to inspect the cars—the car inspectors—were outside inspections, while a load of cinders four feet deep was upon the door and prevented any possibility of discovery by the inspectors of the insecure and defective fastenings thereof; and the jury might well have found negligence on the part of the company in the failure of this primary duty to the deceased.

It is next contended that the damages allowed for pain and suffering and mental anguish are excessive. Deceased's legs were both mashed off through the knees, and no physician ministered to him for an hour and a half thereafter, and he lived for five hours suffering great pain—at least before the arrival of the physician—and the testimony shows that he suffered great anguish of mind about approaching death, and continually begged those present to pray for him.

In *Railway Co.* v. *Robbins,* 57 Ark. 386, the deceased's leg was mangled and his system subjected to a terrible shock, which he survived for twenty-four hours, under intense pain and in the anguish of impending dissolution, and the court, "without intimating that we would have awarded a sum so large," refused to disturb a verdict for $2,500.

But in *St. Louis, I. M. & S. Ry. Co.* v. *Waren,* 65 Ark. 610, it was said: "Courts and juries must deal with these questions in a deliberate and practical manner."

In *Aluminum Co.* v. *Ramsey,* 89 Ark. 522, the plaintiff, 22 years old, was injured in his leg, which had to be amputated below the hip. He was in the hospital ten weeks, suffering great pain; he was disfigured and incapacitated to make a living; and the court reduced the judgment to $12,000.

The court concludes in the case at bar that the verdict upon the second count of the complaint is excessive, and that a remittitur of $5,000 should be entered.

Personally, I do not agree to this. Though the suffering of pain and anguish—the pain of a lifetime and the anguish of mind

at approaching death—was compressed, it is true, into five hours of time when death relieved the sufferer, yet the jury were as capable of judging matters of this kind as this court can be, and they have fixed the damages at $10,000; and under the Constitution of Oklahoma verdicts are not to be limited in amount in actions for damages resulting from wrongful death; and I do not agree to the reduction.

If a remittitur of $5,000 is entered within fifteen days from this date, the judgment herein will be affirmed; otherwise the cause will be reversed and remanded for a new trial.

Mr. Justice WOOD dissents from that part of the opinion holding that the remedy provided by the Federal statute is not exclusive.

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

Opinion delivered March 6, 1911.

1. MASTER AND SERVANT—DEFENSE—WAIVER.—Where the complaint alleged that a firm which employed plaintiff to do certain carpenter work on defendant's railroad was engaged in reballasting such road, and that plaintiff was injured by the negligence of a fellow servant, and defendant, in its answer, did not deny that said firm was working for it, nor set up that the members thereof were independent contractors, it will be held to have waived such defense. (Page 262.)
2. SAME—DUTY TOWARD SERVANT.—Where a railway employee is being transported to or from his place of work on a hand car by fellow servants, the railway company owes him the duty of exercising ordinary care for his protection. (Page 263.)
3. SAME—INJURY TO SERVANT—PROXIMATE CAUSE.—Where a railway employee, being transported from his work upon a hand car, was injured by being thrown from the car, which was started suddenly, without warning to him, just as he was attempting to get on the front end of the car, the sudden starting of the car was the proximate cause of his injuries. (Page 263.)
4. SAME—CONTRIBUTORY NEGLIGENCE.—It was not negligence as matter of law for an employee to ride upon the front end of a hand car, when the employees of the railway company usually rode there, and a reasonably prudent man might believe that he could ride there with safety. (Page 263.)

5. SAME—CONTRIBUTORY NEGLIGENCE—DEFENSE.—An instruction to the effect that contributory negligence is a matter of defense, and that the burden is on the defendant to show it, is not objectionable as implying that defendant must prove such defense, even though it is established by the plaintiff's evidence. (Page 264.)

6. APPEAL AND ERROR—HARMLESS ERROR.—The court modified an instruction to the effect that if plaintiff was himself negligent he could not recover, by adding: "without negligence on the part of defendant's other employees." Another instruction correctly stated the doctrine of contributory negligence. *Held,* that, while the modification was erroneous and rendered the instruction meaningless, it was not prejudicial. (Page 264.)

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

STATEMENT BY THE COURT.

C. F. Wiggam brought this suit against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries alleged to have been sustained on account of the negligence of the railway company's employees.

The plaintiff, Wiggam, testified that Hodges, Downey & Company were getting out gravel for the St. Louis, Iron Mountain & Southern Railway Company from the Ouachita River, and were putting it on the main line of the railroad. The gravel pit was something like six miles from Malvern, Ark., where plaintiff resided. It was about three miles from the main line of the railroad. The railroad came from the main line to the gravel pit, and there is one end of the "Y" there that leads north, and one that leads south. Plaintiff was employed by one LaDuke, representative of Hodges, Downey & Company, to do carpenter work for them at the gravel pit. Plaintiff and one Holt, who hired at the same time, asked LaDuke how they would get to and from Malvern to their work. He told them that they would go and come on the Iron Mountain train. He also told them that when the train stopped they would go and come on the hand cars with the Iron Mountain employees. Plaintiff came and went to and from the gravel pit with the other Iron Mountain employees after they quit using the train.

J. V. Miller was one of the railway company's foremen, and Lon Baker was bridge foreman. J. G. Slibeck was resident engineer and head foreman. They all rode to and from the work

on the hand cars. Miller usually rode on the front one. Just as they were starting home from work one afternoon, plaintiff was injured while attempting to get on one of the hand cars. He described the occurrence as follows:

"That he, Wiggam, was the only white man on this car, and the negroes operating same, seeing that they could not get out to the main line on the north leg of the 'Y,' and being in a big rush to get ahead of the other cars, decided to go to the south leg of the 'Y,' and they jerked the car up with Wiggam on it, and he got off and walked across to the south leg of the 'Y,' and as soon as they set it down on the track he walked up by the side of the car to sit down on the front end and threw one leg over the rail, and as he started to bring the other leg over some one gave the car a shove and knocked his feet out from under him and caused him to fall back under the handle bars and get struck on his neck and crushed down."

Plaintiff said that he had nothing to do with the race to get ahead of the other cars.

Lon Baker testified that Slibeck, the engineer in charge of the construction of the spur track to the gravel pit, told him to let the employees of Hodges, Downey & Company ride to and from their work at the gravel pit on the hand cars he was using. Miller testified that he did not remember Slibeck saying anything to him about Hodges, Downey & Company's employees going to and from the gravel pit with his crews and on his cars; but that they did so.

The plaintiff also adduced evidence tending to show the character and extent of his injuries.

J. G. Slibeck for the defendant testified that he did not authorize or instruct Miller or any other of the foremen to let Hodges, Downey & Company's employees ride to and from their work on the hand cars.

Defendant also adduced evidence tending to show that plaintiff was guilty of contributory negligence. The jury returned a verdict for plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court. Other evidence will be referred to in the opinion.

W. E. Hemingway, E. B. Kinsworthy, Bridges, Wooldridge & Gantt, and *James H. Stevenson,* for appellant.

The verdict is not sustained by the evidence. 2 Hutch. Carr. § 1000; 40 Ore. 225; 66 Pac. 909; 120 N. C. 508; 26 S. E. 284; 3 Hutch. Carr. § 1205; 3 Thomp. Neg. § 2672. When contributory negligence is shown by the testimony of plaintiff, defendant need not prove it. 72 Ark. 572.

Jabez M. Smith, for appellee.

Any defense not pleaded will be treated as waived. 69 Ark. 256; 88 Ark. 153; 76 Ark. 424; 71 Ark. 484; 70 Ark. 505. Appellant is liable for failure to exercise reasonable care. 46 L. R. A. 38; 46 *Id.* 107; 90 Ark. 64; 77 Ark. 561; 57 Ark. 136. It is the duty of a party to a suit to request instructions desired. 67 Ark. 417; 75 Ark. 76.

HART, J., (after stating the facts). It is earnestly insisted by counsel for the defendant that the verdict is not sustained by the evidence. They contend that, under the most favorable deductions to be drawn from the evidence, the plaintiff rode back and forth from his work as a mere licensee, without payment of fare and without any contractual relations of any kind with the defendant. On the other hand, counsel for plaintiff insists with equal force that the complaint alleged, and that there is sufficient evidence from which the jury might have inferred, that Hodges, Downey & Company were working for the defendant railway company; and that if it wished to avail itself of the defense that Hodges, Downey & Company were independent contractors it should have pleaded it as a defense. In support of his contention, he cites the case of *Kansas City, P. & G. Rd. Co.* v. *Pace,* 69 Ark. 256. We are of the opinion that the contention of counsel for the plaintiff is correct. The plaintiff alleged in his complaint that Hodges, Downey & Company were engaged in the work of reballasting the St. Louis, Iron Mountain & Southern Railway with gravel, and testified that Hodges, Downey & Company were getting out gravel from the Ouachita River for the Iron Mountain Railroad, and that he was working for them when he sustained the injury complained of. Lon Baker, defendant's bridge foreman, testified that Hodges, Downey & Company were putting gravel on the main line of the Iron Mountain Railroad for it.

The defendant in its answer did not deny that Hodges,

Downey & Company were working for it, and did not set up as a defense that they were independent contractors.

In the case of *Kansas City, P. & G. Rd. Co.* v. *Pace, supra,* the court held that "if a defendant fails to plead any defense it may have the same will be treated as abandoned or waived." See also *Missouri & North Ark. Rd. Co.* v. *Pullen,* 90 Ark. 182. In 31 Cyc. 128, it is said: "All defenses not made in the pleadings are considered waived, especially such as are connected with the facts alleged."

Hence we hold that it is too late now to set up that Hodges, Downey & Company are independent contractors, but that, under the pleadings and proof, Hodges, Downey & Company were working for the defendant railway company, and that their employees were the servants of the railway company. This being true, the law of the case is as follows:

"Although an employee being transported on a train to his place of work is not a passenger within the common meaning of the term, the railway company owes him the duty of exercising ordinary care for his protection, and he is bound to exercise such care for his own safety as a person of ordinary prudence would exercise under like circumstances." *St. Louis, I. M. & S. Ry. Co.* v. *Harmon,* 85 Ark. 503.

Under the facts and circumstances of this case as presented by the record, the negligence of the defendant and the contributory negligence of the plaintiff were jury questions. From the version of the occurrence given by the plaintiff, the abrupt and sudden starting of the hand car, without warning to him, just as he was attempting to get on the front end of it, was the cause of his receiving the injury. If true, it was such a consequence as would likely result from the acts complained of. *Doss* v. *Missouri, K. & T. Rd. Co.,* 116 S. W. (Mo. Ct. of Appeals), 458.

Nor can it be said, as a matter of law, that plaintiff was guilty of contributory negligence in attempting to ride upon the front end of the hand car. It was a place where the employees of the defendant usually rode, and a reasonably prudent man might believe that he could ride there with perfect safety. *El Dorado & B. Rd. Co.* v. *Whatley,* 88 Ark. 20; *Doss* v. *Missouri, K. & T. Rd. Co., supra.*

2. Counsel for defendant next complain that the court

erred in telling the jury that contributory negligence is a matter of defense, and that the burden of showing it is upon the defendant. They contend that, while the burden of proving contributory negligence is upon the defendant, it is sufficient if it is shown by the evidence on the part of the plaintiff. Their construction of the law is correct, yet it does not follow that the instruction was prejudicial. The point was ruled against their contention in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Sparks,* 81 Ark. 187. Mr. Justice RIDDICK, speaking for the court, said: "But it is evident, when the whole charge is considered, that the court did not intend by this instruction to convey the idea that the defendant must introduce evidence to show contributory negligence, even though it was shown by the evidence of the plaintiff." So in this case the defendant pleaded contributory negligence as a defense; and introduced evidence to establish it. When the instructions are read together, it is evident that the court meant that the jury, in determining the question of contributory negligence, should consider all the evidence in the case—that of the plaintiff as well as that introduced by the defendant.

3. Counsel for defendant also insist that the court erred in instructing the jury on the question of damages for permanent injury. They contend that there is no evidence that the injury is permanent. We think the jury might have inferred from the plaintiff's own testimony that his injury was permanent. While we think the weight of the testimony was contrary to this view, yet the jury differed with us, and their verdict is binding upon us.

4. Counsel for defendant also assign as error the action of the court in giving the following instruction as modified: "5. If you believe from the evidence that the plaintiff assisted in starting the hand car, and then undertook to get on the front end of the same, and in doing so was struck by the handle bar and injured, without negligence on the part of defendant's other employees, you are instructed that he could not recover from the defendant for such injury, and your verdict should be for the defendant." The modification consisted in inserting the words: "without negligence on the part of defendant's other employees." It is insisted by counsel for defendant that the instruction as

modified involves a contradiction of ideas. If the plaintiff was himself guilty of contributory negligence, he of course was not entitled to recover, regardless of the defendant's negligence. The modification rendered the instruction meaningless.

It will be noted, however, that the court gave the following instruction at the request of the defendant:

"6. If you believe from the evidence that plaintiff undertook to get on the hand car while it was in motion or just as it was being started forward, and that a person of ordinary prudence would not have done as he did under the circumstances, or if you believe from the evidence that plaintiff did not exercise ordinary care for his own safety, then you are instructed that he was guilty of contributory negligence, which precludes a recovery by him in this action, and your verdict should be for the defendant."

This instruction was in all essential respects like the instruction modified as it was asked by the defendant. In this respect there is a difference between this case and that of the *Ohio Handle & Manufacturing Co.* v. *Jones, ante* p. 17. In that case the court by modification rendered an instruction meaningless. We reversed the judgment because it was the only instruction asked by the defendant which presented its version of the case to the jury in a concrete form. Here the theory of the defendant as to the manner of plaintiff's receiving the injury was fully presented by instruction No. 6, *supra,* and we hold that, while the court should not have added the words quoted above, the modification did not render the instruction inherently bad or contradictory to the other instructions, but only made it meaningless; and that because the matters embodied in it were fully presented in instruction No. 6 no prejudice resulted to the defendant from the modification.

Other assignments of error are pressed upon us, but we think they are disposed of by the principles of law above announced.

After a careful examination of the record, we are of the opinion that the case was fairly tried upon the whole, and that no prejudicial errors appear in the record.

The judgment is therefore affirmed.

PIRTLE v. SOUTHERN LUMBER COMPANY.

Opinion delivered March 6, 1911.

APPEAL AND ERROR—INCOMPLETENESS OF TRANSCRIPT—PRESUMPTION.—Where the transcript on appeal in a chancery case shows that a deposition which was considered by the chancellor has not been brought up, the presumption will be indulged that the missing evidence sustains the chancellor's finding, though the chancellor certifies that the missing deposition is in all essential respects the same as a deposition which appears in the transcript.

Appeal from Bradley Chancery Court; *Zachariah T. Wood,* Chancellor; affirmed.

E. L. McHaney, W. S. Goodwin and *Williamson & Williamson,* for appellant.

Laches cannot be imputed to one merely for delay, unless such delay works an injury. 81 Ark. 439. Nor when his failure to act is due solely to ignorance. 82 Ark. 371; 145 U. S. 368. There was no occasion for action because there had been no interference with possession. 70 Ark. 256; 75 Ark. 197; 81 Ark. 296; 88 Ark. 395. Defendants had no title, and were not in possession. 123 S. W. 650; 75 Ark. 382.

Fred L. Purcell, for appellee.

In 126 S. W. 714 and 123 S. W. 650, cited by appellant, there were no supervening equities. Since all the evidence is not included in the bill of exceptions, the court will presume that it was sufficient to sustain the findings of the chancellor. 2 Ark. 14; *Id.* 45; 54 Ark. 159; 45 Ark. 240; 43 Ark. 451; 26 Ark. 526.

M. L. Gardner, pro se, and *F. W. Scott, pro se.*

Where it appears that the transcript does not contain all the evidence, it will be presumed that it was sufficient to sustain the chancellor's findings. 80 Ark. 74; 83 Ark. 77; *Id.* 424; 84 Ark. 100; *Id.* 229; 86 Ark. 378; 87 Ark. 232; 88 Ark. 604; 89 Ark. 64; 90 Ark. 214; 45 Ark. 242.

Gaughan & Sifford, for F. W. Scott.

Where the bill of exceptions purports to set forth only the substance of the evidence, it will not be considered. 57 Ark. 459; 38 Ark. 284.

HART, J. This action involves the title to 280 acres of wild and unimproved land situated in Bradley County, Arkansas. The lands were purchased from the State as swamp and overflowed lands in 1860 by Adelia Cone. She died intestate in 1905, leaving surviving her Marcus J. Cone, her son and sole heir at law. On April 23, 1907, he conveyed the lands to Henry C. Pirtle for the sum of $150. On June 22, 1907, Henry C. Pirtle filed a complaint in the chancery court against W. R. Watson and the Southern Lumber Company, in which the above facts were alleged, and in addition thereto that the State of Arkansas, on September 24, 1901, sold and conveyed 120 acres of these lands to W. R. Watson as lands forfeited to the State for nonpayment of taxes; and that on June 17, 1903, Watson sold and conveyed the same to the Southern Lumber Company. He alleges that the tax forfeiture was void, and prays that the deed to the defendant Watson be declared void, and that his title to said lands be quieted.

The State conveyed the remaining 160 acres to M. L. Gardner on the 17th day of June, 1903, and he subsequently conveyed the timber on it to F. W. Scott. On June 22, 1907, Henry C. Pirtle filed a suit in the chancery court against them, making substantially the same allegations as in the complaint against the Southern Lumber Company, and had the same prayer to his complaint.

The defendants to these respective actions filed answers in which they set up that the said Adelia Cone and her heirs have never paid any taxes on these lands, and by their conduct and acts had led defendants and their grantors to believe that they had long since given up and abandoned any claim to said lands; and, relying thereon, they purchased said lands; that in the last few years said lands have become valuable for the timber on them.

Subsequently, Marcus J. Cone filed an intervention, claiming title to said lands and alleging that the conveyance from himself to Henry C. Pirtle had been obtained by the false and fraudulent representations of the latter. By agreement the cases were consolidated and heard together. It was admitted that no taxes were paid by any one on the lands from the time of their original purchase by Adelia Cone in 1860 until 1901 and 1903, the date of their purchase from the State, respectively, by Watson and Gardner. Since that time the taxes have been paid by the de-

fendants and their grantors. It is also conceded that the forfeiture to the State for the nonpayment of taxes was void. The various deeds of the respective parties were read in evidence. The plaintiffs read two depositions of Marcus J. Cone. The defense read depositions tending to show the increased value of the land since their purchase.

The chancellor held that Adelia Cone, her heirs and assigns, were barred by laches from now claiming any interest in said lands, and a decree was entered according to his findings.

The plaintiff has duly prosecuted an appeal to this court.

The decree recites that the cause was heard upon certain record evidence and depositions, which are specifically named. Among others is the following: "The deposition of Marcus J. Cone, filed in the action on August 21, 1909, and the later deposition of Marcus J. Cone filed on the 30th day of September, 1909." After the appeal had been perfected, counsel for appellant discovered that the first deposition of Marcus J. Cone had been omitted from the transcript. Upon inquiry they discovered that the deposition had been lost. They sought and obtained a continuance of the case in this court until after the Bradley Chancery Court convened in order that they might amend the record. They have filed the certificate of the chancellor stating that the lost deposition of Marcus J. Cone was a lengthy one, but in all essential respects is the same as the one in the record.

Counsel for appellees asked that the decree be affirmed because it recites that evidence was considered upon the hearing which does not appear in the transcript.

It may be stated at the outset that the certificate of the chancellor as to what the lost deposition of Marcus J. Cone contained is a matter outside the record and cannot be considered by us on appeal. We must look to the record alone. This was expressly held in the case of *Hardie* v. *Bissell,* 80 Ark. at p. 79. The decree recites that "the deposition of Marcus J. Cone filed in the action on August 21, 1909," was read in evidence. The transcript which appellant has caused to be filed in this court does not contain that deposition. "This being true, every question of fact that was essential, under the pleadings, to sustain the decree, we must assume, was established by the absent evidence." *Mat-*

lock v. *Stone,* 77 Ark. 195; *East* v. *Key,* 84 Ark. 429. See also *Beecher* v. *Beecher,* 83 Ark. 424.

In the case of *Hardie* v. *Bissell, supra,* the rule is stated as follows: "In a case where the record showed that it did not contain all the evidence, this court held that it would presume that the evidence was sufficient to sustain the finding and decree of the chancellor. This presumption in favor of the decree, the court said, 'prevails to the extent of curing every defect in the allegations of the pleadings which by reasonable intendment may be considered as having been proved.'" It is true that the defendants did not introduce any evidence on the subject of their supervening equities; and it is also true that the deposition of Marcus J. Cone, filed on September 30, 1909, does not help the defendant's case; but it may have been that his first deposition established their defense, and that the chancellor believed the testimony he then gave. Be that as it may, the settled rule of this court is that where the decree recites that other evidence was heard by the court which has not been preserved and copied in the transcript, the presumption must be that such evidence sustains the decree. *Dierks Lumber & Coal Co.* v. *Cunningham,* 81 Ark. 427.

The defendants in their answer set up that they had purchased the lands under the belief that the Cones had abandoned all claims to it, and that this belief had been induced by the acts and conduct of the Cones. Hence the decree is responsive to the issue joined by the pleadings. We try chancery cases *de novo* on the record made in the court below. As the appeal presents no question that can be determined without considering the sufficiency of the evidence to establish the defense relied upon, the decree must, according to our practice, be affirmed.

CUNNINGHAM COMMISSION COMPANY *v.* RAUCH-DARRAGH GRAIN COMPANY.

Opinion delivered March 13, 1911.

ACCORD AND SATISFACTION—ACCEPTANCE OF CHECK RECITING PAYMENT IN FULL.—When a debtor sends a check to his creditor, bearing upon its face a statement that it is a payment in full, the retention and col-

lection of the check by the creditor renders it an accord and satisfaction of the debt; and it is immaterial that the creditor immediately wrote the debtor stating that the check was not accepted as a settlement, where no offer was made to return the check if desired by the debtor.

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

J. W. Blackwood and *J. W. Newman,* for appellant.

1. There was no accord and satisfaction. The burden was on the defense to prove a *bona fide* dispute in the settlement of which were all the elements of a complete agreement—a lawful subject-matter, a sufficient consideration and the *aggregatio mentium* of the parties. 2 Ark. 209; 1 A. & E. Enc. 412; 1 Cyc. 311; 2 Watts (Pa.), 424; 5 N. H. 410; 92 Fed. 968.

2. There was no mutual assent. 126 S. W. 394; 56 Ark. 35. In following cases the creditor waited too long and did not give the debtor a chance to withdraw or alter his tender before it was too late: 148 N. Y. 326; 161 Ill. 339; 78 Miss. 912; 188 Mo. 623; 138 N. Y. 231; 20 L. R. A. 785; 68 Kan. 193; 119 S. W. 38; 119 S. W. 765; 46 Ark. 217; 34 Vt. 201. See parallel case of 84 N. Y. 440.

Marshall & Coffman, for appellees.

1. The evidence shows a *bona fide* dispute, a sharp one as to the whole subject-matter of indebtedness; and cases cited have no application.

2. This case cannot be distinguished from *Barham* v. *Bank of Delight,* 94 Ark. 158. All the cases cited in this case support the opinion of this court.

FRAUENTHAL, J. This was an action instituted by the Cunningham Commission Company, plaintiff below, to recover the balance of an account which it alleged was due to it by the Rauch-Darragh Grain Company, one of the defendants, and also to discover and follow the assets of that company, which it alleged were wrongfully held by the other defendants. The defendant pleaded payment, and the case was tried upon the issue of accord and satisfaction, and both parties fully developed their evidence upon that issue.

The plaintiff was a domestic corporation, engaged in the grain business, and the defendant, the Rauch-Darragh Grain

Company, was also a domestic corporation engaged in handling corn and in milling same into chops, meal, etc., and both corporations were located at Little Rock, Arkansas.

The plaintiff had furnished to said defendant a number of cars of corn and other grain upon an account which extended over a number of months during the year 1905. A part of this grain was furnished with the understanding that it should be paid for by the exchange of like commodities to be obtained from the defendant, and the other grain was furnished with the understanding that it should be returned in the manufactured products of meal and chops, the plaintiff paying for the grinding, handling and sacking thereof. A dispute arose between the parties as to the amount which was due to plaintiff upon said account. The controversy grew principally out of four cars of corn which were furnished to defendant in April, 1905. Two of these cars contained white corn and the other mixed corn; and all of this corn, the testimony indicated, was badly damaged. The purpose was to grind it and mix it with products of good grain so as to make it merchantable. It was claimed by the plaintiff that the greater portion of these four cars of corn had never been returned to it or accounted for by the defendant. The defendant, on the other hand, claimed that the two cars of white corn had been ground into meal and hauled to plaintiff's warehouse, and that the remainder of the corn had been ground and mixed with other products and turned over to plaintiff. Some other items of the account were also in dispute.

A few days prior to October 25, 1905, Mr. Cunningham, representing the plaintiff and Mr. Rauch and Mr. Darragh, representing the defendant, met at the office of the plaintiff, in order to adjust and settle their differences relative to the disputed account. The parties representing the defendant testified that all items of grain which had been furnished by plaintiff to defendant, and all items of the account, were considered at this meeting, and that the disputed items involving said four cars of corn were also considered in the consultation and settlement. They testified that the parties made mutual concessions and allowances in considering the various items of the account, and finally arrived at a determination of the amount which was due by the defendant to the plaintiff, and that it was agreed that the final

balance due by defendant amounted to $250.73, and that Mr. Cunningham agreed to accept a check for that sum in full payment of all items due to it, including the four cars of corn.

On the other hand, Mr. Cunningham testified that, while the parties had met and discussed the various items of the account, the four cars were not included in the settlement, and that he did not agree to accept the above amount in payment thereof.

On October 25 the defendant sent to the plaintiff a check for the above sum of $250.73 in full settlement of all its indebtedness to the plaintiff, and it was stated on the face of the check that it was in full payment thereof. The plaintiff retained the check and cashed the same shortly after its receipt, but immediately wrote the following letter, which was delivered at defendant's office within a few hours thereafter:

"Little Rock, Ark., October 25, 1905.

"Rauch-Darragh Grain Co.

"City.

"Gentlemen:

"Your check for $250.73 received and applied to your credit. We wish to advise, however, that we do not accept same as settlement, as there are a number of items that we will not agree to. We will check your statement within the next few days and advise you concerning same.

Yours, etc.,

"Cunningham Commission Company."

The messenger who testified that he delivered this latter letter also testified in the same connection that he went to the bank, and we think that it can be reasonably inferred from the testimony that this letter was delivered after the check was cashed. The defendant made no reply to this letter, and its officers testified that it was never received by it or at its office.

The chancellor made a finding that, while there was some amount due to the plaintiff after crediting the amount of the check upon the account, the plaintiff accepted the check with the understanding that it was sent in full payment of the indebtedness of defendant to plaintiff, and that there was an accord and satisfaction of the disputed account between the parties; and he thereupon entered a decree dismissing the complaint.

We think that the evidence tends to prove that there was a dispute and controversy between the parties relative to the amount of the indebtedness due by defendant to plaintiff, and that this dispute related to various items of the indebtedness, including the above mentioned four cars of corn. The parties met for the purpose of endeavoring to settle the differences as to said indebtedness, and, whether or not they agreed to a definite amount which would be received by the plaintiff in full payment thereof, the testimony shows that the defendant sent the check for the $250.73 in full payment of the disputed indebtedness, and that the plaintiff, when it received the check, understood that the offer or tender of the check was made upon the condition that it should be received and accepted in full payment of all indebtedness due by defendant to plaintiff. The check contained the statement upon its face that it was in full payment, and the plaintiff testified that immediately on its receipt the above letter was written, which shows that the plaintiff understood that the check was sent and tendered upon condition that it should be received in full payment. The plaintiff with this knowledge retained and cashed the check. This, we think, amounted to an accord and satisfaction. The case, we think, is ruled by the case of *Barham* v. *Bank of Delight,* 94 Ark. 158. In that case we held that when a debtor sends a check to his creditor to apply upon a disputed claim, bearing on its face a statement that it is a payment in full, the retention and collection of the check by the creditor renders it an accord and satisfaction of the debt.

It is urged by counsel for plaintiff that there was no accord and satisfaction in this case because the plaintiff immediately on receipt of the check wrote the above letter to defendant in which it stated that it did not accept the same as a settlement of the indebtedness. But in the same letter it is stated that the check was received and applied to the credit of the account; it thus indicated that it had appropriated the check and would not in any event return same to defendant.

It is urged by plaintiff that it was incumbent upon defendant to answer this letter and state that it did not agree to permit the check to be only applied as a credit upon the indebtedness, if it did not consent thereto. But we do not think that a reply was necessary. The plain import of the language of this letter

indicated that the plaintiff had received and retained the check and had appropriated it on the indebtedness; there was nothing in the letter which indicated that they would return the check if it was so desired by the defendant. If the plaintiff had intended to return the check in the event the defendant had not desired to consent to it being placed only as a credit on the account, then it should have stated so in apt language. Its conduct shows that this was not its purpose; for, in addition to stating in the letter that it had applied the check to the credit of the account, it did actually cash same.

But, as stated in the case of *Barham* v. *Bank of Delight, supra,* "if an offer of payment was made upon condition, and the plaintiffs so understood it, there was but one of two courses open to them: either to decline the offer and return the check, or to accept it with the condition attached. The moment plaintiffs indorsed the check and collected it, knowing that it was offered only upon a condition, they thereby agreed to the condition and were estopped from denying such agreement. It was then that the minds of the parties met, and the contract of accord and satisfaction was complete in law."

The chancellor made findings of fact as above indicated, and we think that they were well supported by the testimony adduced upon the trial of the case. Under these circumstances, we think that the conclusion at which he arrived is correct, and the decree is accordingly affirmed.

JOHNSON v. GRAHAM BROTHERS COMPANY.

Opinion delivered March 13, 1911.

1. BILLS AND NOTES—CONSIDERATION—DISMISSAL OF CRIMINAL PROSECUTION.—A note and deed of trust whose consideration is the prevention or dismissal of a criminal prosecution is void, even though the amount of the note represents a debt due the payee. (Page 285.)
2. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—MORTGAGE.—A married woman can mortgage her separate estate for her husband's debts as well as for her own debts. (Page 286.)
3. JUDGMENT—CONCLUSIVENESS.—In a suit to foreclose a mortgage, defendant is estopped to deny the effect of a judgment against him in

a former suit between the plaintiff's grantors and the defendant, in which it was adjudged that the mortgage was valid. (Page 287.)

4. HUSBAND AND WIFE—WIFE'S DEED WITHOUT ACKNOWLEDGMENT.—Since the adoption of the Constitution of 1874, a married woman may convey her separate estate as a *feme sole* without acknowledgment of the deed. (Page 287.)

Appeal from Jackson Chancery Court; *George T. Humphries,* Chancellor; affirmed.

STATEMENT BY THE COURT.

On May 27, 1909, Frances M. Johnson executed a note to Graham Bros. Company, a corporation, for the sum of $6,000, with interest at the rate of seven per cent., payable semiannually. The note was due May 27, 1911. The note was secured by deed of trust executed by Mrs. Johnson to S. M. Stuckey, trustee, in favor of Graham Bros. Company, the beneficiary and payee of the note. The deed of trust included lots 1, 2 and 3 in Lyon's Addition to Newport; lot 5, block 2, in Davis's Addition, and lots 3 and 4 of Stephen's Addition to Newport. The deed of trust provided that "if default be made in the payment of the interest thereon semiannually when due, the whole of said indebtedness shall immediately become due." Mrs. Johnson acknowledged that she had executed the deed of trust "for the consideration and purposes therein mentioned and set forth." The first installment of interest was not paid when due, and this suit was instituted by the appellees to foreclose the mortgage. Appellant resisted the foreclosure upon the ground that the consideration of the note was not her debt, and that the note and deed of trust were not executed with reference to her separate property. She averred that the real consideration for the note was an agreement of T. J. Graham, acting for Graham Bros. Company, to dismiss certain indictments that were pending in the Jackson Circuit Court against her husband, R. M. Johnson. She alleged that the indictments had not been dismissed; that the note and deed of trust were void, and she prayed that the complaint be dismissed, and that the note and mortgage be cancelled.

Appellees replied to the answer, denying its allegations as to the consideration for the note and deed of trust and pleading *res judicata* of that matter by judgment of the Jackson Chancery

Court rendered at a former term, and setting up that judgment in estoppel of appellant's defense here.

R. M. Johnson, the husband of appellant, was a director and also cashier of the Bank of Newport. The bank failed, owing depositors over one hundred thousand dollars. The directors were sued for the amount. R. M. Johnson was named in the complaint, but service was not had upon him. Judgment was rendered against the others. R. M. Johnson and the other directors, including T. J. Graham, were indicted in the Jackson Circuit Court in connection with the failure of the bank. T. J. Graham, in an effort to compromise and settle the claims of the depositors, induced the directors, each, to agree to pay a certain *pro rata* of the sum that was named as the amount to be paid through the compromise. R. M. Johnson agreed to contribute to that sum the amount of $6,000. He did not have the money, and John R., Thomas J., Nimrod, John S. and James Graham advanced the sum of $6,000 for him. Johnson through his attorney delivered to the Grahams a promissory note for six thousand dollars executed by Mrs. Johnson, also a deed executed by R. M. Johnson and Mrs. Johnson for about fourteen hundred acres of land in Jackson County, and the town lots in controversy. Mrs. Johnson owned the farm and all the lots except those in Lyon's Addition to the city of Newport. The title to the latter was in R. M. Johnson.

The Grahams executed to the Johnsons as a part of the same transaction an agreement in which the Grahams stipulated in part as follows:

"Now, therefore, in consideration of the premises and the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, we, John R. Graham, Thomas J. Graham, Nimrod Graham, Joseph S. Graham and James Graham, the grantees in the deed aforesaid, do hereby covenant with the said Frances M. Johnson, her heirs, assigns, and with the said R. M. Johnson, his heirs and assigns, that we will, and the heirs and survivors of us shall, reconvey said lands, hers to her, the said Frances M. Johnson, and his to him, the said R. M. Johnson, and unto their heirs and assigns if on or before one year after the date said compromise shall be effected, the said Frances M. Johnson and the said R. M. Johnson, their heirs or assigns, shall pay

or cause to be paid to us, or to our legal representatives, the said sum of six thousand dollars ($6,000) with interest as aforesaid. Said conveyance so to be executed by us to be free of any incumbrances suffered or done by us, but subject to whatever part of the incumbrances now on said lands may then remain."

After the time given for the redemption of the lands mentioned had expired, the Grahams treated the deed of the Johnsons to them and their contract with the Johnsons to reconvey as an equitable mortgage, and accordingly brought suit in the Jackson Chancery Court to foreclose the lien created by the deed and the defeasance contract. The suit was brought in the name of John R., Thomas J., Nimrod, Joseph S. and James Graham, the grantees in the deed, against Mrs. Johnson and R. M. Johnson *et al.* Mrs. Johnson, in defense to that suit, set up, among other things, the same defense she pleads here, namely, that the sole consideration, so far as she was concerned, for the execution of the note and the deed in that suit was the promise on the part of the Grahams, the grantees in the deed, that her husband should be immune from further prosecution on the indictments that were then pending against him. At the May term, 1909, a decree was entered by consent confirming and quieting the title in the Graham brothers, as joint tenants, to the land and town lots which were included and described in the deed that the Johnsons had executed to the Grahams, and which the latter were treating and seeking to foreclose as a mortgage. By the consent decree in that case the absolute title to the lands described in the complaint in that suit embracing the town lots in controversy in this suit passed to the Grahams as tenants in common, as shown by the decree, which in part recited as follows: "And it appearing to the court that the defendants R. M. Johnson and Frances M. Johnson have withdrawn their defense herein, and have consented that judgment might be taken and decree rendered herein for confirmation of a certain deed mentioned in the complaint therein the same having been executed by R. M. Johnson and Frances M. Johnson on the 18th day of June, 1907, and filed for record on the 26th day of June, 1907, conveying to the plaintiffs the lands hereinafter described in said deed. * * * And it further appearing to the court from the agreement of the parties and the pleadings on file that the plaintiffs are entitled to a confirmation

of said deed, it is therefore considered, ordered and decreed that the said deed executed on the 18th day of June, 1907, conveying the following lands (describing them) be and the same is hereby in all things confirmed, and the fee simple title in and to said lands vested in the plaintiffs, John R. Graham, Thomas J. Graham, Nimrod Graham, Joseph S. Graham and James Graham, as joint tenants, as per the terms of said deed."

The appellees introduced the note and deed of trust and testimony to the effect that the Grahams, joint tenants, sold to appellant the lots in controversy for the sum of six thousand dollars; that they made her a deed to the lots upon her executing to the Graham Bros. Company, a corporation, the note and mortgage in suit. The Graham brothers were the stockholders of the Graham Bros. Company, the corporation. T. J. Graham, who conducted all the negotiations on the part of the Graham brothers, joint tenants, and Graham Bros. Company, the corporation, testified that "the debt we are seeking to foreclose is not the debt for money I put up in the compromise settlement. The title to this property was by decree put in Graham brothers, joint tenants, and we as such joint tenants sold her the property." S. M. Stuckey wrote the note and deed of trust in suit, and the deed from Graham brothers, joint tenants, to Mrs. Johnson, and was present part of the time when negotiations were pending for the settlement of the suit between the Grahams and appellant at a former term and when the consent decree was agreed upon, was present when the note and deed of trust in suit were delivered. He testified that "there were present F. D. Fulkerson, M. M. Stuckey, M. B. Brewer, Frances M. Johnson, Gustave Jones and myself; am sure F. D. Fulkerson was present. There was not anything said about dismissing any indictments against R. M. Johnson, either at the delivery of the deed and note and deed of trust or before."

The testimony of F. D. Fulkerson, an attorney who represented the Grahams, was to the effect that he was present during the negotiations when the consent decree was agreed upon, and when the note and deed of trust were delivered, and that appellant "did not say a word about delivering these instruments on condition that the indictments against her husband should be

dismissed." M. M. Stuckey, one of the attorneys for appellees, testified in part as follows:

"We, that is, Colonel Murphy and the attorneys for the Grahams, had a consultation in my office in regard to a settlement of that case. We agreed upon a settlement, and the result was a decree of the court was entered at that term, in which the matters of difference between the two parties were agreed upon. The decree in that case confirmed the title to certain lands and town lots, which were embraced in several mortgages and a certain deed of conveyance that had been given by Frances M. Johnson and R. M. Johnson to the Graham brothers as joint tenants, naming them severally. After that decree, the Graham brothers, joint tenants, conveyed to Frances M. Johnson the property that is in controversy in this suit now pending for the consideration of six thousand dollars. The Graham Bros. Company, a corporation, loaned Mrs. Johnson six thousand dollars, which was evidenced by this note sued on in this case, the payment of which is secured by a deed of trust that is now sought to be foreclosed. A check for $1,276.15 was at the time of the delivery of the deed of trust and note delivered by me to Mrs. Johnson at my office. I gave her the deed of conveyance from John R. Graham and others as joint tenants conveying to Mrs. Johnson this land and at the same time the check, and she gave to me, as the representative of Graham Bros. Company, the note and deed of trust. The sole consideration of the note and deed of trust is expressed in the note and deed of trust.

"It was no part of the consideration of that deed of trust that Graham brothers or T. J. Graham would have the indictments pending in the Jackson Circuit Court against R. M. Johnson dismissed. Neither was it a part of the agreement of the decree entered of record. Colonel Murphy did not make any such request as that to Mr. T. J. Graham or to any of his attorneys, and not one of us made any such promise for Mr. Graham. We had no authority from him to do so, and had not then nor have now, nor had any of his attorneys, nor have they now, any control over the indictments. At the time of the negotiations, the agreement upon a decree, the delivery of the mortgage, the deed, the note, there was present all the time F. D. Fulkerson, S. M. Stuckey, Marcus Brewer and myself. All these persons were present

when we agreed upon the decree with Colonel Murphy. All were present when the deed was delivered to Mrs. Johnson, and she delivered the note to me for Graham brothers in my office. Mrs. Johnson did not say to me the paramount issue for the execution of that deed of trust and note was the dismissal of the original charges against R. M. Johnson. If she had done so, I would not have delivered to her the deed conveying the property in this suit to her nor given her the check for $1,276.15. The title to the property was in Graham brothers, joint tenants, and they did not have to convey to her without she gave to them the consideration therefor."

M. B. Brewer testified: "I was present when the note, deed of trust and check were exchanged. There was nothing said about the indictments against Mr. Johnson being dismissed, but on the contrary Colonel Murphy did say that he knew they could not make such an agreement."

The court permitted testimony on behalf of appellant over the objection of appellees to the effect that the deed which appellant and her husband executed to the Grahams, and which was the foundation for the foreclosure suit in which the consent decree was rendered, was executed and delivered solely upon the express agreement upon the part of the Grahams that the indictments against R. M. Johnson should be dismissed. Gustave Jones, attorney for appellant, was permitted to testify concerning this as follows:

"The deed was executed by Mr. Johnson and sent to me, together with a letter which I am unable to file, but will bring in. I was directed not to deliver the deed until the indictments were dismissed. I exhibited that letter to Mr. Graham, and received his assurance that every effort would be made to dismiss the indictments against Mr. Johnson. Of course, we both knew that such a contract was not enforcible, but Mrs. Johnson's object, manifested by her earnest solicitations, was the procurement of the dismissal of the indictments against her husband." He exhibited as a part of his testimony the letter which directed him to deliver the deed "when the suits or prosecutions have been dismissed."

Appellant for herself also testified that the sole consideration for the execution of the deed on her part was the express prom-

ise of T. J. Graham that the indictments against her husband should be dismissed. She says: "I executed the deed on Mr. Graham's promise to advance the $6,000 for the compromise and in order to have the indictments dismissed." Concerning the negotiations leading to the consent decree and the note and deed of trust in suit, Jones testified as follows:

"I do not think that I was present at the interview between Mrs. Johnson, Colonel Murphy, the plaintiffs and their representatives until after Colonel Murphy left here. I sat in the clerk's office across the hall from Judge Stuckey's with Mrs. Johnson, and Colonel Murphy would come in there and interview her. I remember particularly that there was a complaint made about the rate of interest and the time. Mrs. Johnson would not stand for the 8 per cent. interest or for just one year. I was present when the deed from T. J. Graham and others and the mortgage and note from Mrs. Johnson to the Graham company were delivered. She signed and acknowledged the deed in George Hays' office, and brought it into Judge Stuckey's, and he or Milt. Stuckey examined it, and one or the other of them delivered her a check. Mrs. Johnson had the conversation with Judge Stuckey in the hall. She came out of the clerk's office, and I called Judge Stuckey, and she told him that her only—I do not remember the exact language, but I remember she did say the word 'paramount'—that it was her paramount desire that the indictments be dismissed, that that was the object in the Shreveport transaction, and is the object of this one. During the conference I heard between her and Colonel Murphy, Mrs. Johnson urged the dismissal of the indictments."

The appellant testified concerning the settlement resulting in the consent decree and the execution of the note and mortgage in suit as follows:

"When I came up town to Judge Stuckey's office to close the papers in this compromise suit with the Graham joint tenants, Judge Fulkerson was not there. I expected him to be there at the closing up of the papers that he helped to draw up. I delivered the deed of trust and note, which I had executed in the clerk's office, to one of the Stuckeys, and I think it was Judge Stuckey delivered me the deed from Graham brothers and the check. Mr. Jones suggested that I file the deed for record, and

went with me to the clerk's office. As we left the clerk's office, Stuckey was standing in his door, and Mr. Jones said: 'Mrs. Johnson, I want you to have a talk with Judge Stuckey,' and he called the judge across the hall, and told him I wanted to talk to him. Judge Stuckey stepped out of the corner of his room and we had the 'paramount issue' conversation. I said: 'Judge Stuckey, you understand, the paramount issue of this compromise settlement is the dismissal of the indictments against Mr. Johnson. The paramount issue of the execution of the Shreveport deed for $6,000 was the dismissal of the indictments against Mr. Johnson, and there was no other consideration on earth except the dismissal of these indictments. I shall expect them dismissed at the September term of court.' He said: 'Mrs. Johnson, I will assure you that Mr. Graham and I will do everything we can to get these indictments dismissed, and I do not think we will have any trouble now.' "

"He understood it, for he did not say that the dismissal of the indictments was not still the absolute consideration of the Shreveport transaction and this compromise. Had he insinuated that that was not the consideration, I would have returned the check. Neither the deed nor the deed of trust had been entered of record. After we walked away, Mr. Jones said: 'You have given them now until September.' I never heard of any effort they made in September to procure the dismissal of the indictments. I think that, if they had gone before the court or had made the slightest effort, I would have heard of it. They did not keep faith with me, and I was astonished that they brought this suit only four days after the first semiannual payment of interest was due."

George W. Murphy testified in part as follows: "My firm was employed to represent the defendant in the former case, and I came here last May for that purpose. A decree was drawn and entered by agreement. I talked with Mr. Graham and his attorneys in Stuckey & Stuckey's office. I think Mr. Graham was absent from several of our conversations. It seems to me that Graham and his brothers held a mortgage on Mrs. Johnson's farm and town lots for $6,000. They had purchased mortgages on the same property from V. Y. Cook and others, amounting in the aggregate to something like $12,000. We had been

retained to defend against the foreclosure on them. Mrs. Johnson's contention was that she had executed a deed formerly which was qualified by a separate defeasance on the part of plaintiffs, agreeing to permit her to redeem. I think we agreed that the plaintiffs take the farm at a certain price, deed her back the town lots and advance her about $1,200, and that she should execute them a mortgage for $6,000 on the town lots payable in two years, provided the interest was paid. The first proposition was to make the mortgage payable in one year and the interest 8 per cent. I submitted it to Mrs. Johnson, and she said that the original debt bore 7 per cent.; that she would not give more, and that the indictments against her husband would have to be dismissed. I went back, and Mr. Graham and his representatives agreed to the two years and 7 per cent. I do not remember what was said as to the dismissal of the indictments except when I said that Mrs. Johnson was very earnest about it, and expected them to be dismissed. Judge Stuckey replied that he would move to have it done, and was confident or sure it could be accomplished. I told Mrs. Johnson her views had been acceded to, and she again spoke of the indictments and wanted assurance about that. I told her they could give her no more assurance than had been given me; that I thought her husband would not be bothered with further prosecutions. She asked me if I thought we could trust them, and I told her that we would have to, that no other assurance could be had. Judge Stuckey, Judge Fulkerson and I then drew the decree, which was, I think, entered the next day, and I left.

"My understanding from Mrs. Johnson was that an agreement to have the indictments against her husband dismissed was the consideration for the first deed. In my talks with reference to the settlement, I spoke of her dissatisfaction about the suits not having been dismissed, and said I would hate to settle that difference for her and have her husband prosecuted afterwards, or something to that effect. None of them told me they had made such an agreement, but they gave me to understand that the indictments would be dismissed, or that they would have or try to have them dismissed. I think Judge Stuckey used the language already given, or terms to that effect. In my conversation with these parties I did not require as a condition of the

compromise that they agree with me to dismiss these indictments or have them dismissed; I did not purport to make that a condition of the settlement. I spoke of the matter as my understanding that such an agreement was the basis of the previous transaction.

"Mrs. Johnson told me that she would not make the settlement unless they would dismiss the indictments or have it done, but I am not able to say that I told them that. I stated to them her indisposition to make the settlement unless she could feel that the indictments would be dismissed. I had no idea there was any disposition to prosecute Mr. Johnson on their part."

The court found for the plaintiff in the sum of $6,427.35, and ordered that the same bear interest at the rate of 7 per cent. from date until paid; that the mortgage on the lands refered to herein be foreclosed, and that the lands be sold to satisfy this judgment.

Appellant prosecutes this appeal.

Gustave Jones, Coleman & Lewis and *C. A. Cunningham,* for appellant.

1. The complaint does not show that the debt is one which a married woman can bind her separate estate to secure. Kirby's Dig. § 5213; 66 Ark. 113, 115, 116.

2. Mrs. Johnson's acknowledgment to deed of trust is defective in that it fails to show that she signed the same "voluntarily and without compulsion or undue influence on the part of her husband." 35 Ark. 365; 129 S. W. 595.

3. The "paramount" and sole consideration for the first deed of trust, and the sole consideration for the one sought to be foreclosed, was the dismissal of the indictment against R. M. Johnson—a void consideration which renders the whole transaction void. 80 Ark. 326; 22 Am. Rep. (Ill.), 117; 80 Ia. 738; 51 Ark. 519; 67 Ark. 480; 2 Beach, Mod. Contracts, § 1551.

Stuckey & Stuckey and *F. D. Fulkerson,* for appellees.

1. The complaint shows a debt which a married woman can bind her separate property to secure. It was her own debt, made for and concerning her separate property. A married woman's power to convey her real estate is not limited to any particular purpose or consideration. She need not acknowledge

a consideration, and she may mortgage it for her husband's debts. Kirby's Dig. § 5213; 35 Ark. 480.

2. Where no objection is raised in the lower court to an acknowledgment to a deed, mortgage or deed of trust, such objection will not be considered here. 69 Ark. 23; 70 Ark. 348; 64 Ark. 305; 71 Ark. 242; 76 Ark. 509; 77 Ark. 103; 75 Ark. 312; 74 Ark. 557; *Id.* 88. But in this case the acknowledgment is in due form of law. Kirby's Dig. § 5207. No privy examination nor disclaimer of undue influence or compulsion on the part of her husband was necessary. 36 Ark. 355; 43 Ark. 160. And the deed of trust would have been good as between the parties, if not acknowledged at all. 47 Ark. 235.

3. A judgment or decree rendered by consent of parties is good upon collateral attack. 71 Ark. 330. The defense in this case is the same as that set up in the former suit between the same parties and their privies. Appellant is therefore estopped. 65 Ark. 467; 76 Ark. 423; 43 Ark. 439.

4. There is here a question of fact purely, and the findings of the chancellor, if not against the clear preponderance of the evidence, are conclusive. 24 Ark. 431; 42 Ark. 246; 44 Ark. 216; 49 Ark. 465.

WOOD, J., (after stating the facts). 1. In *Beal & Doyle Dry Goods Co.* v. *Barton,* 80 Ark. 326, it is held that "a note or agreement whose consideration is the prevention or dismissal of a criminal prosecution is void, even though the amount represents a debt due the payee." Therefore the only question here is whether or not the note and deed of trust in controversy were executed by appellant upon an agreement with those representing the Graham Bros. Company that the indictments pending in the Jackson Circuit Court against her husband should be dismissed. If such was the understanding, the note and deed of trust were void, regardless of whether the indictments were dismissed or not, or whether the appellant or her husband were indebted to Graham Bros. Company. For all such agreements are contrary to public policy and void. *Rogers* v. *Blythe,* 51 Ark. 519; *Kirkland* v. *Benjamin,* 67 Ark. 480.

The question is purely one of fact, and we have set out, somewhat in detail, the testimony bearing upon it. We are of the opinion that the finding of the chancery court is according to the

preponderance of the evidence. George W. Murphy, attorney for appellant, who conducted the negotiations for her resulting in the consent decree and the execution of the note and mortgage, stated that "we agreed that the plaintiffs (appellees) take the farm back at a certain price, deed her back the town lots, and advance her about twelve hundred dollars, and that she should execute them a mortgage for $6,000 on the town lots, payable in two years, provided the interest was paid." He further says: "In my conversation with these parties I did not require as a condition of the compromise that they agree with me to dismiss the indictments or have them dismissed. I did not purport to make that a condition of the settlement."

The testimony of those who conducted the negotiations on the part of Graham Brothers and Graham Bros. Company is to the effect that no promise was made by them to have the indictments dismissed as a condition or consideration upon which appellant signed the note and deed of trust, and four persons of the six who were present when the note and deed of trust were delivered testified that no promise to dismiss the indictments against R. M. Johnson was exacted as a condition of the delivery of these instruments. Since an agreement of that nature is illegal, and, if made, would have rendered the contract and the instruments evidencing it invalid, it is unreasonable to conclude that learned attorneys who were conducting the negotiations for their respective clients would have entered upon such an agreement. It was most natural, however, that the wife should have had a supreme desire to procure the dismissal of the indictments against her husband. Doubtless, it was this "paramount issue" dominating her thoughts that led her honestly to believe that she had exacted a promise to dismiss the indictments as a condition for her signing the note and deed of trust, when, in reality, she had not done so. We are convinced that no such consideration was the basis, in whole or in part, for the note and deed of trust in suit.

2. All the testimony tending to prove that the dismissal of the indictments was the consideration for the deed or mortgage in the former suit was incompetent, and can not be considered here, for it was adjudicated in the former suit that the mortgage was valid, and that Graham Brothers, joint tenants, acquired absolute title thereunder to the lots in controversy. Graham Bros.

Company, the corporation, is privy to the Graham Brothers, joint tenants. The appellant is estopped to deny the effect of the former judgment in this collateral proceeding.

3. The note and mortgage here, according to the preponderance of the evidence, were concerning property which appellant purchased and to which she acquired title in her own right. The debt therefore was one for which she could mortgage her separate estate. Kirby's Dig. § 5213. But, even if it had been her husband's debt, she could have mortgaged her separate property to secure it. *Scott* v. *Ward,* 35 Ark. 480.

4. The acknowledgment of the mortgage was in due form. *Robinson* v. *Wilcoxson,* 36 Ark. 355; *Stone* v. *Stone,* 43 Ark. 160.

But it would have been a valid conveyance between the parties although not acknowledged at all. *Criscoe* v. *Hambrick,* 47 Ark. 235.

Affirmed.

KIRBY, J., dissents.

ALLEN v. BRAME.

Opinion delivered February 13, 1911.

SALE OF LAND—DEPOSIT OF PURCHASE MONEY—RESCISSION—LIABILITY OF VENDOR.—S. contracted to sell certain land to B., and subsequently agreed to sell the same land to A. S.'s agent without authority delivered a deed from S. conveying the land to A., who paid the purchase money to a bank to be held until the contract of B. should be cancelled. S. thereafter conveyed the land to B., and requested A. to return the deed which he held, and withdraw his money from the bank, which A. failed to do. Subsequently the bank which held A.'s money failed. *Held* that A. was not entitled to look either to B. or to S. for the money which was lost in the bank's failure.

Appeal from Lafayette Chancery Court; *J. M. Barker,* Chancellor; affirmed.

Yeaman & Yeaman and *James D. Head,* for appellant.

Searcy & Parks and *Henry Moore, Jr.,* for appellee.

MCCULLOCH, C. J. Dr. B. F. Slusher and his wife, then residing in Lafayette County, Arkansas, owned the large tract of unimproved lands in that county which is involved in this

controversy, and on August 26, 1907, they entered into a written contract with appellee, Frank Brame, for the sale of said land to him for the sum of $8,500, payable $250 cash, and four installments of $250 each, payable in one, two, three and four months, respectively, and $1,584 payable January 1, 1908, on which last named date the vendors were to execute a deed reserving lien for the remainder of the purchase price—$1,888 due January 1, 1909, $1,889 due January 1, 1910, and $1,889 due January 1, 1911.

The contract misdescribed the lands, and the vendors attempted to correct the error by a new contract, dated January 8, 1908; but the last contract omitted the description of 240 acres of the land, and Brame declined to accept it until correction should be made embracing all of the tracts which the vendors had agreed to sell to him. About that time the vendors offered to execute a deed containing a correct description of all the lands, but Brame insisted on a correction of the contract. This part of the controversy is unimportant, since the vendors did in fact correct the contract by inserting a description of the omitted tract of 240 acres, and the corrected contract was delivered to Brame, and on March 12, 1908, was signed and accepted by him, his acknowledgment to the instrument being taken on that day by Slusher's agent as notary public.

Brame immediately filed the contract for record in the office of the recorder of deeds for that county, and the same was duly placed on the records. The Slushers had, on March 7, 1908, instituted an action against Brame in the chancery court of Lafayette County to cancel the contract, and the suit was not dismissed when Brame accepted the corrected contract. Brame demurred to the complaint at the April term, 1908, of the chancery court, and the case stood on his demurrer until the October term of the court, when it was voluntarily dismissed by the Slushers, who appeared for that purpose by their attorneys.

When the contract was corrected, Brame tendered to the Slushers' agent the installments due on the purchase price, but the tender was refused, and subsequently another tender was made and refused, but said agent offered to purchase Brame's equity for a consideration. There is a sharp conflict in the testimony on this point, but the chancellor's finding is not, we think,

against the preponderance of the testimony, and under well-settled rules must be taken as correct.

Some time during the month of March, 1908, the Slushers gave to J. O. Smith, who was cashier of the Merchants' & Farmers' Bank of Lewisville, Arkansas, an option in writing to purchase these lands for $10,000 on condition that the Brame contract could be cancelled and abrogated. That contract has not been brought into the record, nor are its terms disclosed in the record. It does not appear when it expired.

On May 20, 1908, Smith, pretending to act for the Slushers, executed to appellant, C. V. Allen, a contract in writing for the sale of this land at the price of $12,000, and Allen paid $1,000 on the purchase price in the nature of earnest money. On June 19, 1908, Smith notified Dr. Slusher by wire (the Slushers having in the meantime moved to Colorado) that he had an offer of eight thousand dollars for the land, and that one thousand dollars was to be paid over as a forfeit. Dr. Slusher wired acceptance of the offer. This transaction had reference to the sale to Allen, which Slusher then understood was to be for a consideration of $8,000, and the Slushers accepted the contract on the condition that the Brame contract could be cancelled.

The Slushers executed a deed to Allen dated July 14, 1908, and sent it by mail to the Merchants' & Farmers' Bank of Lewisville, with written instruction to "hold until record is clear and Mr. Allen buys draft for $8,000 less the Goss mortgage, and sends to us here." J. W. Warren, who was acting with Smith in negotiating the sale to Allen, took the deed to Henderson, Kentucky, and there delivered the deed to Allen about August 1, 1908, the deed having been either taken there by Warren or sent there by the Merchants' & Planters' Bank attached to a draft on Allen, and the latter subsequently paid the balance of the agreed price of $12,000 on drafts of Smith. The delivery of the deed was made without the knowledge of the Slushers, who, being urged to do so in order to close the deal, executed and caused to be delivered to Allen the following writing, dated August 18, 1908:

"Whereas, the undersigned, B. F. Slusher and his wife, Rena B. Slusher, have conveyed to C. V. Allen of Webster County, Kentucky, certain lands in Lafayette County, Arkansas, lying in

sections 9, 10, 11, 15 and 16, the deed to which is dated July 14, 1908; and,

"Whereas, there may be a cloud upon the title to said land growing out of the fact that one Frank Brame holds a contract for the purchase thereof, suit to cancel which contract is pending in the chancery court of said Lafayette County.

"Now, the said Slusher and his wife, Rena B. Slusher, agree and request that the said Allen leave the purchase price of said lands in the hands and possession of the Merchants' & Farmers' Bank, of Lewisville, Ark., until such time as all questions growing out of the contract with said Brame may be settled by judgment of court or otherwise, and all cloud upon said land, growing out of said contract, removed, which purchase price will be held by said bank for and on account of, and at the risk of, the undersigned, B. F. Slusher and Rena B. Slusher, and when so paid to the bank by said Allen will be in full settlement of the purchase price of said land, but the purchase price is to be returned by said bank to said Allen unless the cloud upon the land growing out of the contract with Brame should be removed by judgment of court or otherwise. When said cloud is so removed, then said purchase price is to be paid over by the bank to said Slusher and wife."

The deed to Allen had been recorded in the office of the recorder at Lewisville on August 3, 1908, but, as before stated, this was without the knowledge of the Slushers. Of the purchase price Allen paid $3,000 on July 31, and the remainder of $7,840 (after deducting $160 allowed as a discount by Smith and Warren) was paid on September 4, 1908. As before stated, these payments were made on drafts of Smith.

Early in September, the Slushers received information that the deed had been delivered and recorded, and also learned for the first time that the price of the land in the sale to Allen was $12,000, instead of $8,000, as they had been informed by Smith. Dr. Slusher immediately wrote to Allen, who lived in Kentucky, calling attention to the fact that the deed had been delivered contrary to instructions, and also referring to the agreement for the bank to hold the deed until the Brame contract should be cancelled. The Slushers also learned, shortly afterwards, for the

first time, as they claim, of Brame's prior tender to Slusher's agent.

Dr. Slusher came to Lewisville to attend the October term of the chancery court, and while he was there Brame again tendered the amount due under the contract, and, being advised by his attorneys that the Brame contract still subsisted and was binding on him, he accepted the money, and he and his wife executed a deed to Brame conveying the lands to him pursuant to the terms of the contract, taking notes for the deferred payments. Soon afterwards, during the month of October, he went to Kentucky to see Allen and there demanded of the latter a reconveyance of the land, and also demanded that he take his money back from the bank at Lewisville, Arkansas. Allen declined to do anything, stating at the time that he would see his attorneys about it.

Nothing further was done, and the Merchants' & Farmers' Bank failed on January 20, 1909, and was found to be hopelessly insolvent. It is conceded that throughout all these transactions Allen knew of the Brame contract, and Brame knew of the deed to Allen when he accepted the deed from the Slushers in October. Brame subsequently conveyed certain undivided interests in the lands to his co-appellees, and on March 9, 1909, they instituted this action in the chancery court of Lafayette County against Allen to cancel the deed to Allen as a cloud on their title. Allen filed his answer and cross complaint, alleging that Brame had failed to carry out or to offer to carry out his said contract with the Slushers, and thereby forfeited all rights thereunder, and prayed that the deed from the Slushers to Brame be cancelled as a cloud on his (Allen's) title. He also prayed that, if the court should uphold the conveyance to Brame, he (Allen) be held to be subrogated by virtue of his contract with the Slushers to their right to collect the purchase price from Brame. On final hearing of the cause, the court dismissed the cross complaint for want of equity, and granted the prayer of the complaint, quieting the title of appellees.

The first question presented is whether Brame was entitled to have his contract of purchase performed, or whether he had forfeited his rights thereunder by failure or refusal to perform the contract himself by payment of the installments of the purchase price as they became due. If it be found that he forfeited

his rights, then the controversy is at an end; for, if Brame's contract be put out of the way, appellant is entitled to have his contract and the deed to him enforced.

Brame had a right to insist on a correction of the contract before he paid the stipulated price, or the installments thereof then due. As soon as this was done, he tendered the amount of the installments, which were refused by the agent of the vendors. The vendors, instead of accepting the tender, insisted on prosecuting a suit against Brame to cancel the contract. When Dr. Slusher came to Lafayette County to attend the term of court at which the suit was to come up, Brame again tendered the amount due, and Dr. Slusher accepted it. There is a conflict in the testimony on these points, as we have already stated, but we cannot say that the testimony does not support the findings of the chancellor. Brame was not in default, and did not forfeit his right to insist on performance of the contract. His equities were first in point of time, and must prevail over appellant's, so far as concerns his right to have the land under his contract.

It being settled, then, that Brame was entitled to have his contract with the Slushers performed by a conveyance of the land, what were appellant's rights under his contract of purchase and the deed executed to him pursuant thereto?

The contract with appellant was made dependent upon the cancellation of the prior contract with Brame. It is contended by appellant that the deed to him was delivered, that he paid the purchase price, and that, even if Brame's contract was enforcible, he (appellant) became subrogated to the right of the Slushers to collect the purchase price from Brame; in other words, that the conveyance to him from the Slushers passed the legal title to the lands and all the rights they had, which included the purchase price which Brame had agreed to pay for the land. If that contention be sound, Brame is not entitled to have appellant's deed cancelled without being required to do equity by paying to appellant the price of the land according to the terms of his contract with the Slushers. On the other hand, it is insisted by appellees that the deed to appellant was improperly delivered without authority from the Slushers, and did not pass the legal title to appellant.

The testimony convinces us, as it did the chancellor, that

the deed was delivered to appellant without the actual knowledge of the Slushers and contrary to their express instructions; but the contract subsequently entered into with appellant concerning the deposit of the money in bank seems to have contemplated a delivery of the deed. We construe that contract, however, to mean a delivery of the deed on condition that the conveyance should be operative only when the Brame contract should be cancelled, and that, if the Brame contract could not be removed by a judgment of court or otherwise, then the price should be returned. Such is the express language of the contract. While it was executed for the benefit of appellant, it implied a corresponding obligation on his part to accept a return of the purchase price in the event that the Brame contract should turn out to be superior.

Conceding that appellant could waive the return of the money held in bank and insist on Brame paying the purchase money to him, he could not do this without permitting the Slushers to take the money in the bank. He could not claim a return of the money held in the bank, or even insist on it being held in bank, and at the same time demand payment of the purchase money from Brame. The contract concerning the funds can be construed only to mean that the same should be held as indemnity to appellant to protect him in the event the Brame contract should be found to be superior to his; and, since we hold that the Brame contract was in fact superior, appellant was bound either to accept a return of the money held in bank or to relinquish his claim to it and allow it to be paid over to the Slushers. He did neither. The money was in bank at the risk of the Slushers, but not under their control. They had no right to withdraw it unless the Brame contract should be cancelled or unless appellant authorized its withdrawal. Appellant had no right to speculate on the result by waiting until the bank failed and then claim the right to collect the purchase price under the Brame contract. He was notified by Dr. Slusher that the Brame contract was enforcible—at least, that he had been advised that it could be enforced against them—and that they had performed it as far as they could by executing a deed to Brame; and it was appellant's duty to make his choice then, without unreasonable delay, whether he would accept a return of the money in bank or relinquish his right to a return

thereof and look to Brame for the purchase price. Having failed to do that, he must bear the loss of the funds, and cannot now put the loss on the Slushers or Brame. The conduct of Allen at the time Slusher demanded a reconveyance and requested him to get a return of his money from the bank shows that he was unwilling to relinquish the purchase which he had secured. If he had been willing to accept a return of his money, he should have so indicated to Slusher, so that the latter could take some steps to have the bank return it. Having taken his position, he cannot now change it and look to either Brame or the Slushers for the money which he could at that time have gotten from the bank.

It appears from the testimony that while the money was in the Merchants' & Farmers' Bank, either the bank or Smith, the cashier, procured another bank in Texarkana to execute a bond to the Slushers indemnifying them to the extent of five thousand dollars against the loss of the money in bank. As the indemnifying bank is not a party to this suit, we cannot decide whether or not appellant is subrogated to the rights of the Slushers and is entitled to sue on that bond.

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

HART and KIRBY, JJ., dissent.

STEELMAN v. ATCHLEY.

Opinion delivered March 13, 1911.

1. BANKS—EFFECT OF DEPOSIT.—By a general deposit a bank becomes the debtor of the depositor, and bound by an implied contract to repay same upon his demand or order. (Page 297.)
2. SAME—RIGHTS OF DEPOSITOR.—Where a depositor in a bank owes the bank a sum of money, he is entitled to set off the amount of his deposit against the bank's demand. (Page 297.)
3. RECEIVERS—EFFECT OF APPOINTMENT.—Receivers of insolvents are not regarded as purchasers for value without notice, but rather as personal representatives of the insolvents, and take their assets subject to setoffs, liens and incumbrances as they existed at the time of their appointment. (Page 297.)
4. BANKS—INSOLVENCY—PREFERENCE.—A depositor in an insolvent bank is entitled to have his deposit set off against his paper that had not

matured at the time of the bank's insolvency, and such set-off will not operate as a preference within the insolvency act, Kirby's Digest, § 951. (Page 298.)

Appeal from Dallas Chancery Court; *John R. Thornton,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

Nathan Steelman alleged by way of intervention that he executed his note on the 5th day of April, 1908, to the Dallas County Bank for $200, and at the same time a mortgage to secure the payment thereof; that on the 15th day of July, 1909, he paid a sum on said note reducing the amount to $204.55, for which he executed a renewal note on July 15, 1909, and directed the paid note to be mailed to him, which was not done, and that the receiver of the bank is now holding both his notes; that the defendant bank closed its doors on about the 19th of February, 1910, on which date the intervener had on deposit in said bank the sum of $218.12; that the note for $204.55 with interest thereon to the said 19th day of February, 1910, amounted to the sum of $217.71, leaving a balance due him of 31 cents; prayed judgment for the surrender and cancellation of the old paid note, and that the sum of $218.12 be allowed him as a setoff as against said note executed in renewal thereof, and for judgment for 31 cents balance against said receiver and bank, etc.

The receiver answered, denying any knowledge of the execution of the note dated July 15, 1909, for $204.55 in renewal of the former note, and also that intervener had on deposit in the bank said sum of $218.12 as claimed by his statement; denied that he was entitled to any credits on said notes; denied on information that he was entitled to the credits on the notes as claimed and his right to judgment for 31 cents or any other amount.

The court found from the intervention, answer and oral evidence that Nathan Steelman on the 15th day of April, 1908, was indebted to the Dallas County Bank on his promissory note in the sum of $200 with 10 per cent. interest from date, which was secured by a deed of trust; that on the 15th day of July, 1909, he executed his promissory note payable to the order of said bank for the sum of $204.55 with interest, and secured same by deed

of trust; that said last note and deed of trust was executed and given to the bank in lieu of and full settlement of the first note and deed of trust dated April 5, 1908; that the note of July 15, 1909, for $204.55 is the property of the bank, due and unpaid and a valid claim of said bank against said intervener, and authorized the receiver to institute suit to enforce the payment of same within 90 days if it was not sooner paid; that on February 15, 1910, there was on deposit to the credit of said intervener, as shown by the receiver's statement, the sum of $43.95. The court further found that he had placed as general deposits in said bank the following amounts, not shown on said statement, towit:

Jan. 21, 1910	$ 10.00
Jan. 29, 1910	15.00
Feb. 2, 1910	38.75
Feb. 9, 1910	10.00
Feb. 16, 1910	100.40

amounting in all to the sum of.....$218.12

and that said sum so deposited immediately became the money of the bank and intervener a creditor of the bank by reason of said deposit; that said sum, placed on general deposit by said intervener constituted a part of the assets and property of the bank, was held by the receiver to be distributed *pro rata* towards the payment of the claims of the creditors of the bank; that said sum of $218.12 did not constitute a setoff in favor of intervener against said note executed by him on July 15, 1909, for the sum of $204.55. Further, the said Dallas County Bank is an insolvent corporation, and the court decreed that the note for $200, dated April 5, 1908, be surrendered or delivered to intervener, but denied intervener's prayer that the sum of $218.12, the amount of his deposits in said bank, be allowed him as a setoff against said note of July 15, 1909.

From this decree intervener appealed.

Morton & Morton, for appellant.

1. It was error to allow the setoff prayed in the interplea. 146 U. S. 499, 36 L. Ed. 1059; 34 Cyc. 195-6; 81 Conn. 636; 20 L. R. A. (N. S.), 863; 57 Minn. 87; 47 Am. St. 576; 98 *Id.* 111.

2. The relation of a bank and a depositor is that of debtor and creditor. 69 Ark. 47; 46 *Id.* 537. Choses in action pass to

a receiver subject to the equitable right of setoff then existing, so that a debtor of the insolvent who has such a right is not bound to pay what he owes and take his chances with the other creditors, but is only bound to pay the balance. 34 Cyc. 195, 196, and cases cited.

McMillan & McMillan, for appellee.

1. The deposits in the bank were *general* and not to pay off the note. Appellant was not entitled, *under our statutes,* to use the deposits as a setoff (Kirby's Digest, § § 949, 950, 951-2). A depositor is a creditor of the bank. 69 Ark. 47. Where money is deposited as a *general deposit,* it becomes the money of the bank, 46 Ark. 540; 48 *Id.* 267; 56 *Id.* 499. Appellant cannot be entitled to secure a greater proportion of his debt than other creditors. 64 Ark. 136. Sand. & H. Dig., § 1426, requires that where assets of a corporation are seized they shall be distributed equally among creditors after paying certain salaries, wages, etc. 96 Ark. 556; 76 Ark. 504; 68 *Id.* 389.

KIRBY, J., (after stating the facts). Did the court err in denying appellant the right to set off the amount of his deposit in said bank at the time of its failure against his said note held by the receiver of the insolvent bank? The bank became the debtor of appellant upon his general deposit of funds therein to the amount thereof, and bound by an implied contract to repay same upon his demand or order. *Carroll County Bank* v. *Rhodes,* 69 Ark. 47; *Himstedt* v. *German Bank,* 46 Ark. 537; *Warren* v. *Nix,* 97 Ark. 374.

He was the bank's debtor upon the note executed to it for the sum thereof, and the bank was his debtor for the sum of his deposits therein; and if a suit had been brought for the collection of his note before the bank's failure, there is no question but that he could have set off against such demand the amount of his said deposits due him by the bank. Kirby's Digest, § § 6098, 6101.

Did the appointment of a receiver deprive him of such right? We think not. Assignees and receivers of insolvents are not regarded as purchasers for value without notice, but rather as personal representatives of the insolvents and standing in their shoes so far as their assets are concerned, and take same subject to setoffs, liens and incumbrances as they existed at the time of their appointment. *Scott* v. *Armstrong,* 146 U. S. 499; *Nash-*

ville Trust Co. v. *Bank,* 91 Tenn. 336; *Green* v. *Conrad,* 114 Mo. 651.

"Choses in action pass to a receiver subject to the equitable right of setoff then existing, so that a debtor of the insolvent who has such a right is not bound to pay what he owes and take his chances with the other creditors, but is bound to pay only the balance." 34 Cyc. 195-6.

"Mutual claims that are due bank and depositor may be set off against each other. The bank's authority to do this is transmitted to the receiver, while the depositor's defenses are not impaired by the bank's insolvency." 2 Bolles, Banking, p. 854. See also *Scott* v. *Armstrong, supra; Booth* v. *Prete,* 81 Conn. 636, 20 L. R. A. (N. S.), 863; *St. Paul & Minnesota Trust Co.* v. *Leck,* 57 Minn. 87, 47 Am. St. Rep. 576 and note; *State* v. *Brobston,* 94 Ga. 95, 47 Am. St. Rep. 138; *Nix* v. *Ellis,* 118 Ga. 404, 98 Am. St. Rep. 111.

It is not shown in this case whether the appellant's note to the bank was due at the time of the insolvency or not, but this would not prevent his right to setoff.

"A depositor may have his deposit set off against paper that has not matured at the time of the bank's insolvency, whether State or National, because the deposit was due at the time of the assignment," etc. 2 Bolles on Banking, p. 858.

There is no question in this case but that the transaction was *bona fide,* the loan having been procured long before the bank's insolvency and secured by a deed of trust, and it could not in any event be regarded as having been obtained by appellant in contemplation of its insolvency. Under the doctrine of these cases and the right to setoff, the receiver of the insolvent bank was only entitled to collect from appellant the amount of his note to it after deducting the amount due by the bank to him on his general deposit at the time of the receiver's appointment; and since the amount due appellant from the bank exceeded the amount which was due from him to the bank at that time by 31 cents, he was entitled to a decree allowing his setoff in the sum claimed and for the said sum of 31 cents against the receiver. Such allowance of the setoff does not operate as a preference obtained by him within the meaning of the insolvency act. Sec. 951, Kirby's Digest.

The chancellor erred in denying intervener's right to the setoff, and the decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

VALE *v.* BUCHANAN.

Opinion delivered March 13, 1911.

1. COUNTIES—AUTHORITY TO ISSUE WARRANTS.—The power and authority to issue county warrants is derived solely from the statute, and before such warrants can be received in payment of the taxes and debts due the county they must conform to the provisions of the statute authorizing their issuance. (Page 301.)
2. SAME—DUTY OF OFFICERS TO RECEIVE COUNTY WARRANTS.—Under Kirby's Digest, § 1466, providing that "all warrants drawn upon the treasurer shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received, irrespective of their number and date, in the payment of all taxes and debts accruing to the county," it is the duty of the sheriff, collector or treasurer of the county to receive such warrants offered in payment of taxes or dues to the county, without regard to the date of their issuance. (Page 302.)
3. SAME—EFFECT OF MAKING WARRANTS PAYABLE IN FUTURE.—Where a claim against a county is not due, but the county court issued a warrant payable when the claim is due, such warrant is not receivable in payment of the taxes and debts accruing to the county until the claim is due and payable. (Page 303.)
4. COUNTY WARRANTS—NEGOTIABILITY.—County warrants are not negotiable instruments in the sense of the law merchant, and persons acquiring them take them with notice of the purpose for which they were issued and of the order of the county court authorizing their issuance. (Page 304.)

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

Greaves & Martin, for appellant.

The warrants were a legal tender for any county indebtedness as soon as issued and without regard to their date, and that notwithstanding the contract. Const. art. 16, § 10; Kirby's Dig. § § 1174, 1466; 34 Ark. 356; 48 Ark. 247; 29 Ark. 354; 32 *Id.* 415; 36 *Id.* 490. A distinction is drawn between the availability of a warrant presented for redemption, and the same tendered

for taxes or indebtedness due the county. 54 Ark. 169; 37 Ark. 113; 39 *Id.* 139. See also 54 Ark. 169; 74 Ark. 498; 77 Ark. 250-257.

J. B. Wood, for appellee.

We agree that the contract was void. 44 Ark. 437; 7 *Id.* 80. There can be no allowance for depreciation of scrip. 31 Ark. 552; 4 Dill. 209. The warrants were not due nor payable nor redeemable before July 1, 1914, and were not a legal tender. They were receivable for taxes. 36 Ark. 487; 54 *Id.* 169; 7 Ark. 214; 103 U. S. 74.

The cases cited by appellant sustain our contention. (54 Ark. 169; 37 *Id.* 113; 39 *Id.* 139.) 36 Ark. 557; 25 Ark. 64.

Cancellation and reissue does not change the character of county warrants. Kirby's Dig. § § 1179, 1467; 44 Ark. 437; 47 *Id.* 205.

The collector could not impeach the warrant or the order (judgment) upon which it was issued collaterally. 37 Ark. 649; 22 *Id.* 595; 39 *Id.* 485.

FRAUENTHAL, J. On October 28, 1910, W. H. Vale, plaintiff below, applied to the defendant as collector of Garland County for a peddler's license in said county, and therefor tendered the amount required by law in payment of the State tax, and in payment of the county tax prescribed by section 6885 of Kirby's Digest he tendered an alleged order or warrant of said county drawn upon its treasurer for $25. The collector refused to accept said warrant, and the plaintiff instituted this action, asking for the issuance of a writ of mandamus commanding the defendant to receive said warrant and issue said license.

The defendant filed a response, in which he stated that he refused to accept the alleged order or warrant because it was not payable immediately or upon demand, but that by virtue of the order of the county court upon which it was issued, and of the terms of the alleged warrant, it was not due and payable until July 1, 1914.

The case was submitted to the court for its decision upon an agreed statement of facts. From this it appears that the warrant was issued upon a claim of the Arkansas Democrat Company, which was based upon a contract which it made with said county. On April 21, 1906, the Arkansas Democrat Company entered into

a written contract with the county court of Garland County whereby it agreed to furnish said county supplies and goods for its court house, and the county agreed to pay therefor the sum of $16,500 in county warrants, which, under the terms of contract, were payable July 1, 1914, and should state on their face that they were payable on such future date. The Arkansas Democrat Company performed its part of the contract, and an order of the county court was made stating that the above amount should be paid to it on July 1, 1914, and that warrants should be issued payable on said future date as per said contract, which was done. Subsequently, the Arkansas Democrat Company sold and transferred said warrants to the Hot Springs Savings, Trust & Guaranty Company. Afterwards there was a re-issue of the warrants of Garland County, made in manner provided by law, and warrants were re-issued in lieu of those formerly issued to the Arkansas Democrat Company. The order of the county court re-issuing said warrants stated that the debt was not due until July 1, 1914, and that the warrants issued thereon should not be due and redeemable until said future date, and the clerk was directed to indicate upon the face of the warrants themselves that they were not due and payable until July 1, 1914. The warrant involved in this suit is one of the above re-issued warrants. It was drawn upon the treasurer of said county in the ordinary form, but it stated upon its face that it was due July 1, 1914, and was payable to said Hot Springs Savings, Trust & Guaranty Company, which had notice of the contract and terms upon which it was issued.

The court dismissed the complaint, and the plaintiff has appealed to this court.

It is urged by counsel for plaintiff that this was a warrant duly issued by Garland County upon its treasurer, and that it was payable upon demand, and should be received in payment of any tax or debt accruing to said county. It is claimed that the statement upon the face of the warrant that it was payable at a future date was unauthorized by law, and therefore of no effect.

The power and authority to issue county warrants is derived solely from the statute, and before such warrants can be received in payment of the taxes and debts due to the county they must

conform to the provisions of the statute authorizing their issuance. When issued in the manner prescribed by law, "such warrants, irrespective of their number and date, should be received in payment of dues to the county." It is provided by section 1466 of Kirby's Digest that "all warrants drawn upon the treasurer shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received, irrespective of their number and date, in the payment of all taxes and debts accruing to the county." Under this provision it has been uniformly held by this court that it was the duty of the sheriff, collector or treasurer of the county to receive such warrants offered in payment of taxes or dues to the county, without regard to the date of their issuance. *Daniel* v. *Askew,* 36 Ark. 487; *Whitthorne* v. *Jett,* 39 Ark. 139; *Howell* v. *Hogins,* 37 Ark. 110.

But this court has never decided that a warrant which is payable in the future could be received in payment of taxes or dues to the county, irrespective of the date of the maturity of such warrant. Under our statutes, before a warrant or order can be issued upon the treasurer, it is necessary that there shall be an order or allowance therefor made by the county court. Kirby's Digest, § 1459. Before any claim or demand shall be allowed by any county court, it is required that the person presenting such demand and "*claiming the same to be due* should make affidavit to its justice and correctness." Kirby's Digest, § 1453.

Ordinarily, county courts are not authorized to issue warrants except in payment of county indebtedness. *Lusk* v. *Perkins,* 48 Ark. 238. And a claim does not ordinarily become a completed indebtedness until the maturity thereof.

We do not deem it necessary now to decide whether or not a county court is authorized to order the issuance of a warrant upon a claim which has not matured, but certainly it is not authorized to issue a warrant payable immediately upon such claim when the order itself shows that the claim has not matured. Where a claim against the county has not yet matured, the order of the court allowing same and directing its payment when due is but a finding that the claim is just and should be paid when it matures. The warrant issued thereon is simply an evidence of

the finding of the county court relative to the claim which has been presented against it. The validity of the warrant depends upon the regularity of its issuance, and it can be issued only in pursuance of the statute. In section 1459 of Kirby's Digest the form of such warrant is set forth, and therein it is made payable upon demand only. Such warrants are payable immediately, and we think that it was the evident intention of the Legislature to make only such warrants as are made payable immediately receivable in the payment of taxes and debts accruing to the county. The manifest purpose of providing for the issuance of warrants was to sustain the credit of the county, which could not make payment thereof, by providing for their use in the payment of taxes and debts due the county. *Worthen* v. *Roots,* 34 Ark. 356. In other words, it was the intent to permit the offset of the one debt against the other. But, until a claim had fully matured, it would not be such an indebtedness as would entitle it to be a setoff against an indebtedness which had matured. Until, therefore, the claim itself had matured, it could not be used as such setoff. The warrant, which is but the evidence of the claim, could not therefore be used as a setoff or payment of taxes and debts due the county until it had matured.

It is urged by counsel for plaintiff that the statement in the warrant that it was due July 1, 1914, was unauthorized and ineffective; and to sustain that contention the case of Ex parte *Willis,* 74 Ark. 498, is cited. But in that case it was simply held that a warrant or scrip of a city should be issued in the manner prescribed by law, and should contain no provision or statement contrary to the law, and any such contrary provision or statement would be ineffective. In that case it was stated in the scrip or warrant that it should not be receivable for taxes or debts before the payment of warrants previously issued. It was therein held that such provision was contrary to the statute providing for the issuance of such warrants or scrip, and therefore was illegal and ineffective. But in the case at bar the warrant was issued upon a claim based upon a contract. In that contract it was expressly agreed and provided that the claim should not be due or payable until a future date, and the order of the county court authorizing the issuance of the warrant expressly stated that it should not be due or payable until such future date. Thereupon the order or

warrant was issued, and stated on its face that it was not payable until such future date. If, under the statute, the county court is not authorized to pass upon a claim that has not matured and direct the issuance of a warrant therefor, payable in the future, then the warrant involved in this case was issued without authority of law, and it therefore was not receivable in payment of taxes or debts due the county. If, however, the order of the county court in passing upon such claim, which is payable in the future, is but a finding that such claim is just, and the issuance of the warrant thereon is but the auditing of the same, then it would not be effective as a warrant until it matured and became actually due. In such event it was not such a warrant as could be received in payment of the taxes and debts accruing to the county until it was due and payable. In either event the collector was justified in refusing to accept it in payment of the tax or debt which was actually due to the county.

The plaintiff obtained the warrant involved in this case from the holder thereof, but he is in no better position than the party to whom it was issued. The orders or warrants of a county are not negotiable instruments in the sense of the law merchant, and no one can become an innocent purchaser thereof, although he obtains same for value and before maturity. Every one receiving such a warrant takes the same with full notice of the purpose for which it was issued and of the order of the county court authorizing its issuance. *Lindsey* v. *Rottaken,* 32 Ark. 619; *Mayor* v. *Ray,* 19 Wall. 468; *Wall* v. *Monroe County,* 103 U. S. 74; *Ouachita County* v. *Walcott,* 103 U. S. 559; *First Nat. Bank* v. *Whisenhunt,* 94 Ark. 583.

But, in addition to this, the warrant involved in this case upon its face showed that it was not payable until July 1, 1914.

The judgment of the lower court in dismissing the complaint was correct, and it is affirmed.

BLACKWOOD v. EADS.

Opinion delivered March 13, 1911.

1. NEW TRIAL—DISCRETION OF TRIAL COURT.—Trial courts have large discretion in the matter of granting new trials, especially upon the

weight of the evidence, and the Supreme Court will not interfere with such discretion unless it be made to appear that it was improvidently exercised. (Page 310.)

2. SAME—DISCRETION OF TRIAL COURT.—Where there is substantial or decided conflict in the evidence, the Supreme Court will not review the action of the trial court in granting a new trial because the verdict was against the weight of the evidence. (Page 311.)

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

STATEMENT BY THE COURT.

From July, 1908, to November 14, 1908, the appellant, who was plaintiff in the court below, was in partnership with one Jacob Thompson, Jr., of Helena, in the real estate brokerage business, under the firm name of Blackwood & Thompson, and on the 9th of October, 1908, the appellee and his co-owner, McAlexander, decided to sell their plantation in Tunica County, Mississippi, for thirty-five thousand dollars. Appellee listed the said place with the appellant's firm under a verbal contract, by which it was agreed between the appellant, on behalf of his firm, and appellee, for himself and his co-owner, that appellee should pay appellant's firm five per cent. commission for selling their plantation. The appellee in the said verbal contract reserved the right of himself and McAlexander to sell the place themselves without paying any commission to appellant. The appellant, before the plantation was sold, bought out Thompson, and succeeded to the business and assets of the firm of Blackwood & Thompson. Appellant advertised the plantation for sale, and in other ways sought purchasers for it. He notified appellee by letter of what he had done. About October 10, 1908, he went to the office of Chew, who afterwards purchased the place, and asked him to buy it. He priced it to Chew at $35,000, and talked it over with him fully, and interested him in the plantation. Chew said he was not in the market at that time to buy a place, but wanted to lease one. Appellant wrote to appellee, and told him in the letter that he had priced the place to Chew and considered him a customer. Appellant within four or five days before November 24, 1908, figured with Chew about buying the place. Chew was able financially to buy. He was going away and seemed to want to wait till he returned, and to talk to appellant again. Appellant

had a conversation with appellee four or five days before November 24, 1908, and appellee did not at that time withdraw the sale from appellant, but told appellant not to do anything until he, appellee, told him, appellant, further about it. In this conversation appellee asked appellant if he had a customer, and appellant replied that he had talked to Mr. Chew. The conversation just alluded to was on the 18th or 20th of November, 1908. There was no one present except appellant and his stenographer. Appellee invited appellant out into the hall, and the above conversation took place. Appellant did not tell appellee positively at that time that Chew was a customer, but that he was considering Chew as a prospective customer, and then appellee told him, appellant, not to do anything further about it until he, appellee, saw appellant again. Within three or four days after that appellee sold the place to Chew and Govan. Some time within two weeks after the 24th of November, 1908, appellant learned that the plantation had been sold. Chew told him about it. On November 24, 1908, appellee came to the office of appellant, and told appellant that he was going to take the sale of the plantation out of his hands. Appellant objected in a way because he told appellee that he thought he would sell it to Chew, but appellee did not leave appellant any opportunity in the matter. Appellee proposed to pay appellant the expense incurred while the plantation was in appellant's hands for sale, and appellee paid appellant the sum of $4.30, and appellant then wrote and gave appellee the following receipt: "November 24, 1908. Received of W. P. Eads four and 30-100 dollars, total expenses in advertising land for sale of W. P. Eads and A. S. McAlexander, while the property was with us for sale, and which is now withdrawn." Signed, "Blackwood & Thompson, H. S. B."

Appellant thought at that time that appellee had taken the land off the market. Appellant told appellee that he was sorry that appellee had taken the place off the market because he was expecting to sell it to Mr. Chew. The stenographer of appellant, Miss Royal, was present November 24, 1908, when the conversation took place in regard to taking the plantation off the market and reimbursing appellant for his expense in advertising. She heard the conversation. The stenographer testified that Mr. Eads called to see Mr. Blackwood at one time when he was out

and told her, while he was waiting for his return, he had decided to take this farm off the market. Mr. Blackwood came in, and Mr. Eads told Mr. Blackwood that he wanted to take the place off the market, and asked him what his expenses were for advertising, which she thought he said was $2.20. Mr. Blackwood told Captain Eads that he was sorry that he was going to take the place off the market just then as he had Mr. Chew interested in the purchase of the place, and he thought if he would leave the place with him for a few days longer he could sell it to Mr. Chew, but Mr. Eads replied that he was going to take the place off the market.

R. E. Chew testified substantially as follows: that appellant, quite a while before he, Chew, and Mr. Govan bought the place, came to him and told him that he had the place for sale, and he told him he was not in the market for it, but that he might lease it; said he was busy with the Higgins place at that time. After he got through with the Higgins place appellant again mentioned the matter to him, and he told appellant that he might consider it. The first information he had about the place being for sale was from appellant. He told his partner Govan that the Eads place was for sale. They met Eads on the street and made a date to go and look at the place. They decided to buy it. It was quick work. Chew gave a check payable to the order of Govan for $10.00, which Govan indorsed to appellee, and appellee then gave them his receipt or contract showing the contract of sale. It was dated November 20, 1908, and showed the terms of the sale. The amount of the purchase price was $35,000. Mr. Eads said he was going over to see Mr. Blackwood, but at that time something was said between him and Mr. Eads about Mr. Blackwood having been the agent for the sale of the place, and he, witness, told Mr. Eads that he was sorry that he had overlooked the fact that it was in Blackwood's hands, that he believed he could have saved something by buying it from him. The parties did not want it known, as the deed had not then passed, and Mr. Eads said he had rather it would not be known, that he did not want Mr. Blackwood to know it. Witness did not mention the fact that Blackwood had spoken to him in regard to the place, and he had forgotten at the time that it had been mentioned to him by Mr. Blackwood. He could not say that before saying

anything to Mr. Eads about it, just prior to the time, it was in his mind that the place was for sale. Govan testified that Chew told him the Eads place was for sale. The day he saw Mr. Chew and Mr. Eads together he tried to rent or lease the place, and Eads said he wouldn't lease it, but would sell it, and Mr. Chew said: "Suppose you go over and look at it," and they set a day and went over it.

Appellee testified that he said to Blackwood when he listed the place with him for sale: "When you have a prospective buyer, notify me, so we will not get hold of the same purchaser." That he never received from Blackwood any verbal or written notice that Mr. Chew was in the market for the place. That the only letters he had received from Blackwood and Thompson in regard to prospective purchaser was the one in which they stated with reference to Mr. Pouncey and Dr. Cartwright. That the first he knew Mr. Chew wanted to lease it. He told him that McAlexander did not want to lease it, that they wanted to sell it. That Mr. Chew said he would go over there and look over it with him. That they all three went over there one day, and looked over the place, and made a trade, and confirmed it in Helena, and talked to McAlexander over the telephone. That on the 18th of November he went to Mr. Blackwood's office; that he did not tell him that he did not want to sell the place, but that he was going to take it out of his hands. That he had no recollection of Mr. Blackwood saying anything about Mr. Chew being a prospective buyer.

He further testified as follows: "I went to their office and listed the place with them. Once when Mr. Thompson was there I listed the place with them. There was a lady there, and when I went back there was some lady there then, and I called him out in the hall, and I withdrew the place from his hands, and afterwards I went back there to his office, and paid him what he was out for advertising when the place was listed with him for sale. Paid him $4.30. When I went up there and asked him how much it was, and said I wanted to pay him, he said he would make it out, and I went back up there in a few days, and he had it made out, and I paid him."

He also said he had no recollection of Mr. Blackwood saying anything about Mr. Chew, and if he said anything about him he

would have remembered it. He says: "I know that I called him out and asked him if he had a prospective purchaser, or prospect of selling the place to any of the parties he had notified me about and he said he had not."

The appellant sued for a commission of $1,750 with 6 per cent. interest and appellee denied liability. The above are the facts. The court instructed the jury, and they rendered a verdict in favor of appellant. Motion for new trial by appellee was sustained. Appellant appeals, stipulating for judgment absolute in favor of appellee if the order granting a new trial be affirmed by this court.

Moore & Vineyard and *Bevens & Mundt,* for appellant.

1. The court erred in setting aside the verdict and granting a new trial, because, on a review of the evidence adduced at the trial, it clearly appears that the verdict is not only not contrary to the evidence, but the preponderance of the testimony clearly sustains it.

2. In order to entitle a broker to his commissions, it is not necessary for him to have formally introduced the purchaser to the seller, nor that the broker should have made the sale himself, nor even was it necessary that he should have advised the seller of the name of the purchaser. 53 Ark. 49; 84 Ark. 468; 76 Ark. 375; 4 Am. & Eng. Enc. of L. 980; 19 Cyc. 264; 89 Ark. 205; 77 Pac. (Kan.) 104; 158 Fed. 277; 78 N. E. (Mass.) 560; 98 S. W. (Tex.) 943; 95 S. W. (Tex.) 86; 78 N. W. (Neb.) 498; Rapalje, Real Estate Brokers, 200-201. If he was the procuring cause of the sale, that entitles him to commissions, and to constitute such procuring cause all that is necessary is that through his efforts, disclosures or advertisements the seller and purchaser were brought together and the sale resulted from such meeting. 88 S. W. (Mo.) 157; 81 Pac. (Cal.) 1015.

3. The discretion of a trial court to set aside a verdict and grant a new trial is by no means absolute; and where it is done on the weight of the testimony, the test of the correctness of the court's action is: After drawing all the inferences most favorable to the verdict that the evidence will reasonably warrant, is it sufficient in law to sustain the verdict? 94 Ark. 566. This discretion does not mean that a new trial may be granted or refused at the mere will or pleasure of the trial judge, but that

he is to exercise a sound judicial discretion, in the interest of justice. 10 W. Va. 677; 11 W. Va. 122.

R. W. Nicholls, for appellee.

1. The court could not well do otherwise than grant a new trial, because the verdict was contrary to the law and the evidence. Where, as in this case, a broker did not introduce the purchaser to the seller, did nothing to induce him to buy further than to make an unsuccessful attempt to sell, was in no manner instrumental in the sale, and was in no sense the procuring cause, there can be no liability on the principal for the commissions. 4 Am. & Eng. Enc. of L. (2 ed.) 977, and note 1, 978, and note 2, 981, and note 3, 979; 77 Ark. 375; 33 Ark. 448; 55 Ark. 574; 80 Ark. 254; 91 Ark. 212; 81 Ark. 96; 130 S. W. 524; 82 Ark. 381.

2. The sound judicial discretion of the trial court to grant a new trial will not be interfered with by this court, where the preponderance of the evidence fails to sustain the verdict. 42 Ark. 566; 57 Ark. 451; 27 S. W. (Ark.) 1062; 38 Am. St. Rep. 256-7; 127 S. W. 962; Baylies on New Trials, 246.

WOOD, J., (after stating the facts). In *Taylor* v. *Grant Lumber Co.,* 94 Ark. 566, this court, reviewing an order of the circuit court granting a new trial, said: "The trial judge still has control of the verdict of the jury after and during the term it was rendered. Because of his training and experience in the weighing of testimony, and of the application of legal rules to the same, and of his equal opportunities with the jury to weigh the evidence and judge of the credibility of witnesses, he is vested with the power to set aside their verdicts on account of errors committed by them, whereby they have failed in their verdict to do justice and enforce the right of the case under the testimony and instructions of the court. This is a necessary counterbalance to protect litigants against the failure of the administration of the law and justice on account of the inexperience of jurors." Judge BATTLE in that case quoted from the Supreme Court of Missouri in *Baughman* v. *Fulton,* 139 Mo. 557, 41 S. W. 215, as follows: "Trial courts have large discretion in the matter of granting new trials, especially upon the weight of the evidence, and this court will not interfere with such discretion unless it be made to appear that it was improvidently exercised." "Improvidently ex-

ercised," as used above, means thoughtlessly exercised or without due consideration. Webster, New Int. Dict.: *"Improvidently."*

The Supreme Court of Missouri in the above case further stated as the uniform and settled rule of that State that "the Supreme Court will not, where there is substantial conflict in the evidence, review the action of the trial court in granting a new trial because the verdict is against the weight of the evidence," and stating further that the granting of a new trial for the reason that the verdict is against the weight of the evidence rests peculiarly with the judge presiding at the trial. See also *Rickroad* v. *Martin,* 43 Mo. App. 597. This is the rule of many jurisdictions, and the rule of this court. *Taylor* v. *Grant Lbr. Co. supra; Moore* v. *Los Angeles Infirmary,* 49 Cal. 669; *McGregor* v. *Christie,* 37 Ga. 557; *Nagle* v. *Hornberger,* 6 Ind. 69; *Roberts* v. *Jones,* 30 Ia. 525. See many cases collated in 3 Supplement Encl. Pl. & Pr. p. 255, under title, "order granting [new trial] rarely reversed."

Where there is decided conflict in the evidence, this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for new trial or overruling same. "The Supreme Court will much more reluctantly reverse the final judgment in a cause for error in granting than for error in refusing a new trial." *House* v. *Wright,* 22 Ind. 383; *Oliver* v. *Pace,* 6 Ga. 185. The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused.

We would have readily affirmed a judgment in favor of appellant under the evidence adduced. But such deference must be shown the trial court in passing upon the weight of conflicting testimony that his ruling will not be set aside merely because we differ with him on a question of preponderance. *New York Piano Forte Co.* v. *Mueller,* 38 Ia. 552. There were sharp conflicts in the evidence. The testimony of appellee and of Chew would have warranted the jury in returning a verdict in favor of appellee, and, had the jury done so, we could not have disturbed same on appeal. The instructions upon the whole cor-

rectly declared the law, as it has been often announced by this court. *Little Rock* v. *Barton,* 33 Ark. 448; *Scott* v. *Patterson,* 53 Ark. 49; *Hill* v. *Webb,* 55 Ark. 574; *Hunton* v. *Marshall,* 76 Ark. 375; *Featherston* v. *Trone,* 82 Ark. 381; *Branch* v. *Moore,* 84 Ark. 468; *Stiewel* v. *Lally,* 89 Ark. 205; *Blumenthal* v. *Bridges,* 91 Ark. 212. Therefore the only question is, did the court err in granting a motion for a new trial on the facts? and we are of the opinion that it did not, for the reasons above stated. Judgment absolute is therefore entered here in favor of appellee.

HART and KIRBY, JJ., dissenting.

TOWNSLEY v. YENTSCH.

Opinion delivered March 20, 1911.

1. HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR WIFE'S TORTS.—A husband is liable for a slander committed by his wife. (Page 317.)
2. LIBEL AND SLANDER—VARIANCE.—In an action of slander the plaintiff must prove the use of substantially the same words as those alleged in the complaint, it not being sufficient to prove the use of substantially different words, though of similar import. (Page 317.)
3. INSTRUCTION—FORMAL DEFECT.—In a slander case wherein defendant is alleged to have falsely charged plaintiff with stealing, a general objection to an instruction directing the jury to find for plaintiff if defendant's wife falsely uttered words which in their common acceptation amounted to a charge of stealing is insufficient to point out that the instruction fails to contain the limitation that the slanderous words used must be substantially the same as those alleged in the complaint. (Page 317.)
4. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Where, in a slander case, the plaintiff was permitted, without objection, to prove that defendant used words substantially different, though of import similar to the alleged slander, the complaint will be considered as amended to conform to the proof. (Page 318.)
5. LIBEL AND SLANDER—INSTRUCTION.—Where, in a slander case, the defendant was charged with having falsely charged plaintiff with stealing, it was not error to refuse an instruction to the effect that if defendant's wife said to plaintiff words implying that plaintiff had taken a basket without paying for it, this would not justify plaintiff in maintaining a suit against defendant, as such instruction denied a recovery by plaintiff, even though defendant's wife had charged plaintiff with stealing. (Page 318.)

6. SAME—INSTRUCTION.—Where, in a slander case, the defendant was alleged falsely to have charged plaintiff with stealing, it was not error to refuse an instruction to the effect that if defendant's clerk asked a customer whether she had an article which she was supposed to have taken in her muff, this did not constitute slander; as such instruction would deny a recovery by plaintiff, even though the alleged slander was proved. (Page 318.)

7. SAME—ELEMENTS OF DAMAGES—INSTRUCTION.—It was not error, in a slander case, where there was evidence tending to prove that plaintiff suffered a nervous shock by reason of the slanderous charge complained of, to instruct the jury that physical pain is a proper element of damages in such case. (Page 319.)

8. SAME—DAMAGE TO REPUTATION—INSTRUCTION.—It was not error, in a slander case, to instruct the jury that they might consider the element of injury to reputation in fixing the damages, although the alleged slanderous words were used in the presence of strangers who knew nothing of plaintiff, and the charge was retracted in a few moments and in the same place. (Page 319.)

9. SAME—DAMAGES—REMITTITUR OF EXCESS.—Where the injury to plaintiff's reputation by a slander was slight, consisting of a merely temporary humiliation, and where the slander was retracted after a few moments, an award of $1,000 as damages will be reduced to $500. (Page 320.)

Appeal from Pulaski Circuit Court; *Robert J. Lea,* Judge; affirmed.

George W. Murphy and *Morris M. Cohn,* for appellants.

1. F. P. Townsley was never served with summons, and is improperly named in the judgment.

2. An abstract instruction is misleading and improper. 14 Ark. 530; 37 Ark. 580; 6 Ark. 156. Instruction 4 is erroneous not only for this reason but also because it assumes facts to exist which are in controversy, and allows a recovery for physical pain, which is neither a natural nor probable consequence of slander. 62 Atl. 272.

3. Where no ill will is shown, in an action for slander, only compensatory damages can be recovered. 55 Ark. 494; *Id.* 501. The absence of ill will on the part of Mrs. Townsley would certainly not justify an award of punitive damages against C. G. Townsley. As to him, before punitive damages could be awarded, it would be necessary, not only to prove special ill will on the part of Mrs. Townsley, but also to show that he ratified what she did, with knowledge of all the material facts. 64 Ark. 217; 76 Ark.

422; *Id.* 563; 77 Ark. 606, 608; 39 N. Y. 381; 43 Hun 336; 139 Pa. St. 289; 21 Atl. 157; 52 Ia. 59; 47 La. Ann. 436; 46 N. Y. Supp. 1038; 33 Neb. 582; 65 Ark. 145; 1 East 106. In this case instructions were erroneous which authorized the jury to find for the plaintiff if in their opinion Mrs. Townsley used words which in their common acceptation amounted to charging plaintiff with having committed larceny, without regard to whether the words proved were either literally or in substance the same as the words charged in the complaint. 77 Ark. 64.

4. Words implying that plaintiff had taken a basket without paying for it would not, of themselves, support an action against the appellant. It was error, therefore, to refuse the fifth instruction requested by defendant. 76 Ark. 348; 64 Ark. 538; 53 Pa. St. 418; 27 *Id.* 112; 57 S. W. 973; 25 Gratt. 495; 120 Ind. 43; 40 Ind. 533; 8 Blackf. 414; 5 Blackf. 393; 6 Bush 518; 14 Me. 317; 34 Mo. App. 315; 63 Am. St. Rep. 356.

It was likewise error to refuse instruction 13 requested. There was evidence to support it.

Gus Fulk and *Bradshaw, Rhoton & Helm,* for appellee.

1. The instructions are not abstract. Appellant's objections to instructions given ought not to be considered, because no specific objection to any instruction given was pointed out to the trial court. Its attention was not called to the length of any instruction, nor to the use of the words "physical pain," now objected to by appellant. Neither was the court's attention specifically called to the point that the instructions should have contained the words, or substantially the words, charged in the complaint or shown by the testimony. 90 Ark. 112; 66 Ark. 46; *Id.* 264; 74 Ark. 355; 70 Ark. 563.

2. C. G. Townsley is not only liable for Mrs. Townsley's words and acts because she was his agent within the scope of her authority but also because she was his wife and committed the tort in his presence. 92 Ark. 487; 44 Ark. 401.

3. In an action for slander, the proof need not correspond in every minute detail with the words as charged in the complaint, provided the identity of the charge is made out. 25 Cyc. 485, note 19; *Id.* 487, note 28; 84 Ark. 487.

Where no objection has been made to the introduction of testimony, the pleadings will be considered amended so as to con-

form to the proof. 75 Ark. 181; 76 Ark. 551; 84 Ark. 37; 85 Ark. 217.

McCULLOCH, C. J. The plaintiff, Mrs. Ella Yentsch, sued defendants, C. G. Townsley and his son F. P. Townsley, for damages on account of slanderous words alleged to have been uttered to and about plaintiff in the presence of others by Mrs. Townsley, the wife and mother of defendants. The alleged slanderous words consisted of an accusation of having stolen a basket.

The jury returned a verdict in favor of the plaintiff, assessing actual damages in the sum of one thousand dollars (no punitive damages being assessed by the jury). Judgment was rendered on the verdict, and an appeal to this court has been duly prosecuted.

F. P. Townsley was not summoned to answer the complaint, and did not appear, the action seeming to have been abandoned as to him. The circuit court inadvertently, it appears, rendered judgment against F. P. Townsley as well as against his father and as to him the judgment must be reversed.

The defendant C. G. Townsley was engaged in the mercantile business in the city of Little Rock, operating what is known as the "Dollar Store." His wife assisted him in the store, waited on customers, superintended the clerks, and overlooked the business generally. F. P. Townsley was an electrical engineer in Milwaukee, Wisconsin, but was at home visiting his father and mother for a short time, and while here he assisted them in the store.

On December 20, 1909, which was during the rush of the holiday trade, Mrs. Yentsch, came in, and went to a table in the middle of the store to look at some ornamental wall baskets or whisk-broom holders, which were displayed on the table. All of the clerks—most of them ladies—were busy at the time waiting on other customers, so for that reason no one went to wait on Mrs. Yentsch. She picked up a basket to examine it, and looked around for a clerk of whom to ask the price, but, observing that all were busy and being in a hurry to return home, she put the basket down and started along the aisle to the door. Mrs. Townsley observed Mrs. Yentsch, as she relates, picking up the baskets and putting them down again as if examining them, and as Mrs. Yentsch started down the aisle Mrs. Townsley thought she ob-

served that Mrs. Yentsch still had one of the baskets. She called to her son, who was standing near the front door, to tell the lady with the furs (meaning Mrs. Yentsch) that she wanted to speak to her. F. P. Townsley, in compliance with his mother's request, spoke to Mrs. Yentsch, and said: "Wait a minute; mother wishes to speak to you." C. G. Townsley was in the store at the time, and did not participate in the occurrence, and was not, so far as the testimony discloses, immediately present.

Thus far the facts are undisputed, but as to what was said by Mrs. Townsley the testimony is sharply conflicting. The plaintiff testified that Mrs. Townsley seized her by the arm, and said: "I want that basket you have got. I saw you steal it; you have got it in your muff;" at the same time took the muff off her arm, running her hands through it, and searching around her body. She says that she went on out of the front door, without fully realizing for the moment that she had been accused of stealing, but, after standing out in the vestibule a few minutes, she returned and said to Mrs. Townsley: "It just came to me that I have been accused of stealing;" and that the latter replied: "Well, I thought I saw you pick up that basket and make for the door;" and she then said to Mrs. Townsley: "You must be very careful in the future about such mistakes," and went on out, thus closing the incident.

She testified that she was greatly humiliated and embarrassed on account of the accusation, and was nearly sick from it for two or three days; that several customers were present at the time, none of whom she was acquainted with, and no one spoke to her about it except a Mrs. Daniel, who was present and displayed considerable solicitude concerning her, though not acquainted with each other at the time.

Mrs. Daniel testified substantially the same as plaintiff as to what was said by Mrs. Townsley.

Lula Davis, another witness introduced by plaintiff, testified that Mrs. Townsley seized plaintiff's arm, and took off her muff, searching it, and said, "I thought you had a basket," or "Did you have a basket?" Still another of plaintiff's witnesses gives the following account of the occurrence: That F. P. Townsley said to the lady (plaintiff): "Wait a minute; mother wishes to speak to you"; that Mrs. Townsley came up and asked the lady: "Do

you want the basket?" The lady replied: "What basket?" Mrs. Townsley asked: "Did you have one in your muff?" She answered: "I have not." And Mrs. Townsley said: "That's all right; go ahead." That plaintiff went out the door, and in a few moments came back and talked a little while with Mrs. Townsley. That plaintiff left, and, after being gone fifteen or twenty minutes, came back and walked about the store, talking angrily to different persons that were shopping.

Mrs. Townsley testified that she thought she saw a basket in plaintiff's hands as she started down the aisle, and supposed she was looking for a clerk, and would stop at the last clerk before she reached the door; that she followed plaintiff, and asked, "Do you want the basket?" or "Have you a basket?" That plaintiff replied: "I have no basket." And she then said to her: "All right." That plaintiff came back in a few minutes, and asked: "Do you think I would steal?" to which she replied: "Why, I don't know you, and you don't know me," and explained to plaintiff that it was easy to make mistakes around a big store. That plaintiff asked: "Do you apologize?" and she replied: "I certainly do," which ended the incident. Other witnesses corroborated Mrs. Townsley.

The court gave instructions submitting the questions to the jury as to the agency of Mrs. Townsley for her husband and of her authority as such and also as to his ratification of her conduct. We need not pass on the correctness of these instructions, inasmuch as the undisputed evidence shows that the slanderous words, if used at all, were used by the wife of defendant C. G. Townsley; and if they were used, he is liable for the damage. *Jackson* v. *Williams,* 92 Ark. 487.

It is insisted that the court erred in giving instructions which authorized the jury to find for plaintiff if Mrs. Townsley used slanderous words which amounted to an accusation of stealing, even though the words were not literally or in substance the same as those set forth in the complaint. The rule is well settled that in an action for slander the plaintiff must prove the use of substantially the same words as those alleged in the complaint, it not being sufficient to prove the use of substantially different words, though of similar import. *Miller* v. *Nuckolls,* 77 Ark. 64.

We do not, however, think that this rule was violated in the

instructions. It is true that in the instruction of which defendant complains the court told the jury to find for the plaintiff if Mrs. Townsley falsely uttered words which in their common acceptation and under the circumstances used amounted to a charge of stealing. This was not strictly correct, as it failed to limit its application to words substantially the same as those set forth in the complaint, but, as plaintiff proved the use of words by Mrs. Townsley substantially the same as those mentioned in the complaint, a specific objection ought to have been made to the instruction, calling attention to the fact of the omission to limit its application to substantially the same words. A general objection was not sufficient. *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255; *McElvaney* v. *Smith,* 76 Ark. 468.

Some of the witnesses testified to the use of words substantially different from those mentioned in the complaint, though they might be considered in their common acceptation and under the circumstances as amounting to a charge of larceny. But, if appellant deemed this matter of sufficient importance to have the jury pass upon it, he should have made a specific objection to the instruction on that subject. As the instruction was given, it was probably understood by the jury to refer to the words proved by plaintiff, which were substantially the same as those charged in the complaint.

There is still another reason we think why the instruction on the question was not prejudicial. The plaintiff was permitted to prove by witnesses other than himself, without objection from defendant, the use of words which were substantially different from those set forth in the complaint, but which, under the circumstances, amounted in their common acceptation to a charge of stealing. This testimony being admitted without objection, the pleadings may be considered as amended to conform to it.

The court refused to give two instructions requested by defendant, as follows:

"5. Although the jury may believe that Mrs. Townsley, as an employee of the defendant, C. G. Townsley, said to the plaintiff words implying that the plaintiff had taken a basket without paying for it, this would not of itself justify the plaintiff in maintaining a suit against the defendant, C. G. Townsley.

"13. If a clerk, employee, or manager in a store notices a

visitor or customer at a table examining baskets or trinkets, and then, on seeing her turn away, thinks she has found the article she wants, and is looking for a clerk to ascertain the price, goes to her, asks her if she wants the article, and, on being told by the visitor or customer that she has not the article, says, 'Didn't you have it in your muff?' or 'Didn't you have one in your muff?' or words of similar import, this does not constitute slander."

These instructions were wrong because they denied a recovery by plaintiff, even though she had proved the use of words which amounted in their common acceptation to a charge of stealing.

The following instruction, given at plaintiff's request, was also objected to:

"4. You are instructed that in an action for slander the law implies some damage from the uttering of actionable words; and the law further implies that the person using the actionable words intended the injury the slander is calculated to effect; and in this case if you find for the plaintiff on that part of the complaint alleging slander you will determine from all the facts and circumstances proved what damages ought to be given her, and in assessing the damages you are not confined to any mere pecuniary loss sustained; physical pain, mental suffering, humiliation, and injury to reputation or character, if proved, are proper elements of damages."

It is insisted, in the first place, that the instruction assumed that Mrs. Townsley used actionable words. We do not think it is open to that construction. On the contrary, it clearly submits that question to the jury. In the next place, it is contended that the instruction was erroneous in submitting the question of physical pain and of injury to reputation and character as elements of damage.

A majority of the judges have concluded that there was evidence from which the jury might have found that plaintiff sustained injury to her reputation by reason of the accusation, even though it was in a few moments retracted. They think that even a retracted accusation of dishonesty is calculated to result harmfully by reason of lowering the estimate of the character of the one accused in the minds of those who heard the charge and the retraction. They think, too, that the words "physical pain" used

in the instructions were understood by the jury to be considered as referring to the nervous shock resulting from the humiliation of the occasion, and that this was properly considered in connection with the humiliation and mental pain resulting from the slanderous charge. For myself, I must say that, in view of the sharp conflict in the evidence as to any actual damage at all, I think the instruction was prejudicial, and that the judgment should be reversed. The words were used in the presence of strangers who knew nothing of plaintiff or her reputation, and the charge was retracted in a few moments and at the same place. She had not stolen a basket, and that fact was fully demonstrated in the presence of those who heard the accusation; therefore no injury to reputation resulted, for no person went away with the impression that she still rested under the imputation. It seems to me there was no evidence at all of any injury to plaintiff's reputation. Her own statement of the facts shows she left the store finally, after the last conversation with Mrs. Townsley, with the feeling that the charge had resulted only in temporarily humiliating her in the presence of strangers. In her last words she expressed to Mrs. Townsley nothing more than a grievance for a mistake unnecessarily made by the latter. Nor do I think that we should say that no prejudice resulted from the use of the words "physical pain" in the instruction. The use of those words in the instruction gave the jury the privilege of going out into a realm of uncertainty where their assessment of damages can not be measured by the evidence adduced.

The majority of the judges agree, however, that the injury to plaintiff's reputation, if any, was very slight, and that the injury consisted in the main of mere temporary humiliation for a short time. They reach the conclusion that the verdict is excessive, and cannot be sustained for more than $500. In this I fully agree. So the judgment is modified by reducing it to the sum of $500, and to that extent it is affirmed.

KIRBY, J., dissents as to reduction of amount of damages.

DOUGLASS v. HUNT.

Opinion delivered March 20, 1911.

EJECTMENT—BETTERMENTS—GOOD FAITH.—Where the losing defendant in an ejectment suit testified that he was advised by his attorneys that his title was in fee simple, and that he occupied and improved the land

in the honest belief that he had a perfect title, but that both before and after he purchased the land he received information that plaintiffs, who were the children of defendant's grantor, were going to claim the land at her death, he was not a *bona fide* purchaser, and could not claim betterments.

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

Winchester & Martin, for appellants.

A defendant cannot claim for improvements made on land before he has acquired title thereto; neither can he claim for such improvements where he has been notified that the plaintiffs intended to sue for the land and contest the title thereto. 76 Ark. 146, 152; Kirby's Dig. § 2754; 53 Ark. 572-3; 71 Ark. 605.

Webb Covington and *T. D. Crawford,* for appellee.

If any person believing himself to be the owner, under color of title peaceably improves land which is afterwards decided to belong to another, the value of such improvements shall be paid to him by the successful party. Kirby's Dig. § 2754. Any improvement that adds to the value of the land by rendering better adapted to man's use and enjoyment may properly be considered to be within the meaning of the statute. 37 Ark. 137; 5 Dana (Ky.) 547; 137 Cal. 524.

McCULLOCH, C. J. Appellee, W. R. Hunt, occupied a tract of land in Johnson County, Arkansas, and made improvements thereon. He held under a certain deed which purported to convey the title in fee simple, but which in fact conveyed only the life estate of one Sarah E. Hacking. Appellants own the remainder, and instituted this action, after the death of Mrs. Hacking, to recover possession of the land. Appellee alleged that he held the land under color of title and peaceably improved the same, believing himself to be the owner thereof, and he claimed compensation for such improvements. The trial court allowed an amount which was found to be the value of said improvements, and rendered judgment, in accordance with the provisions of the statute, in favor of appellants for recovery of the land and in favor of appellee for the value of improvements, less the amount of rents.

The question arising on the appeal relates to the correctness of the judgment for betterments.

The case was tried before the court sitting as a jury, and we are bound by the findings of fact, as far as there is legally sufficient evidence to support them. It appears from undisputed testimony that Sarah E. Hackney, the life tenant, died on April 7, 1909, and that the improvements for which the court allowed compensation were made by appellee shortly after her death. He purchased the land in the year 1903 from one Lovejoy, who had purchased at a foreclosure sale by a commissioner of the chancery court the title of Mrs. Hackney. The deed under which Mrs. Hackney held conveyed to her only a life estate, with remainder over to appellants, her children.

Appellee testified that he was advised by attorneys of well known learning and integrity that his deed from Lovejoy conveyed the title in fee simple, and that he occupied and improved the land in the honest belief that he had a perfect title. He testified, however, that both before and after he purchased the land from Lovejoy he received information that appellants, who were the children of Mrs. Hackney, were going to lay claim to the land at her death. He said that it was generally understood, and that he heard every few days, that the Hackney heirs were going to contest the title as soon as their mother died. The deed to Mrs. Hackney was on record, and it gave her only a life estate with remainder over to her children. With notice that the heirs were going to contest the title, he improved the land relying on the advice of attorneys that the title was good. Can he, under those circumstances, be deemed to have been a *bona fide* occupant, within the meaning of the statute, after the death of the life tenant? In *Fee* v. *Cowdry,* 45 Ark. 410, this court quoted with approval the following definition of the term "*bona fide* occupant" given by Mr. Justice Washington in delivering the opinion of the court in *Green* v. *Biddle,* 8 Wheat. 79:

"He is one 'who not only *supposes* himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person, claiming a better right to it. Most unquestionably this character cannot be maintained, for a moment, after the occupant has notice of an adverse claim, especially if that be followed up by suit to recover the possession. After this, he becomes a *mala fide* possessor, and holds at his peril, and is liable to restore all the *mesne* profits, together with the land."

The same was quoted with approval in *Brown* v. *Nelms,* 86 Ark. 368, and in *McDonald* v. *Rankin,* 92 Ark. 173.

Again in *Beard* v. *Dansby,* 48 Ark. 183, this court said: "Good faith, in its moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is implied to conveyances of title, as when we speak of a *bona fide* purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself the true proprietor. It must be an honest belief and an ignorance that any other person claims a better right to the land."

In *White* v. *Stokes,* 67 Ark. 184, the court said: "He (the occupant) cannot shut his eyes and say that he believed in good faith that he had a good title, when he was informed that he did not have."

The policy is not to be tolerated of allowing an occupant to make improvements and charge them against the owner after the latter has notified him that the title is to be contested. That would allow the occupant to speculate at the expense of the true owner, on the result of litigation, of which he is actually forewarned. It has often been said by this court that the betterment statute is sustainable on the ground that it was designed as an adjustment of equities between innocent parties, therefore the equities of the case forbid that the true owner shall be charged with the cost of improvements made by the occupant after notice from the owner that the title is to be called in question.

The court erred in adjudging in favor of appellee the value of improvements. The judgment is therefore reversed, and, the facts being undisputed, the cause is remanded with directions to enter judgment absolute in favor of appellants for recovery of possession of the land and the amount of rents according to the findings of the court, less the amount of taxes paid by appellant since the death of the life tenant.

BEASLEY v. STATE.

Opinion delivered March 20, 1911.

TRIAL—IMPROPER ARGUMENT.—Upon the trial of a felony case, the prosecuting attorney said: "At the last term of this court the husband of Mrs. A. B. Quertermous was on trial, and the defendant testified for him; and now the defendant is on trial, and Mrs. Quertermous comes as a witness for the defendant. The defendant testified for the witness' husband at a former term of the court when he was being tried, and she is now testifying for the defendant. It looks like swapping work." *Held,* that the argument was not improper.

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

R. D. Rasco and *Joe T. Robinson,* for appellant.

Not only was the verdict contrary to the law and the evidence, but the conduct and statements by the prosecuting attorney in argument to the jury are within themselves so prejudicial as to call for a reversal of the case. His declaration that the instructions were misleading, and afterwards, when told by the trial judge that they were not misleading but were the law of the case, he repeated his statement that they were misleading, was prejudicial error. His further statement, in commenting upon the testimony of the witness Mrs. Quertermous, that "the defendant testified for her husband at a former term of this court, when he was being tried, and she is now testifying for the defendant; *it looks like swapping work*"—was clearly prejudicial error. It was a manifest attempt to influence the jury to believe that he had testified falsely at the trial of Quertermous, and that she in return was testifying falsely in behalf of appellant. 70 Ark. 305-307; 58 Ark. 353; 61 Ark. 138; 92 Ind. 40; 76 N. W. 426; 123 Ill. 333; 63 Ark. 174; 48 Ark. 106-132; 44 Wis. 282; 61 N. W. 246; 39 N. W. 585; 27 S. W. 128; 8 Tex. App. 416; 41 N. H. 317.

Hal L. Norwood, Attorney General, and *William H. Rector,* assistant, for appellee.

1. A reading of the abstract furnished by the appellant is sufficient to show that there is evidence legally sufficient to sustain the verdict.

2. The case should not be reversed because of the argument of the prosecuting attorney because it was not prejudicial, and because the record does not show that the trial court was asked for a ruling upon the matter now insisted upon. A bare exception to argument of counsel is not sufficient. It must be pressed to a ruling. 74 Ark. 259; *Id.* 131; 38 Ark. 304; 95 Ark. 321; 93 Ark. 446; 81 Ark. 173; 88 Ark. 62; 73 Ark. 453; 74 Ark. 489; 76 Ark. 67; *Id.* 39; 71 Ark. 403; 94 Ark. 548.

McCULLOCH, C. J. Appellant was convicted under an indictment charging him with having feloniously altered and changed the marks of five hogs, the property of W. W. Simpson, with intent to steal the same.

The principal contention is that the evidence is not sufficient to sustain the conviction. It is insisted that the evidence fails to identify the hogs as the property of Simpson, and fails to establish the fact that they were marked by appellant with intent to steal them.

The testimony adduced by the State tended to show that Simpson owned five hogs at the time mentioned—four of them year-olds, and one a two-year old sow—all marked with crop and two splits in the right ear and underhalf crop in left ear; that the hogs ranged around Clyde Inman's place with ten others about the same age and size owned by Arthur Brewer; that he afterwards found the four young hogs countermarked, but did not recover the sow.

Appellant and Jerry Inman and Weaver Langford drove a bunch of sixteen hogs marked in that mark up to appellant's house on Saturday night about nine o'clock, and next morning changed the marks by counter-marking them with "crop in left ear and crop and undercrop in the right ear, and some of them with crop and under-half crop in left ear and right ear cropped," both of which marks were appellant's; that they killed one of the larger hogs on Sunday morning, and herded the others in appellant's field, where they were afterwards kept. Appellant afterwards denied having marked Simpson's hogs, and on the witness stand denied that they drove the hogs up at night or that they herded the hogs. He claimed that he bought the hogs from other parties.

We think the testimony was legally sufficient to sustain the verdict.

Improper argument of the prosecuting attorney is assigned as error. During the argument the prosecuting attorney, in discussing the credibility of a witness introduced by appellant, said:

"At the last term of this court the husband of Mrs. A. B. Quertermous was on trial, and the defendant testified for him; and now the defendant is on trial, and Mrs. Quertermous comes as a witness for the defendant. The defendant testified for the witness' husband at a former term of this court when he was being tried, and she is now testifying for the defendant. It looks like swapping work."

Appellant's counsel objected to this, and, his objection being overruled, he saved exceptions.

It was disclosed in the testimony that appellant was, at the former term of the court, a material witness on behalf of the husband of the witness, Mrs. Quertermous, who was on trial charged with felony. We think this was a competent circumstance tending to show the relations between the parties, and that it was not improper to comment on it within reasonable bounds, as tending to show some bias on the part of the witness. The language of the attorney cannot be said to be intemperate, and we fail to see anything in it which calls for a reversal of the judgment. The testimony of Mr. Quertermous only went to credibility of a witness for the State, being alleged statements of that witness tending to show prejudice on his part against appellant.

There are other assignments as to alleged improper remarks of the prosecuting attorney, but objections to each of the remarks were sustained by the court, and the prejudice thus removed.

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

WOOD and HART, JJ., dissent on the ground that the remarks of the prosecuting attorney constituted reversible error.

LANGFORD v. STATE.

Opinion delivered March 20, 1911.

JURY—COMPETENCY OF JUSTICE OF THE PEACE.—Kirby's Digest, § 4537, providing that "whenever any juryman shall be presented for examination in impaneling any jury it shall be a ground of peremptory challenge that said juryman is a postmaster, justice of the peace or county officer," means that it shall be ground for challenge that one presented for examination as to his qualifications as juror fills either one of the positions mentioned.

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

J. T. Bullock, Brooks, Hays & Martin and *Bullock & Davis,* for appellant.

The juror Hanks, being a justice of the peace, was not subject to jury duty; the court therefore erred in overruling appellant's challenge of him for cause, and in requiring appellant to exhaust one of his peremptory challenges on him. Kirby's Dig. § 4537; 69 Ark. 449; *Id.* 323.

Hal L. Norwood, Attorney General, and *William H. Rector,* assistant, for appellee.

Appellee confesses error as to retention of the juror Hanks and requiring appellant to exhaust a peremptory challenge upon him.

McCULLOCH, C. J. Ed Langford was convicted of the crime of manslaughter, and appeals to this court.

One of the assignments of error relates to the ruling of the court in overruling appellant's challenge of juror Hanks who was a justice of the peace at the time he was impaneled. The Attorney General confesses error on this assignment.

When the fact was disclosed, on the examination of this juror, that he was a justice of the peace, appellant challenged him for cause, and the court overruled the challenge. Appellant then peremptorily challenged the juror, and thereafter, in impaneling the jury, exhausted all of his peremptory challenges.

The statute provides that "whenever any juryman shall be presented for examination in impaneling any jury, it shall be a ground of peremptory challenge that said juryman is a postmaster, justice of the peace or county officer." Kirby's Dig. § 4537.

This court, in construing the statute, said: "We construe this to mean that the fact that a justice of the peace is a juror is cause for challenge. Of course, any juror can be peremptorily challenged; and unless the statute means that the fact that a juror is a justice of the peace is a disqualification if the defendant desires to avail himself of the fact, then it is meaningless nonsense." *Terrell* v. *State,* 69 Ark. 449.

There are other assignments of error relating to alleged disqualification of other jurors and to improper argument of counsel for the State; but as the error indicated above calls for a reversal, and the other matter may not occur at another trial, it is unnecessary to pass on them.

Reversed and remanded.

KAMPMAN v. KAMPMAN.

Opinion delivered March 20, 1911.

1. DEEDS—CONDITIONS.—Conditions subsequent in a deed that defeat the estate conveyed thereby are not favored in law; and when the terms of the grant admit of any other reasonable interpretation, they will not be held to create such a condition. (Page 330.)
2. EQUITY—OBJECTION TO JURISDICTION—WAIVER.—Though courts of equity abhor forfeitures and will not enforce them, leaving the parties to such remedies as they may have at law, the objection to the court's jurisdiction in such case will be treated as waived if no objection thereto was raised in the court below, and no motion was made to transfer the case to a court of law. (Page 331.)
3. APPEAL AND ERROR—BRINGING UP EVIDENCE—PRESUMPTION.—Where the decree appealed from recites that the cause was heard by the chancellor upon the pleadings and "the depositions on behalf of the plaintiff and the defendant and other evidence," and the transcript contains only the depositions of the witnesses and the exhibits filed with the complaint, and this is certified by the clerk as all the records and proceedings on file in his office, it will be presumed on appeal that the "other evidence" which the chancellor heard referred to the exhibits found in the transcript. (Page 331.)
4. SAME—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where there is a sharp conflict in the testimony of the parties, and nothing to corroborate either one, the court, on appeal, will accept the chancellor's findings as conclusive. (Page 331.)

5. FORFEITURE—WAIVER.—Any conduct on the part of the party having the right to declare a forfeiture which is calculated to induce the other party to believe that the forfeiture is not to be insisted on will be treated as a waiver. (Page 332.)

6. DEEDS—CONDITION SUBSEQUENT—WAIVER.—Where a father executed a deed to a son on condition that the son should pay the father a certain sum annually for life, the father will be held to have waived any right to declare a forfeiture for nonpayment thereof when he made no demand for payment and gave the son no notice that strict performance would be insisted on. (Page 333.)

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

R. D. Rasco, for appellant; *Manning & Emerson,* of counsel on the brief.

1. Equity does not favor forfeitures, and deeds must be strictly construed as against the grantors. "Courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so." 2 Washburn on Real Prop. (5 ed.) § 3; *Id.* § 5; Tiedeman on Real Prop. (2 ed.) § 279; 2 Washburn, Real Prop. (14 ed.) § 7; 25 S. W. (Mo.) 201; 15 Wall. 146; 2 Story's Eq. § 1319; 4 Kent's Com. 131; 59 Ark. 405-8.

Conditions subsequent are not favor in law because they tend to destroy estates. 109 Va. 676; 64 S. E. 982; 50 So. 443; 133 Ga. 540; 90 Minn. 352; 152 Fed. 143; 13 Cyc. 687.

2. A condition subsequent will not defeat an estate, if the condition has been performed by the grantee or waived by the grantor, and waiver may result from acts as well as from agreement. Tiedeman on Real Prop. (2 ed.) § 278; 13 Cyc. 708; 75 Ark. 411.

3. The deed does not constitute a condition subsequent, neither does the special clause therein. 1 Cooley's Blackstone (4 ed.) 154; 4 Kent's Com. (13 ed.) 142; Tiedeman, Real Prop. (2 ed) § 271; Black's Law Dictionary, 246; 6 Am. & Eng. Enc. of L. 500; 8 Cyc. 559; 232 Ill. 594; 4 Cush. 178; 25 S. W. (Mo.) 201; 47 S. E. 415; 64 N. E. 531; 121 S. W. 15; 111 S. W. 1069; Kirby's Dig. § 733.

4. The special clause in the deed is repugnant both to the granting clause and habendum, and is therefore void. 13 Cyc. 683-4-5; 66 S. E. 104; 27 L. R. A. (N. S.) 388, 395; 92 Ark. 324; 82 Ark. 209.

John L. Ingram, for appellee.

Taking into consideration the relationship of the parties, the grantor's age and physical infirmities and the language of the deed, it is plain that the annual payment by grantee to the grantor was a condition of the deed; and this was the real consideration. For failure to pay the grantor had the right to sue for cancellation of the deed. 67 Ark. 265; 86 Ark. 251; 64 S. W. 426; 21 S. W. 283; 12 N. E. 698; 21 N. E. 897.

McCULLOCH, C. J. The plaintiff, H. J. Kampman, and his wife, Ulferdina Kampman, on August 8, 1907, executed to their son, the defendant, Henry J. Kampman, a deed conveying 40 acres of land situated in Arkansas County, and on July 30, 1909, he instituted this action in the chancery court of that county to cancel the deed, claiming that it expressed on its face a condition subsequent which the defendant had failed to perform. The condition was that the defendant, Henry J. Kampman, "is to pay to the said H. J. Kampman, and wife, Ulferdina Kampman, forty dollars a year as a dowry during their natural lifetime." Plaintiff's wife died before the institution of the suit. The defendant in his answer denied that the deed contained a condition subsequent, or that he had failed or refused to perform all the conditions stated in the deed. He alleged that his father had stated to him from time to time that he need not pay the stipulated amount unless he needed it, and that he had performed services for his father from time to time in value more than equal to the amount stipulated. On final hearing the chancellor entered a decree in favor of the plaintiff, cancelling the deed, and the defendant appealed.

The questions whether the language of the deed was sufficient to create a condition subsequent, and whether the condition expressed therein was void by reason of being repugnant to the granting clause of the deed, are argued by counsel pro and con with much earnestness, but, in the view we shall express on the questions of fact involved, it becomes unnecessary for us to pass upon those questions. We concede, for the purpose of disposing of the cause in this opinion, that the deed contained a condition subsequent, and that the condition expressed was not in conflict with the granting clause of the deed so as to render the condition void and unenforcible. It is not amiss, however, to say in this

connection, that such conditions are not favored in the law, and must be clearly expressed before they will be enforced. Judge RIDDICK, in delivering the opinion of the court in *Bain* v. *Parker*, 77 Ark. 168, said: "Conditions subsequent that defeat the estate conveyed by the deed are not favored in law. The words of the deed must clearly show a condition subsequent, or the courts will take it that none was intended; and when the terms of the grant will admit of any other reasonable interpretation, they will not be held to create an estate on condition." It is also well settled that courts of equity so abhor forfeitures that they will not enforce them, leaving the parties to such remedies as they may have at law. If the condition had been broken, as contended by plaintiff, his remedy at law was complete. *Little Rock Granite Co.* v. *Shall*, 59 Ark. 405. But, as the jurisdiction of the chancery court was not questioned below, nor was any motion made to transfer the case to a court of law, that question is deemed to have been waived.

The first question presented in the argument, however, is that the decree shows that evidence was heard which is not in the record. The decree recites that the case was heard by the chancellor upon the pleadings and "the depositions on behalf of the plaintiff and the defendant, and other evidence." The transcript contains only the depositions of the witnesses and the exhibits filed with the complaint, and this is certified by the clerk as all the records and proceedings on file in his office. The certificate of the chancellor, expressed in the recital of the decree, must, of course, control where there is any conflict with the certificate of the clerk. There is no conflict, however, between the two certificates in this instance, as the words "other evidence" are deemed to refer to the exhibits which are found in the record. *Beach* v. *Turpin*, 88 Ark. 604.

This question being out of the way, we are of the opinion that the evidence shows a waiver on the part of the plaintiff of strict performance of the condition expressed in the deed. According to the terms of the deed, the installments were due annually at the end of each year, beginning from the date of the deed, making the first payment due August 8, 1908. There is a sharp conflict between the statements of the two parties, and there is nothing to corroborate either, but, as the chancellor

accepted the plaintiff's statement of the facts, we must, under well settled rules, do the same, as it cannot be said that that conclusion is against the preponderance of the evidence. We therefore reach our conclusion upon the version of the transaction given by the plaintiff himself. According to that version, the plaintiff and his son, the defendant, lived near each other from the time the deed was executed until the first demand made for payment of the stipulated amount, which was on June 21, 1909. No request was made for payment of the amount until that day, though father and son had, up to that time, been living in the usual degree of intimacy. They frequently exchanged work with each other, and, as the father states, treated the work of one as offsetting that of the other. They kept no accounts against each other, and nothing was said between them about the payment of the so-called "dowry." The plaintiff relates the conversation between himself and his son on the occasion that a demand was made for payment, as follows:

"Q. State when and where the demand was made. A. A demand was made on the 21st day of June, 1909, in the blacksmith shop of Simpson & Kampman, Gillett, Arkansas County, Arkansas. Q. Did he pay you this dowry or any part of same when you made this demand? A. No. He told me, if I made him pay that dowry, he would feel very hard toward me; and if in the future he done anything for me, I would have to pay him the cash; and if I done anything for him, he would pay me the cash. Q. What did you reply to that statement he made? A. I left the shop, feeling dumbfounded, with only such feelings as a father could have over a son giving me that kind of treatment. Q. State whether or not before you left the shop you gave him any understanding whether you would expect the payment of the amount due or not? A. That had already been given in the demand that I made in a formal way for my dowry."

Nothing further transpired between them until the plaintiff commenced this suit, something more than a month later than this, and soon after the institution of the suit the defendant made a formal tender of the amount of two of the stipulated payments and during the progress of the cause tendered into court a sum sufficient to cover three payments.

Now, as we have already said, conditions which operate as

a forfeiture of rights under a deed are not favored in the law, and slight circumstances will often be seized upon to prevent such forfeitures. Any conduct on the part of the party having the right to declare a forfeiture which is calculated to induce the other party to believe that the forfeiture is not to be insisted on will be treated as a waiver. As said by Judge RIDDICK in *Bain* v. *Parker, supra,* "a condition may be waived by acts as well as by express release." See also *Salyers* v. *Smith,* 67 Ark. 526, where it is said that until the grantee "had positively refused to render him the support promised, or had done some act tantamount to that, conceding that such was the consideration for the deed, there could be no cause of action to appellee" to declare a forfeiture.

Now, it was the duty of the plaintiff, if he expected to insist on a forfeiture on account of failure to strictly perform the conditions, to make demand for the payment or to give notice to the defendant in some way that strict performance would be insisted upon. This is especially true when we consider the intimate relations between the two parties and their daily association together. The undisputed evidence in this case shows that, as soon as an unequivocal demand for payment was made, which was by the commencement of this suit, defendant responded with a tender of the unpaid amount. The plaintiff's own statement shows that at the time he made the only demand which was ever made he acquiesced in defendant's reply—not a refusal to pay, but the statement of what was claimed to be a reason why he should not pay. He states that when his son said, "If you make me pay that dowry, I will feel very hard toward you," he left the shop feeling dumbfounded, without insisting further on his demands. Conceding that he was right in his version of the controversy, and that the son should have paid the amount without complaint, yet, if he expected to insist upon a forfeiture, he should have so indicated distinctly on that occasion. Not having done so, we think that he cannot, without another demand, claim a forfeiture of the deed. For this reason, we are of the opinion that the chancellor erred, and his decree is reversed, and the cause remanded with directions to enter a decree dismissing the complaint for want of equity.

McDONNELL v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered March 20, 1911.

NEW TRIAL—WEIGHT OF EVIDENCE—DISCRETION OF TRIAL COURT.—Where there is a substantial conflict in the evidence upon which a verdict was rendered, the Supreme Court will not review the action of the trial court in granting a new trial because the verdict was against the weight of evidence.

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

STATEMENT BY THE COURT.

Appellants sued appellee for damages in the killing of a mule belonging to appellant Bene, and on which appellant McDonnell held a mortgage. The testimony on behalf of appellants tended to prove that the mule of appellant Bene was found lying close to appellant's railroad, badly injured, and showing evidences of having been struck by appellant's train. There were mule tracks in and about the railroad bed as if a mule had been grazing there. There were tracks that indicated that the mule had come upon the track and had run a distance of 150 yards on the railroad and then that it had been thrown to one side. There was blood and hair on the ties between the rails of a switch near the main track. The mule was lying on the left side of the track going south to the east of the road bed. The railroad was north and south at that point. The tracks indicated that the mule had been running at a good speed, before it stopped at the point where it appeared that the mule was thrown from the track. The mule was a white or gray mule and was shown to have a value of $200. The evidence on behalf of appellee tended to prove that the train that killed appellant's mule was running at the time about 30 miles an hour, the speed limit for the through freight. The engineer testified: Couldn't do anything but hit him. That the mule came running from this tool house, right on the track. That he didn't have any show to do anything. That he only had 45 or 50 feet when he first saw him coming on the track. That he did not see the mule before he reached the seed house. That he couldn't have seen him if he had been on the south side of the house. That the witness was going south, and that the mule was on the south side of the tool house. That he could not, at the

rate of speed he was running, do anything because the mule jumped from that tool house right on the track, and that he could not have stopped the train. That he was keeping a lookout. That his fireman was putting in a fire at that time. That he holloed to him and told him that he had struck a mule. That he is required under the rules to make a report to the superior officer about hitting stock. That he did make a report at Pine Bluff on his arrival there of that case. That the injury occurred about 5 o'clock on the 30th of August. That it was daylight; that he could have seen anything down the track. That his headlight was kept burning until sunup. That his headlight was in good condition, an electric headlight. The track along there was a straight track. He was looking down the track all the while for the distance of a mile. He could have seen the mule that distance. The tool house was fourteen or fifteen feet from the track, and was a shed 12 x 14 feet. There was a verdict in favor of appellants for $213.00. A motion for new trial was sustained by the court on the ground that the verdict was not supported by the evidence. The appellants appealed, stipulating for judgment absolute in favor of appellee if the Supreme Court should affirm the judgment of the lower court in setting aside the verdict.

Crawford & Hooker, for appellant.

It is reversible error for the trial court to take from the jury consideration of a case where there is any evidence to support an issue. 63 Ark. 94; 77 Ark. 556; 70 Ark. 74; 71 Ark. 305; *Id.* 446; 73 Ark. 561; 91 Ark. 337. Only in cases where the evidence is uncontradicted, or is of itself insufficient to sustain a verdict for the plaintiff, will the trial court be justified in directing a verdict for the defendant. 76 Ark. 520. The theory upon which courts set aside verdicts of juries is want of evidence to support them, and not the lack of preponderance. In this case the only issue was the negligence of the appellee, the burden being upon it to remove the presumption of negligence cast upon it by statute; and the action of the court in setting aside the verdict was an invasion of the right of the jury to weigh the evidence and to accept or reject the testimony of witnesses on a disputed point. Kirby's Dig. § 6607; 42 Ark. 122; 39 Ark. 413; 36 Ark. 87; 54 Ark. 214; 57 Ark. 137; 80 Ark. 415.

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

The trial court, having the same opportunity as the jury to observe what passes at the trial and to form a just estimate of the credibility of the witnesses, is not only authorized, but it is its duty, to set aside the verdict when, in its judgment, the verdict is contrary to the weight of the evidence, and substantial justice has not been done between the parties. 29 Cyc. 831; 2 Am. & Eng. Ann. Cas. 762, note; 17 Kan. 172; 58 Mo. 421; 39 Cal. 565; 49 Kan. 1, 30 Pac. 109; 81 Ia. 99, 46 N. W. 862; 37 Wash. 537; 47 Ark. 567; 41 S. W. 215; 34 Ark. 632, 637; Kirby's Dig., § 6215; 65 Ark. 278, 285. The testimony of the engineer, the only eye witness to the accident, being consistent, reasonable and uncontradicted, overcame the *prima facie* case of negligence made by proof of the killing of the animal, and could not arbitrarily be disregarded. 78 Ark. 234; 67 Ark. 514; 89 Ark. 120; 80 Ark. 396.

WOOD, J., (after sating the facts). It is reversible error for the trial court to direct a verdict for one party where there is any substantial evidence to warrant a verdict for the other party. The trial court can not take from the jury its prerogative to determine disputed questions of fact. *St. Louis, I. M. & S. Ry. Co.* v. *Petty,* 63 Ark. 94; *Wallis* v. *St. Louis, I. M. & S. Ry. Co.,* 77 Ark. 556; *State* v. *Caldwell,* 70 Ark. 74; *Hutchinson* v. *Gorman,* 71 Ark. 305; *LaFayette* v. *Merchants' Bank,* 73 Ark. 561; *Neal* v. *St. Louis, I. M. & S. Ry. Co.,* 71 Ark. 446; *Crawford* v. *Sawyer & Austin Lbr. Co.,* 91 Ark. 337.

But that is a different question from the one under consideration. It is not invading the province of the jury for the trial judge to set aside its verdict where there is a conflict in the evidence. On the contrary, it is the duty of the trial court to set aside a verdict that it believes to be against the clear preponderance of the evidence. But it should not, and the presumption is that it will not, set aside a verdict unless it is against the preponderance of evidence. This court will not reverse the ruling of the lower court in setting aside a verdict where there is substantial conflict in the evidence upon which the verdict was rendered, but will leave the trial court to determine the question of preponderance. *Taylor* v. *Grant Lumber Co.,* 94 Ark. 566; *Blackwood* v. *Eads, ante* p. 304.

There was a conflict in the evidence in the present case, and the above cases rule this. The judgment of the circuit court setting aside the verdict is affirmed, and judgment absolute is rendered here in favor of appellee dismissing the cause and for costs.

LEE WILSON & COMPANY v. DRIVER.

Opinion delivered March 20, 1911.

1. TAXATION—TAX SALE—COUNTY HAVING TWO DISTRICTS.—If the special act of April 1, 1901, dividing Mississippi County into two judicial districts, contemplated the sale of delinquent lands in the Chickasawba District, at Osceola, the law in this respect was changed by the act of May 6, 1905, providing "that hereafter the delinquent lands in counties having two judicial districts shall be advertised and sold in the district in which the lands lie." (Page 338.)
2. SAME—TAX SALE—COUNTY HAVING TWO DISTRICTS.—The requirement of the act of May 6, 1905, that delinquent lands in counties having two judicial districts shall be sold in the district where the land is situated, is mandatory. (Page 339.)
3. SAME—TAX BOOKS—COUNTY HAVING TWO DISTRICTS.—The requirement of Kirby's Digest, § 7019, that the county clerks of the counties in this State having two judicial districts shall prepare a set of tax books for each district, is mandatory. (Page 339.)

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

J. T. Coston, for appellant.

Since there was no publication in the district in which the land was situated, and the sale was not made in that district, and no tax books were kept therein, the sale was void. Acts 1905, p. 755; 73 Ark. 221; Kirby's Dig. § 7019; 39 Ark. 201.

W. J. Driver, for appellee.

The statute requiring separate tax books for each district in counties having two judicial districts and separate records of lands sold at the annual tax sales is directory only. Kirby's Dig. § 7019; 91 Ark. 117. The statute dividing Mississippi County into two districts was enacted subsequent to the enactment of § 7019, and makes no provisions for keeping separate tax books, etc., but on the contrary provides that the county seat shall re-

main at Osceola. The act of 1905 is a general act, and cannot repeal any provisions of the special act of 1901. 50 Ark. 132; 63 Ark. 397.

WOOD, J. Appellant, being the original owner of a tract of land in the Chickasawba District of Mississippi County, seeks to cancel a tax title of appellee acquired at a sale in 1905 for the taxes of 1904, and quieting his own title. The lands in the Chickasawba District were all embraced in one tax book kept at Osceola, the county seat, and in the Osceola District of the county. No separate tax book was kept in the Chickasawba District of the taxes on the lands in that district for the year 1904. No separate delinquent list for the taxes of 1904 on lands in the Chickasawba District was filed in that district. The notice of sale of the land in the Chickasawba District for the taxes of 1904 was published in a paper printed exclusively in the Osceola District, but having a *bona fide* circulation in the Chickasawba District.

A book containing a list of the lands delinquent for the taxes of 1904 in Mississippi County, including the land in suit, was on file in the office of the county clerk at Osceola. The list contained in this book was not sworn to by the collector, is not signed by him, and bears no date showing when it was made and filed with the clerk. This list was in the handwriting of W. A. Fowler, a deputy sheriff, and was the only list and notice of sale of the land delinquent for the taxes of 1904, in Mississippi County, Arkansas.

Was the sale void? The county of Mississippi was divided into two judicial districts—the Chickasawba and the Osceola—in 1901. Acts of 1901, p. 137. The land was sold for taxes June 12, 1905. On May 6, 1905, the Legislature passed an act providing:

"Sec. 1. That hereafter the delinquent lands in counties having two judicial districts shall be advertised and sold in the district in which the lands lie."

"Sec. 3. This act shall be in force from and after its passage, and all laws and parts of laws in conflict herewith be and the same are hereby repealed."

There is an invincible repugnancy between this statute and the provisions of any prior special or general law that permitted

the sale of delinquent lands in counties having two judicial districts to be made in any other than the district in which the lands were situated. The special act of April 1, 1901, dividing Mississippi County into two judicial districts, is silent as to where delinquent tax sales should be made. It does provide, however, "that as to all matters not within the provisions of this act the county of Mississippi shall be entire and undivided." There is no provision in the special act of 1901 changing the county seat.

In undivided counties the sale of delinquent lands is made at the court house, and the court house is at the county seat. Sections 7087 and 1009, Kirby's Dig. So, if it can be said that the special act of April 1, 1901, provides for the sale of delinquent lands at Osceola, the county seat of Mississippi County, regardless of the district in which such lands were situated, still the act of 1905, *supra,* under the doctrine of irreconcilable conflict between the two, repeals the act of April 1, 1901. The act of May 6, 1905, is applicable to the sale under consideration.

It is alleged in the complaint, and conceded in the answer, that the sale was not made in the Chickasawba District, where the land is situated. The sale therefore was not made as the law requires. Section 1, act of 1905, *supra.* This provision was intended for the benefit of taxpayers and owners, and is mandatory. *Hare* v. *Carnall,* 39 Ark. 196, 201. Furthermore, "the county clerks of the counties in this State having two judicial districts shall prepare in the manner now prescribed by law a set of tax books for each district; and the law governing the preparation, use and care of tax books shall be the same as the law now is regulating tax books." Kirby's Dig., § 7019. This is also a mandatory provision that was not complied with. For a failure to observe the above requirements of the law, the tax sale under which appellee claims was void, and the lower court erred in not so holding.

It is unnecessary to consider other alleged errors. The judgment is reversed with directions to enter a decree cancelling the tax title of appellee, and quieting the title of appellant.

PAGE v. METROPOLITAN LIFE INSURANCE COMPANY.

Opinion delivered March 20, 1911.

1. LIFE INSURANCE—VALIDITY OF ASSIGNMENT OF POLICY.—Any person has a right to procure insurance on his own life and afterwards to assign the policy to another, provided, it be not done by way of cover for a wager policy, even though the assignee has no insurable interest in the life of the insured. (Page 342.)
2. SAME—WHEN ASSIGNMENT OF POLICY NOT A WAGER.—The assignment of a life insurance policy to one not having an insurable interest in the life of the insured is not objectionable as being by way of cover for a wager policy unless at the time the policy was taken out the insured intended to make such assignment. (Page 343.)
3. SAME—POLICY PAYABLE TO LEGAL REPRESENTATIVE—EFFECT.—Under a policy of life insurance whereby it was stipulated that it should be payable to the insured's "legal representatives" if he died before a period named, the term "legal representatives" should be understood in its legal and technical sense, in the absence of anything in the policy or application, or in the constitution and by-laws of the association, giving a different meaning. (Page 343.)
4. SAME—ASSIGNMENT OF POLICY—EFFECT.—A policy of life insurance payable to the insured or his assigns at a future day named, and if he should die before that day to his legal representatives, is assignable, and the assignment passes to the assignee the right to receive the sum insured in case of the death of the insured before the day named. (Page 345.)
5. DEFINITION—LEGAL REPRESENTATIVES.—The term "legal representatives" is broad enough to cover all persons who, with respect to one's property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law, and includes assignees as well as executors and administrators. (Page 345.)

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

STATEMENT BY THE COURT.

This is an action by Thomas Page, William Page and Charles Page against the Metropolitan Life Insurance Company to recover on a policy of life insurance. The policy was issued on June 30, 1905, and was payable to Ben Page, the insured, providing he was living at the end of 15 years, or, if he died before that time, it was made payable to his "legal representatives." The policy was for $2,000, and on June 29, 1906, Ben Page, by a

written assignment, transferred the policy to Pettus & Buford. The insured died at his home in St. Francis County, Arkansas, on July 31, 1909. Upon proof of death being made, the insurance company paid the full amount of the policy to Pettus & Buford.

Plaintiffs are the surviving children and sole heirs at law of Ben Page, deceased. They demanded payment of the amount of the policy, and, upon the refusal of the company to pay them, brought this suit as above stated. The policy of insurance and the assignment to Pettus & Buford were introduced in evidence.

The court, after the evidence was introduced, withdrew the case from the consideration of the jury, and gave a peremptory instruction for the defendant.

The plaintiffs have duly prosecuted an appeal to this court.

J. M. Prewett, for appellants.

1. Language designating a beneficiary in a life insurance policy must be construed as testamentary in character and must receive the same interpretation as if used in a will. 79 Fed. 461; 44 L. R. A. 689. The words "legal representatives" in a life insurance policy are construed to mean "heirs" or "next of kin," or "descendants," and not executors or administrators. 61 N. W. 331; 71 Ill. 91; 26 N. E. 464; 63 S. W. 863-6; 32 S. W. 458-9.

2. The word "assigns," usually found in policies which are assignable by the insured, is not found in this policy. The only interest the insured had in the policy was contingent upon his living fifteen years, and, as written, he had no interest in it that he could assign. 71 Ark. 60; 26 N. E. 464. A policy cannot be assigned without the consent of the beneficiary, nor the beneficiary changed by the insured unless the policy by its terms, or the rules of the company incorporated therein, authorize it. 71 Ark. 295; 52 Ark. 201; 68 Ark. 391.

3. A contract of insurance not supported by an insurable interest in the life of the insured, is void; and an assignment of a policy to one not having an insurable interest is also void. It is a speculative or wager contract, and against public policy. 15 Wall. 643; 104 U. S. 775; 92 Mich. 584; 76 Tex. 400; 9 Fed. 249; 46 Mich. 473; 104 Ga. 446; 51 S. W. 312.

J. H. Harrod and *S. H. Mann,* for appellee.

1. The term "legal representatives" means, *prima facie,* executors and administrators, and the only effect of the decisions cited by appellant is that under some circumstances if it can be clearly shown by extrinsic testimony that the party using the term intended that it should be given a meaning different from the *prima facie* meaning the courts will carry out that intention. The acts of the parties under the contract and the construction they have given to it will be looked to, where its terms are ambiguous or uncertain as to intention. 52 Ark. 95; 46 Ark. 122.

There is no conflict of authorities in the holding that the term means executors, administrators or assigns, where the testimony or statute does not expressly require a different interpretation. 86 Fed. 255; 117 U. S. 591 (29 Law. Ed. 997); 92 U. S. 728, 23 Law. Ed. 767; 17 Law. Ed. 854; 34 App. D. C. 575; *Id.* 583; Kirby's Dig. § 7808; 20 Ct. Cl. U. S. 279.

2. The assignment was valid. 77 Ark. 60.

HART, J., (after stating the facts). Plaintiffs offered to prove that Pettus & Buford had no insurable interest in the life of Ben Page, now deceased, and that they paid nothing to the insured for the transfer to them of the policy sued on. The court refused to permit them to make this proof, and they now assign as error the ruling of the court in this regard. They contend that the insured had no right to assign the policy. There is an irreconcilable conflict of authority upon the question of whether or not a person has the right to assign a policy of life insurance taken out by himself to one who has no insurable interest in his life, but we think the weight of authority and the better reasoning is that any person has a right to procure insurance on his own life and afterwards to assign the policy to another, provided it be not done by way of cover for a wager policy, even though the assignee has no insurable interest in the life of the insured. This is substantially the language used in a note to the case of *Rylander* v. *Allen,* 125 Ga. 206, reported in 5 Am. & Eng. Ann. Cas. 355. See also same case and note in 5 L. R. A. (N. S.) 128. There the authorities on both sides of the question are collected, and an examination of the cases cited in both notes will show that a decided majority of the courts of last resort of the various States have adopted the rule above announced. The objections

to such transfer and the answers thereto are tersely and clearly stated in the case of *Clark* v. *Allen,* 11 R. I. 439, quoted in the case of *Rylander* v. *Allen, supra,* as follows: "A life policy is a chose in action, a species of property, which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if permitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful, but it does not follow that such an assignment is not to be permitted at all because if permitted it may be abused. Let the abuse, not the *bona fide* use, be condemned and defeated. * * * Again, the assignment is said to be a gambling transaction, a mere bet or wager upon the chance of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from the holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is when a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account. But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation."

The insured had the same right to give as he had to transfer the policy for a valuable consideration. *Matlock* v. *Bledsoe,* 77 Ark. 60. This is the trend of modern decision, and it is to be noted that the courts of Indiana and Massachusetts have changed from the minority to the majority rule.

The assignment of the policy in the case at bar was made one year after the policy was issued, and the pleadings in the case do not raise the question that the assignment was made by way of cover for a wager policy. That is to say, it is not alleged that, at the time he took out the insurance, Ben Page intended to assign or transfer it to Pettus & Buford.

The policy of insurance sued on is what is known as an endowment policy, that is, it was payable to the insured himself

if he was living at the end of 15 years and to his "legal representatives" if he died before that time. It is conceded that he died before the end of 15 years, and it is contended by plaintiffs that they acquired a vested interest in the policy by the use of the phrase "legal representatives," and that the insured had no right to assign the policy to Pettus & Buford. They contend that the words "legal representatives" as used in the policy mean heirs. The words "legal representatives" have a well recognized meaning in the law. They are equivalent to executor or administrator, and are technical words. When used in any legal instrument, and there is nothing in the context or otherwise to explain their meaning, they should be understood in their legal and technical sense. *Johnson* v. *Knights of Honor,* 53 Ark. 255; 25 Cyc. 176.

It sometimes happens that the contract of insurance or the application which is made a part of it shows that the parties did not intend to give the words "legal representatives" their primary or usual meaning, and in such cases the courts have construed them to be used in a secondary sense to effectuate the intention of the parties. Sometimes the statute authorizing insurance companies indicates the purpose and objects of the same, and places a limit upon their powers and privileges in regard to designating beneficiaries. In other cases, the constitution and bylaws of the association designate who may be beneficiaries and place a limit to this extent upon the powers of the association, or they forbid a change in the beneficiaries after the issuance of the policy. In all such cases if, by giving the words "legal representatives" their legal signification, it would result that the insurance company had designated a beneficiary which was beyond its power to do, such construction is to be avoided where there is a secondary or broader sense which would make the contract conform to the law or the constitution and rules of the association. In short, the law does not presume that parties to a contract intend by it to accomplish an illegal object, but it rather presumes that they intended to accomplish a legal purpose. In the application of this rule to proper cases, there are a number of decisions in regard to insurance policies where the words "legal representatives," "personal representatives," etc., have been held to mean heirs at law. Counsel for plaintiffs have cited a number

of them in their brief, and others may be found; but we do not deem it necessary to cite them or further comment upon them. They all recognize the rule above announced, and apply it according to the particular facts of each case in order to effectuate the intention of the parties. There is no context in the contract of insurance nor any statute or provision in the charter of the insurance company, so far as the record discloses, that indicate that the words "legal representatives" were used in their broader sense to mean heirs at law.

As above stated, there is no allegation that the assignment was made to cover a speculative risk. The contention is that the policy was not assignable. "A policy of life insurance payable to the assured or his assigns at a future day named, or if he should die before that day to his legal representatives within 60 days after notice and proof of his death, is assignable if the assignment is not made to cover a speculative risk; and an assignment of it passes to the assignee the right to receive the sum insured in case of the death of the assured before the day named. *New York Mutual Life Ins. Co.* v. *Armstrong,* 117 U. S. 591. The court said: "The provision for payment in such case to his legal representatives was intended to meet the contingency of his dying without having disposed of his interest, and not to limit his power over the contract during his life and pass the insurance to those who should represent him after death. The term 'legal representatives' is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place, and represent his interests, whether transferred to them by his act or by operation of law. It may, in this case, include assigns as well as executors and administrators."

It follows that the judgment must be affirmed.

LONOKE COUNTY *v.* CARLLEE.

Opinion delivered March 20, 1911.

CERTIORARI—IRREGULARITY IN ESTABLISHING ROAD.—A judgment of the county court establishing a public road, under Kirby's Digest, ch. 58, cannot be set aside on certiorari because the owners of the land taken

for the road had no notice of the meeting of the viewers appointed by the court to lay out the road, and because the viewers met on a day prior to the day designated by the court for them to meet.

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

Thomas C. Trimble, Joe T. Robinson and *T. C. Trimble, Jr.,* for appellant.

All things necessary to confer jurisdiction upon the county court were done in accordance with the statute. Kirby's Dig. § § 2992-3-4-5, 7226, 7229. The fact that the viewers met on a different day from that named in the appointment did not divest the court of jurisdiction, nor render its judgment void. If appellees were aggrieved, their remedy was by appeal and not by certiorari. 61 Ark. 295; 43 Ark. 33; 44 Ark. 5, 13 and cases cited; 52 Ark. 213; 47 Ark. 441.

George M. Chapline, for appellees.

The remedy was by certiorari since appellees were never parties to the proceedings and had no notice of the judgment of the county court until after the right to be made parties to the proceedings and after their right of appeal was lost. 69 Ark. 587.

WOOD, J. Can the judgment of the county court establishing a public road, under chapter 58, Kirby's Digest, be set aside by certiorari, because the owners of the land taken for the public highway did not have notice of the meeting of the viewers appointed by the court to lay out the road, and because the viewers met on a day prior to the day designated by the court for them to meet? The question is answered through Chief Justice COCKRILL in *Howard* v. *State,* 47 Ark. 431, 441: "The landowner can not be said to be deprived of his rights to be heard by the want of notice of the viewers' meeting. The assessment of damages by the viewers is not of itself binding upon him. It requires the judgment of the county court to give it any force or validity. It is made the duty of the court to see that the award of damages is just to the public and the individual, and the landowner, who is a party by virtue of the publication, is thus afforded his day in court, regardless of the report of the viewers." In the instant case notice by publication was duly given as required by the statute, section 2995, Kirby's Digest. This gave the county court

jurisdiction. The errors of which appellees complain were mere irregularities in the exercise of jurisdiction which could and should have been corrected on appeal. *Pettigrew* v. *Washington County,* 43 Ark. 33; Ex parte *Pearce,* 44 Ark. 513; *Burgett* v. *Apperson,* 52 Ark. 213; *Aven* v. *Wilson,* 61 Ark. 287. Such errors were so corrected in *Beck* v. *Biggers,* 66 Ark. 293, and cases cited by appellees. In *Grinstead* v. *Wilson,* 69 Ark. 590, there was no notice by publication or otherwise. Hence the county court had no jurisdiction. The other case of *Roberts* v. *Williams,* 15 Ark. 43, cited and relied on by appellees, is referred to in *Howard* v. *State, supra.*

The judgment is therefore reversed with directions to enter a judgment reinstating the judgment of the county court.

WESTERN UNION TELEGRAPH COMPANY v. MCMULLIN.

Opinion delivered March 20, 1911.

1. TELEGRAPH COMPANY—DUTY IN DELIVERY OF A MESSAGE.—It is the duty of a telegraph company to exercise ordinary diligence to deliver a message within its delivery limits. (Page 350.)
2. SAME—DELAY IN DELIVERY OF MESSAGE—WHEN QUESTION FOR JURY.—In an action against a telegraph company for negligence in failing to deliver a message promptly, where the operator at place of delivery testified that he telephoned to all the hotels and boarding houses in the town which were in the telephone directory, and failed to locate the addressee, who was stopping at a boarding house, and there was evidence of a number of keepers of hotels and boarding houses that the operator did not telephone them about the message, the question whether the telegraph company was negligent was one for the jury. (Page 350.)
3. SAME—MENTAL ANGUISH—ELEMENT OF DAMAGE.—In an action for negligent delay in delivering a telegram it was not error to submit to the jury whether the addressee was entitled to damages for mental anguish because she was thereby deprived of being with her daughter to comfort her on account of the loss of her baby; the company having notice of the relationship of the addressee to the deceased child. (Page 350.)
4. SAME—DEGREE OF CARE—INSTRUCTION.—Where the sender of a telegram asked for an immediate delivery of the message and offered to pay for its special delivery, but the operator told him that the

message would be sent without extra pay, an instruction that if "the defendant negligently and carelessly failed and refused to make an immediate and special delivery of said message within its delivery limits when it could reasonably have done so, and when it had undertaken and was paid to do so, then you will find for the plaintiff," was erroneous as imposing too high a degree of care upon the telegraph company. (Page 351.)

Appeal from Cleburne Circuit Court; *Brice B. Hudgins*, Judge; reversed.

George B. Fearons, Mitchell & Thompson and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

1. The burden of proof was on appellee to show that she could have been reached by proper effort. 91 N. E. 867; 84 N. Y. 54; 130 S. W. 616; 130 S. W. 212; 7 So. 419; 41 So. 405; 65 App. Div. 149.

It was appellant's primary duty to deliver the telegram to James Clark, in whose care it was addressed. 13 S. W. 985.

2. The court's instruction as to the degree of care required of appellant (instruction 2) was erroneous. There is no testimony to show that appellant made any agreement in regard to this message other than that imposed by law to exercise reasonable care and diligence. The fact that the sender demanded some diligence above that required by law would not of itself enlarge the duty of the telegraph company. 27 S. W. 892. See also Kirby's Dig., § 7943.

3. Instructions which authorized the jury to allow damages for mental anguish to the mother because she was not with her daughter to comfort her 24 hours earlier than she actually reached her were erroneous, as this is not such mental anguish as is a ground of recovery within the legal meaning of that term. 82 Ark. 128; 83 Ark. 476; 90 Ark. 268; 92 Ark. 59; 9 S. W. 958; 73 S. W. 1043; 58 S. W. 204; 41 S. W. 469; 99 S. W. 704; 100 S. W. 974; 85 S. W. 1171; 32 N. E. 871; 10 La. Ann. 33.

HART, J. Appellant prosecutes this appeal to reverse a judgment rendered against it in favor of appellee for damages for the alleged negligence of appellant in delivering a death message. The message is as follows:

"To Mollie McMullin,

"Care James Clark, Heber.

"Horse ran away, killed Roy Russell's baby; injured his wife.

"Bathie Pulliam."

And was delivered to appellant at Moro, Ark., for transmission at 5:30 o'clock P. M. on August 27, 1910.

James Clark and Mollie McMullin, the appellee, were brother and sister, and had been in Heber for about one week when the message was sent. They were there for the benefit of their health, and were staying at separate boarding houses several blocks distant from each other. Appellee lived near Moro, and was the mother of the wife of Roy Russell, and the grandmother of his baby. Bathie Pulliam, who sent the message, was the son of appellee. He informed the operator at Moro of the relationship between all the parties. He said that he got to the depot at about 5:30 o'clock P. M., and asked for a special delivery, and the operator said the message would be sent without extra pay; that the message would only cost 25 cents, and would be delivered without extra pay. The operator sent the message to Heber while he was in the office, and told him it had been received there. The operator at Heber said that it was only 45 minutes from the time he received the message until the train arrived at Heber, the arriving time being 6:30 P. M. The train left at 7:05 P. M. That is to say, the train going towards Moro left an hour and twenty minutes after the message reached Heber. He further testified that as soon as he received the message he made effort to deliver the message by telephoning to the various hotels and boarding houses to ascertain if either James Clark or appellee was there; and that he was unable to locate either of them. It is conceded that both James Clark and appellee were boarding at houses within the free delivery limits of appellee.

The evidence on the part of appellee shows that she did not receive the message until between 12 and 1 o'clock on the next day. She left on the next train for home, but arrived there too late to attend the funeral of her grandchild. She testified that she loved the baby as much as if it had been her own child, and she suffered great anguish of mind because she did not reach home in time to attend the burial of the child, and to have comforted her daughter.

It was the duty of appellee to exercise ordinary diligence to deliver the message within its delivery limits in the town of Heber. *Arkansas & La. Ry. Co.* v. *Stroude,* 82 Ark. 117. This counsel for appellants admit, but insist that the undisputed evidence shows that appellant discharged its duty in this respect. We do not think so. While the operator at Heber states that he telephoned to all the hotels and boarding houses at Heber which were in the telephone directory, he does not know whether he was answered by the proprietors or merely by some one of the guests. Moreover, appellee introduced quite a number of hotel and boarding house keepers, who testified that the operator did not telephone them about the matter. In view of all the facts and circumstances adduced in evidence, we are of the opinion that the question of the negligence of appellant in delivering the message was one for the jury. *Western Union Tel. Co.* v. *Sockwell,* 91 Ark. 475.

2. Counsel for appellant contend that the court erred in submitting to the jury that appellant was entitled to damages for mental anguish because she was not with her daughter to comfort her 24 hours earlier than she reached her. This element of damage was submitted to the jury with the element of mental anguish for failure to attend the funeral of the baby, and counsel contend that it was an emotion too vague and uncertain to be within the legal meaning of mental anguish. In the case of *Western Union Tel. Co.* v. *Raines,* 78 Ark. 545, Mr. Justice BATTLE, speaking for the court, said: "The damages recoverable under the statute are such as the jury may conclude resulted from the negligence of the telegraph company. Such damages are allowed as a compensation for the mental anguish or suffering; and the liability of the company for the same depends upon its having had notice, before or at the time of receiving the telegram, of the special circumstances on account of which mental suffering was caused by negligence in transmitting or delivering the message. This notice may be given by or through the telegram itself or otherwise." Our statute, which allows a recovery in telegraph cases for mental suffering, does not define its meaning or provide a rule of evidence for its ascertainment. (Kirby's Digest, § 7947.)

It is impossible to define everything that should be regarded as mental anguish or suffering. Of course, there can be no re-

covery for imaginary situations, or conditions or anxiety caused thereby; but a recovery will be allowed for the mental suffering which the failure to deliver the telegram may reasonably be expected to produce upon an ordinary human being, and, under all the facts and circumstances of this case, the court properly submitted to the jury the question of what mental anguish, if any, resulted to the appellee from the alleged negligence of appellant in not delivering the message.

3. It is next contended by counsel for appellant that the court erred in giving the following instruction:

"2. You are further instructed that if you believe from the evidence that plaintiff's son, Bathia Pulliam, at the time he delivered said telegram at Moro, Arkansas, for transmission and delivery, informed defendant of the importance of the message and the near blood relationship existing between plaintiff and the deceased baby and its injured mother, Mamie Russell; and if you further believe that the said Bathia Pulliam then and there did ask and demand an immediate and special delivery of said message to the said plaintiff or to James Clark in whose care it was sent, and did then and there offer and pay to the defendant the sum by it demanded for the transmission and immediate and special delivery of said message from its office at Heber to sendees, and if you further believe that the defendant negligently and carelessly failed and refused to make an immediate and special delivery of said message within its delivery limits when it could reasonably have done so, and when it had undertaken and was paid to do so, then you will find for the plaintiff and assess her damages at whatever sum you may find her entitled to under the proof."

We think it was error to give the instruction. In the first place, there was no evidence upon which to base it. It is true that Bathie Pulliam testified that he asked for a special delivery, but the agent told him it would be delivered without extra pay. The message was then delivered and received for transmission in the ordinary course of business, and without any contract for delivery at Heber other than the duty required by law. As soon as appellant received the message at Heber, it was his duty to exercise ordinary diligence to deliver it to the sendee within its delivery limits, and this is in accord with the other instructions

given. The instruction complained of imposed a stricter duty than this upon appellant. It in effect told the jury that the request of Bathie Pulliam for a special delivery created a special or greater duty in regard to the delivery of the message than would have been imposed upon appellant without such request. The jury might have found for appellee under each of these theories, and we can not tell upon which one it based the verdict. For this reason the instruction complained of was prejudicial. *St. Louis, I. M. & S. Ry. Co.* v. *Denty*, 63 Ark. 177.

For the error in giving instruction No. 2 the judgment will be reversed, and the cause remanded for a new trial.

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

Opinion delivered March 13, 1911.

1. WITNESSES—TESTIMONY OF PHYSICIAN—PRIVILEGE.—Under Kirby's Digest, § 3098, providing that no person authorized to practice physic or surgery 'shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician," the fact that a patient waived the privilege as to a physician who once treated him will not authorize the opposing side to call another physician who treated the patient at another time for the same disease. (Page 356.)
2. SAME—PRIVILEGED COMMUNICATION—IMPEACHMENT OF PARTY.—Where plaintiff testified that physicians who treated her in 1907 had not treated her for a certain disease, it was not competent over her objections to contradict her testimony by introducing the physicians and proving that they treated for such disease, as the patient alone is authorized to waive the objection to such testimony. (Page 358.)
3. EVIDENCE—EXPERT TESTIMONY—FORM OF HYPOTHETICAL QUESTION.—A hypothetical question addressed to an expert witness need not embrace all the facts which the testimony tends to prove. *Ince* v. *State*, 77 Ark. 426, followed. (Page 359.)
4. SAME—FORM OF HYPOTHETICAL QUESTION.—The form of a hypothetical question is within the discretion of the trial court, who should see that the facts upon which they are based are fairly stated. (Page 360.)
5. APPEAL AND ERROR—HARMLESS ERROR.—The court's refusal to permit the court stenographer to testify from his notes what the testimony of the plaintiff was upon a former trial of the case was not prejudicial where there was no material difference between the testimony

of plaintiff given upon the second trial and the transcript of the stenographic notes of her testimony upon the former trial. (Page 360.)

6. DEPOSITIONS—TAKING UPON INTERROGATORIES.—Under Kirby's Digest, § 3176, providing that "a party to whom more than three days' notice to take a deposition out of the State is given may, by notice to the adverse party or his attorney, served in one day after the service of the first notice, require the deposition to be taken upon interrogatories," the method of taking the deposition upon interrogatories is governed by section 3178 and the following sections of Kirby's Digest. (Page 361.)

7. DAMAGES—PERSONAL INJURIES—PREVIOUS DISEASED CONDITION.—Where a female passenger was injured by a fall in alighting from a car, an instruction that, although before the alleged injury she was suffering from the same trouble which would eventually have brought about her present condition, still if her fall was caused by defendant's negligence, and such fall augmented her diseased condition and caused her to suffer pain, the jury should assess her damages at a sum commensurate with the pain so caused, was not erroneous. (Page 362.)

8. INSTRUCTIONS—GENERAL OBJECTION.—A general objection is insufficient to call attention to the mere phraseology of an instruction. (Page 362.)

9. SAME—WHEN HARMLESS.—An instruction which imposes too high a degree of care upon the carrier towards a passenger was not prejudicial where other instructions properly defined the degree of care in such case, and the real issue under the evidence was as to whether plaintiff was injured in alighting from defendant's train, and not the degree of care exercised by defendant toward plaintiff. (Page 363.)

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

W. B. Smith and *J. Merrick Moore,* for appellant.

1. Where the plaintiff testifies to ailments alleged to have resulted from an accident and attributes the same to such accident, and introduces the testimony of a physician who treated her after the accident, who likewise attributes her diseased condition to such accident, she, by introducing such testimony, waives the right to have considered as privileged communications to, and discoveries made by, physicians who treated her before the alleged accident for the same disease. N. Y. Code, § § 834-836; Kirby's Dig. § 3098; 4 Wigmore on Ev. § 2380, pp. 3350, 3351; *Id.* p. 3352; *Id.* § 2390; 39 Mich. 606; 89 Mo. App. 604; 40 Hun (N. Y.) 441, s. c. affirmed, 110 N. Y. 643; 148 N. Y. 88; 104 N. Y. 352, 353; 10 N. Y. Supp. 159; 16 *Id.* 536; 106 N. Y. 306; 27 N. E. (Ind.) 1111.

2. Where the testimony of the complaining witness varies from that given on a former trial, and the memory of the stenographer who took notes of the testimony given at the former trial fails, the notes taken by him at such former trial may lawfully be admitted for the purpose of contradicting testimony of the complaining witness given at the second trial. Greenleaf on Ev. § § 436, 437; Wigmore on Ev. § 735; 56 Vt. 426; 2 *Id.* § § 1286, 1325, 1330; 35 S. C. 549; 50 Pac. 445; 74 N. W. 146; 78 N. W. 1046; 61 S. W. 719; 97 S. W. 496; 35 Pac. 621; 60 N. E. 685; 52 N. W. 247; 69 S. W. 487; 68 N. W. 428; 56 Pac. 861; 96 Mich. 486; 92 N. W. 1014; 61 N. E. 716; 71 Pac. 249.

3. The court erred in suppressing the deposition of E. L. Routh. The provisions of sections 3178-3180, Kirby's Digest, apply to depositions taken upon order of court, *i. e.,* upon a commission under order of the court. Sections 3166-3176, inclusive, prescribe the mode of taking depositions upon notice, etc.

4. The fourth instruction given is erroneous. The second instruction is also erroneous in that it is inconsistent with other instructions given, and because it implies a degree of care in assisting passengers from trains which the law does not require. It is abstract. 85 Ark. 117.

W. F. Pace and *Troy Pace,* for appellee.

1. Appellee's testimony was not a waiver of her right to object to the testimony of phyiscians who had treated her prior to the accident, and such testimony was properly excluded. 82 S. W. 95-6; 10 L. R. A. 36.

2. Where a stenographer does not remember the testimony of a witness given at a former trial, he will not be permitted at a second trial to read from his stenographic notes the testimony of such witness for the purpose of contradicting or impeaching the witness. Kirby's Dig. § 3138; 66 Ark. 546-550.

3. There was no error in suppressing the deposition of E. L. Routh. Section 3178, Kirby's Digest, provides the only method in which depositions may be taken upon interrogatories, except by agreement. Code, § § 622, 629, 630, 631.

4. In propounding a hypothetical question, it is not necessary that the question embrace all the facts which the testimony tends to prove, but the questioner may select the undisputed

facts, or such facts as he conceives to be established by the evidence, and predicate his question upon them. 77 Ark. 426; 87 Ark. 201.

5. The fourth instruction is correct. 91 Ark. 343. If there was any objection to the wording of the instruction, it was the duty of appellant to call attention thereto by a specific objection. 90 Ark. 108-112; 78 Ark. 22; 83 Ark. 61; 88 Ark. 204.

If there was any error in instruction 2, it was cured by instruction 12 given at appellant's request. 67 Ark. 531; *Id.* 1; 69 Ark. 558; 74 Ark. 431; *Id.* 377; 75 Ark. 260-261.

FRAUENTHAL, J. This was an action instituted by Mattie Daniels, plaintiff below, to recover damages for personal injuries which she alleged she sustained in alighting while a passenger from one of defendant's trains at the station of Batavia, Ark. She alleged that when she was descending the steps of the coach to the depot platform the conductor in charge of the train took hold of her arm and carelessly and negligently jerked her, causing her to fall to the depot platform; that in falling she struck her knee on the edge of the platform, and twisted her body to such an extent that it resulted in a prolapsus of the uterus. The defendant denied all allegations of negligence attributed to it or its employee, and denied that plaintiff had sustained any fall, alleging that the condition of her womb was due to a displacement which she had sustained long prior to the alleged injury.

There was a sharp conflict in the evidence on the question of whether the plaintiff fell as she descended from defendant's train at Batavia, and also as to the cause of the condition of her uterus. The testimony on the part of the plaintiff tended to prove that on February 27, 1909, she became a passenger on one of defendant's trains *en route* from Harrison to Batavia, arriving at the latter station the same evening after dark; that while she was descending the steps of the coach the conductor stepped up on the last step and grabbed her by the arm, jerking her down so as to cause her to fall and strike her left knee on the edge of the platform. Her knee was cut, and her leg bruised, and in falling her body was twisted so that it caused her severe pains in her back and resulted in a displacement of her womb. The testimony tended to prove that inflammation set in, developing into a growth of tumors, known as polypi, which necessitated an operation

within a few months thereafter, and that on this account she had been an invalid from the date of her injury; and there was testimony tending to prove that such injury was permanent. Dr. Fowler, a physician, was introduced by plaintiff, and he testified that he had examined her subsequent to the date of the injury, and had attended her for several months thereafter, and that she was suffering from a prolapsus of the uterus, which might have resulted from her fall; and this witness detailed the nature and extent of her diseased condition, and the consequent growth of the polypi in the womb.

The plaintiff testified that prior to the injury she was strong and in good health, and had been engaged in various kinds of hard work, such as general house work and laboring in the field.

There were a number of witnesses who testified on behalf of the defendant that they were at the station and saw the plaintiff as she was descending from the train, and they testified that they did not see her receive any fall. Defendant also introduced testimony tending to prove facts and circumstances occurring immediately after the plaintiff had left the train indicating that she had received no injury from any alleged fall.

The jury returned a verdict in favor of the plaintiff, and we think that there was sufficient evidence to sustain its finding.

Defendant does not contend that there was not sufficient evidence to sustain the verdict of the jury, nor does it contend that the amount returned by them was excessive. It urges only that there were errors committed by the lower court in the rejection and admission of evidence, and in its rulings upon the instructions.

During the progress of the trial the defendant introduced two physicians who had attended on the plaintiff about two years prior to the time of the alleged injury, and offered to prove by them that she had sustained a displacement of the womb at that time, and had suffered from that trouble long prior to the date of the alleged injury. The plaintiff objected to the admission of this testimony, and her objection was sustained by the court.

It is conceded by the defendant that the information which the testimony of these witnesses would have disclosed was acquired by them while attending the plaintiff as physicians; but it contends that the evidence was admissible because the plaintiff

had waived her right to object to the introduction of any testimony relative to her condition by reason of having herself introduced the testimony of Dr. Fowler, above referred to.

It is provided by section 3098, Kirby's Digest, that "no person authorized to practice physic or surgery, and no trained nurse, shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or to act for him as a surgeon or trained nurse." This enactment was manifestly made for the benefit of the patient. Its evident purpose was to throw around him a protecting shield, so that he might freely and fully disclose to his physician every fact relative to his ailment with the confident knowledge that the information thus obtained could not be divulged to his injury or disgrace. Being for his benefit, the provision was adopted out of reasons of public policy as a privilege accorded solely to the patient; and, like any other privilege, it is one that the patient may waive. By the terms of this statute, a physician is prohibited from disclosing information obtained while treating his patient; but it has been uniformly held by the courts of those jurisdictions having similar statutes that the provisions thereof must receive that construction which was intended by the Legislature which framed them, and that is, that the patient himself may waive the privilege of the statute in order to obtain the benefit of the physician's evidence. When this privilege is waived as to any particular witness, the opposing side is entitled to the benefit of the waiver as to such witness. But the benefit of such waiver in behalf of the adversary should not extend further than to the witness who has been called by the patient, or as to other physicians who may have been present upon the same occasion to which the witness testifies. By virtue of the statute, the patient alone is given the right to remove the ban of secrecy. The patient may be willing to waive the objection of incompetency as to a particular physician in whom he reposes confidence, and yet be unwilling to waive this objection as to another, who treated him at a different time for the trouble complained of. The statute affords him this privilege, when the testimony of the offered witness does not relate to the same occa-

sion as that from which the patient has removed the seal of secrecy.

In the case of *Hope* v. *Troy & Lansingburgh Rd. Co.*, 40 Hun 438, the rule is laid down that when this privilege is waived by the patient as to any particular witness, the adversary is entitled to the benefit of the waiver as to such witness, but is not entitled thereby to call another physician who had treated the patient at a different time to testify relative to the matter. This case was affirmed later by the Court of Appeals of New York (*Hope* v. *Troy & Lansingburgh Rd. Co.*, 110 N. Y. 643).

We think this rule sound. When a patient divulges what occurred between himself and a certain physician who treated him, that would waive his privilege regarding a disclosure of all that such physician knew and of all that occurred at the time that such physician treated the patient; but this would not authorize the opposing side to call another physician who might have treated the patient at another and different time for the same disease. *Mellor* v. *Mo. Pac. Ry. Co.*, 105 Mo. 455; *Webb.* v. *Met. St. Ry. Co.*, 89 Mo. App. 604; *Dotton* v. *Albion*, 57 Mich. 575; *Westover* v. *Aetna Life Ins. Co.*, 99 N. Y. 56.

Counsel for defendant, upon cross examination of plaintiff, asked her if the physicians whom defendant desired to introduce as witnesses as to her condition prior to the alleged injury had treated her in 1907 for displacement of the womb. This she denied, and it is now urged by defendant that it was entitled to have the benefit of these physicians' testimony in order to contradict the plaintiff. But, if the defendant's position in this respect should be upheld, then the above statute in regard to privileged communications would be easily evaded. In any cause where the opposing party desired to obtain the testimony of an attending physician, it could be secured in like manner, although against the objection of the patient. The plain provisions of the statute forbidding such testimony by a physician cannot thus be abrogated. *Holloway* v. *Kansas City*, 184 Mo. 19, 82 S. W. 89; *Burgess* v. *Sims Drug Co.*, 114 Ia. 275, 54 L. R. A. 364, 89 Am. St. Rep. 359.

We are therefore of the opinion that the plaintiff, by the introduction of the testimony of Dr. Fowler relative to his treatment of her as a physician after the injury, did not waive her

privilege to object to the testimony of other physicians who had treated her prior to that time, although for the same alleged trouble.

It is urged by the defendant that the court committed error in permitting a certain hypothetical question to be propounded to physicians introduced by the plaintiff. This hypothetical question was propounded for the purpose of determining whether or not the displacement of the plaintiff's womb and her subsequent condition was due to a fall. The defendant objected to the question upon the ground that it was not a complete statement of the facts that had been proved by witnesses introduced by the plaintiff, and that it omitted a number of essential facts that had been proved. In propounding a hypothetical question to an expert witness, the data upon which it is based need not cover all the facts which have been proved in the case. The party offering the testimony may select such facts as he conceives to have been proved, and predicate his hypothetical question thereon. In *Ince* v. *State,* 77 Ark. 426, the following is quoted with approval from Prof. Wigmore: "The questioner is entitled to the witness' opinion on any combination of facts that he may choose. It is often convenient, and even necessary, to obtain that opinion upon a state of facts falling short of what he or his opponent expects to prove, because the questioner can not tell how much of the testimony the jury will accept; and, if the proof of the whole should fail, still proof of some essential part might be made, and an opinion based on that part is entitled to be provided for the jury. For reasons of principle, then, and to some extent of policy, the rational conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or by the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis." 1 Wigmore on Evidence, § 682.

In *Taylor* v. *McClintock,* 87 Ark. 243, Mr. Justice WOOD, delivering the opinion of the court, in speaking of the data upon which a hypothetical question should be based, said: "The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence or any part thereof, and it is not necessary that the facts stated, as established by the evidence, should be uncontroverted. Either party may state the facts which

he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts."

The question to some extent is within the discretion of the trial court, who should control the form of the question, so that there may be no abuse thereof in the statement of the assumed facts upon which it is based. The hypothetical question which is complained of by the defendant in the case at bar, we think, fairly stated the facts which it was claimed by the plaintiff were sufficient upon which to base the opinion of the expert as to the cause of her condition. It is now urged that the question stated certain matters as facts which were contrary to the uncontroverted testimony. This objection was not made to the question in the court below, and we do not think that the contention is well founded. We think that there was some evidence upon which to base all the assumed facts which are set forth in the hypothetical question complained of.

It is urged by the defendant that the court erred in refusing to permit it to introduce in evidence the stenographer's notes of the testimony of the plaintiff upon a former trial of the cause. The stenographer who had taken the notes of the testimony on the former trial testified that he could not remember the testimony that had been given by the plaintiff upon the former trial, and that his memory thereof could not be sufficiently refreshed by the stenographic notes taken by him so that he could testify that he remembered the testimony which plaintiff had given. But he testified that it was his custom, and that, upon the occasion of taking the plaintiff's testimony at the former trial, he had made correct stenographic notes thereof. Defendant asked that the witness be permitted to read said stenographic notes to the jury, and the court refused to permit this to be done.

We do not think that it is necessary to pass upon the question as to whether or not it was competent to permit the witness to read the stenographic notes which he had made of the testimony of the plaintiff at the former trial, which he testified he could not remember, because we do not think that the defendant was prejudiced by the exclusion of such testimony. We do not think that there was any material difference between the testimony as given by the plaintiff upon the second trial and the transcript of stenographic notes of her testimony upon the former trial.

This testimony related to the manner in which the fall was sustained and the injury incurred, and we think that there is no variance between the two in any material particular.

Prior to the trial of the case defendant had taken the deposition of a nonresident witness, and upon the motion of the plaintiff this deposition was suppressed. It appears that the defendant had given notice to the plaintiff that it would take the deposition of this witness, and the witness resided at such a distance that it was necessary to give more than three days' notice under the statute. The plaintiff, immediately upon receiving the notice, served notice upon defendant that it would require the deposition to be taken upon interrogatories. It was insisted by counsel for the plaintiff that, upon such notice being given by him, the defendant was required to file interrogatories with the clerk as provided for in section 3178 of Kirby's Digest, to which the plaintiff would then be entitled to file cross-interrogatories. This was not done by the defendant. It is urged by counsel for defendant that depositions are required to be taken upon interrogatories and cross-interrogatories only in cases where the court has ordered same to be taken upon commission as provided for in section 3177 of Kirby's Digest. But by section 3176, Kirby's Digest, it is provided that "a party to whom more than three days' notice to take a deposition out of the State is given may, by notice to the adverse party or his attorney, served in one day after the service of the first notice, require the deposition to be taken upon interrogatories."

The above provisions are taken from the Civil Code of Practice, in which section 3176 of Kirby's Digest is section 629, and section 3177 of Kirby's Digest follows as section 630 of the Code. We are of the opinion that under both sections it is requisite that depositions be taken upon interrogatories and cross-interrogatories as provided for in section 3178 *et seq.* of Kirby's Digest. In suits at law the right to take depositions in any given case rests upon statutory authority, and in no case can the right be exercised unless the authority therefor exists. Authority to take the deposition of a witness residing without the State is prescribed by the statute. Section 3157, subdivs. 1 and 4, Kirby's Digest. But it is also prescribed that where more than three days' notice to take a deposition out of the State is given to the

adverse party, such party may require the depositions to be taken upon interrogatories; and when this is required by the opposing party, such depositions must be taken upon interrogatories and cross-interrogatories as provided in section 3178 *et seq.* of Kirby's Digest.

It is urged by the defendant that the court erred in giving the following instruction to the jury on behalf of the plaintiff:

"4. I charge you that, although you may believe that before the time of the alleged injury the plaintiff was suffering from a female trouble, or a falling of the womb, or a growth in the womb, which would have eventually brought about her present condition, still if you find from a preponderance of the testimony that the plaintiff fell and was injured by the negligence of the defendant, and that such fall and injury augmented the diseased condition of plaintiff, and caused her to suffer pain, then you will find for the plaintiff, and assess her damages at a sum commensurate with the pain so caused by such negligence."

An instruction similar in effect to the one above was approved in the case of *St. Louis S. W. Ry. Co.* v. *Lewis,* 91 Ark. 343, and we see no reason for disturbing that decision.

The above instruction is also complained of on account of certain verbiage therein; but if there was any error in the language used, the attention of the trial court should have been directed thereto by a specific objection, which was not done. We do not think, however, that the jury could have been misled by the verbiage complained of.

It is urged that the court erred in giving instruction No. 2 as asked by the plaintiff: "2. I charge that if you find from a preponderance of the testimony that the plaintiff was a passenger on the train of defendant, then you are instructed that it became and was the duty of the defendant to exercise for her safety the highest degree of skill, care and diligence which a reasonably prudent person under like circumstances would exercise and which is reasonably consistent with the mode of conveyance and the practical operation of its trains, and for any omission of these duties whereby injury resulted to plaintiff, the defendant would be liable." But at the instance of the defendant the court instructed the jury as follows: "12. You are instructed that the agent of the defendant in assisting passengers to alight from

trains is only required to use that care in so doing as an ordinarily prudent person would exercise under like circumstances;" and also specifically instructed them further that "it is the duty of the conductors and brakemen, where it is deemed necessary, to take hold of the hand or arm of passengers to assist them in alighting from the car, and it is not negligence *per se* for the conductor to take the hand or arm of the passenger and endeavor to lift or guide them so as to enable them to alight in safety. If you find in this case that Conductor Mearnes took hold of the arm or hand of plaintiff, and at the time was in the exercise of ordinary care, and did so for the purpose of assisting plaintiff, and that while he so held plaintiff's hand or arm she made a misstep through no negligence of the conductor, then the fact that the conductor had taken hold of her would not entitle her to recover against the defendant company."

The real issue under the testimony that was involved in this case was whether or not the plaintiff had received the fall in alighting from the train of which she complained, and not the degree of care which was required of the defendant or its employee. There was a sharp conflict in the evidence as to this question of fact, the defendant denying that the plaintiff had received any fall at all. The defendant controverted the cause of the fall by claiming that she did not actually fall. The issue then was whether or not the plaintiff had actually received the fall testified to by her. We do not think, therefore, that there was any prejudice in the giving of the above instruction No. 2 on behalf of the plaintiff, even if it should be considered erroneous. *Arkadelphia Lumber Co.* v. *Posey,* 74 Ark. 377; *Citizens' Electric Co.* v. *Thomas,* 75 Ark. 261.

Counsel for defendant has referred to other rulings of the court upon the giving and refusal to give certain instructions which it claims were erroneous. We have examined each of these, and we do not think that its contention as to any of them is correct. Upon examination of the whole case we fail to find that any prejudicial error was committed by the lower court in the trial of this cause, and the judgment must be accordingly affirmed.

WILLIAMS v. COMER.

Opinion delivered March 20, 1911.

MASTER IN CHANCERY—CONCLUSIVENESS OF FINDINGS.—The findings of fact of a master in chancery, made under a consent reference, have the same binding force as the verdict of a jury; and where the evidence was legally sufficient to sustain it, it was error for the chancellor to set his finding aside.

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

M. B. Rose and *Wiley & Clayton,* for appellants.

The findings of fact by a master who is appointed by consent of parties is as conclusive as the verdict of a jury. 85 Ark. 414; 74 Ark. 338 and authorities cited. His findings in this case must stand if there is any evidence to support them.

John D. Shackleford, for appellee.

McCULLOCH, C. J. The plaintiff, Gabe Williams, and his wife, Linsey Ann Williams, owned a tract of land in Lonoke County, Arkansas, constituting their homestead, and they instituted this action in the chancery court of that county, alleging that they had formerly executed a mortgage on said land to the American Freehold Land Mortgage Company to secure a debt of $700 for borrowed money; that afterwards N. Baum, a Little Rock merchant, solicited plaintiffs to trade with him, and promised, if they would do so, to pay off said mortgage debt; that they were induced by representations of said Baum to execute to him an instrument which was represented to be a mortgage on said land, but which was, in fact, a deed to said Baum, conveying said land for a named consideration of $2,000; that, by virtue of their confidential relations with said Baum and because the plaintiffs were old and ignorant, and could neither read nor write, and were unlearned in business affairs, they relied wholly upon the representations of Baum and upon his advice and instructions. They alleged further that they had recently discovered that there were other mortgages of record on said land, purporting to have been executed by them to Baum but which were, in fact, forgeries; that Baum had filed a voluntary petition in bankruptcy and scheduled as assets the mortgage on the land at $460, but that

nothing was in fact due thereon; that defendant, J. A. Comer, became trustee of said bankrupt's estate and sold to Morris Phillips the choses in action of Baum, among them a purported mortgage executed by plaintiffs to Baum for $460 on said land, which was a forgery. They prayed that all debts claimed by Baum against plaintiffs be cancelled, including that bought by Phillips, and that all purported mortgages on said land be cancelled, and that an accounting be had, and that said deed, fraudulently procured by Baum upon the representation that it was a mortgage, be cancelled. An amendment to the complaint was filed, stating that Baum and wife had mortgaged said land to Sam Storthz to secure a debt of $1,000, who took with full knowledge of the fraud practiced upon plaintiffs, and they also prayed that said Storthz be required to satisfy said mortgage.

Comer, as trustee, Baum and Phillips and Storthz were all made parties defendant to the suit. Each of said defendants filed separate answers, Baum denying the charges of fraud and Storthz and Phillips each claiming to be *bona fide* purchasers of the property for value.

Depositions were taken, and on the trial of the cause the chancellor announced that he would hold that the deed executed by the plaintiffs to Baum was intended as a mortgage, and, by agreement of the parties, there was a reference to a master, the parties agreeing upon George W. Clark as such master, to state an account of the amount of the mortgage indebtedness due by the plaintiffs. Testimony was heard by the master, and a report was filed by him stating the various items of the account between plaintiffs and Baum through a number of years from 1902 to 1907, inclusive. He found that the plaintiff, Gabe Williams, is indebted to Baum in the sum of $232.48, which includes interest at six per cent. up to May 15, 1909.

Defendant Comer filed exceptions to the master's report, and these exceptions were sustained by the chancellor, who found from the testimony adduced before the master that plaintiffs were indebted in the sum of $1,192, including interest to December 1, 1909. He rendered a decree against the plaintiffs, declaring a lien on the land for said sum and ordering it sold. From this decree the plaintiffs appeal.

The rule is thoroughly established in this court, as in other

courts where the question has been decided, that the parties are bound by the findings of fact by a master to whom there has been a reference made by consent where there is any evidence to sustain those findings; in other words, that findings of a master under a consent reference have the same binding force as the verdict of a jury, and will not be disturbed where the evidence is legally sufficient to sustain them. The last case in this court on this subject is the recent one of *Mortimore* v. *Adkins, ante* p. 183, wherein the other decisions of this court on the subject are collated. Where the findings of the master are sustained by sufficient evidence, it is error for the chancellor to set same aside; and where he does so improperly, this court will reverse the decision of the chancellor. This is so because chancery cases come here on appeal for trial *de novo*, and this court renders such decree as the chancellor should have rendered.

It is contended in the present case that the evidence adduced before the master was not sufficient to sustain the findings, but we do not agree to that conclusion. It is true that the evidence was conflicting, and the master might well, under the evidence, have found against the plaintiffs for a larger amount of indebtedness, but the evidence was sufficient to sustain his findings. The plaintiffs were ignorant old negroes, but they testified that they received an itemized bill of everything that they purchased from Baum, and that they kept those bills and turned them over to the master at the hearing. They testified further that at the close of the business in 1904 they owed Baum nothing, and that he gave them a clear receipt against all indebtedness. Baum's bookkeeper testified that there were mistakes in the accounts on the books. The report of the master shows that he examined the bills and compared them with the books and accounts of Baum, and, after considering those matters in connection with the other testimony in the case, he found that there was only an indebtedness in the sum of $232.48. We conclude, therefore, that the evidence was sufficient to sustain that conclusion, and the findings of the master should not have been disturbed. The decree is reversed, with directions to enter a decree in accordance with the findings of the master, and allowing plaintiffs to redeem the lands in controversy by paying to defendant Storthz the amount so found by the master, with interest and costs of the action.

ARNOLD v. CHAS. T. ABELES & COMPANY.

Opinion delivered March 20, 1911.

1. PUBLIC LANDS—PRESUMPTION IN FAVOR OF LAND COMMISSIONER'S DEED.—A deed executed by the Commissioner of State Lands conveying lands forfeited to the State for nonpayment of taxes is *prima facie* evidence of title in the purchaser. (Page 369.)
2. COVENANT OF WARRANTY—BREACH.—To charge a grantor upon a covenant of warranty in the case of wild and unimproved land, actual eviction is unnecessary, as a paramount title carries possession with it, amounting to a constructive eviction. (Page 369.)
3. ADVERSE POSSESSION—ADJOINING TRACTS.—One who takes actual possession of one of two adjoining tracts of land under a deed conveying both of them does not acquire constructive possession of the other tract, though it is unoccupied, if the legal title to the two tracts are in different persons. (Page 369.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellants to recover damages for a breach of a covenant contained in a deed executed by appellants to appellee, conveying the timber on a certain 160 acres of land. The complaint alleges that the land in question is wild and unimproved, and that the Southern Lumber Company has a superior title to said land, and refused to permit appellee to remove the timber therefrom.

Appellants admitted the execution of the deed and the covenant of warranty, but denied the eviction, or that the title of the Southern Lumber Company was a superior one, and denied a breach of warranty. The facts, so far as they are pertinent to the issues involved, may be briefly stated as follows: On June 26, 1902, appellants by their warranty deed conveyed to appellee the timber on the lands in question, being described as follows: the northwest quarter of section 12, township 11 south, range 5 west, in Drew County, Arkansas. During the trial of the cause it was conceded that appellants had title to the west half of the northwest quarter of said section 12, and this left in question the title to the east half of northwest quarter of said section 12.

Chas. T. Abeles testified that appellee was a corporation organized and doing business under the laws of the State of Arkan-

sas. That it established a sawmill near the lands in question for the purpose of sawing the timber removed therefrom as well as from other lands owned by it. That the Southern Lumber Company claimed title to the lands and forbade appellee from cutting and removing any timber or trees therefrom. That, upon investigation, appellee ascertained that the title to said lands was in the Southern Lumber Company, and notified appellants of that fact, and requested them to obtain the title for it. That appellants failed and refused to get title from the Southern Lumber Company, claiming that they already had title thereto. That subsequently appellee bought the timber from the Southern Lumber Company.

On the 9th day of December, 1857, J. C. Griffing received a patent to the west half of section 12, township 11 south, range 5 west. The east half of the northwest quarter of section 12, township 11 south, range 5 west, was forfeited to the State for the nonpayment of taxes for the year 1867. On the 10th day of April, 1882, the State of Arkansas conveyed same to M. W. Benjamin. The Southern Lumber Company deraigns title to said land by mesne conveyances from M. W. Benjamin. It also deraigns title from some of the heirs of J. C. Griffing, but the views we shall hereinafter express make it unnecessary to consider this.

Appellants deraign title from the heirs of J. C. Griffing by deed made by them in 1888. They deny that appellee or its agents notified them that the title to said lands was in the Southern Lumber Company, or requested them to obtain title from it. Other facts will be referred to in the opinion.

By agreement the case was tried before the court sitting as a jury. Certain findings of fact and declarations of law were made by the court and reduced to writing.

The court rendered judgment for appellee, and appellant by this appeal seeks to reverse that judgment.

Vaughan & Vaughan, for appellants.

Morris M. Cohn, for appellee.

HART, J., (after stating the facts). From the statement of fact, it is readily apparent that the title to the lands in question was in the Southern Lumber Company at the time it stopped appellee from cutting and removing the timber therefrom. The

lands were forfeited to the State for the nonpayment of taxes while they were owned by J. C. Griffing. After the period for redemption had expired, they were purchased from the State by M. W. Benjamin; and he obtained a deed therefor from the Commissioner of State Lands. The commissioner's deed was *prima facie* evidence of title to the purchaser. *Cracraft* v. *Meyer,* 76 Ark. 450; Kirby's Dig., § 4806. Appellants have not attempted in any way to overcome this presumption of title in Benjamin, and the Southern Lumber Company deraigns title from him.

In 1888 the heirs of J. C. Griffing conveyed the lands to the grantors of appellants; and we hold that they had no title to convey because the land had previously been forfeited to the State for the nonpayment of taxes. It follows that the legal title to said lands was in the Southern Lumber Company and its grantors at the time appellants conveyed the timber on the same to appellee.

The evidence sustains the finding of the court that the lands were wild and unimproved, and the Southern Lumber Company, having the legal title to the land, had the right to the possession of it.

In the case of *Seldon* v. *Dudley E. Jones Co.,* 74 Ark. 348, the court held that where land is wild and unimproved actual eviction is not necessary; that "the possession follows the legal title, and a paramount title carries possession with it, amounting to a constructive eviction."

Counsel for appellants claim that the deed to Bell, one of their grantors, conveyed to him the whole of the west half of section 12, and that Bell went into actual possession of a part of it under color of title to the whole, and must be presumed to have been in the actual possession of the entire half section. It is true that one of the witnesses for appellant does testify that there were five or six acres enclosed on the extreme western side of the northwest quarter of section 12, and that Bell went into possession of it in 1888.

It is conceded that the title to the west half of the northwest quarter, section 12, at that time was in Bell; but the title to the east half of the northwest quarter of section 12 at that time was in the grantors of the Southern Lumber Company. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Moore,* 83 Ark. 377, the court said: "When one takes possession of one of two adjoining tracts

of land under a deed conveying both tracts to him, if the actual title to the two tracts are in different persons, his actual possession of one tract will not give constructive possession of the other so as to oust the owner of that tract. The reason for this is that in such a case the possession of one tract is no notice to the owner of the other tract that his land is claimed adversely. If the law was otherwise, one by buying a small tract and taking a deed conveying the adjacent unimproved lands with the tract bought might, by taking possession of the tract bought, become constructively in the possession of the land without any visible act to notify the owners thereof of such adverse claim."

Moreover, both the testimony for appellants and appellee shows that the east half of the northwest quarter of section 12, being the land the title to which is in controversy, is wild and unimproved land, and the evidence adduced by appellee tends to show that the whole of the northwest quarter of section 12 was wild and unimproved land. The court, sitting as a jury, found for appellee, and the finding will not be disturbed on appeal.

The judgment will be affirmed.

BUCHANAN v. HICKS.

Opinion delivered March 20, 1911.

1. RECEIVER—INSOLVENT CORPORATION—POWERS.—Upon the appointment and qualification of a receiver of an insolvent corporation he became invested with the title to all of the personal property and choses in action thereof, and was entitled to receive payment of all debts due to it; and thereafter its officers and agents are without authority to meddle with the property of such corporation or to collect indebtedness due to it, and a payment to them will constitute no defense in a suit by the receiver. (Page 374.)
2. SAME—APPOINTMENT AS NOTICE.—The appointment of a receiver of the property of an insolvent corporation is legal notice to all persons having contractual relations with such corporations. (Page 376.)
3. SAME—CONTRACT FOR MANAGEMENT OF ESTATE.—An agreement by a receiver appointed by the court to turn over to another the control and management of the property and business intrusted to his charge is void. (Page 377.)
4. SAME—SITUS OF DEBT.—Where a debtor in another State owed an insolvent corporation of this State, the situs of the debt follows the

domicil of the corporation, and the right to collect same is invested in a receiver appointed in this State. (Page 378.)

5. CIRCUIT COURT—ACCOUNT—JURISDICTION.—The circuit court has jurisdiction over an action upon an account where the total amount of the account is within that court's jurisdiction. (Page 379.)

6. APPEAL AND ERROR—REHEARING—DIVIDED COURT.—Where, on a rehearing, the four judges who participate in the decision are equally divided, the petition for rehearing will be overruled without an opinion of the court. (Page 379.)

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

Henry Moore & Henry Moore, Jr., for appellant.

1. The court erred in overruling the demurrer to the second count of the complaint. The circuit court was without jurisdiction. Art. 7, § 40, Const. 1874; 1 Ark. 252; *Id.* 275; 2 Ark. 449; 3 Ark. 494; 5 Ark. 34; 9 Ark. 465; 18 Ark. 249; 34 Ark. 188; 35 Ark. 287; 55 Ark. 143; 72 Ark. 334; 74 Ark. 615; 78 Ark. 595; 85 Ark. 213; 89 Ark. 435.

2. The court should have instructed the jury that a receiver as such has no extraterritorial jurisdiction; that is, being a mere creature of the court, he can have no wider or greater jurisdiction than the power which created him. 23 Am. & Eng. Enc. of L. (2 ed.) 1107. See also 3 *Id.* 1109.

3. The court erred in instructing a verdict in favor of the plaintiff. Where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. 89 Ark. 368, 372 and cases cited.

W. H. Arnold, for appellee.

FRAUENTHAL, J. This was an action instituted by John T. Hicks as the receiver of an insolvent corporation to recover from the defendant upon an account which he claimed to be due to said corporation. The complaint contained two paragraphs. In the first paragraph it was alleged that the defendant was indebted for two carloads of lumber in the sum of $637; and in the second paragraph it was alleged that he was indebted in the sum of $32.70 for a balance due for wares and merchandise sold to him; and recovery was sought for both of said amounts.

The defendants filed a demurrer to the second paragraph of

the complaint on the ground that the amount therein sued for was below the jurisdictional limit of the circuit court. The court overruled said demurrer, and the defendant thereupon filed an answer in which he admitted the shipment of the two carloads of lumber, but denied that he owed plaintiff as receiver therefor, and alleged that he had made payment thereof to the proper person entitled to receive same. He did not deny owing for the balance of account set forth in the second paragraph of the complaint. Upon the trial of the case the court directed the jury to find in favor of the plaintiff for the amount sued for, which was done. From this action defendant has appealed to this court.

It appears that the Camden Lumber Company was a corporation duly organized under the laws of the State of Arkansas, and was located in the county of Ouachita, with its place of business at a postoffice in said county called "Lumber," at which it operated a sawmill plant. On October 3, 1905, said corporation having become insolvent, J. T. Hicks was regularly appointed receiver thereof by the United States Circuit Court for the Western District of Arkansas, and duly qualified as such receiver on October 5, 1905. No question was made in the lower court, and none is made in this court, relative to the regularity of the institution of said suit and the legality of the appointment of said Hicks as receiver of said corporation by said court. The sole defense that was made in the lower court, and which is pressed here, against the recovery for said two carloads of lumber, is that the defendant claims that he bought the same from said corporation prior to the appointment of said receiver, and that he thereafter paid therefor to the manager of said corporation, who was authorized to receive the same.

Inasmuch as the lower court directed a verdict against defendant, if there was any testimony adduced upon the trial of this case which tended to establish an issue constituting a legal defense to a recovery for this lumber, then the lower court erred in giving said peremptory charge for a verdict in favor of plaintiff. We think, however, that the testimony adduced at the trial of this case is virtually undisputed. According to this uncontroverted testimony, the case is this:

The Camden Lumber Company had been engaged in the manufacture of lumber for quite a period prior to October, 1905,

in Ouachita County, Arkansas, and J. J. Cochran was the vice president and manager thereof, with a sales office located at St. Louis, Mo. The defendant, through said Cochran, had purchased from said corporation a number of cars of lumber during the year 1905, and in August of that year made an order for the two cars involved in this suit, one of which he directed to be shipped to his customer at Warsaw, Mo., and the other to be shipped to another customer at Colorado Springs, Colorado.

On the 2d or 4th of October, 1905, and prior to the qualification of said receiver, invoices for said lumber were sent to the office of the defendant at Kansas City, Mo. According to the terms of the invoices, the defendant was entitled to a discount on the price of the lumber of two per cent. by paying for same within a certain time after receipt of said invoice; and on October 17, pursuant to the terms of said invoices and according to his prior custom in his dealings with this corporation, he executed a check payable to the corporation for $637, same being the price of the lumber less the discount of two per cent., and sent the same to its office at St. Louis, Mo. This check was drawn upon a bank located at Kansas City, Mo., and was paid by said bank on October 30, 1905. In the meanwhile, the receiver, on October 7, 1905, proceeded to the place of business and plant of said insolvent corporation in Ouachita County, and took possession of all the assets thereof at that place. Amongst these were the two carloads of lumber involved in this suit, which were on the cars but which had not then been delivered to a common carrier for shipment. The receiver also took possession of all the books and accounts of said corporation, and therefrom found that these two cars had been ordered prior to his appointment, and had been directed to be shipped to the two customers of defendant above named. In order to carry out the contract for the sale of these two cars of lumber, he then obtained bills of lading from the common carrier at that place, consigning the same to said two customers, and on October 14 he attached same to drafts drawn on said customers for the price of the lumber, and on October 17 wrote to each of these customers, stating that he had drawn upon them for the price of the lumber through the bank with the bills of lading attached, and requesting that they honor the same upon presentation thereof. The customers, upon receipt of said

letters, immediately wrote to the defendant at his office at Kansas City, notifying him of the receipt of these letters from the receiver, which were received by the defendant on October 22. On October 23 defendant wrote to said receiver, stating that he had purchased the lumber, directing it sent to his customers, and that, in accordance with his custom, he had sent a draft in payment therefor to the office of the corporation at St. Louis, Mo., and therein requested the receiver to recall the drafts upon his customers. Further correspondence was exchanged between the receiver and the defendant, in which the receiver insisted upon payment being made to him, and defendant contended that he had rightfully sent payment to the corporation at St. Louis.

In the meanwhile said draft was received by said Cochran at St. Louis some time after October 17th, and he indorsed the corporation's name thereon and also his own name, and placed same for collection in a bank in St. Louis with direction to place the amount to his individual credit when collected. The draft was paid on October 30th, and said Cochran testified that he thereafter paid the proceds thereof to creditors of the corporation in Missouri.

Subsequently, the receiver made report of his actions relative to carrying out the contract of the corporation for the sale of this lumber and as to the claims of the defendant with reference to the payment therefor, and he was directed by the court to institute this suit against the defendant.

It thus appears that the defendant made a contract for the purchase of this lumber from the corporation prior to the time the receiver was appointed therefor, and sent a check in payment for the lumber some time after the receiver had been appointed and qualified, and prior to the time that the lumber had been delivered to a common carrier for shipment. The question therefore involved in this case is whether or not defendant had a right to make payment for this lumber to any one except the receiver. The plaintiff was appointed receiver of this insolvent corporation is a suit regularly pending in a court having jurisdiction thereof, and no question is made contesting the regularity of that appointment. The appointment of the receiver was a matter resting entirely within the discretion of the court which appointed him, and he thereby became the representative of all persons who

were concerned in the corporation. Upon his appointment by the court, the receiver became entitled to the possession of all property and assets belonging to said insolvent corporation for the benefit of the parties to that suit and all concerned, and his possession could not be disturbed by any one without leave of that court. The receiver was but an arm of the court, and all the property of the corporation within the jurisdiction of that court by virtue of his appointment was placed within the custody of the court through him as such receiver. The title to all the property of the insolvent corporation within the jurisdiction of the court became immediately vested in said receiver upon his appointment and qualification. This included not only all the personal property of said corporation but all its accounts and choses in action.

In speaking of the nature and extent of the title of a receiver to the property of an insolvent corporation, Mr. High in his work on Receivers, says that he is vested by law with the title to the estate of the corporation, deriving his title thereto under and through it. (High on Receivers, § 315.) In section 316 he says further: "As regards the rights of action vested in a receiver of a corporation by virtue of his appointment, the general rule is that he takes all rights of action which the corporation itself originally had, and may enforce them by the same legal remedies."

The receiver, as an officer of the court which has taken control of the property of an insolvent corporation, is, for the purpose of the administration of the assets thereof, invested with the title to its property, and is the real party in interest in any litigation concerning it. *Henning* v. *Raymond,* 35 Minn. 303; Re *Schuyler's Steam Tow Boat Co.,* 136 N. Y. 169; In re *Tyler,* 149 U. S. 164; 23 Am. & Eng. Enc. Law, 1087.

It is provided by the statutes of this State that when a receiver shall be appointed for a corporation he shall thenceforward have full possession of and shall be vested with the title to all its personal property, including money, credits, choses in action, and rights and interests of every kind, so as to preserve the assets and property for the benefit of the corporation and all persons interested. Kirby's Digest, § 6348.

Immediately, therefore, upon the appointment and qualifi-

cation of the plaintiff as receiver of the said insolvent corporation, he became invested with the title to all the personal property and choses in action thereof, and was the party who was entitled to receive payments of all debts due to it. *Driver* v. *Lanier,* 66 Ark. 126; *Ratcliff* v. *Adler,* 71 Ark. 269; High on Receivers, § 316.

Upon the appointment of the receiver for said insolvent corporation its corporate functions were suspended, and it could exercise no further authority over its property or effects. As is said in High on Receivers, section 290: "The appointment of a receiver over a corporation is generally equivalent to a suspension of its corporate functions and of all authority over its property and effects, and is also equivalent to an injunction restraining its officers and agents from intermeddling with its property."

So that, after the appointment of a receiver, the corporate officers and agents are without authority to meddle with the property of said corporation, and have no right or authority to collect any indebtedness that may be due to it. In effect, the receiver succeeds to all of the rights of the corporation and the authority to control its property and collect its assets, including all debts that may be due to it, and this authority can only be exercised by him or by some one appointed by him. *Linville* v. *Hadden* (Ind.), 43 L. R. A. 222; *Squire* v. *Princeton Lighting Co.* (N. J.), 68 Atl. 176; 34 Cyc. 182.

Now, in the case at bar the undisputed testimony shows that on October 5, 1905, the plaintiff was appointed and duly qualified as receiver of said insolvent corporation, and on October 7 he actually took possession of the two cars of lumber involved in this case. Prior to that time the defendant had made an order for this lumber, and the receiver thereupon, in carrying out the agreement of the corporation to sell him the same, shipped the two cars to defendant's customers, and defendant received from such customers payment therefor. Whether we shall consider that the title to the two cars of lumber became invested in the receiver upon his appointment and taking possession thereof, and therefore the defendant became indebted to plaintiff as receiver by reason of the same having been shipped thereafter to parties for his benefit, or whether we shall consider the defendant had purchased the lumber from the corporation prior to the appoint-

ment of the receiver, and simply owed to the corporation the debt therefor upon his appointment, in either event the title to the lumber or the title to the debt became invested in the receiver on October 5, when he was duly qualified. After the 5th of October the corporation itself could exercise no authority over its assets, and its former vice president and manager could not exercise such authority. Both the powers of the corporation and of its former officers and agents became suspended immediately upon the qualification of said receiver. After that the only party who had a right to receive payment for any property belonging to the corporation, or for any indebtedness due to it, was the receiver. Therefore, when the defendant sent payment for said lumber to the corporation or to Cochran, its former manager, on October 17, 1905, he made the payment to one who was not authorized to receive the same, and therefore such alleged payment would not extinguish the debt. *Jenkins* v. *Shinn,* 55 Ark. 347; *Bank of Batesville* v. *Maxey,* 76 Ark. 472; 30 Cyc. 1183.

But it is urged by the defendant that at the time he sent the draft to the corporation at St. Louis, or to its manager, he did not know and had received no notice of the appointment of a receiver for said insolvent corporation, and that under such circumstances the payment made by him to the corporation or its former manager would be effective. But, as is said in the case of *Breed* v. *Glasgow Inv. Co.,* 92 Fed. 760: "The appointment of a receiver of the property of an insolvent corporation is legal notice to all persons having contractual relations with it. Their rights are not affected by the notice or the want of it, but by the operation of the law which the court has put in motion." The contention, therefore, made by the defendant that he had no notice of the appointment of the receiver, and therefore was not bound by the order appointing the receiver for this insolvent corporation, is without merit." 34 Cyc. 216.

It is further contended that, prior to the appointment of the plaintiff as receiver, he had some arrangement with said Cochran, the former vice president and manager of the corporation, whereby it was agreed that after he was appointed the said Cochran should control and manage certain of its properties and business. But such an agreement, if made, could not be valid. The receiver is an officer of the court, and he cannot, by any

agreement, tie himself up in the performance of his official duties. An agreement, therefore, even if made by him, to turn over to another the control and management of the business and property of the corporation, which by the court is entrusted to his care and management, is void. *Shadewald* v. *White*, 74 Minn. 208.

It is also contended by defendant that the indebtedness that was due to this corporation was an asset situated in the State of Missouri, and therefore outside of the jurisdiction of the court which appointed the receiver over this insolvent corporation in the State of Arkansas. It is therefore insisted that, by virtue of his appointment, the receiver was not entitled to the possession of this indebtedness, and the title thereto was not vested in him. But we do not think this contention is correct. The *situs* of a debt follows the creditor, and the creditor in this case was a corporation. The place of business and domicil of this corporation was in Ouachita County, Arkansas, and the *situs* of this debt was therefore at that place. The debt was therefore an asset of the corporation over which the court in Arkansas, which appointed the plaintiff as its receiver, had full jurisdiction, and the title thereto and the right to collect the same was thereby invested in the plaintiff. *Smead* v. *Chandler*, 71 Ark. 505; 9 Cyc. 681.

It follows from the foregoing that the plaintiff as the receiver of said insolvent corporation was the only person who was entitled to collect from the defendant the amount due for these two cars of lumber, and that the payment, or attempted payment, made to the corporation or its manager after the appointment of said receiver, was ineffective. In addition to this, defendant had received notice of the appointment of a receiver, and of his contention that he was entitled to receive payment for this lumber, on October 22, 1905, at his office at Kansas City, and long prior to the time when the draft which he had given to the corporation was actually paid. He therefore had ample time to have stopped the payment of said draft after he had received such notice, and before its payment, which he failed to do.

We are of the opinion, therefore, that the plaintiff was entitled to recover from the defendant the amount of said two cars of lumber. We do not think that there is any merit in the contention of the defendant that the circuit court did not have jurisdiction over the items of the account set out in the second para-

graph of the complaint. We think that the items of lumber set out in the first paragraph were but parts of an account due by the defendant to the corporation, and that the items set out in the second paragraph were but other items of the same account, and that therefore the items set out in both paragraphs constituted parts of one running account, and were not claims founded upon separate and distinct contracts. The entire items set out in both paragraphs could have been, and probably should have been, set forth in only one paragraph.

The circuit court therefore had jurisdiction over the entire account, which included all of the items of both paragraphs of this complaint.

Under the undisputed testimony, which was adduced upon the trial of this case, we are of the opinion that the plaintiff was entitled to recover the amount sued for, and the court therefore did not err in directing a verdict for said amount in favor of the plaintiff.

The judgment is affirmed.

HART, J., dissents; KIRBY, J., disqualified.

ON REHEARING.

Opinion delivered April 10, 1911.

PER CURIAM. On the question of jurisdiction of the circuit court as to the item of $32.70 set forth in the last paragraph of the complaint, the four judges who participated in the decision (one of the judges being disqualified) are equally divided in opinion, therefore the petition for reconsideration will stand overruled without an opinion of the court on that question.

LEE WILSON & COMPANY v. CRITTENDEN COUNTY BANK & TRUST COMPANY.

Opinion delivered March 20, 1911.

1. MORTGAGES—EFFECT OF ORAL MORTGAGE WITH DELIVERY OF POSSESSION.—An oral mortgage, accompanied by delivery of possession, is as effective for all purposes as if in writing. (Page 383.)

2. PLEDGE—NECESSITY OF POSSESSION.—In order to constitute a pledge, it is necessary that possession of the personal property be transferred as security for the debt or obligation. (Page 384.)

3. MORTGAGES—WHEN INDISTINGUISHABLE FROM PLEDGE.—There is no distinction between a verbal chattel mortgage and a pledge, it being essential in both that possession of the chattel be delivered to and retained by the creditor. (Page 384.)

4. VERBAL MORTGAGE—NECESSITY OF POSSESSION.—In the case either of a verbal chattel mortgage or a pledge the possession of the mortgagee or pledgee must be absolute, unequivocal and notorious, so that all persons may be advised of the change in possession thereof. (Page 384.)

5. VERBAL MORTGAGE OR PLEDGE—POSSESSION.—Where, in case of a pledge or verbal mortgage of a stock of lumber, the only act of the pledgee or mortgagee, looking toward taking possession of it, was to go and look at it several times, this was insufficient to put strangers on notice. (Page 386.)

6. AGENCY—ADMISSIONS OF AGENT.—Where an agent was placed in possession of a stock of lumber by a mortgagee, the acts and admissions of such agent relative to such possession are within the scope of his authority and binding upon the principal. (Page 388.)

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

Percy & Hughes, for appellants.

1. This case is ruled by the case of the *Bank of Black Rock* v. *Decker,* 65 Ark. 33. The transaction was a mortgage, good between the parties, but void as against subsequent innocent purchasers. Interpleaders being such purchasers, they hold title to the property free of the bank's lien. Kirby's Dig. § 5396.

2. Whether the transaction be regarded as an unrecorded mortgage or as a pledge is immaterial. Delivery of possession is essential in either case. Here there was no such delivery or change of possession as would constitute notice to subsequent purchasers. 44 Mich. 196, 6 N. W. 222; 84 N. Y. 634; 206 U. S. 415; Jones on Chattel Mort. § § 186, 187; 97 Fed. 735.

3. If Coverdale was the bank's agent, it is bound to his acts, and estopped to assert a claim. 41 N. J. Eq. 336.

A. B. Shafer, for appellee.

This case is not ruled by the Decker case, 65 Ark. 33. The essential difference between a mortgage and a pledge is that in a mortgage the title to the property always passes, while in a pledge possession only passes, the title remaining in the pledgor.

The agreement between the lumber company, Coverdale and the bank that Coverdale should hold possession of the lumber for the bank, that the lumber company should have the right of sale, but could not move the lumber until the bank was paid, constituted a pledge on the part of the lumber company. The lien of the bank was not prejudiced by the failure of Coverdale to disclose to the purchasers that he was holding for the bank nor that it held a lien on the lumber for advances made. 55 S. W. 709; 30 Wis. 81; 6 Cyc. 1053 and cases cited; 60 N. Y. 40; 126 Ala. 194; 57 Ia. 651; 22 N. H. 196.

FRAUENTHAL, J. This was an action instituted by the Crittenden County Bank & Trust Company, plaintiff below, against the Clements-Stevens Lumber Company and N. C. Coverdale, seeking to recover judgment upon a note and acceptance due by them to plaintiff, and to have the same declared a lien on a lot of lumber, and for the foreclosure of such lien. At the time of filing the suit, plaintiff also sued out a specific attachment for the enforcement of said lien, which was levied upon the same lot of lumber. Lee Wilson & Company and the Kansas City Packing Box Company filed separate interventions in the case, in which they claimed to be the owners and in the possession of said lumber by reason of having purchased same from the said lumber company and executed bonds for the retention thereof.

Upon the trial of the case the chancellor found that the defendants were indebted to plaintiff upon said acceptance and note, and that the said lumber had been pledged to it for the payment thereof. A decree was entered in favor of plaintiff for the amount of said indebtedness, and the same was declared a lien, by reason of said pledge, upon said lumber; and a return thereof by the interveners was ordered, and in the event same was not returned it was decreed that judgment should be had upon the bond of said interveners for the value of said lumber.

The evidence adduced upon the trial of this case was virtually undisputed, and the case that is thereby presented is as follows:

The defendant Coverdale was engaged in the manufacture of lumber at Marion, Ark., and on September 17, 1909, he had stacked upon his yards 198,300 feet of gum lumber. This lumber was stacked in piles upon an acre of land which had been

leased by said Coverdale. On said day he sold said lumber to the Lumber Company, and executed to it a bill of sale therefor, and also executed to it a written lease of the said acre of ground upon which said lumber was stacked. In order to make a payment to Coverdale upon said lumber, the Lumber Company on September 17 accepted a draft drawn by him upon it for $375, payable November 17, 1909, and some days later executed a note to him for $500, due sixty days after date. In order to obtain the money upon said draft and note, the manager of the Lumber Company and Coverdale went to the plaintiff, which was engaged in the banking business, and agreed to sell same to the plaintiff. Plaintiff purchased the paper from Coverdale, who indorsed the same; and, in order to secure the payment thereof, it was agreed between said parties that the said 198,300 feet of lumber should be pledged to it. The cashier of plaintiff testified that at first he refused to purchase the paper, but the manager of the Lumber Company said to him that he was perfectly safe in handling the paper, and that he could have the lumber as security until it was paid. "I said, 'About the possession of that lumber?' and turned to Mr. Coverdale, and asked him if he would hold the lumber on the yard for the bank until the acceptance was paid. He said 'Yes,' and it was agreed that Mr. Coverdale should hold the lumber on the yard for the bank until same was paid." This agreement was made at the office of the bank. Some days later the cashier of the bank walked over to where the lumber was, and looked at it, and probably did this on several other occasions. But there was no actual change made in the location of the lumber, nor were there any marks or other outward indicia of change of ownership placed upon it. Nor did Coverdale place any marks upon the lumber, or in any way make any outward and visible evidence that the possession of the lumber had been altered or changed. The only testimony relative to any delivery or change in the possession of said lumber was that it was agreed between the parties that Coverdale should hold possession for the plaintiff in order to secure the payment of said acceptance and note, and that thereafter the plaintiff's cashier walked around and looked at said lumber on several different occasions.

On September 23, 1909, the Lumber Company sold to the intervener, Kansas City Packing Box Company, 150,000 feet of

said lumber, upon which the intervener paid the sum of $1,125, with the agreement that upon final measurement it would pay any balance that might be due at the price at which it purchased.

Later, the intervener, Lee Wilson & Company, purchased the remainder of said lumber, paying thereon at the time $350, with a like agreement that upon actual final measurement it would pay any remainder that might be due at the price at which it purchased.

At the time these interveners purchased said lumber, the Lumber Company executed to them bills of sale for the lumber so purchased, and the parties went over and examined and counted the identical stacks of lumber which they respectively purchased, and at the time marked said lumber in their respective names. At the time the interveners purchased the lumber, Coverdale was present, and made no statement that he was holding possession for the plaintiff, or that plaintiff had any interest whatsoever in said lumber. On the contrary, the manager of the Lumber Company stated in the presence of Coverdale to the purchasing interveners that the Lumber Company owned the full title to said lumber, free of any lien. Some time later the interveners began to move said lumber, when this suit was instituted.

Upon this state of the case, we think that in order to secure the payment of the indebtedness to the bank, evidenced by said acceptance and note, which had been executed by it to Coverdale, the Lumber Company either mortgaged verbally or pledged the lumber involved in this suit to the plaintiff. It was simply agreed between the parties verbally that the lumber should be and remain as security for the payment of said indebtedness, and we think that the rights of the plaintiff to enforce its lien thereon as against innocent purchasers thereof would be the same whether it should be considered that the agreement was a verbal mortgage or a pledge. In either case it was necessary that the lumber should be delivered to and the possession thereof turned over to the plaintiff in order that its lien should be effective as against innocent purchasers thereof for value. In order that a mortgage shall constitute a valid lien upon chattels as against third persons, when the mortgagor retains possession thereof, it is necessary that it shall be in writing, duly acknowledged and filed for record; the filing of same for record being, by virtue of the statute, legal

notice thereof to all persons. But where a mortgagee takes actual possession of the mortgaged property, such notice is given to third persons as effectually as the filing of such mortgage for record. It is therefore well settled under our law that if a mortgagee takes possession of the mortgaged chattels before any right or lien attaches in favor of third persons, his title thereunder would be perfectly valid although the mortgage was not acknowledged or recorded. A valid mortgage may be created verbally as well as by writing; and therefore if the possession of property is actually turned over to one in order to secure the payment of indebtedness, it becomes as effective as a mortgage as if the agreement was in writing, and the possession of the mortgaged chattel would make such agreement valid and binding as to third persons. *Applewhite* v. *Harrell Mill Co.,* 49 Ark. 279; *Garner* v. *Wright,* 52 Ark. 385.

Now, in order to constitute a pledge, it is necessary that the possession of the personal property be transferred as security for the debt or obligation. Possession of the property is of the very essence of a pledge, and without such possession in the pledgee there can be no privilege thereunder as against third persons. The only distinction between a chattel mortgage and a pledge is that in the case of a pledge the legal title remains in the pledgor, and no writing is required, the property being simply delivered to the pledgee; when a mortgage is executed, the legal title passes to the mortgagee, but the possession of the property remains with the mortgagor, and the agreement is evidenced by writing. In the case of a mortgage, therefore, the delivery of possession to the mortgagee is not absolutely necessary, and the record of the instrument is only required in order to make it effective as against third persons.

But where the transaction constitutes a verbal mortgage, and the possession of property thereunder is turned over to the mortgagee, there is no distinction between it and a pledge. In both cases it is essential, in order to make valid the lien of the creditor as against third persons, that the possession of the chattel should be delivered to and retained by the creditor. *Peet* v. *Burr,* 31 Ark. 34; *Casey* v. *Cavaroc,* 96 U. S. 467; 6 Cyc. 790.

So that, whether we consider the transaction in this case, in which the lumber was put up as security to the bank for the pay-

ment of said draft and note, a mortgage or a pledge, it was essential that the possession of the lumber should have been turned over to the bank or some one for it, and held exclusively by it; and the sole question for determination is whether or not there was sufficient delivery of the property to the plaintiff or its agent under the testimony adduced on the trial of this case. In order to constitute such delivery of property, either to the mortgagee or the pledgee, there must be an actual transfer of the possession and control thereof. The possession should be absolute, unequivocal and notorious, so that all persons may be advised of the change in the possession thereof. Where property is susceptible of actual delivery, that should be made; but where the property is too bulky for an actual change of its possession, a symbolical delivery can be made. In a change of possession of bulky articles, there should be a clear and unequivocal designation, so that all persons dealing therewith, especially subsequent purchasers, should not be misled or left in doubt as to the nature of the transaction.

As is said in the case of *Anderson* v. *Brenneman,* 44 Mich. 198, in referring to the symbolical delivery of articles of a bulky nature which are permitted to remain in a place where the possession may be equivocal, "under such circumstances, where doubts exist they must be solved in favor of the purchaser."

In the case of *Strahorn-Hutton-Evans Com. Co.* v. *Quigg,* 97 Fed. 735, it was claimed that the possession of mortgaged property had been turned over to the mortgagee in a case where the mortgage had not been properly filed for record. In that case the court said: "One of the strongest indicia of ownership of or of a lien upon personal property is possession, and for this reason it is that the delivery of the possession of personal property to the mortgagee has been universally held to validate an unrecorded mortgage and to be an effectual substitute for its record. The change of possession, however, which may have this effect must be of a character to accomplish the full purpose of the recording acts. It must be calculated to give notice of the claim of the mortgagee as open and effectual as a record of the mortgage. It must be so open, public, actual and apparent that the creditor or purchaser who undertakes to deal with the

property would be likely to receive notice of the possession of the mortgagee."

And the same is true of a pledge. In the case of *American Pig Iron S. W. Co.* v. *German,* 126 Ala. 194, in speaking of the notice that it is requisite to give to the public of the pledgee's interest in property by reason of possession thereof, it is said: "Such possession, however, to be effective either for notice or to give validity at law to the pledge, must be complete, unequivocal and exclusive of the pledgor's possession in his own right."

We think that this case is ruled by the case of *Bank of Black Rock* v. *Decker,* 65 Ark. 33. In that case a controversy arose between the mortgagee and purchaser of certain lumber. The owner of the lumber had borrowed money from the Bank of Black Rock, and to secure the payment thereof had executed a written instrument in which he transferred the lumber to it for the purpose of securing said indebtedness. Thereafter, and before said instrument was filed for record, the owner of the lumber sold same to an innocent purchaser. It was claimed by the Bank of Black Rock, in order to obviate the necessity of record notice to said purchaser, that the lumber had been delivered to it before such sale, and was in its possession. In that case the lumber was stacked in piles upon the yard of the owner, and the cashier of the bank and the owner of the lumber went to the lumber and the owner formally delivered possession thereof to the cashier, who "took possession while walking around it." But he placed no notice or marks on it to indicate the bank's ownership thereof. Subsequently, the lumber was sold to an innocent purchaser. In that case this court said: "Under these circumstances, we are of the opinion that the bank did not have such possession of the lumber as to supply the place of record notice to third parties. The bank should either have recorded its mortgage, and thus given notice of its lien, or it should have taken and retained actual possession of the lumber in order that subsequent purchasers might not be misled. This was not done. As actual possession of the lumber was not taken and retained by the bank, the constructive delivery and possession taken while walking around the pile of lumber amounted to nothing so far as the rights of subsequent purchasers were concerned."

In the case at bar the plaintiff and the manager of the Lum-

ber Company were not actually present where the lumber was situated when the agreement that it should be security for the payment of the draft and note was made. In this respect the case at bar differs from the above case. It also differs from it in that the transfer of the lumber in the case at bar was made verbally, while in the above case it was made by a written instrument. In the case at bar there were no marks or other notice placed on the lumber to indicate the ownership of the bank thereof, and the cashier simply "walked around the lumber" as was done in the case of the *Bank of Black Rock* v. *Decker, supra.* In the case at bar it was further agreed that Coverdale should hold possession of the lumber for the bank, but Coverdale took no steps to take possession of the lumber other than had been taken by the bank itself. The lumber was actually located upon land which he had leased to the Lumber Company, and the possession of which he had turned over to the Lumber Company; and Coverdale himself had no actual possession thereof. So that the possession of Coverdale was no more effective than the possession of the bank.

Under these circumstances, neither the bank nor Coverdale took or obtained possession of the lumber in any other manner than was done in the case last above cited. In that case it was held that such alleged possession amounted to nothing, so far as the rights of subsequent purchasers were concerned, and we are therefore constrained in the case at bar to make the same holding. Therefore, whether we consider the agreement made between the owner of the lumber and the plaintiff as a verbal mortgage or as a pledge, there was not a sufficient delivery of the lumber to the plaintiff or its agent in order to make its lien or title valid as against innocent purchasers thereof.

It is urged by counsel for plaintiff that the interveners were not *bona fide* purchasers of the lumber, but we find no testimony to sustain such contention. The evidence clearly shows that the interveners purchased this lumber in good faith, and paid therefor. It further shows that the amount of the payments exceeded the price of the lumber after the same was actually measured, so that they paid full value therefor; and there is no testimony from which it can possibly be inferred that their purchases were made with an intent to defraud the plaintiff or any one else.

In addition to this, Coverdale, the alleged agent of the plaintiff to hold possession of the property, was present at the time interveners purchased same, and made no statement that he held possession thereof for plaintiff, or that plaintiff had a lien thereon. On the contrary, it was stated in his presence by the manager of the Lumber Company that it owned the full title to the lumber, free of any liens. The object of placing Coverdale in possession of the lumber was to notify all third persons having dealings therewith of the interest of the bank therein, and therefore the acts and admissions of Coverdale made relative to the possession of the property and the interest of the plaintiff therein were within the scope of his authority as such agent, and under such circumstances the plaintiff would be bound thereby. *Quinn* v. *Sewell,* 50 Ark. 380; 31 Cyc. 1587; 1 Am. & Eng. Enc. Law 1143.

It follows, therefore, that, under the uncontroverted evidence adduced upon the trial of this case, the interveners were innocent purchasers of the lumber involved in this suit, and obtained title thereto free from any alleged lien or claim of the plaintiff.

The chancellor erred in the decree which he rendered herein against the interveners; the same is therefore reversed, and a decree will be entered here in favor of the interveners for the retention of said lumber.

SOUTHERN ENGINE & BOILER WORKS *v.* VAUGHAN.

Opinion delivered March 20, 1911.

1. EVIDENCE—MAILING LETTER—PRESUMPTION.—If a letter is properly mailed, it is presumed that it was received by the party to whom it was addressed in due course of mail. (Page 392.)
2. SAME—WHEN LETTER MAILED.—Testimony that a letter was "mailed" justifies the inference that it was properly prepared for transmission in due course of mail and was placed in the custody of the officer charged with the duty of forwarding the mail. (Page 392.)
3. SAME—PRESUMPTION—REBUTTAL.—The presumption that a letter properly mailed was received may be rebutted by testimony that it was not in fact received, but the positive denial by plaintiff that it had been received would not be sufficient, as matter of law, to nullify the presumption. (Page 392.)

4. TRIAL—QUESTION FOR JURY.—Where defendant testified that he mailed a certain letter to plaintiff company, and one of plaintiff's officers testified that he never received the letter, but it appeared that some one else might have received and opened the letter on plaintiff's behalf, the question whether the letter was received by plaintiff was properly left to the jury. (Page 393.)

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

E. H. Mathes and *Norton & Hughes,* for appellant.

Where uncontradicted testimony shows that a letter has not been received, the presumption of its receipt growing out of the fact that it was stamped and mailed is overcome. 72 Ark. 305, 80 S. W. 151. The presumption of receipt of a letter only arises upon proof that it was properly addressed, stamped and mailed.

S. H. Mann, for appellee.

The presumption that a letter, properly stamped and addressed, is received, is not overcome by the testimony of the vice president of the company to which the letter was addressed that *he* did not receive it, when the proof shows that he did not open the mail received, but that all mail received by him came to him through the hand of some employee under him whose duty it was to decide whether the letter was of the class he should see or not. 74 Ark. 16.

FRAUENTHAL, J. This was an action instituted by the Southern Engine & Boiler Works, plaintiff below, to recover possession of a boiler, engine and other machinery which it sold to defendant. In its complaint it alleged that it had sold said property, in pursuance of a written contract made with the defendant, for the sum of $2,000, a part of which defendant paid, and for the balance of which he executed two notes for the sum of $643 each, the second of which was due December 19, 1909, and that it was stipulated, both in said contract and in said notes, that the title to said property was retained in the plaintiff until the payment of the purchase money therefor. It was also alleged that said last note had not been paid, although past due.

Defendant admitted the execution of the contract and the notes, but alleged that in said written contract it was stipulated that the plaintiff warranted the said machinery against any defects, and that he had been damaged by reason of the breach of

said warranty, and had duly notified the plaintiff thereof according to the terms of said contract. He pleaded said damages as a counterclaim, for which he asked a recovery.

The plaintiff replied to said counterclaim, denying that the machinery was defective, and also denying that notice of any defects therein was given to it in accordance with the terms of said written contract. By the terms of said written warranty of the machinery, contained in said contract, it was provided that within thirty days after receiving it the defendant should give written notice to the plaintiff of any alleged defects therein, so that they could send a man to remedy the same.

Upon the trial of the case, the jury found in favor of defendant in the sum of $468.10 damages upon his counterclaim, and a judgment was rendered in favor of plaintiff for the balance of said notes. From this judgment plaintiff has appealed.

There was no question made in the lower court relative to the right of the defendant to plead said counterclaim, or to the judgment rendered upon the verdict, if defendant was entitled to recover any damages. It is conceded by the plaintiff that there was sufficient testimony to sustain the verdict of the jury that the machinery was defective, and that thereby defendant was damaged to the extent of the jury's finding. The sole assignment of error now made by the plaintiff why the judgment rendered on said verdict should be reversed is that there was no testimony showing that the defendant had given to it the written notice of the defects in said machinery as required by said written contract.

The property was received by the defendant about the 15th day of July, 1909, and the defendant testified that soon after its installation he found that the same was defective and would not run, and that he immediately telephoned to the plaintiff to this effect, and on the same day wrote to the plaintiff a letter stating that the machinery was defective, and requesting that a man be sent at once to remedy the same. He testified that he wrote this letter July 28, 1909, addressed to the plaintiff at Jackson, Tenn., where plaintiff was located, and introduced in evidence a copy thereof. He further testified that he never received any answer to this letter. He also testified that he wrote to plaintiff another letter on August 2, 1909, in which he stated that there were defects in the saws, and said: "Send me relief at once."

The plaintiff concedes that these two letters, if written and properly mailed to it, were within the time required by the contract; but it claims that it never received said letter of July 28, 1909, and it urges that the letter of August 2, which it admits it received, was not sufficient notice to it of any defects other than in the saws, which it subsequently repaired. It is urged by the plaintiff that the defendant only testified that he wrote the above letter of July 28, but did not testify further that he had deposited it in the postoffice, duly addressed to it, and that therefore no presumption arose that it had received it. And it further contends that the evidence on the part of the plaintiff proved that such letter was never received.

It is true that upon his direct examination the defendant testified only that immediately upon telephoning the plaintiff he sat down and wrote to it the above letter of July 28. He was not asked, either upon his direct or cross examination, whether he had stamped the letter duly addressed to plaintiff and deposited it in the postoffice in the due course of mail. He testified that he had written other letters to the plaintiff, which it admitted it received, and as to them made no statement relative to mailing same other than he had made as to said letter of July 28. We think that the plain import of the language used by the witness indicated that he had mailed the letter, duly addressed to the plaintiff, and that it was so understood by the parties to the suit and by the jury at the time of the trial, and for this reason no other questions were asked him relative to the mailing of the letter. But, upon the cross examination of the witness by the plaintiff, it asked him whether he wrote a letter to plaintiff dated November 6, 1909, and introduced said letter in evidence. Defendant testified that he wrote said letter, and that the statements contained in it were true. In said letter he stated that the machinery broke the first or second day he sawed with it, and that from that day on it had caused him a great deal of delay, "and then I called you up and asked you to send a man to see what was the matter, * * * and then I wrote you the letter in order that I might comply with my part of the contract, and mailed the letter to you in one of your backed envelopes, and I think you got that letter, and you still failed to act in the matter." Now, as above stated, the defendant had testified in his direct examina-

tion that he telephoned to the plaintiff regarding the defects in the machinery, and had at once written it the letter dated July 28, 1909, and that he only telephoned to the plaintiff one time. In this letter of November 6 he states also that he telephoned to the plaintiff and immediately wrote it the letter, and that he mailed this letter to the plaintiff.

We think that it is a fair inference from this testimony that the letter referred to was the letter dated July 28, 1909; so that, by the introduction of this letter of November 6, 1909, by plaintiff, there is testimony showing that the letter of July 28, 1909, was duly sent by mail to it.

The rule is well settled that if a letter is properly mailed it is presumed that it reached the party to whom it was addressed, and was received by him in the due course of mail. *Burlington Ins. Co.* v. *Threlkeld,* 60 Ark. 539; *Planters' Mut. Ins. Co.* v. *Green,* 72 Ark. 305; *Click* v. *Sample,* 73 Ark. 194; *Merchants' Exchange Co.* v. *Sanders,* 74 Ark. 16; *Bluthenthal* v. *Atkinson,* 93 Ark. 252; *Rosenthal* v. *Walker,* 111 U. S. 185.

The word "mailed," when applied to a letter, means that it was properly prepared for transmission in the due course of mail, and that it was placed in the custody of the officer charged with the duty of forwarding the mail. When, therefore, the witness testified that this letter had been mailed to the plaintiff, it was sufficient evidence that it had been properly directed, stamped and delivered to the officials of the postal department for proper transmission through the mails; and from this the presumption arose that the plaintiff, to whom the same was addressed, received it. This presumption could be rebutted by testimony that it was not in fact received, but the positive denial by plaintiff that same was received would not be sufficient, as a matter of law, to nullify the presumption of its receipt. Such testimony simply left the question as to the receipt of the letter for the determination of the jury, under all the testimony adduced at the trial. 10 Cyc. 1670; *Merchants' Exchange Co.* v. *Sanders, supra.*

In the case at bar, the only witness introduced by the plaintiff who testified that said letter was not received was its vice president and sales manager. He testified that in plaintiff's office at Jackson there were at least twelve persons who handled its correspondence, and that the witness never opened any of the letters

himself. It appears that the letters were opened by clerks in the office, who thereupon would turn over to the witness such letters as appertained to his department. His department handled all correspondence relative to the sales of machinery. He testified that to the best of his knowledge and belief, and from the course and custom of the business at plaintiff's office, the above letter of July 28 was not received by it. Under this testimony and that given by the defendant, we think that it was a question of fact for the jury to determine whether or not the letter had been mailed and received by the plaintiff. That question the jury has, by its finding, determined in favor of defendant.

It is also urged by the plaintiff that the court erred in instructing the jury on behalf of the defendant that when a letter is placed in the postoffice, addressed to a certain party, the presumption is that it was received by the party to whom it was addressed. It is contended that there is not sufficient testimony upon which to base this instruction. But, in view of what we have said above, we think there was no error in giving this instruction.

It is also urged that this instruction was inconsistent with one given on behalf of the plaintiff. On behalf of the plaintiff the court instructed the jury that before defendant could recover anything upon his counterclaim it was incumbent upon him to prove that he had given written notice to the plaintiff within thirty days after receiving the machinery that same was defective. We do not think that these instructions are inconsistent. It was incumbent on the defendant to prove that he had given written notice to the plaintiff that the machinery was defective, and also that it received such notice. Defendant could prove this by showing that he gave this notice by a letter which was duly mailed to plaintiff, for, upon showing that a written notice was thus mailed, the law will presume that the plaintiff duly received it.

It follows therefore that the assignment of errors thus made by plaintiff is not well taken.

Judgment is accordingly affirmed.

OAKLEAF MILL COMPANY v. LASH.

Opinion delivered March 20, 1911.

JUDGMENT—WAIVER OF JURISDICTION OF PERSON.—In a case wherein the court rendering a judgment by consent had jurisdiction of the subject-matter, the judgment-defendant will be held to have waived any objection to the court's jurisdiction over his person.

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

The Oakleaf Mill Company was a domestic corporation operating a sawmill in Hot Spring County, Arkansas, where it maintained its chief office. Frank Lash was one of its employees, and was killed in an accident at this mill in said Hot Spring County, on the 25th of August, 1909. The Mill Company carried indemnity insurance, and two weeks after Lash's death the attorney for the insurance company went to see his widow relative to a settlement of the case. A compromise for $800.00 was agreed upon. Josie Lash, the widow, was appointed administratrix of her deceased husband's estate, and on the 14th of September, 1909, a consent judgment was entered in the Saline Circuit Court in her favor as administratrix against the Oakleaf Mill Company for $800, $500 of which was for the next of kin, and $300 for the estate. Mr. Henry Berger, an attorney of Malvern, appeared for the plaintiff and T. D. Wynne for the defendant. The judgment was paid on the date of its rendition.

On the 15th day of August, 1910, Mrs. Lash as administratrix filed a complaint in said Saline Circuit Court to set aside and vacate said judgment, alleging that letters of administration were issued to her and used in said cause without her authority or consent, and that Henry Berger was not employed nor authorized by her to appear in said cause; that said court was without jurisdiction to try it; that the consent judgment set out was fraudulent and prejudicial to plaintiff and obtained by collusion between counsel and a fraud upon the court. That plaintiff's husband, at the time of his death was 38 years of age, and earning $65 a month, and killed by the gross negligence of defendant company while in the discharge of his duties and in the exer-

cise of due care, and that plaintiff has good cause of action for damages against said company, "but that, as long as the above mentioned judgment stands, it will bar plaintiff from enforcing her cause for damages for the death of her husband." Prayer for order vacating and setting aside the judgment.

Defendant answered, denying that the letters of administration were issued without authority to plaintiff without her consent; that she did not authorize Henry Berger to appear as her counsel in the cause, and did not know that he did so appear until after the judgment was entered. That the said judgment was fraudulent, and that it was prejudicial to plaintiff, and that it was obtained by collusion between counsel and a fraud upon the plaintiff and the court. Alleged that the court had jurisdiction of the matters involved in the judgment rendered. Denied that appellee's intestate was killed by negligence of the defendant, and that she had a good cause of action against the defendant on account of his death. Alleged that said judgment was entered and rendered by consent of plaintiff and defendant to consummate and carry into effect a compromise settlement of the cause of action for the death of Frank Lash, which compromise was agreed upon by the parties; that every step in the said compromise and the said proceedings was taken in good faith by the defendant, and no wrong of any kind was practiced on the plaintiff therein, and, said judgment being thus fairly rendered, is conclusive in all matters involved in the case of said action.

It also demurred to the complaint on account of the court being without jurisdiction to order and determine the same, and because it did not state facts sufficient to constitute a cause of action, but the demurrer was not passed on.

Plaintiff replied, admitting that she entered into a compromise with defendant by which she received the sum of $800 for the death of her husband and signed papers which the defendant asked her to sign in connection with the settlement, alleging that at the time she signed said papers she was in a critical condition, both in body and mind, and prostrated on account of her husband's horrible death, which occurred only a little more than a week before she entered into the compromise, and the near approach of the birth of their child, etc., and not in a fit condition to discuss the matter; that she was urged to make said com-

promise, and fraudulently misled by statements from the attorney of the insurance company that if she did not close the matter out at once her husband's father would supersede her as administrator of the estate and get what was coming to her. By reason of such fraudulent representations and undue influence while she was in such a critical condition and while she was on such unequal footing and at such a disadvantage with defendant's agent, she signed papers presented to her by the defendant, "of the contents of which she was and is ignorant, which was a fraud and from which she asks the court to release her."

Testimony was introduced by both parties, tending to show a compromise entered into between the attorney for the insurance company and the manager of the Oakleaf Mill Company on the one side and Josie Lash, the widow of Frank Lash, upon the other, for damages for the death of her husband, and a settlement of the claim for $800, $500 for the widow and next of kin and $300 for the estate; that she was in consultation at the time of the settlement with her father and sister, and advised by a friend, Mr. Norton, who was a justice of the peace, and who had been sent for by her before the agreement was entered into. After the amount was agreed upon, it was suggested that an administration would be necessary, and a consent judgment of the court to carry out the agreement. The widow did not care to employ an attorney and pay out any sum for a fee, and it was further agreed that the attorney's fee would be paid in addition to the amount agreed upon. After her appointment as administratrix, Mr. Berger was selected, by her consent, to draw up the complaint, and he and the attorney for the defendant went before the Saline Circuit Court, then in session, and filed the complaint and answer, and a consent judgment was taken for $800 and the amount paid to her.

The testimony sustained the findings of fact made by the court, as follows:

1. The claim and demand of Josie Lash as administratrix against the Oakleaf Mill Company for the death of Frank Lash, was compromised, and there was no fraud or imposition in said compromise.

2. The judgment of Saline Circuit Court in case of Josie Lash as administratrix *v.* Oakleaf Mill Company was taken to

carry into effect the compromise, and there was no fraud or collusion in said judgment or in any proceedings connected therewith. The parties voluntarily appeared in said court in said cause.

The court declared the law to be "that the Saline Circuit Court had no jurisdiction in said cause of Josie Lash as administratrix *v.* Oakleaf Mill Company, wherein consent judgment was rendered at the September term, 1909, in said court," and set aside and vacated it, from which judgment this appeal is brought.

J. H. Harrod, for appellant.

Notwithstanding the fact that appellant had its principal office in Hot Spring County, it could, nevertheless, voluntarily appear in the circuit court of another county in the State; and when it so appeared, that court would have jurisdiction, and its judgment would be legal.

J. C. Ross and *H. B. Means,* for appellee.

The circuit court of Saline County had no jurisdiction to hear the case and enter the judgment of September 14, 1909, and the judgment was properly vacated. Kirby's Dig. § 6067; 77 Ark. 417; 83 Ind. 89; 64 N. C. 631; 41 Mich. 598, 600; 10 Wash. 147; 16 Utah, 151, 158, 159; 33 Ark. 31; 38 Ark. 205; 70 Ark. 346; 72 Ark. 376; 77 Ark. 412.

KIRBY, J., (after stating the facts). It is contended that the court erred in holding that it had no jurisdiction to render the judgment of September 14, 1909. Section 6067, Kirby's Digest, provides:

"An action, other than those mentioned in sections 6060, 6061, against a corporation created by the laws of this State, may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides; but, if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency."

The defendant was a corporation created by the laws of this State, situated in Hot Spring County, with its principal office or place of business in said county, and it did not appear that its chief officer resided in Saline County.

The administratrix who also resided in Hot Spring County brought a friendly suit in Saline County, the circuit court being in session in said county, to carry into effect a compromise of a claim for damages arising out of the death of her husband Frank Lash caused by an injury received at the mill of defendant company in Hot Spring County where he was employed, and said company appeared in said Saline Circuit Court and filed an answer therein, and judgment was thereupon rendered for the plaintiff in the sum agreed upon, eight hundred dollars, which was duly paid to said administratrix, plaintiff.

In *Spratley* v. *Louisiana & Arkansas Ry. Co.*, 77 Ark. 412, said section 6067 was construed, the defendant having appeared to the suit and objected to the jurisdiction of the court because it was sued out of a county designated in said section, and it was strongly intimated that, but for the objection by the defendant to the venue, the court, after its appearance there, could have rendered judgment against it in the cause.

The action brought in the Saline Circuit Court in which the defendant appeared and the consent judgment was rendered was a transitory one, and the court was one of general jurisdiction having the authority given by law to try such causes.

"Jurisdiction of the subject-matter is given only by law, and cannot be conferred by consent; and therefore the objection that a court is not given such jurisdiction by law, if well founded, can not be waived by the parties." *In matter of Moore,* 209 U. S. 490, 52 L. Ed. 914.

Here the parties appeared in a court having jurisdiction of the subject-matter of the action and consented to the judgment therein, and there was nothing whatever to indicate that the suit was brought in other than the county designated by statute, and defendant thereby waived any right it might otherwise have had to object to the jurisdiction on that account. *Hearn* v. *Ayres,* 77 Ark. 497. The judgment as to it was valid and binding, and surely the plaintiff will not be heard to complain of it on that account.

The court found that there was a compromise of the valid cause of action of plaintiff, and that the judgment was rendered to carry into effect such compromise, "and there was no fraud or collusion in said judgment or in any proceedings connected there-

with," and it should have rendered judgment denying the prayer of the petition to vacate it.

The judgment is reversed, and the cause dismissed.

ARKANSAS MIDLAND RAILROAD COMPANY v. PEARSON.

Opinion delivered March 20, 1911.

1. MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF MEDICAL MEN.—Where a railway company gratuitously assumed to collect and preserve a fund deducted from the salaries and wages of its employees and therefrom to provide hospital accommodations and medical attention to its injured employees without any profit or gain therefrom, it will not be responsible for negligence of the physicians and surgeons employed at such hospital, unless it agreed to become liable for their negligence, providing it used ordinary care in their selection. (Page 409.)
2. EVIDENCE—EXPERT EVIDENCE—FORM OF HYPOTHETICAL QUESTION.—In propounding a hypothetical question to an expert witness the data upon which it is based need not cover all of the facts which have been proved in the case. (Page 412.)

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

STATEMENT BY THE COURT.

This suit was brought by appellee to recover damages for the benefit of the widow and next of kin and the estate, for the wrongful death of his intestate, caused, it was alleged, by the failure to furnish him proper medical and surgical attention.

It was alleged that the deceased, Jack Campbell, while in the discharge of his duties as conductor of a freight train on appellant's road, known as the accommodation, running from Helena to Clarendon and return, jumped or fell from the top of one of the box cars on September 22, 1908, at about 11:45 A. M., and sustained from said fall the following injuries: "a comminuted fracture of the right ankle and fracture and dislocation of the left ankle." That both said injuries were serious, and the demand for immediate skillful attention urgent. That the train was ordered to proceed on its regular trip, and the said Campbell was left at the town of Holly Grove, where only the most perfunctory attention was given him until the return trip of the train about

2 o'clock P. M. That he was then placed on a crude cot in one of these box cars, and, without any attendant provided by defendant, was brought to the city of Helena, arriving at 8:30 P. M. That while said Campbell was in said box car, the train did its regular and ordinary work, switching a large number of cars at the towns of Womble, Poplar Grove and Barton, by reason of which he was roughly and cruelly thrown from side to side upon his cot and caused to suffer untold agony and his wounds to receive fresh injuries. That the company physician failed to do anything for his relief, and upon his arrival at Helena advised that he be taken to the hospital at St. Louis, which was done by defendant's direction, on the morning of September 23. On arriving at St. Louis at 8:30 P. M., by reason of the failure of the defendant's hospital department to provide an ambulance as it had agreed to do, he was compelled to remain in the station for several hours, and did not reach the hospital until 11 o'clock at night. That he then received no attention, except a perfunctory examination by an interne, until 11 o'clock the next day, at which time decomposition had set in, and that he died the following morning as a result of said injuries at 7:30 o'clock.

Plaintiff charges that the proximate, the immediate and the only cause of the death of said Campbell was the gross negligence, indifference and inhumanity of the defendant company. Plaintiff charges the truth to be that if the defendant had used even ordinary care and caution in the treatment of said Campbell after the nature and extent of said injuries were fully known to defendant, his life could and would have been saved and his usefulness unimpaired. That by reason of said failure by defendant to provide surgical and medical attention at the proper time, and by reason of the delay in getting said Campbell where he could be and would have been properly treated, which said delay was caused by the gross negligence and carelessness and indifference of the defendant, said Campbell was caused to suffer and did suffer the most excruciating misery and physical pain, by reason of which he was finally caused to lose his life." That he left surviving his widow, Maggie Campbell, and five children of the ages of 12, 10, 7, 5 and 3 years, respectively. At the time of receiving said injuries he was 39 years old, in perfect health and earning $100 a month. That deceased contributed to the main-

tenance and support of his wife and children as aforesaid the entire amount of his salary; that he was sober, industrious, of good moral character, in direct line of promotion, kind to his children and solicitous of their well being. Prayed judgment for $15,000 for the widow and children and for the mental and physical pain and suffering of deceased, for the benefit of his estate, damages in the sum of $10,000.

Defendant filed a motion to strike out certain parts of the complaint, which was overruled. It then answered, denying that said Campbell was engaged in the performance of his duties as conductor of the train mentioned when he received the injuries complained of. That there had been taken out and retained by the defendant any sum of money from his salary for the support and maintenance of the hospital department of the defendant, and that in return therefor it was understood by and between the said defendant and Campbell that he should receive proper medical and surgical attention, to be supplied and furnished by the said defendant whenever the emergency or necessity therefor should arise; that it was defendant's duty to give such medical and surgical attention to said Campbell, and denied that there was any neglect of such duty. Denied all the material allegations specifically. Alleged that deceased was allowed to remain at Holly Grove after the accident and injury and put upon the return train and carried to Helena at his own solicitation and suggestion, and made as comfortable as possible on his return trip, and handled with all the care and attention as was suggested and required by him. Denied that any physician or surgeon on its behalf failed to do anything for Campbell's relief; alleged that everything possible was done for his comfort and relief, and that it was at his request that he was transferred to the hospital at St. Louis. Denied that there was any failure or refusal of hospital department to provide an ambulance to take him from the station to the hospital, or that it had agreed or promised to do so. Denied that after reaching the hospital he received no attention, and alleged that he was properly examined and treated, and everything known to medical science and surgery was done and performed for the said Campbell. Denied that he died as a result of any neglect of defendant as to his alleged injuries. Denied that it failed to use ordinary care and

caution in the treatment of Campbell, or that his life could and would have been saved and his usefulness unimpaired by the most skillful treatment known to medical or surgical science. Denied that the nature and extent of his injuries were fully known to the defendant at the time; that there was any failure to provide surgical and medical attention at the proper time, or that by reason of any delay to get Campbell to a place where he could and would have been treated he was caused to suffer, or that by reason of any such failure said Campbell was caused to lose his life; that plaintiff was entitled to recover any damage for mental or physical suffering.

Answering the second paragraph of the complaint, denied that deceased was conscious of mental or physical pain and suffering, or that it was caused by or was the direct or proximate result of any cruel or inhuman treatment alleged to have been received by him while on the return trip to Helena, or that any part thereof was caused by any negligence or careless failure of the defendant to provide surgical and medical attention at the proper time, or that there was any failure on the part of defendant to provide proper medical and surgical attention to said Campbell, and alleged that he did receive proper medical and surgical attention and treatment, and whatever was done in the way of caring for him after the injury and in the way of medical and surgical treatment or in transportation to secure the same, or in the waiting for such medical or surgical treatment, was pursuant to the request of the said Campbell himself. Denied that his estate was damaged in any sum whatever by any wrongful or negligent conduct on the part of the defendant. Alleged further that if deceased experienced or endured mental or physical pain or suffering, same was caused and contributed to by his neglect and his own conduct, and pursuant to his own request; that any injuries or damages alleged were within the assumed risks and hazards of said deceased as to his employment, for which the defendant was not liable."

An amendment to the complaint was filed, alleging the sale of the Arkansas Midland Railroad to the St. Louis, Iron Mountain & Southern Railway Company after the filing of the complaint and the consolidation and merger of the said roads. Prayer that said St. Louis, Iron Mountain & Southern Railway Company

be made a party defendant, and for judgment against it as against the Midland.

The St. Louis, Iron Mountain & Southern Railway Company appeared and adopted as its answer to the original and amended complaint the answer filed by the Arkansas Midland Railroad Company; "and each and both of said defendants denied any liability whatever, and prayed judgment on behalf of defendants herein, and for all other and proper relief."

The testimony tended to show that Jack Campbell was conductor on the accommodation train carrying freight and passengers, running from Helena to Clarendon and return, at a salary of $100 a month; that he fell or jumped from the top of a box car to the ground in the yards at Holly Grove about 11 o'clock on the morning of the 22d of September, 1908. That the brakeman and engineer went to his assistance and set him up in the box car, carried him down to the station and sent for the doctor. Dr. Sylar was the company physician at Holly Grove, and reached the patient within 20 or 30 minutes after he was telephoned for. The witnesses first reaching him saw that his ankle was swollen. The skin was not broken, but badly bruised, turning black. He had removed his shoes before they reached him. The car was stopped near the station by Campbell's direction, and the physician examined him while in the car and removed him across the street to Dr. Johnson's house. The engineer, then the superior officer of the train, telephoned the superintendent, reporting the accident and asking for instructions as to the further proceeding of his train. He was directed to proceed to Clarendon and return, and was met on his return trip by the superintendent at Pine City. Campbell suggested that they go on to Clarendon and pick him up on the return trip. Upon reaching Holly Grove on returning, he was brought over on a cot and put in the baggage car, the attendants not being able to get the cot in the coach. The train then proceeded to Helena, doing the usual switching at the different stations, the employees handling it as carefully as possible and with as little jolting and jarring from switching, connecting and disconnecting the train, as was possible. It reached Helena between 8:00 and 8:30. Campbell was carried to his residence, where he was treated by Dr. Cox, the company physician. The next morning he was placed upon one of defend-

ant's passenger trains and taken to the hospital at St. Louis, Mo. After reaching the station there, there was some delay of probably an hour before he was carried to the hospital. Upon arriving at the hospital a physician examined him, unwrapped his feet and took off his splints, and re-wrapped them and put them in a wire basket. He was then put to bed, and about 9 o'clock the next morning the superintendent and chief physician examined him, and about 11 o'clock he was examined with the X-Ray. His father, who had accompanied him to St. Louis, testified that at this time his feet were black. He was then carried back to his ward and warm water in bottles was put around his legs. About 4 o'clock they took him to the operating room, punctured his feet and put in some rubber drainage tubes to let out the bruised and black blood. He was then taken to his ward and suffered considerably, and finally went into convulsions and died at 7:30, the morning of Friday, the 25th, of delirium tremens, the physicians of the hospital testified after an autopsy was made by the medical assistant of the coroner as required by law. The post mortem examination showed "Cause of death: oedema of brain and shock from injury."

Dr. Sylar, the company physician at Holly Grove, stated: "I made an examination of his injury, and there was a fracture and dislocation of the right ankle and dislocation of the left ankle. It was not possible for me to tell the extent of the fracture. The fibula bone was fractured about one and one-half or two inches above the articulation. I could discover no fracture of any other bone of the ankle. There was no abrasion of skin. Patient did not show any symptoms of shock whatever. Heart action and respiration were normal. I made the examination between 11 and 12 o'clock, and was with him most of the time until about 2 o'clock. At that time he was at the residence of Dr. J. M. Johnson on his front gallery. We took him out of the box car about 15 minutes after I got to the depot. I didn't think his injuries fatal. We removed him to Dr. Johnson's front porch and splinted his legs, gave him water and a hypodermic to relieve the pain, and arranged him on a cot comfortably. He did not care for dinner. I gave him such treatment as is customary with physicians of this community as to injuries of similar character."

Campbell told the engineer on the train to take it on to Clarendon, and that he would stay there until the train came back. Dr. Cox, the company physician at Helena, treated him about 8 or 9 o'clock that night. He took a couple of men with him and met the train. Campbell was on a cot, and they unloaded him out of the car and carried him over to the house. There Dr. Cox unwrapped his bandages, loosened them and rebound them, and left some tablets to give him. He came the next morning, and went to the depot with Campbell on his trip to St. Louis.

It was also shown that 50 cents per month hospital fees were deducted from the wages of deceased by appellant; that such deductions were made from the wages of all employees for the support and maintenance of its hospital department for furnishing medical attention to its said employees when the occasion arose therefor. The deceased after his injury was attended and treated by the company's physicians at Holly Grove, the place of the injury, and at Helena, his home, upon his arrival there, and its physicians in its said hospital at St. Louis to which he was sent, all of whom were paid from said sums so derived and collected from the wages of its employees. There was some testimony tending to show negligence upon the part of the physicians in the treatment of his injuries in permitting him to be carried upon the local train to his home after the injury and on to St. Louis, instead of requiring absolute rest for him, and also by the physicians at the hospital there.

The expert witnesses for appellee, in answer to the hypothetical questions propounded to them, stated that deceased should have recovered from the injury, and probably would have done so, with proper treatment; that the indications were he died because of the delay in administering the right treatment; that he died of hyperaemia of the brain and spinal cord, produced by a venous eclusion, which is an obstruction of the venous flow back from the injured part, a restricted condition caused by a tight bandage or something of that kind, the obstruction of the blood causing a loss of its vitality and decomposition to set in, which produced hyperaemia.

The court gave among others, over appellant's objection, the following instructions, Nos. 1, 2 and 3:

"1. You are instructed that if you find from a fair pre-

ponderance of the testimony that the deceased, Jack Campbell, during the time he was in the employ of the defendant company, contributed monthly out of his salary for what is known as hospital dues, and if you further find that it was agreed and understood by and between the deceased and defendant that the payment of such dues entitled him to surgical and medical care and attention in event of his being injured in the course of his employment, *then it was the duty of the defendant to use reasonable care to provide Jack Campbell, the deceased, with such medical and surgical attention and within such times as is usually and ordinarily provided by physicians in the several communities in which he was treated for such injuries.*

"2. You are instructed that if you find from a fair preponderance of the testimony in this case that the proximate cause of the death of the deceased, Jack Campbell, was the *failure on the part of the defendant to use reasonable care to provide such medical and surgical care and attention, and at such times as are usually and ordinarily given by physicians in the localities in which he was treated to injuries of the kind described by witnesses in this case,* then your verdict will be for the plaintiff.

"3. You are instructed that, if you find from a fair preponderance of the testimony in this case that the deceased, Jack Campbell, would have recovered if he had received *such medical and surgical care and attention, and at such times as are usually and ordinarily given to injuries of the kind described in evidence in this case by physicians in the localities in which he was treated,* then your verdict will be for the plaintiff.

And for it, out of 21 instructions asked, all but five, among the number given being 16, which reads:

"16. Even though the hospital at St. Louis and the local surgeons at different points upon the railway system of defendant are maintained by small sums of money deducted monthly from the wages of the employees of defendant, yet the only duty which the defendant owed its employees in regard to medical and surgical attention was to use reasonable care in the selection of physicians, surgeons or attendants."

The jury returned a verdict for $15,000 upon the first paragraph of the complaint for the widow and next of kin, and $5,000

upon the second, for the benefit of the estate, upon which judgment was rendered, and from which this appeal is brought.

W. E. Hemingway, E. B. Kinsworthy, S. D. Campbell and *James H. Stevenson,* for appellant.

1. Appellant does not contend that a hospital maintained partly by contributions from employees and partly by the company, and not for profit of the company, is a charitable institution, as is held by some courts, but it is contended that when the hospital, though maintained out of contributions or deductions from the wages of employees, is not a source of profit to the company, and an employee out of whose wages contributions have been made toward the maintenance of the hospital is injured, and is sent to the hospital for treatment, the company is liable only to the extent of being required to exercise ordinary and reasonable care to select competent physicians to care for and treat such cases. 100 Mo. App. 424, 74 S. W. 456; 57 S. W. 695; 94 Tex. 76; 58 S. W. 724; 32 Tex. Civ. App. 487; 19 *Id.* 166; 13 So. 638; 30 S. W. 1030; 44 S. W. 589; 153 Ind. 119; 103 S. W. 272; 11 L. R. A. 711, 712; 154 Mass. 272; 107 N. Y. 228; 89 Ill. App. 199; 47 S. W. 342, 104 Ky. 456; 102 Va. 23.

2. The proper test of the treatment given by a physician in a case is not what is ordinarily and usually given by *physicians in the locality,* but what is ordinarily and usually given by an *ordinarily capable physician* in the locality. 119 S. W. 1082-3; 35 Pa. Sup. Ct. 320-322; 37 L. R. A. 830, 839; 86 Ill. 387; 133 Ill. App. 301; 100 S. W. (Ky.) 312; 102 Pac. (Okla.) 138.

3. The proof is that the local physicians are generally confined in their duties to the giving of *emergency treatment,* and that they are authorized to operate or give final treatment only when a case is so serious as to admit of no delay. There is no contention that it was negligence on the part of either of the physicians who first treated deceased in sending him on to the hospital for more complete treatment than they were prepared to give him. The issue, therefore, which should have been submitted to the jury was whether or not the "temporary" or "emergency" treatment which they gave was, under all the circumstances, negligent.

4. It was error to assume, as was done in instruction 2, that there was a "failure on the part of the defendant to use

reasonable care to provide such medical and surgical attention, and at such times as are usually and ordinarily given by physicians in the localities in which he was treated for injuries of the kind," set out in the complaint and proof, and then to authorize the jury by said instruction to find for the plaintiff, if they found "that the proximate cause of the death of deceased" was such failure.

Instruction 3 is erroneous in that it assumes that deceased *did not receive* "such medical and surgical attention and at such times as are usually and ordinarily given by physicians in the locality in which he was treated."

4. It is error to admit hypothetical questions and answers thereto, unless such questions fairly reflect the evidence, and where they omit a material part of the facts which should be considered in their determination. Not only must such questions embrace undisputed facts that are essential to the case, but it is the duty of the court to see that such a question is so framed as to prevent the opinion given in response thereto from misleading the jury by concealing the real significance of the evidence or unduly emphasizing a part thereof. 87 Ark. 243, 293, 294 and authorities cited.

Fink & Dinning, for appellee.

1. Under the proof in this case, the hospital association is but the agent of the appellant. It cannot be held to be a charitable association, and the rule which exempts such institutions from liability does not apply. Neither is such institution exempted from liability by the mere employment of competent servants, but it must go further and *competently treat* the patients received. 14 Am. & Eng. Ann. Cas. (Mo.) 742; 34 Am. Rep. 673; 121 S. W. (Tex.) 1133; 20 Tex. Civ. App. 642; 124 S. W. (Tex.) 202; 30 Wash. 349; 70 Pac. 972; 94 Am. St. Rep. 880; 86 Ark. 465, 469; 87 Ark. 628, 632.

2. Counsel are hypercritical in their objections to instructions 1, 2 and 3. As to the physicians, the language employed therein could mean nothing more nor less than the average or ordinary physician, in so far as it applies to his care and skill. To say that these instructions required the same high degree of care as would be required of the "best" physician in the commu-

nity is unreasonable. The care and skill required in the performance of a surgical operation is that reasonable degree of care and skill that physicians and surgeons ordinarily exercise in the treatment of their patients. 2 L. R. A. 587. A physician must use the ordinary skill and care of the profession generally. 39 Vt. 447; 94 Am. Dec. 338; 31 Bard. 534; 80 N. Y. 631; 47 Neb. 727; 21 Minn. 464; 86 Me. 414; 34 Ia. 287; 11 Am. Rep. 14; 56 Ind. 467.

If appellant desired the word "physicians" to be limited to those of ordinary care and skill, it should have called the trial court's attention thereto by specific objection, pressed to a ruling. 65 Ark. 254; 71 Ark. 314; 81 Ark. 187; 82 Ark. 387; 89 Ark. 522; 140 U. S. 76. Under the instructions from the hospital association distributed to employees to the effect that "whenever passengers or employees are injured *everything* must be done to care for them properly," deceased was entitled to more than temporary treatment, and to be treated by surgeons who were permitted to exercise their best judgment in treating him.

3. The objection taken at the trial of this case to appellee's hypothetical question reveals the fact that appellant excepts because the question assumes matter not in evidence, but no objection is made because it does not embrace material matters that are in evidence. Since there is no complaint of anything except alleged omissions, appellant has no right to urge such objection in this court for the first time.

KIRBY, J., (after stating the facts). It is insisted by appellant that it was not maintaining its hospital department and employing physicians with the expectation of deriving any gain or profit therefrom, and that it was only liable, in furnishing medical attention to deceased, to use reasonable and ordinary care in the selection of competent and skilled physicians to administer it, and not for the negligence or malpractice of such physicians so selected; and by appellee that since said railroad company employed its physicians and maintained and supported its hospital by deductions made from the wages of its employees, without regard to their consent thereto, in fact assuming for pay taken from its said employees to furnish them proper medical and surgical attention, that it was bound to answer for the negligence of its said physicians in their treatment of such employees. This

question is for the first time before our court, and it has been decided differently by the courts of other jurisdictions. A physician cannot be regarded as an agent or servant in the usual sense of the term, since he is not and necessarily cannot be directed in the diagnosing of diseases and injuries and prescribing treatment therefor, his office being to exercise his best skill and judgment in such matters, without control from those by whom he is called or his fees are paid. It is generally held that hospitals conducted for charity are not responsible for the negligence or malpractice of their physicians, and that persons and hospitals who treat patients for hire with the expectation and hope of securing therefrom gain and profit are liable for such negligence and malpractice on their part.

It is alleged in this case that deductions were made monthly from the salary of the intestate, as required by the rules and regulations of the company, "for the support and maintenance of the hospital department of said company, and, in return for such monthly payments or assessments, it was understood by and between said company and said Campbell that he should receive proper medical and surgical attention to be supplied and furnished by said defendant whenever the emergency and necessity for said medical and surgical attention arose."

There was no allegation that such hospital department was conducted for gain or profit to the company, and no proof showing that any such gain or profit resulted to it because of such deductions from the wages of its employees, over and above the maintenance and support of said hospital department, and the company denied any understanding or agreement on its part to furnish proper medical attention for the deductions made.

It could not be said to be conducted as a charity, for only those employees who had contributed the fees deducted from their wages for its maintenance were entitled to enter there for treatment, and all the physicians and employees required to maintain and operate it were paid from such fund. Nor can it be said to have been administered by the railroad company out of pure philanthropy, since it may have had some benefit therefrom in decrease of amount of damages for injuries caused in the operation of the road, and the better and more efficient service to the company by its employees because of its maintenance. It is also

true that none of the employees are required to accept the treatment provided at said hospital, and cannot do so unless before their service with the railroad company is ended, thus in effect creating a fund for the benefit of themselves it may be, and certainly for others, for how few of all those contributing thereto receive any personal benefit therefrom and how small a part of the expense of caring for an injured employee was actually paid by him, to provide hospital accommodations and medical skill and attention, to relieve pain and suffering and restore health, without any hope of any other profit or gain upon their part, and without any purpose upon the part of the company in the deduction of the fees from their wages and collecting such fund other than to administer it for the support and maintenance of the said hospital department, as alleged, and without any gain or profit therefrom to it, so far as the testimony in this case shows. It was not contemplated by such employees in their contribution to this fund that it should be used in the payment of damages for the negligence or malpractice of physicians employed in the operation of such department, and certainly the railroad company that assumed gratuitously to collect and preserve such fund and provide hospital accommodations and competent physicians and surgeons to operate it, without any profit or gain or hope thereof therefrom, should not be required to pay damages for such negligence or malpractice, it being no part of its business under its charter to maintain a hospital. At most, it can only be considered a trustee for the proper administration and expenditure of such fund, and should be held only to ordinary care in the selection of competent and skillful physicians to administer relief and provide attention to sick and injured employees. *Union Pac. R. Co.* v. *Artist,* 60 Fed. 365, 9 C. C. A. 142, 3 L. R. A. 851; *Big Stone Gap Co.* v. *Ketron,* 102 Va. 23, 45 S. E. 740; *Texas Central Rd. Co.* v. *Zumwalt* (Texas) 132 S. W. 113; *Louisville & Nashville Rd. Co.* v. *Ford,* 104 Ky. 456, 47 S. W. 342; *Cummings* v. *C. & N. W. Ry. Co.,* 189 Ill. 608; *Fire Ins. Patrol* v. *Boyd,* 120 Pa. 643, 15 Atl. 533, 1 L. R. A. (N. S.) 417.

It follows that the instruction No. 16, given on the part of appellant, was a correct statement of the law defining the care required of it in the selection of competent and skilled physi-

cians, and that said instructions 1, 2 and 3, being in conflict therewith and requiring a different and higher degree of care of the railroad company and holding it responsible for negligence and malpractice on the part of physicians employed for its hospital department and treatment of employees, were erroneous, and should not have been given.

II. If the railroad company did in fact realize a profit from the total deductions from the wages of its employees for the hospital fund, after paying for the support and maintenance thereof, and the employment of physicians, or if it agreed and contracted with such employees, in consideration of the fees paid by them, to furnish proper medical attention, the rule might be different. No such contract of employment to furnish medical attention for such consideration was shown to exist, nor was it shown that the funds so collected amounted to more than the expenses of carrying on said hospital department, nor that any of such fund was used by the railroad company. The testimony of the chief surgeon as to the receipt and disbursement of the funds, same being paid out by his direction, was that it was for the maintenance of hospital and emergency hospitals for treating sick and injured employees, and not for gain or profit. "The funds so derived are used solely for that purpose" was competent and should not have been withdrawn.

There was no error in permitting the hypothetical questions to be asked. In *Missouri & N. Ark. Rd. Co.* v. *Daniels, ante,* p. 352, the court said: "In propounding a hypothetical question to an expert witness, the data upon which it is based need not cover all of the facts which have been proved in the case. The party offering the testimony may select such facts as he conceives to have been proved, and predicate his hypothetical question thereon."

And in *Taylor* v. *McClintock,* 87 Ark. 243:

"The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence or any part thereof, and it is not necessary that the facts stated as established by the evidence should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts."

For the errors indicated, the judgment is reversed, and the cause remanded.

HELENA GAS COMPANY *v.* ROGERS.

Opinion delivered March 20, 1911.

1. NEGLIGENCE—STREETS—DUTY AS TO KEEPING IN REPAIR.—An instruction which made it the absolute duty of one who makes an excavation in a street to keep and maintain such excavation in a proper and safe condition is erroneous. (Page 417.)
2. SAME—LEAVING EXCAVATION IN STREET.—Whether it was negligence to dig a hole in a street, cover it with boards and leave it for five days without attention is a question for the jury. (Page 417.)
3. DEATH—ELEMENTS OF DAMAGE.—Sorrow caused by the death of her husband and loss of his companionship are not elements of damage to be recovered by the wife. (Page 418.)

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

STATEMENT BY THE COURT.

This is a suit by the administrator for damages for the benefit of the widow and next of kin and the estate of E. M. Burns, deceased, for his wrongful death, caused, it was alleged, by the negligence of the Helena Gas Company. The negligence complained of was the digging of a post hole 24 inches in diameter and six feet deep, at a point near the northeast corner of Cherry and Perry streets, in the city of Helena, in which to place a pole for the stringing of its wires and the distribution of electricity in said city, and negligently and carelessly permitting it to remain open, unguarded, unprotected and in a dangerous condition for persons using said Cherry and Perry streets and failing to place over and around such excavation such warning as would give notice of the dangerous condition of the street.

The Gas Company denied every allegation of the complaint; denied any negligence upon its part or any liability to the plaintiff; admitted making the excavation "within the curb on the north side of Perry Street east of its intersection with Cherry Street," and that said excavation was made at the direction of the city, and under the supervision of the city engineer, for the pur-

pose of placing a pole therein on which wire was to be stretched for lighting the city; denied that the excavation was made in the street; alleged that it was within the curb and at a place safely removed from where there was traveling on horseback or otherwise; denied that it negligently and carelessly permitted said hole to remain open, unguarded and unprotected and in a dangerous condition, and, on the contrary, says that the same was covered with boards two inches in thickness and in the most secure manner possible.

The testimony tended to show that E. M. Burns was riding horseback north along Cherry Street in the city of Helena on the afternoon of August 26, 1909, on his way home to dinner. After he had crossed Perry Street and at a place in the street upon which he was riding opposite a blacksmith shop, the side of the street next to same being somewhat obstructed by vehicles left there for repairs, a negro boy, driving a wagon south, suddenly pulled his horse toward Burns, and the shaft struck the left flank of the horse ridden by him, scaring him, and he bolted to the right and ran across the corner of the sidewalk and fell into the hole dug by said company, which was only partly covered by a 1x6 board, throwing his rider violently to the sidewalk, his head striking same and fracturing the skull, from which injury he died the next day, after much pain and suffering.

The hole was on the outside of the paved part of the sidewalk and between it and the curb on Perry Street at its intersection with Cherry Street. The streets and sidewalk at this place were about on a level. The hole was dug by the Helena Gas Company under the supervision of the city engineer, and when finished covered with some old boards about two inches thick, from an old bridge nearby. About five days thereafter the injury occurred, and there was no testimony showing any further care or attention upon the part of the company to guard or keep covered the excavation, which was shown to have been uncovered and open several times after it was made.

The court gave, over defendant's objection, the following instruction No. 4, and refused to give requested instruction for it No. 2 as follows:

"IV. You are furthermore instructed that one who makes an excavation either in or adjacent to a public street can not

avoid liability to one who is injured by falling into same, by showing that it was left in a safe and proper condition for a time. It is the duty of one making such excavation to keep and maintain it in a proper and safe condition from the time it is made until it is restored to its condition prior to the making of the same.

"II. You are instructed that, under the law, the defendant had a right to place its poles on the streets of the city of Helena, and make all reasonable excavations therefor under the direction of proper officers of said city. And if you believe and find from the testimony that the excavation which is alleged to have been the proximate cause of the injury complained of was made at the place designated by the proper officers of said city, then such excavation was a lawful act on the part of the defendant, and the only duty incumbent on the defendant in making such excavation was to use ordinary care to prevent any injury liable to result therefrom. And you are further instructed that the ordinary care which the law enjoins upon every person in the discharge of a lawful act is that degree of care which an ordinarily prudent person would exercise under a like situation and circumstances; and if you believe from the testimony that the defendant, in excavating and covering the hole alleged to have caused the injury complained of, used ordinary care as defined in this instruction, then your verdict must be for the defendant."

The jury returned a verdict for $5,000 on the first count of the complaint and $2,500 on the second in favor of plaintiff, and from the judgment rendered thereon this appeal is brought.

S. H. Mann, Moore & Vineyard, Norton & Hughes, and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. In removing the pole, the gas company was simply the agent of the city, and a city is not liable for injuries occasioned by defective streets. 49 Ark. 139; 4 S. W. 450; 52 Ark. 84; 12 S. W. 157; 73 Ark. 447; 84 S. W. 480; 74 Ark. 519; 86 S. W. 295.

2. From the nature and place of the excavation, the purpose for which and the authority under which it was made, the appellant was not required to use more than ordinary care. 61 Ark. 141; 32 S. W. 500; 79 Ark. 490; 86 Ark. 36, 45. The effect of the fourth instruction given at appellee's request was to make

appellant an insurer of the safety of persons passing along the streets by this excavation. 1 S. W. 865, 869; 9 N. E. 155; 56 Pac. 141. A municipality is not an insurer of the safety of persons who go upon its streets. In the construction of public ways, it is bound only to the use of ordinary care, skill and diligence, and is only required to keep them in a reasonably safe condition. 61 Ark. 141; 95 N. W. 1084; 72 N. E. 531; 73 N. E. 481; 120 Ill. 607; 86 Pac. 264; 67 Atl. 175; 81 N. E. 594; 59 S. E. 992; 132 Ill. App. 604; 119 S. W. 1084; 32 App. D. C. 32; 116 N. Y. 657; 123 S. W. 249. The licensee of a municipality does not owe to the public any higher duty, nor incur any greater liability, than would the city itself under the same circumstances, 69 Atl. 636.

The duty to insure the safety of persons in the use of public streets and highways arises only in those cases where the excavation, obstruction or other defective condition is, in its nature, a nuisance due to some act done wrongfully and without authority or done or omitted in violation of a statute or some municipal ordinance. 113 N. W. 1081; 36 Pac. 411; 2 S. W. 417; 97 Pac. 881; 114 N. W. 57; 37 Pac. 220; 46 S. E. 565; 83 Pac. 271; 39 S. W. 884.

2. It was error to instruct the jury that in estimating the pecuniary loss to the widow on account of the death of her husband it was "proper to take into consideration the care and attention that one of his character and disposition would be expected to give to his wife." Loss of companionship is not an element of damages. Kirby's Dig. § § 6289, 6290, 6288; 57 Ark. 306, 315; 33 Ark. 350; 36 Ark. 41; 13 Cyc. 371; 81 S. W. 645; 88 S. W. 515; 9 So. 335; 52 N. W. 840; 30 N. J. L. 188; 16 S. W. 924; 87 S. W. 328; 93 Ind. 523; 72 S. W. 967; 48 Fed. 57; 3 Current Law 1038 and note 84; 5 *Id.* 948 and note 56; Cooley on Torts (2 ed.) 321 and note 3; *Id.* 322; 3 Sutherland on Damages (1 ed.) 281-284.

P. R. Andrews, for appellee.

1. Appellant cannot escape liability on the ground that the excavation was made for the convenience of the city of Helena and under the supervision of the city engineer. That does not relieve it from the consequences of its own negligence. 79 Ark. 490, 496. A city cannot justify against a nuisance created by

its officers, nor can any one justify against a nuisance created under a license from the city. Wood on Nuisance (2 ed.) § 274.

2. The fourth instruction declares the law. 54 Ark. 131; 50 N. Y. 659; 1 McArthur, 626; 19 Mo. 192. One whose active agency has brought about a dangerous condition in a street is bound to take cognizance of his own wrongful or negligent act. 56 Ark. 132; 54 Ark. 131; 68 Ark. 291. It is immaterial what caused the horse's fright and caused it to run away; appellant is nevertheless liable if its own negligence was one of the concurring proximate causes of appellee's intestate's injury. 86 Ark. 36.

KIRBY, J., (after stating the facts). I. It is contended that said instruction No. 4 given to the jury was not a correct statement of the law, in that it made the appellant an insurer of the safety of persons using the streets and sidewalks of the city near the excavation by requiring said company "to keep and maintain it in a proper and safe condition" until it was restored to the condition existing prior to its having been made. The appellant had the right to make the excavation for the post necessary to be used in the stringing of its wires and distributing the electricity to light the city at the place designated therefor, and was only bound to the exercise of ordinary care in guarding same, to protect persons using the streets and sidewalks from harm and damage on account of it. *St. Louis S. W. Ry. Co.* v. *Aven,* 61 Ark. 131, 32 S. W. 500; *Strange* v. *Bodcaw Lumber Co.,* 79 Ark. 490; *Pugh* v. *Texarkana Light & Traction Co.,* 86 Ark. 36.

If the words, "to use ordinary care," had been inserted in the second sentence of said instruction, after the word, "excavation," making it read, "It is the duty of one making such excavation *to use ordinary care* to keep and maintain it in a proper and safe condition from the time it is made, etc," it would have given the jury the correct rule of the care required by law of appellant for the protection of the public in the use of the streets and sidewalks. As to whether the digging of the hole and covering it with the boards as indicated, when finished, and leaving it there for five days without any further care and attention to keep it covered or otherwise guarded, was the exercise of ordinary care to which it was bound was the question for the jury

which should have been submitted upon proper instructions. Instruction No. 2 asked by appellant should have been given.

II. Sorrow caused by the death and the loss of companionship of a husband and happiness found in his love and kind and affectionate treatment of his wife are not elements of damage under our statute, and testimony relating thereto should not have been introduced on the trial.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. HAMMETT.

Opinion delivered March 27, 1911.

1. CARRIERS—RULE AS TO PURCHASE OF TICKET.—Kirby's Digest, § 6613, providing that "all passengers who may fail to procure regular fare tickets shall be transported over all railroads in this State at the same rate and price charged for such tickets for the same service," does not prohibit a carrier from enforcing reasonable rules refusing to permit persons without tickets to enter passenger trains. (Page 420.)
2. SAME—RULE MUST BE REASONABLE.—Where no opportunity is given to comply with a carrier's rule requiring the purchase of tickets before entering its trains, one may become a passenger without having purchased a ticket; and when he is refused admittance to the train or is ejected from the train under such circumstances, the company is liable for the damages which result. (Page 420.)
3. DAMAGES—EVICTION OF RAILWAY PASSENGER—HUMILIATION.—The sense of wrong and humiliation suffered from an illegal expulsion of a passenger from a train is a proper element of damages. (Page 420.)

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

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

1. Plaintiff was never a passenger on the train within the rule established by law. The relation of passenger and carrier is contractual, and there must be an offer and acceptance as a passenger. The failure to procure a ticket did not warrant an attempt to force himself upon the train in the face of the advice of the conductor. 21 Ark. 164. A verdict should have been directed for defendant. 132 Mass. 116; 43 Ill. 176.

2. One cannot enter a train with the expectation that he would be put off and then recover for wounded feelings. 82 Ark. 128. Nor, where a passenger is accidentally or carelessly carried beyond his destination, can one recover for humiliation. 77 Ark 20.

3. Mental suffering alone unaccompanied by physical injury does not warrant a recovery, even where the act of violation of duty is wilful. 84 Ark. 42; 70 Ark. 136; 67 Ark. 123.

Huddleston & Taylor, for appellee.

1. Those who hold themselves out as carriers of passengers are bound to reecive and carry all who offer themselves as such. 2 Hutchinson on Car. (3 ed.), § 963.

2. 89 Ark. 188, is conclusive of this case as to damages for mental suffering.

3. The damages are not excessive. Humiliation and sense of wrong suffered, in the presence of strangers, by an illegal expulsion from a train is a proper element of damage. 82 Ark. 130; 6 Cyc. 566; 5 Wash. 621; 32 Pac. 468.

McCULLOCH, C. J. The plaintiff was ejected from one of defendant's passenger trains just as he boarded it at Marmaduke, Arkansas, and he sues for the damages alleged to have been sustained by reason of such ejection. The trial jury assessed damages in the sum of $100, and defendant appealed.

Plaintiff went to the railroad station at Marmaduke for the purpose of taking passage on the train to Paragould. He reached the station about ten minutes before the train was due, but as the agent was not there he could not purchase a ticket. The agent returned just as the train arrived. He had been over to the postoffice to get the mail sack, and when he reached the station he went to the baggage car for the purpose of loading the mail and express, without going to the station. Plaintiff attempted to board the train, but the conductor required him to show a ticket. He asked the conductor to hold the train until he could get a ticket, which the conductor agreed to do. He went to the ticket window, and the agent ran to the office for the purpose of selling him a ticket, but before this could be done the conductor gave the start signal and the train moved. Plaintiff, with his money in his hand, ran up and caught the moving

train and succeeded in getting on the steps or platform, when the conductor forcibly ejected him. The conductor spoke to him in an angry tone of voice, saying, "Get out of here!" and caught him by the arm, turned him around, and shoved him off the train. He was compelled, in order to get to Paragould that day, to go in a private conveyance a distance of twelve miles. These are the facts of the case which the jury found to have existed.

A statute of this State provides that "all passengers who may fail to procure regular fare tickets shall be transported over all railroads in this State at the same rate and price charged for such tickets for the same service." Kirby's Dig. § 6613. We have held that this statute does not prohibit a carrier from enforcing reasonable rules refusing to permit persons, without tickets, to enter passenger trains. *St. Louis & S. F. Rd. Co.* v. *Blythe,* 94 Ark. 153.

But such rules must be reasonable, and a railroad company can not enforce a rule of that kind without giving passengers reasonable opportunity to procure tickets, otherwise the statute would have to be altogether ignored.

"The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier under our statute." *St. Louis & S. F. Rd. Co.* v. *Kilpatrick,* 67 Ark. 47.

One who has no opportunity to comply with rules requiring the purchase of a ticket cannot be said to have violated such rules, and cannot be denied the right to ride on that ground. Where no such opportunity is given, one may become a passenger without having purchased a ticket; and when he is refused admittance to the train or is ejected from the train under such circumstances, the company is liable for the damages which result.

The court correctly submitted to the jury the question whether or not plaintiff had been given an opportunity to purchase a ticket.

The sense of wrong and humiliation suffered from an illegal expulsion from a train is a proper element of damages. *Brenner* v. *Jonesboro, L. C. & E. Rd. Co.,* 82 Ark. 128; *Chicago, R. I. & P. Ry. Co.* v. *Moss,* 89 Ark. 188; *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 93 Ark. 35.

The assessment of damages was not excessive.

Affirmed.

HAYNES v. MASONIC BENEFIT ASSOCIATION.

Opinion delivered March 27, 1911.

1. INSURANCE—POLICY—CONDITION PRECEDENT.—The provision in a policy of life insurance that the insured "shall have fully and faithfully complied with the constitution of this association" is a condition precedent to liability on the policy. (Page 423.)
2. INSURANCE—BENEFIT SOCIETY—NOTICE OF DUES.—In the absence of a statute or of any law of a mutual insurance society requiring notice as a condition precedent to the payment of dues, where such dues are permanent charges to be paid at regular intervals, a member failing to pay dues at the time prescribed becomes delinquent and loses the right to share in the benefit. (Page 424.)
3. CONTRACT—CONSTRUCTION.—If the meaning of a contract be ambiguous, the conduct of the parties under it will be considered by the court in construing it. (Page 425.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an action by appellant against appellee on a life insurance policy in the sum of $200 issued by appellee to W. A. Haynes November 1, 1906. By the terms of the policy or benefit certificate sued on and introduced by appellant in evidence, the appellee agrees to pay to the beneficiary the sum named within thirty days after proof of death, provided the assured "shall have fully and faithfully complied with the constitution" of the association; "otherwise the certificate is void and without force."

The assured died November 3, 1907. The proof of the death of the assured was made. Deceased in his life time paid all assessments except for the quarter ending October 30, 1907. The sections of the constitution applicable here are as follows:

"2. Every master mason in good standing in his lodge is hereby made a member of the Masonic Benefit Association, so long as he shall remain in good standing in his lodge.

"6. The secretary shall, on the first day of October, A. D. 1891, and every three months thereafter, make out and forward to the masters of every lodge in the State an assessment of $1 against each master mason in good standing at the time of such notice, the same to be paid to the master of his lodge by each master mason within thirty days from the date of said notice,

and upon his failure to pay the same within the time specified he stall stand suspended from his lodge and from all masonic privileges and masonic intercourse until he shall have paid all dues and assessments against him. Any lodge in this State failing to forward to the secretary within the time required by law the full amount of each assessment against the lodge, less the express or postal charges, shall stand suspended from all masonic privileges and intercourse until said assessment is forwarded."

The secretary whose duty it was to levy the assesments under the above section never levied any assessment. He never issued any notice that an assessment had been made. On October 29, 1907, two days before the time for paying dues expired, the assured left the money to pay his assessment, due October 1, 1907, with a member of the order, but the member did not tender payment until November 5, 1907. The assured having died before the payment was tendered, same was not accepted. Demand for payment of the amount of the policy was made and refused, and this suit followed. The defense was that the assured had not complied with the constitution of the appellee association by paying the dues. The court found that the dues were not paid, and that appellant offered no evidence of payment. The court, sitting as a jury, found substantially the above facts.

Judgment was rendered in favor of appellee, and this appeal was taken.

Jones & Price, for appellant.

1. Deceased was in good standing at the time of his death as no assessment had been made for October, and no notice given to appellee. Notice is requisite. Bacon on Ben. Soc. § 379; 116 Ia. 311; 108 Mich. 665; 77 Miss. 830; 126 N. C. 477; 56 Minn. 414; 24 Fed. 450.

2. A certificate issued to a member of a benefit society is evidence that the member is in good standing, and this is presumed to continue until proof to the contrary, and the burden is upon the society to show this when relied upon as a defense. 87 Ark. 115.

3. Insured is entitled to notice, although the assessments fall due at regular intervals, where the laws of the order provide for it. 114 Ill. 467; 78 Ind. 110; 45 Minn. 262; 93 Ia. 402; 71 Tex. 149; 50 L. R. A. 114; 49 N. Y. S. 151; 17 Abb. N. C. 53.

F. T. Vaughan, for appellee.

1. The assessments fell due quarterly at *regular* intervals. The constitution told all members when they were due. No notice was required by the rules of the society nor the statutes of this State. 132 S. W. 998; 1 Bacon on Ben. Soc. § § 81, 161; 102 Ind. 262; 66 Ind. 134-136.

2. Members are presumed to know the rules and laws of their societies, and cannot excuse their omissions or failure to comply therewith on the ground of *omissions* or acts of other members or officers. 2 Bacon, Ben. Soc. p. 1114; 40 Mo. App. 605, 606; 57 Atl. 922.

WOOD, J., (after stating the facts). 1. The provision in the policy that the assured "shall have fully and faithfully complied with the constitution of this association" is a condition precedent to liability on the policy. Section 6 of the constitution requires the secretary of the grand lodge after the 1st of October, 1891, to give notice quarterly to the masters of every lodge in the State of an assessment of $1 against each master mason in good standing at the time of such notice. It further requires each master mason to pay within thirty days from the date of said notice the amount of the assessment or dues. Failure to pay within the time specified *ipso facto* results in suspension until the dues and assessments are paid.

The "assessment of $1 against each master mason in good standing" is a fixed and continuing charge levied by the constitution itself at regular periods. Each master mason must pay this assessment at the time prescribed in order to preserve his good standing in the association. The time when the secretary shall give the notice is fixed at a certain date, and within thirty days from this date the master masons in good standing must pay their dues or stand suspended. It will be observed that the secretary is not required to "make out and forward an assessment" to each master mason, but to the "masters of every lodge." The constitution does not contemplate that any notice of assessment shall be given to each master mason. On the contrary, each master mason must take notice of the assessment, and that it is due "at the time of such notice, *i. e.,* at the time when the constitution requires the notice to be given. He must pay it within thirty days of that date, whether the secretary has

given notice of the assessment or not. Each member is conclusively presumed to know the requirements of the constitution of the society to which he belongs. He receives notice, when he gets his certificate and becomes a member, of what the laws of the association require of its officers; and he cannot excuse himself for failing to comply with the laws prescribing his own duties because the officers may have neglected some duty exacted of them. 2 Bacon, Ben. Soc. p. 1114, § 434a; also § 379, p. 950.

When under the laws of the society the assessments are irregular in amount or time for payment or become payable only when notice thereof is given to the subordinate lodge, the members of the latter lodge are not in default until notice in conformity with the laws is given and they have failed to pay. 2 Bacon, Ben. Soc. § 379; *Hall* v. *Supreme Lodge K. of H.*, 24 Fed. 450.

Where the statutes of the State under which the society operates, or the laws of the society itself, require notice to be given before the dues or assessments become due and payable, then, of course, such notice must be given and in the manner and form prescribed before a member becomes delinquent. Bacon, Ben. Soc. § 379; *Newton* v. *Southwestern Mut. L. Asso.*, 116 Ia. 311; *Wolf* v. *Masonic Mut. Ben. Asso.*, 108 Mich. 665; *Doggett* v. *Golden Cross*, 126 N. C. 477; *Ball* v. *Northwestern Mut. Acc. Assoc.*, 56 Minn. 414; *Covenant Mut. Benefit Assn.* v. *Spies*, 114 Ill. 467; *Supreme Lodge K. of H.* v. *Johnson*, 78 Ind. 110; *Scheufler* v. *Grand Lodge A. O. U. W.*, 45 Minn. 262; *Garrettson* v. *Life Assoc.*, 93 Ia. 402; *McCorkle* v. *Texas Benefit Assoc.*, 71 Tex. 149; *Murphy* v. *Independent Order, etc.*, 77 Miss., 830, 50 L. R. A. 114; *Shafer* v. *United Brothers, etc.*, 49 N. Y. S. 151; *Paym* v. *Mutual Relief Soc.*, 17 Abb. N. C. 53.

But, in the absence of a statute or any law of the society requiring notice as a condition precedent to the payment of dues, and where the dues are unvarying and permanent charges to be paid at fixed and regular intervals, then a member failing to pay such dues at the time prescribed therefor becomes delinquent and loses his standing and the right to insurance benefits. Such is the case here under the proper construction to be given the constitution of the appellee association. 2 Bacon, Ben. Soc. § 379. See *Lavin* v. *Grand Lodge A. O. U. W.*, 78 S. W. Rep.

325. Taking the provisions of section 6 of the constitution as a whole, it was only intended to prescribe that a charge of $1 as assessments or dues against each master mason in good standing was to be paid at a definite time. It is not a provision for notice to the members, but a provision designating the amount and the time for payment of regular assessments or dues.

2. This is the construction that was put upon it by the officers and members of the association from the beginning. For the court found that the secretary "never levied any assessment," and "never issued any notice that any assessment had been made." Yet the assured for almost a year had continuously paid the assessments, and had left with a brother member the money to pay the last assessment due, but which the member neglected to pay until the death of the assured. Then it was too late. This conduct of the officers and the assured, who must be held to have known the laws of the association, tends strongly to show that they understood that no notice was required, and this conduct too confirms us in the opinion that the laws of the association do not require any notice to be given to each master mason.

The judgment is therefore affirmed.

KIRBY, J., dissents.

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

Opinion delivered March 27, 1911.

1. RAILROADS—DUTY TO LICENSEE.—Where there was evidence tending to prove that defendant's trainmen saw plaintiff engaged in unloading a freight car, and negligently injured her by allowing another car to collide with such car with unusual force, a finding of negligence will be sustained. (Page 428.)

2. INSTRUCTIONS—GENERAL OBJECTION.—A general objection to an instruction is insufficient to point out an objection to the mere phraseology employed. (Page 429.)

3. DAMAGES—EXCESSIVENESS.—Where the physicians who examined plaintiff testified that her injuries were not permanent, and it does not appear that she suffered severe pain for any length of time, a verdict for $2,000 is excessive, and a reversal will be ordered unless a remittitur of $1,000 is entered. (Page 429.)

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

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton and *James H. Stevenson,* for appellant.

1. The verdict is not sustained by *any* evidence, and is contrary to the evidence. There was a total failure of proof to show that defendant's servants actually knew or were fairly chargeable with notice of plaintiff's presence in the car; further, the uncontradicted evidence shows that such was not the case. 93 Ark. 15.

2. The court erred in its oral instructions. 93 Ark. 15; 90 Ark. 18.

3. The verdict is excessive. There were only a few bruises.

Tellier & Webster, for appellee.

1. This case rests on a question of fact which the jury has settled, and there is ample evidence to sustain the verdict. Even if she had warning, it was not negligence to remain in the car to protect her property, for she had no reason to expect a collision of unusual force. 93 Ark. 18. This court will not disturb a verdict when there is any legal evidence to sustain it. 90 Ark. 103; 86 Ark. 608; 85 Ark. 195; 84 Ark. 78; 82 Ark. 375; 75 Ark. 111; 67 Ark. 537; 65 Ark. 125; 57 Ark. 577; 76 Ark. 327; 46 Ark. 524; 47 Ark. 196. They are the sole judges of the weight and the credibility of the evidence. 73 Ark. 383.

2. The speed of the switched car was negligence *per se.* 93 Ark. 18.

3. Even if there was error in the court's charge in using the word "might," no specific objection was made. 65 Ark. 260; 66 Ark. 48.

4. The verdict is not excessive. Kirby's Digest, § 1904.

HART, J. Appellant prosecutes this appeal to reverse a judgment for $2,000 rendered against it in favor of appellee for injuries sustained while unloading some household goods from one of appellant's freight cars. According to the abstract of appellant, appellee testified as follows:

"I am the plaintiff in this case. I was 36 years old the 4th day of February. I am married. I have four children. We

arrived at Cominto Saturday night at 7 or 8 o'clock—something like that—and we could not unload the car until Monday. I don't know what time we started, but I suppose it was 10 or 11 o'clock. It was raining that morning, and we waited until the weather was suitable to move it, and that evening when I went down to see that the trunks and a few things were taken—the train didn't leave Wilmar until about 4:30, and there wasn't any show to unload that night—so we were down there, and it was about 5, I guess, in the afternoon—might have been a few minutes after 5. The mill stopped at 5 o'clock, and the mill hands were leaving the mill, and I was down at the car at that time, and this local came in, and I stood in the door, and so did the children, and looked at the engine. It was stopped down below us there. I don't know how far, as I didn't measure beforehand and wasn't able to afterwards, and so I, of course, looked at them; they saw me, and I saw them, and I went on about my business in the car, to get my things arranged so I could get them out, as I wanted them, and I heard the train pulling out, but I had no idea it was coming on the switch, and the first I knew I was thrown about six feet forward. When I saw it, the engine was off on the main line. I never saw it on the side track. If I had had any idea it was coming on the side track, I would not have been on it, and when they struck they threw me six feet forward. There was a heater there, a couple of sewing machines, a barrel of fruit jars, a heavy trunk and myself, all bundled up there together. The top of a heavy walnut dresser was thrown on me, and my head was struck here, and had a knot on it as big as your head and black as your shoes. When I got out of this car after the accident, went direct to Mrs. Lindsey's."

She also gave a detailed account of the character and extent of her injuries, a reference to which will be made later.

Rube Mays for appellee testified that he saw the flat cars when they struck the car in which appellee was at work unloading her goods. There was a little girl assisting appellee in her work. Witness warned her that there were cars coming down the side track, and told her that she had better get out of the car. He says he called to the little girl loud enough for appellee to hear him, but does not know whether appellee did hear him. Witness then went forward, and called to the brakeman on the

moving cars that there was a lady in the car he was approaching. The track was down grade, and the cars were moving pretty fast. The brakeman then tried to stop the cars and jumped off before the moving cars struck the one in which appellee was working.

Other evidence for appellee shows that the cars struck the one in which appellee was unloading her goods with unusual force.

The train crew state that they did not see appellee in the car unloading her goods on the day she was injured. The conductor stated that he remembered appellee coming in with him on Saturday preceding the injury, and that he "spotted" the car at her request in order that she might unload it. When he returned on Monday, he states that he never thought about that car at all; that, if he had thought of it at all, he would have thought it was unloaded; that he went down there after the accident, and it seemed as if they struck the car "a little hard."

The brakeman stated that the three cars were sent in on the side track by what is known as a drop switch; that he was on the middle car, and set the brake on it; that he could not set it very tight, but checked the cars a little; that the chain got down below, and the brake would not work well; that no one called to him that there was any one in the car; that he dropped the cars down in the usual way, and jumped off and opened the knuckle in order to make the coupling.

Counsel for appellant contend (to use their own language) that "there is absolutely no evidence, circumstantial or direct, tending to show either actual or imputable knowledge of the presence of plaintiff in the car up to the time when Mr. Mays says he shouted to the brakeman and warned him."

Appellee testifies that when the train came in and stopped, she looked at the train crew. She says: "They saw me, and I saw them."

It is a matter of common experience that two persons may look toward each other, and that one may see the other while the latter, from preoccupation of mind or other causes, may not see the former. It is equally true, however, that within certain limits of distance if one person looks at another he can tell whether or not that person sees him. Appellee does not state

what the distance was between her and the train crew. She states that she does not know, but she says they saw her. If close enough, she could tell whether or not they saw her, and the jury had a right to accept her testimony, and reject that of the train crew who testified that they did not see her.

While the brakeman testified that the drop switch was made in the usual manner and was accompanied by only the ordinary jolt or jar, it will be noted that the cars were moving down a steep grade, and the brake was out of fix, and the jury may have found from this and other evidence that the cars came together with unusual force. The question of fact which the jury was called upon to decide was whether, under the facts and circumstances adduced in evidence, the train crew knew of or should have anticipated the presence of some one at the car, and should have operated the cars with that end in view to avoid injury. *St. Louis, I. M. & S. Ry. Co.* v. *Clements,* 93 Ark. 18; *Watson* v. *Wabash, etc., Ry Co.,* 66 Iowa, 164, 23 N. W. 380; *Dooley* v. *Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 110 S. W. 135; *Missouri, K. & T. Ry. Co.* v. *Thomas* (Tex. Civ. App.), 107 S. W. 868; *Louisville & N. R. Co.* v. *Hurst* (Ky.) 116 S. W. 291; *Houston, etc., Ry. Co.* v. *Gerald* (Tex. Civ. App.) 128 S. W. 166; *Louisville & N. R. Co.* v. *Crow* (Ky.) 118 S. W. 366; *Hudgens* v. *St. Louis & S. F. R. Co.* (Mo. App.) 119 S. W. 523; *State* v. *Western Md. R. Co.,* 98 Md. 125, 1 Am. & Eng. Ann. Cas. 598, and case note.

Counsel for appellant insist that the court used the words "knew or might have known" in an instruction on this question, when it should have used the words "knew or ought to have known." Might is often used to suggest an omission or neglect, and in any view we think a specific objection should have been made to the use of the word. *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 260; *St. Louis, I. M. & S. Ry. Co.* v. *Pritchett,* 66 Ark. 46.

We now come to the excessiveness of the verdict. The physicians who examined plaintiff testify that she has received no permanent injuries. One of these had been her family physician. Other evidence shows that she soon recovered from her injuries. She walked away from the car on the day she was injured, and it does not appear that she suffered severe pain for

any length of time. Without recounting the evidence in detail, we deem it sufficient to say that we have given the testimony bearing on that point careful consideration, and have come to the conclusion that the verdict was excessive.

If within 15 days appellee will enter a remittitur of one thousand dollars, the judgment will be affirmed; otherwise, the judgment will be reversed, and the cause be remanded for a new trial.

CHILDS v. STATE.

Opinion delivered March 27, 1911.

1. EVIDENCE—RES GESTAE.—It was not error, in a murder case, to permit the State to prove that defendant's brother struck decedent immediately after he was fatally shot by defendant, where there was testimony tending to prove that defendant and his brother were acting together in assaulting decedent. (Page 435.)
2. SAME—RES GESTAE.—It was not error, in a murder case, to permit the State to prove as part of *res gestae* that defendant's brother struck decedent over the head with a breast yoke immediately after defendant shot him and that one of defendant's shots struck an innocent bystander. (Page 436.)
3. HOMICIDE—BURDEN OF PROOF.—It was not error in a murder case to refuse to instruct the jury that the State must prove beyond a reasonable doubt that the defendant did not kill the deceased in the exercise of self-defense. (Page 436.)
4. SAME—BURDEN OF PROOF.—Under Kirby's Digest, § 1765, providing that when a killing has been proved the burden of proving circumstances of mitigation that will justify or excuse the killing devolves on the defendant, *held* that upon proof of a killing by defendant the burden is on him to show facts to justify or excuse the killing, but it is sufficient if the evidence raises a reasonable doubt of his guilt. (Page 436.)

Appeal from Union Circuit Court; *George W. Hayes*, Judge; affirmed.

Marsh & Flenniken, Pat McNally and *Bradshaw, Rhoton & Helm*, for appellant.

1. The punishment is excessive. 76 Ark. 515, 520.

2. It was error to refuse to give instruction No. 5 asked by defendant, and in modifying it. It was the duty of the State

to prove beyond a reasonable doubt that defendant did not kill in self-defense. The burden was on the prosecution.

3. The court erred in admitting testimony as to the action of Seth Childs, and in permitting P. Price to testify to substantially the same facts. Also in permitting testimony as to the shooting of Smith, which was purely accidental.

4. The indictment should have been quashed. Kirby's Digest, § 4519.

Hal L. Norwood, Attorney General; *Wm. H. Rector,* assistant, for appellee.

1. The punishment is not excessive. We think defendant was lucky in escaping the halter.

2. It was not error to refuse instruction No. 5. The court properly modified it. The State is not called on to prove a negative. Self-defense must be proved by the defendant. Kirby's Digest, § 1765; 76 Ark. 110; 76 Ark. 515.

3. There was no error in the court's rulings as to admitting testimony. 77 Ark. 444.

4. The motion to quash was properly overruled. The excuse of a juryman is a matter addressed to the sound discretion of the judge. Kirby's Digest, § 4519.

HART, J. Dave Childs was indicted for the crime of murder in the first degree, charged to have been committed by killing Franklin Williams. Upon a trial before a jury, he was convicted of murder in the second degree and sentenced to a term of ten years in the State penitentiary.

Franklin Williams was killed by Dave Childs on August 27, 1910, at a public speaking at Midway Church in Union County, Arkansas. Williams was the husband of Callie Williams, a sister of Childs. They had been married 20 years; but had separated on the 20th of September, 1909. A suit for divorce, which also involved the custody of their children, was pending at the time of the killing. Williams' wife had charged him with cruelly beating her before their separation. It seems that all these matters had caused bad blood between Childs and Williams. On the day of the killing Franklin Williams and M. D. Smith, a justice of the peace, passed the wagon of Dave Childs. The manner of the killing and the circumstances connected therewith, as testified to by Smith, may be briefly stated as follows:

Williams said: "Dave, I wish you would let my children alone." And the latter replied: "I think Callie ought to have the right to have her children part of the time." That was about all of that conversation, and Williams and Smith passed on. Childs stayed at his wagon, where he was feeding his horses. In a few minutes Williams and Smith returned going in the direction of the speaking. As they passed Childs' wagon, he said to Williams: "Your boy has been here two or three times for a nickel to buy candy and lemonade." Williams said: "Do not let him have it." Dave Childs then asked Smith if there was any law to keep Callie from having her children part of the time, and Smith answered that he knew no such law. About this time, Scott Childs, the brother of the defendant, Dave Childs, began to curse and abuse Williams, whereupon the latter with an oath said: "If nothing but trouble will do, I can give it to you." Smith commanded the peace. Then he and Williams started away. After they had walked away two or three steps, Dave Childs commenced firing a pistol at Williams. He fired two shots, hitting him both times. The next shot hit Smith. Childs then fired two more shots.

On cross examination, Smith stated that when Williams said: "If nothing but trouble will do, I can give it to you," he just stood there rubbing his hands together. Just prior to this, he had been advancing toward Dave and Scott Childs, and when he made the remark was within three feet of Scott Childs and four or five feet from the defendant, and was standing facing them both. Smith said that Scott Childs had a knife in his hand; and that he (Smith) was trying to keep the deceased from advancing on Scott Childs. That deceased had stepped back one step and, starting to leave, had taken two or three steps toward the crowd before the shooting began.

On re-direct examination, over the objection of defendant, Smith was permitted to state that Scott Childs, the brother of defendant, grabbed the breast yoke of the wagon and struck deceased over the head two licks with it immediately after defendant shot him. Smith also stated that he did not see any pistol in the hands of deceased.

Dr. J. A. Moore, witness for the State, testified as follows:

That he lives at Lisbon, Arkansas; was a practicing physi-

cian and surgeon, and had been for twelve years; knew the deceased in his lifetime; that he was at Midway the day the deceased was killed, and was called on to make a *post mortem* examination, and that he did so; he found the top bullet entered the body in front of the right shoulder; passed the collar bone between the first and second ribs, ranged to the left, passing through the lung came out on the left side in front of and below the shoulder. The next bullet passed through his left arm below the elbow. The next one entered between the eleventh and twelfth rib about three inches to the right of the spine, ranging to the left, passing through the kidney and liver and the lower part of the heart, and came out between the fifth and sixth ribs. The next one entered in about an inch of the one just referred to, passing below the twelfth rib, ranging to the left, and this one struck the spinal process of the first lumbar vertebrae and glanced behind the spine. "Any one of the three of these shots would have produced death, and I think that the one that passed through the kidneys and heart would have produced instant death."

Another witness for the State testified that when deceased's body was turned over, his pistol, which was already partly out of his scabbard, fell from it. Other witnesses for the State testified that the pistol of deceased was out of the scabbard and was lying near his body when it was turned over. They also state that deceased had turned and started to walk away when defendant shot him.

Dave Childs, the defendant, testified that at the time the difficulty took place I was feeding my team; after I went to my wagon I saw Franklin Williams, the deceased, and Mr. Smith come by, and they went up the road. As they went up, Franklin Williams said to me: "I want you to leave my children alone," and I replied: "I am not bothering your children." They went on up the road.

"The next time I saw him he was coming back down the road. While he was up the road, his little boy came down to the wagon. I saw him coming down the road, and told him his child had been there again for money, and he told me not to let him have it. I asked Mr. Smith if there was any law to keep Callie from being with her children at a public gathering like

this, and he said that he did not know there was any. After I spoke to Mr. Smith mentioning my sister, Williams made towards me. He had something in his right hand down at his side, and I took it to be a knife, and I said to him: "Back up; back up." He didn't just then. I reached over in my wagon after a pistol, and by that time he had his pistol drawn on me, and I shot just as quick as I could. I shot to save my life. I really believed if I did not shoot I would be killed. When I fired the first shot, his right side was towards me. As he walked up, he said: "If trouble is what you are expecting, you can get it." I started to get my pistol the moment I saw something in his hand.

"When I reached for my pistol, I thought he was coming on me with a knife. When I told him to back up, he backed up a step and threw his gun like this. I realized it was a pistol, and shot as quick as I could. I do not know where the first shot hit him, but it was somewhere about his right side. There was smoke in my face, and I could not tell. He careened down and threw his right side to me. It took not more than half a second to fire these shots. I knew at this time that he had made threats against me. I knew the threats he had made to Sam Vinson against me. He was a large, tall, rawboned man.

"The pistol I had was taken away from me by the officers. I have no opportunity to present it here. It is a double action pistol. I had never seen an automatic pistol."

Scott Childs corroborated the testimony of the defendant. He admitted calling deceased a vile name, but said that it was after Williams had called him one.

The defendant also adduced evidence tending to show that deceased was a turbulent, quarrelsome and overbearing man; and that he had previously made threats against the life of the defendant, and that these threats had been communicated. To rebut this, the State introduced evidence tending to show that deceased had the reputation of being a quiet, peaceful and law-abiding citizen.

It is first earnestly insisted by counsel for defendant that the punishment is excessive, and they ask that it be reduced. They rely upon the case of *Petty* v. *State,* 76 Ark. 515, where this court reduced the punishment from 15 to 5 years. There, as in this case, the jury found the defendant guilty of murder in

the second degree, and the court held that, there being a conflict of evidence, the finding of the jury as to the grade of the offense must stand. We think a comparison of the facts and circumstances in the two cases are not in defendant's favor. In the Petty case the killing was the result of a sudden quarrel, and was done "under the heat of passion caused by very provoking language" on the part of the deceased. Here, according to the testimony of the witnesses for the State, the deceased was walking away when the defendant shot him. Conceding that he had his pistol in his hand as testified to by defendant and his brother, it is evident that he was making no attempt to use it; for defendant reached into his wagon, took his pistol from a satchel and fired at deceased four times without his fire being returned. If deceased was armed with an automatic pistol, and had it in his hand, it seem incredible that he did not fire it if he was endeavoring to kill the defendant. We think the facts and circumstances adduced in evidence in the case at bar show a more aggravated case of homicide than those disclosed by the record in the Petty case, and are of the opinion that they do not justify us in reducing the punishment.

We are next urged to reverse the judgment of conviction on account of the alleged error in admitting testimony to the effect that Scott Childs, the brother of defendant, struck deceased over the head with the breast yoke of the wagon immediately after the deceased had been shot. The testimony was competent. There was sufficient evidence, we think, to justify the conclusion that defendant and his brother were acting together in making the assault upon deceased. Besides, the evidence was a part of the *res gestae,* and it was necessary to make this proof to fully and correctly detail and set out the facts of the assault. The defendant's brother was present the whole time, and struck deceased as soon as the defendant ceased shooting him. It was all a part of one transaction, and it would be difficult to give a connected and correct account of the occurrence without stating all that was said and done concerning it. Under the law all that occurred at the time and place of the shooting which had reference thereto or connection therewith was part of the *res gestae. Byrd* v. *State,* 69 Ark. 537. "*Res gestae* are the surrounding

facts of a transaction, explanatory of an act, or showing a motive for acting." *Carr* v. *State,* 43 Ark. 99.

It is also insisted that the testimony showing that one of the shots struck Smith was incompetent and prejudicial. What we have already said we think disposes of this objection.

Moreover, Smith was shot accidentally because he was between defendant and deceased, and it is not claimed that he in any way participated in the quarrel or subsequent assault. Hence it is apparent that no prejudice could have resulted from this testimony. It was a part of the proof showing the manner and circumstances connected with the shooting.

It is next insisted that the court erred in modifying the following instruction asked by defendant:

"5. You have been told that, the killing being proved, the burden of proving circumstances of mitigation or justification is on the defendant. This does not, however, mean that the burden is on the defendant to show that he killed the deceased in self-defense. Before a conviction can be had in this case the State must prove beyond a reasonable doubt that the defendant did not kill the deceased in the exercise of self-defense; but if after a careful consideration and comparison of the evidence and the circumstances in the whole case you have a reasonable doubt as to whether or not the defendant killed deceased in self defense, you should find the defendant not guilty."

The court modified it so as to read as follows:

"You are told that, the killing being proved, the the burden of proving circumstances of mitigation or justification is on the defendant, but if, after careful consideration and comparison of the evidence and circumstances in the whole case, you have a reasonable doubt as to whether or not defendant killed deceased in self defense, you should find defendant not guilty."

It was not error to refuse the instruction in the form requested by the defendant. It is not sound law wherein it puts the burden on the State of negativing beyond a reasonable doubt defensive matter.

The instruction as modified was correct. It was based upon section 1765 of Kirby's Digest. This section was given to the jury and reads as follows:

"VI. The court tells the jury that, the killing being proved,

then the burden of proving circumstances of mitigation that will justify or excuse the killing devolves on the defendant, unless by proof on the part of the State it is manifest that the offense amounts only to manslaughter, or that the accused was justified or excused in committing the homicide; provided the burden of the whole case is on the State to show that the defendant is guilty beyond a reasonable doubt."

It was proved that the defendant killed Franklin Williams. The burden was then on the defendant to show facts to justify or excuse the killing. In doing this he is entitled to receive the benefit of all the evidence in the case. It is sufficient if the evidence raises a reasonable doubt as to the defense he advances. The jury were also instructed that if there was a reasonable doubt on the whole case it must acquit. *Cogburn* v. *State,* 76 Ark. 110; *Petty* v. *State,* 76 Ark. 515.

The judgment will be affirmed.

LYRIC THEATER *v.* STATE.

Opinion delivered March 27, 1911.

1. INJUNCTION—PUBLIC NUISANCE.—Before an injunction will be issued restraining acts constituting a public nuisance, it is necessary that such nuisance affect the civil or property rights or privileges of the public or the public health; it is not sufficient that such acts are criminal. (Page 439.)
2. NUISANCE—WHEN NOT RESTRAINED.—Theatrical performances or exhibitions on Sunday, where admittance is charged, are criminal and may become a public nuisance, but will not be enjoined, since neither the civil or property rights or privileges of the public nor the public health is affected. (Page 440.)

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

Cravens & Cravens, for appellants.

1. The court should have sustained the demurrer because it did not state facts sufficient to constitute a cause of action nor fact sufficient to give the chancery court jurisdiction. Courts of equity will not interfere where the acts complained of do not work great and irreparable injury, and where no private property or corporate rights are involved. 25 Ark. 301. Injunction does

not lie to restrain a public nuisance unless it affects the civil property rights of the State or the public health. 81 Ark. 117; 14 Mo. App. 413; 78 Ill. 237; 99 Ill. 489; 102 Ill. 449; 158 U. S. 564; 37 S. W. 478. A failure to enforce the law prohibiting such entertainments as Sunday shows confers no jurisdiction on courts of equity. 37 S. W. 478; 81 Ark. 117. Nor does injunction lie to prevent a violation of the criminal laws. 55 Ark. 10; 2 Wood on Nuisances, § 788 to 791; 37 S. W. 478; 42 Am. Rep. 182.

2. Where the remedy is complete at law, equity is without jurisdiction. 13 Ark. 630; 26 *Id.* 649; 27 *Id.* 331; 102 Ill. 449: 141 N. Y. 232. If appellants violated the law they could have been prosecuted; if the show was a nuisance, it could have been abated. Kirby's Digest, § 5438; 35 Ark. 352.

Hal L. Norwood, Attorney General, *Wm. H. Rector,* assistant, for appellee.

A public nuisance, irremediable at law, will be enjoined. *Vaughan* v. *State,* 81 Ark. 117, only holds that a crime at common law adequately remedied by fine, imprisonment and abatement will not be enjoined—the remedy at law being complete and adequate—and does not apply to this case.

FRAUENTHAL, J. This was a suit instituted in the name of the State of Arkansas on the relation of the prosecuting attorney of the Twelfth Judicial Circuit, seeking to enjoin appellants from giving any vaudeville or moving picture shows upon Sunday in a theater conducted by them in the city of Fort Smith. It was alleged in the complaint that appellants had advertised that they would conduct such shows at their theater on certain Sundays, and, upon being notified by the law officers that they would be arrested for the offense of Sabbath breaking if they did so, they thereupon made no charge for admittance to such performances in order to evade the criminal laws of the State in that respect. It was further alleged that such Sunday performances were legally and morally wrong, and would tend to create a violation of the Sabbath breaking laws; that they would bring together a lawless and turbulent assembly of persons, which would result in an injury to the morals and general welfare of the people of that community, and that such performances constituted a public nuisance. It was also claimed that one of the purposes of appel-

lants in giving such Sunday exhibitions was to advertise their show which was given during the other days of the week, and that the amount of the fine fixed by law for Sabbath breaking was not sufficient to prevent appellants from violating such laws.

There was a demurrer interposed to this complaint, which was overruled. Thereupon, the appellants filed an answer in which they denied that these performances given by them were illegal, or that they constituted a nuisance. They alleged that the persons assembled at such exhibitions were quiet and orderly, and that the performances were of a good and proper character, and not detrimental to the moral and religious sentiment of the people.

It appears that the appellants were, and had been for some time prior to the filing of the complaint herein, engaged in giving moving picture shows in a building located on one of the principal streets in the city of Fort Smith. They advertised that on Sunday, October 30, 1910, and on the following Sunday, they would give these performances at their theater, and did so. There was no charge of any kind made for admission to these performances. The evidence shows that these performances were given in an inclosed building, and consisted of moving pictures. On the first Sunday there was portrayed by these pictures the life of Damon and Pythias, accompanied by a lecture thereon and sacred songs and music; and on the following Sunday night the performance was of a similar character. The undisputed evidence shows that neither the moving pictures, songs or music were immoral or objectionable in any regard.

Upon final hearing of this cause the chancellor entered a decree perpetually enjoining the appellants from giving these performances in their theater upon Sunday, and from this decree they have appealed to this court.

The question involved in this case is whether or not the acts complained of were of such a nature as a court in the exercise of its chancery jurisdiction would restrain. The appellants could not be enjoined from doing any act which was not in itself wrongful. Under the undisputed testimony adduced upon the trial of this case, the performances themselves were not of a character which was illegal or immoral. It is contended, however, that the day upon which these performances were given,

being Sunday, made them wrong and immoral. It is urged that the giving of the performances upon Sunday constituted an infraction of the law against Sabbath breaking, and that they gathered together an assembly of lawless and turbulent persons, and that this constituted a public nuisance. But the illegal acts thus complained of were only violations of the criminal laws; and courts of equity will not interfere simply for the purpose of restraining acts constituting crimes because they are criminal. Courts of equity do not exercise their powers to enforce the criminal laws.

It has been held by this court that theatrical performances or exhibitions given upon a Sunday, where admittance is charged, are violations of the law against Sabbath breaking. *Quarles* v. *State,* 55 Ark. 10.

It is also well established that, although a theater is not a nuisance in itself, still it may become a public nuisance where it collects together a crowd of noisy and lawless people to the annoyance of the community in which it is situated; and such a nuisance is a violation of the criminal laws of the State and punishable. Bishop on Criminal Law, § 1135; 29 Cyc. 1183.

It is true that courts of equity have jurisdiction to enjoin acts constituting public nuisances and to abate them. But such jurisdiction is interposed solely for the protection of property or of civil rights; and, whether the nuisance be private or public, the same principle must guide the interference of a court of equity in both cases. In the absence of an injury to property or to civil rights, the chancery court has no jurisdiction to restrain acts simply because they are criminal, nor has it the power to enforce the performance of moral duties solely as such. The power of a court of equity to exercise its jurisdiction in cases similar to the one herein has been fully discussed by this court in the case of *State* v. *Vaughan,* 81 Ark. 117, and its right to issue an injunction against acts constituting a public nuisance has therein been determined. In that case it is said that there are some courts holding that common law nuisances may be restrained by injunction; and, after discussing the legality of the exercise of such right, this court finally decided that "it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the State to restrain a public nuisance

where the nuisance is one arising from the illegal, immoral or pernicious acts of men which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law." It was there held that, before an injunction could issue restraining acts constituting a public nuisance, it was necessary that the public nuisance should affect the civil or property rights or privileges of the public, or the public health; that the criminality of the act itself will not be sufficient to give jurisdiction in chancery. In that case the defendants were charged with operating what is known as a "turf exchange," or pool room, where a great number of people were assembled for the purpose of gambling. It was there held that this was in effect a gaming house, where these people were congregated, and that it constituted a public nuisance and a common-law misdemeanor, but that it did not touch civil property rights or the privileges of the public, and that an injunction would not lie at the instance of the State to restrain the operation and maintenance of this public nuisance.

We think that the principles enunciated in the opinion delivered in that case are controlling in the case at bar, even if the testimony proved that the appellants were violating the law against Sabbath breaking or the law against maintaining a public nuisance. No civil property rights or privileges of the public were affected by the giving of these performances; and therefore there was no ground shown for the exercise by a court of chancery of its power to issue a writ of injunction herein. In re *Debs,* 158 U. S. 590; *State* v. *Patterson,* 37 S. W. 478; *Attorney General* v. *Evart Booming Co.,* 34 Mich. 462.

The decree is therefore reversed, and the complaint dismissed.

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

Opinion delivered March 27, 1911.

1. RAILROAD—KILLING STOCK—NEGLIGENCE.—Evidence that an animal ran parallel with a train for 75 or 100 yards before attempting to cross ahead of the train and that no effort was made to stop the train or to frighten the animal justifies a finding of negligence. (Page 444.)

2. SAME—FAILURE TO POST NOTICE—LIABILITY.—Under Kirby's Digest, § 6774, imposing a penalty of double damages for failure of a railway company to post notice of the killing of stock, the statute makes it no exception that the owner of the stock had actual notice of its killing. (Page 445.)

Appeal from Clay Circuit Court, Eastern District; *Frank Smith,* Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit for damages for $200 alleged to have been caused by the negligent killing of a gray mare, the property of appellee, by the railroad company, and for the penalty provided by statute, double damages, for the failure to post and keep posted the description of such animal as the law requires.

The answer admitted the killing of the animal, but alleged that it was unavoidable after she was discovered near the track, and denied its failure to post and keep posted notice and description thereof.

The testimony tended to show that the mare was of the value of $200, and was killed by a freight train on defendant's track near Piggott in Clay County, at a place where the track was straight for three-quarters of a mile.

The engineer testified that he had about 45 cars in the train, and was going north at about 15 miles an hour on a pretty heavy up grade, and that when he whistled for the road crossing the mare threw up her head and started towards the crossing; that she ran along with the train some ten car lengths, and was not more than 50 to 75 feet from him when he discovered that she was going to try to cross the track, and then it was too late to stop the train. She was struck by the pilot beam as she crossed the track. That she was not on the dump when she was running parallel, and until she turned to cross he thought she would go the other way. He discovered her when she was something over 600 feet away and 25 or 30 feet from the track at the time with a ditch between her and the track. He first saw her something like 2,000 feet from the track. The fireman testified that he did not see the mare until she was struck, and did not know which side she came from.

Another witness testified that he saw the train strike the mare; that it was running pretty fast; that the whistle was not

sounded nor bell rung before striking her; that the track was straight from the place she was struck to Piggott, a distance of three-quarters of a mile; that she was close to the end of the ties on the east side of the track when he first saw her, and ran along parallel with it 75 to 100 yards, when she attempted to cross and was struck.

Appellee examined the railroad dump about 30 minutes after the mare was killed, and saw the tracks along the ends of the ties for about 75 or 100 yards up to the point where she was struck, and where the tracks stopped.

Appellee testified that he went to the depot with Dr. Martin about a week after the mare was killed and looked in the waiting room, in front of the depot and in the wareroom for a notice, and could find none; that about two days after she was killed he was talking to the section foreman, and he (the section foreman) told him that they had not posted the killing of the animal and did not post them where they notified the owners; that on several occasions through the month of July, for two or three days he looked in the waiting room and about the depot, and there was no notice and description of the animal killed posted.

The section foreman testified that he made a report of the killing of the plaintiff's mare, giving the description, value, etc., upon information which he obtained from Mr. Castleberry, the plaintiff, and the next day after she was killed he gave this description to his son and told him to post it at the depot. The boy testified that he was 11 years old; that he had heard of the killing; that his father gave him the papers and told him to post them at the depot; "that there was a nail which had been driven there by his father, and he tore a hole in the paper and hanged the notice on the nail in the waiting room, and that he posted another one about a hog."

T. L. Davis testified that he went in company with the plaintiff to the depot of defendant to see whether the animal had been posted, and did not see where it had been posted. He saw a notice of "Hog killed" in the southwest corner of waiting room.

The court instructed the jury and submitted the case on interrogatories, which were answered as follows:

"1st. Do you find for the plaintiff? Ans. Yes.

"J. F. Ethridge, Foreman.

"2d. What was the market value of the mare? Ans. $200.
"J. F. Ethridge, Foreman.

"3d. Was the notice posted and kept posted? Ans. No.
"J. F. Ethridge, Foreman."

Thereupon it rendered a judgment for $400, from which this appeal is brought.

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

1. The testimony fully exonerates the engineer from negligence or keeping proper lookout. The law does not require the engineer to anticipate that the animal would undertake to cross the track. 69 Ark. 619; 64 Ark. 236; 37 Ark. 593. The *prima facie* case of negligence was overcome by positive proof. The court should have directed a verdict for defendant. 67 Ark. 514; 80 *Id.* 396; 86 *Id.* 190; 89 *Id.* 120.

2. The posting of the notice met all the requirements of the statute and relieved the company from the penalty. 28 Ark. 372.

W. L. Castleberry pro se, for appellee; *L. Hunter,* of counsel.

1. The *prima facie* case of negligence was not overcome.

2. The notice required by § 6774, Kirby's Digest, was not posted and kept posted. 39 Ark. 246.

KIRBY, J., (after stating the facts). 1. It is contended here that appellant was not negligent, and that the killing of the animal was unavoidable.

2. That it complied with the statute by posting a notice and description of the animal killed and incurred no penalty by failure to keep it posted.

I. The question of negligence of appellant in the killing of the animal was submitted to the jury upon proper instruction, and they found for appellee. The testimony showed that no effort whatever was made to stop the train, and no warning or alarm given to frighten the animal while she was running down the track parallel with the train for 75 or 100 yards. It is true the engineer stated that the mare was not close to the track during this time, but he was contradicted by one witness who saw her and by the physical facts of the tracks being near the end of the ties and continuing to the place where the animal was killed.

The testimony was sufficient to sustain the finding of the jury.

II. It is next contended that no penalty was incurred by the failure to post and keep posted the notice and description of the animal killed as required by section 6774, Kirby's Digest. Said section requires "the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post, within one week thereafter, and to keep posted for 20 days thereafter, a true and correct description of such stock as may have been so killed or wounded, at the nearest station house and the nearest depot house, giving a true and correct description of the color, marks, brands, etc., * * * and, on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock so killed and not advertised. * * *"

There was some testimony tending to show that the notice was made out by the section foreman and sent by his eleven-year-old son, who tore a hole in the paper and hanged it on a nail in the waiting room of the depot where such notices were usually posted within a week after the killing. Two or three witnesses testified that they examined the waiting room within two or three days after the killing and found no such notice posted there, nor anywhere else about the building, and that they examined it every two or three days for 30 days thereafter and saw no such notice posted there. The purpose of the law was to require the advertising of the killing or injury of the animal, to apprise the owner thereof and assist him in its identification, and it could not be said that the hanging of the paper containing the notice on a nail, without anything else to secure it, as was testified to, was a compliance with the statute. Such notice could not reasonably be expected to remain posted and advertise the stock killed for the 20 days required, and the testimony conclusively shows that it did not remain posted any length of time if it was posted, and casts a doubt as to whether it was posted at all. The jury answered the question "Was the notice posted and kept posted?" "No," and the testimony sustains their finding.

It is true that the testimony shows that the section foreman got the description of the animal killed to put in the notice from the owner, who knew it had been killed, within 20 or 30 minutes after it occurred, and of course, the notice, if it had been posted

in strict compliance with the statute, could not have been of any benefit to apprise the owner of a fact already known to him, but the statute makes the company liable for such failure to advertise stock killed and injured, and makes no exception of "the case of the owner who has actual notice of the injury sustained by him." *Memphis & Little Rock Rd. Co.* v. *Carley,* 39 Ark. 246.

The appellant, having failed to comply with the law in posting and keeping posted for the time required, the description of the animal killed, incurred the penalty denounced by the statute, and the double damages were properly assessed by the court. *Memphis & L. R. Rd. Co.* v. *Carley, supra.*

The judgment is affirmed.

FIRST NATIONAL BANK OF SPRINGDALE *v.* FROST.

Opinion delivered March 27, 1911.

PARTIES—ADJUDICATING RIGHTS OF STRANGER.—It was error for the trial court to attempt to adjudicate the rights in the land involved in the suit of one who was not a party thereto.

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

This was a suit by the bank against J. B. Frost upon an alleged indebtedness, and to set aside certain alleged fraudulent conveyances of lands from him to the other defendants.

Upon the hearing the court rendered judgment against Frost in the sum of $4,942.31, and ordered the individual interest of Frost in the lands sold to satisfy the judgment, which interest it declared was "the entire interest therein except a one-third interest in the crops to be raised thereon during the lifetime of L. J. Walker, which right the court declared he (J. B. Frost) held in trust for her." To this holding of the court exceptions were saved, and from the judgment this appeal is brought.

The testimony showed that the lands in controversy were conveyed by B. F. Walker and his wife, L. J. Walker, to J. B. Frost, their son-in-law, by deed executed and acknowledged September 1, 1894, which expressed a consideration of $1,300 paid

by him. At the time of the execution and delivery of this deed, and as a part of the consideration for it, Frost executed and delivered to B. F. and L. J. Walker the following instrument:

"Know All Men By These Presents:

"That I, J. B. Frost, of the county of Washington and State of Arkansas, for and in consideration of a deed in fee simple with general warranty made, signed and delivered to me, as party of the first part to this contract, by B. F. Walker, Sr., and Louisa Jane Walker, his wife, party of the second part, conveying to me and to my heirs and assigns the following pieces or parcels of land situate in the county and State aforesaid, towit: * * * A more perfect description of the metes and bounds of the aforesaid land being given in the aforesaid deed of conveyance of even date of this obligation, for which I have paid the sum of one thousand and three hundred dollars to the aforesaid B. F. Walker, Sr., and L. J. Walker, his wife, the receipt of which is acknowledged by the aforesaid B. F. Walker, Sr., and wife, in the above described deed of conveyance, it, the said sum of one thousand three hundred dollars, being only a part of the agreed value of the above described land. I, J. B. Frost, party of the first part to this contract, bind myself, my heirs, executors and administrators and assigns to the aforesaid B. F. Walker, Sr., and his wife, that they, the aforesaid B. F. Walker, Sr., and L. J. Walker, his wife, shall keep and remain in peaceable possession of the mansion house, door yard and outbuildings belonging thereto and garden, during their natural lives. And I further bind myself to deliver to the aforesaid B. F. Walker, Sr., in the corn crib or bin at the usual gathering and harvesting of the crop or crops raised on the aforesaid farm, as described in the above mentioned parcels of lands, one-third part of the corn, wheat and other products raised on the aforesaid farm, if, in the judgment of the aforesaid B. F. Walker, Sr., so much should be required for their support and maintenance, at the option of the aforesaid B. F. Walker, Sr., party of the second part.

"Witness my hand and seal this 1st day of September, 1894.

"J. B. Frost (Seal)."

This instrument was not acknowledged nor attested by witnesses, and was filed for record October 12, 1898, and recorded.

The testimony showed also that B. F. Walker, Sr., and his

wife, L. J. Walker, were supported by the defendants J. B. Frost and wife until the death of B. F. Walker in 1906, since which time L. J. Walker had lived with the said defendant and his family on other lands and was cared for and supported by them.

McDaniel & Dinsmore and *McGill & Lindsey,* for appellant.

1. L. J. Walker was not a party to the suit. She is not bound by the decree nor are her rights affected by it. So much of the decree should be reversed.

2. Even if she had been a party, there could be no cause of action until refusal or failure to support; and then the amount would be uncertain and unliquidated, and no lien could be enforced. 67 Ark. 526; 43 Minn. 473; 19 Am. St. 252.

Walker & Walker, for appellee.

1. Only Frost's actual interest in the land could be sold. A lien is subject to all the equities against the land. 23 Cyc. 1382; 82 Am. Dec. 608; 15 Ark. 73; 16 *Id.* 543; 28 *Id.* 82; 33 *Id.* 328.

2. L. J. Walker was entitled to a lien for one-third of the crops, a definite, fixed amount. 67 Ark. 526.

3. The fact that L. J. Walker was not a party did not affect the court's jurisdiction; nor was she a necessary party. The court simply saved her rights. Kirby's Digest, § 6011.

KIRBY, J., (after stating the facts). It is contended that L. J. Walker was not a necessary party to the suit, and that since she was not a party to the suit at all the court erred in decreeing in her in effect a life interest in one-third of the rents of the land, and J. B. Frost trustee for her for the collection thereof, and ordering the lands sold subject to such interest. While this deed and contract were executed and delivered at the same time, and were in effect but one transaction, creating, it may be, a life estate in the possession of a part of the lands, and one-third of the rents derived from all of them, as effectually perhaps as if a reservation thereof had been contained in the deed, still it was not proper to adjudicate the rights of said L. J. Walker, who was not a party to the suit, for she could not have been bound nor her rights affected by any decree made. If she had asked to be made a party, it could have been done, since she had or claimed an interest in the land and was a proper party. If she had been

a necessary party, the court could and should have had her brought in as the statute requires, but, since the court could determine the controversy between the parties before it without prejudice to her rights, she was not a necessary party, and, not being before the court, it was error to attempt to adjudicate her rights, which might have been greater or less in fact and other than as shown by said contract. The judgment creditor was only entitled to subject the interest of its debtor in the lands to the payment of its debt, and the purchaser at the sale could not acquire any other or greater interest than that owned and held by him at the time, and such sale could in no wise have affected the rights of L. J. Walker in and to said lands, she not having been a party to the suit.

For the errors indicated the decree is reversed, and the case remanded, with directions to enter a decree not inconsistent with this opinion.

O'NEAL v. STATE.

Opinion delivered March 27, 1911.

BILL OF EXCEPTIONS—WHO SHOULD SIGN.—Under Acts 1909, c. 59, providing that "where the judge who presided at any trial shall die, become insane, or for any other cause become incapacitated before he has signed the bill of exceptions, his successor in office shall allow or correct and sign the said bill of exceptions," *held* that, though the term of office of a circuit judge who tried a case expired before the time fixed for presenting the bill of exceptions therein, he was not incapacitated thereafter to sign the bill of exceptions, and his successor was not authorized to do so.

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

Jones & Campbell, for appellant.

The old statute, Kirby's Dig. § 6225, worked great hardship in cases where the trial judge was dead, insane or had left the State, and persons desiring to perfect appeals were prevented from doing so through no fault. It was manifestly the intention of the Legislature by the amendatory act, Acts 1909, p. 147, to correct the mischief occasioned by the former statute.

where the trial judge was physically incapacitated, as was the case here, from signing the bill of exceptions before the time for filing same had expired. 3 Coke, 7; 5 Ark. 58; 13 Ark. 58; 24 Ark. 155; 3 Ark. 285; 28 Ark. 200, 203; 29 Ark. 304. Effect is to be given to the larger expression, "otherwise incapacitated." 27 Ark. 420.

Hal L. Norwood, Attorney General, and *William H. Rector,* assistant, for appellee.

Under the former statute, Kirby's Dig. § 6225, it was necessary that the bill of exceptions be signed by the trial judge, and no other judge was authorized to do so. 37 Ark. 371; *Id.* 528; 40 Ark. 173.

Under the amendatory act (Acts 1909), the trial judge must still allow and sign a bill of exceptions, unless he dies, becomes insane or from some other cause *becomes incapacitated;* and the expiration of his term of office did not incapacitate him from signing it, etc. 42 Ark. 280; 95 Ark. 71; 73 Ark. 600; 74 Ark. 528; 70 Ark. 451; and authorities cited in dissenting opinion in case of *Lee* v. *Huff,* 61 Ark. 502.

PER CURIAM. Appellant was tried in the circuit court of Independence County, and convicted of the crime of manslaughter, the Honorable Charles Coffin, judge of said court, presiding at the trial. Motion for new trial was overruled, and exceptions saved, and appeal granted, and time given beyond that term of court in which to file bill of exceptions. Before the expiration of the time allowed for the presentation of the bill of exceptions, Judge Coffin's term of office as judge of the circuit expired, and he was succeeded by the Honorable R. E. Jeffery. The bill of exceptions was, within the time allowed, presented to Judge Jeffery, and was signed by him and filed with the clerk. It was not presented to Judge Coffin, nor does any reason appear, either in the bill of exceptions signed by Judge Jeffery or otherwise in the present record, why this was not done, but an affidavit is filed here stating that Judge Coffin was absent from the county at the time appellant's counsel was ready to present the bill of exceptions. The Attorney General now raises the question that the alleged errors assigned are not now before this court for review, for the reason that the bill of exceptions was not signed by the judge who presided at the trial.

Appellant relies on the following statute, which was enacted by the General Assembly of 1909:

"Where the judge who presided at any trial shall die, become insane, or for any other cause become incapacitated before he has signed the bill of exceptions, his successor in office shall allow or correct, and sign the said bill of exceptions." Acts 1909, c. 59.

Prior to the enactment of that statute it was repeatedly ruled by this court that the bill of exceptions must be signed by the judge who presided at the trial, and that the only remedy, where an appellant lost his right of appeal by reason of death or incapacity of the presiding judge before the bill of exceptions was signed, was by an action in the chancery court for relief on account of the unavoidable casualty. The act of 1909 sought to remedy this, and to give appellants appropriate relief "where the judge who presided at any trial shall die, become insane, or for any other cause become incapacitated before he has signed the bill of exceptions." The present case does not, however, fall within the terms of that statute, for it does not appear that the presiding judge died, became insane, or in any other way incapacitated. The expiration of his term of office did not incapacitate him from signing the bill of exceptions, and, notwithstanding that fact, it was his duty, and not that of the succeeding judge, to sign it. *Watkins* v. *State,* 37 Ark. 370; *Turner* v. *Collier,* 37 Ark. 528; *Cowall* v. *Altchul,* 40 Ark. 173; *Bullock* v. *Neal,* 42 Ark. 281. Nor did the absence of Judge Coffin authorize his successor to sign the bill of exceptions.

It is clear, therefore, that there is no bill of exceptions in the record signed in accordance with the statute, and the alleged assignments of errors can not be reviewed by this court. Nothing is before us for consideration except the indictment, the sufficiency of which is not questioned, and the judgment of the court, which is in regular form.

The judgment is therefore affirmed.

FOSTER v. TREADWAY.

Opinion delivered March 27, 1911.

1. RESULTING TRUST—PAROL PROOF.—Where a mother purchased land and took deed to herself, "trustee," parol evidence is admissible to prove that the purchase was made for the benefit of the purchaser's children and paid for out of the proceeds of their homestead. (Page 453.)

2. SAME—WHEN CREATED.—Where, at the time land was purchased by a mother, it was understood that it was for the benefit of her children, and that the purchase money was to be paid out of the proceeds of the sale of their homestead, and such money was so applied at the time the deed was executed to the mother, a resulting trust arose in the children's favor. (Page 454.)

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

Carmichael, Brooks & Powers, for appellant.

Where in a deed the word "trustee" is added to the name of the grantee, but there is no declaration of trust, the word "trustee" may be regarded as *descriptio personae*. 104 Fed. 398. A trust must be declared in writing. 45 Ark. 481, 483; 99 U. S. 100; 56 Ark. 130, 136; 55 Ark. 414; 42 Ark. 503; 41 Ark. 393. An absolute deed cannot be converted into a trust for the benefit of a stranger by parol evidence, unless it be so clear and certain as to leave no well-founded doubt upon the subject. 48 Ark. 169; 45 Ark. 484; 71 Ark. 377; 64 Ark. 162. Declarations of the trustee or beneficiary after the grant are inadmissible. There can be no resulting trust unless the money that purchased the property was the money of the beneficiary. 40 Ark. 68.

A. J. Newman, for appellee.

It is admissible to prove by parol testimony any facts, oral agreement or statement of grantee made preceding, immediately succeeding or contemporaneous with the conveyance to prove such conveyance created a trust estate. 45 Ark. 481; 2 Washburn on Real Property, 445, 446; 68 Ark. 326; 65 Ark. 506.

McCULLOCH, C. J. The appellee's father, Paca H. Treadway, owned a tract of land in Pulaski County, Arkansas, which constituted his homestead, and conveyed a life estate therein to his wife, E. H. Treadway, with remainder over at her death to appellee and his other children, and also to appellant, Mary Jane

Foster, the daughter of E. H. Treadway, by a former marriage. Subsequent to the death of Paca H. Treadway this land was sold and conveyed away, the remaindermen all joining with the life tenant in the conveyance, and out of the proceeds of that sale the appellant was paid in cash her share. Another tract of land, which is the subject of this controversy, was purchased from a man named Smith, and a conveyance was executed to Mrs. Treadway. The deed from Smith to Mrs. Treadway is in ordinary form of a warranty deed, with the exception of the word "trustee" appearing after the name of the grantee, wherever it appears in the several clauses of the deed. Mrs. Treadway and appellee occupied this land up to the time of the death of the former, the other children of Mrs. Treadway having previously executed to appellee a deed conveying to him whatever interest they may have had in the land. Appellant asserts an interest in the land as one of the heirs of Mrs. Treadway, claiming that the latter died seized and possessed thereof. Appellee contends that the land was purchased from Smith for the benefit of himself and the other children of Paca H. Treadway, and that Mrs. Treadway took the title thereto as trustee. He instituted this action in the chancery court of Pulaski County to quiet his title to the land in question. On the trial of the cause the chancellor granted the relief asked by appellee, and an appeal has been duly prosecuted to this court. Learned counsel for appellant insist that the use of the word "trustee" in the deed was only descriptive of the person, and that oral testimony can not be introduced for the purpose of engrafting an express trust upon the deed. This is a question which we do not now deem it necessary to decide, for we think that, according to the preponderance of the evidence, a resulting trust in the land is fully established, in favor of appellee and his grantors, by reason of the fact that the proceeds of sale of their interest in the homestead were used in the purchase of this land from Smith. The law applicable to such state of facts is clearly stated by Mr. Justice Smith in the case of *Milner* v. *Freeman,* 40 Ark. 67:

"When a man buys an estate and takes the deed in the name of a stranger, a trust results by operation of law to him who advances the purchase money. If, however, the nominal purchaser is a child or the wife of the person from whom the money

comes, it is presumed to have been an advancement or a gift. But this presumption is not conclusive. It may be rebutted by antecedent or contemporaneous declarations and circumstances which tend to prove the intention of the person who furnished the money to buy the estate that the grantee should hold as trustee and not beneficially for himself."

The evidence in this case clearly shows that when the land was purchased from Smith it was with the understanding that it was to be a purchase for the benefit of appellee and his grantors, and the proceeds of the sale of the homestead were used in the payment of the purchase price and the cost of improvements subsequently made.

Appellant insists that the homestead was sold long after the purchase of the Smith land, that the proceeds were not applied in payment for the Smith land, if at all, until after the land had been purchased, and that a resulting trust did not arise. But we conclude from the evidence that when the purchase was originally made from Smith it was understood that it was for the benefit of appellee and his grantors, and that the purchase price was to be paid out of the proceeds of the sale of the homestead as as soon as consummated. The deed was not executed by Smith until the homestead was sold, and enough of the proceeds of the sale collected to pay the price of the Smith land. Under that state of facts the trust arose when the land was originally purchased from Smith.

The law touching this question is also settled by Judge Smith in the case just referred to as follows:

"A further objection was that the plaintiff did not pay the purchase money at the time of purchase. The evidence conduced to show that he bargained for the lots before he paid for them; the payment not being completed until the deeds were made. This court in *Sale* v. *McLean,* 29 Ark. 612, and in *Duval* v. *Marshall,* 30 *Id.* 230, said in effect that, in order to create a trust of this nature, payment of the purchase money must be made at the time of the purchase. By this it was meant that the trust must arise, if at all, from the original transaction, at the time it takes place and at no other time; and that it can not be mingled or confounded with any subsequent dealings."

We are therefore of the opinion that for these reasons the decree of the chancellor is correct, and the same is affirmed.

HART, J., concurs on the ground that the word "trustee" as used in the deed means something different from the word owner, and that parol evidence may be introduced to explain it.

FLEMING v. WEAVER.

Opinion delivered March 27, 1911.

1. LEVEES—DELINQUENT TAXES—PROCEEDING AGAINST NONRESIDENT.—Under Acts 1895, c. 71, § 1, amending the St. Francis Levee District Act, by which it is provided that notice of a suit to foreclose the lien of the district for levee taxes shall be given as against nonresidents of the county and the unknown owners by publication of a warning order, which shall contain a description of said lands, *held* that the unoccupied land of a nonresident owner must be proceeded against in the manner pointed out by the statute, or the proceeding will be void, nor does the court acquire jurisdiction by reason of a warning order against such owner describing other land of same owner duly proceeded against. (Page 457.)
2. TAXATION—DELINQUENT TAXES—WHO IS OWNER.—One holding a certificate of purchase at a tax sale before the period of redemption has expired can not be proceeded against as the owner of the land in a proceeding under Acts 1895, c. 71, to collect delinquent levee taxes. (Page 458.)

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

Wm. M., George and *Wassell Randolph,* for appellants.

1. The chancery court had jurisdiction. The redemption from the sales to Fleming could have been made at any time before June 9, 1904. Kirby's Dig. § 7095. The act of 1893, § § 7-10, was followed. Acts 1895, pp. 88-90. The decree is conclusive. 74 Ark. 174; 204 U. S. 241. It is immaterial that the ownership of land is incorrectly alleged, or that the owner not named as a party. 74 Ark. 104. The suit is *in rem.* Acts 1895, p. 89; 74 Ark. 180. Failure to get notice is the owner's misfortune, and he must abide the consequences. 130 U. S. 559. Personal notice or knowledge not requisite. 204 U. S. 262; 55 Ark. 434-5; 57 Ark. 49. The court had jurisdiction of the subject-matter;

this is sufficient. 79 Ark. 19, 29; 76 Ark. 465; 94 Ark. 519; 127 S. W. 718.

Published notice of the pendency of the suit, as required by the act, and a recital in the decree to that effect is conclusive on collateral attack. 127 S. W. 983; 77 Ark. 477.

3. A tax-purchaser is the owner of the land until redemption. 41 Ark. 63; 74 Ark. 343, 348; 56 Ark. 145, 146, 7. A certificate of purchase from the tax collector is color of title. 71 Ark. 386: *Ib.* 390.

Under section 7114, Kirby's Digest, no inquiry into the validity of the assessment or levy of taxes or validity of the proceedings of the chancery court can be had. 52 Ark. 400; 50 *Id.* 188; 22 *Id.* 118; 24 *Id.* 519; 49 *Id.* 336.

5. Want of jurisdiction must be affirmatively shown. 5 Ark. 424; 21 *Id.* 364; 117 U. S. 255, 270-1; 66 Ark. 1; 68 *Id.* 211; 70 *Id.* 88; 71 Ark. 480; 72 Ark. 101, 107-8; 93 Ark. 490.

Norton & Hughes, for appellee.

The levee decree is void for want of jurisdiction. *Van Etten* v. *Daugherty,* 83 Ark. 534. The defense of *res judicata* cannot be invoked when the judgment is void. 8 How. 540. The case of *Hall* v. *Morris,* 94 Ark. 519 and 127 S. W. 718, does not apply, for there the court had jurisdiction of the person and the land. In this case the nonresident owner was not even constructively summoned.

Personal service is not sufficient to impound the *res,* either actually or constructively. 2 Black on Judg. § § 794, 809; 74 Fed. 515; 10 Wall. 308-317.

McCULLOCH, C. J. This case involves the title to two tracts of land in Crittenden County, and turns on the question of validity of a sale of the land under decree of the chancery court of that county to enforce payment of the levee assessment of the Board of Directors of St. Francis Levee District.

At the time the suit to collect the levee assessment was commenced the lands in controversy were wild and unoccupied, and were owned by O. C. Friedlander, one of appellee's grantors, who was a nonresident of the State. The lands had been sold to one Henry Fleming by the collector for State and county taxes. The time for redemption had not expired, but the lands were unredeemed and stood on the tax books in the name of Fleming.

They were proceeded against as the lands of Fleming, and, being a resident of the county, he was summoned to appear in the suit. They were not proceeded against as the lands of a nonresident, and were not embraced in the warning order published.

Did the court have jurisdiction to decree a sale of the lands for unpaid levee assessments?

The statute authorizing the foreclosure proceedings reads, in part, as follows:

"Notice of the pendency of such suit shall be given as against nonresidents of the county and the unknown owners by publication weekly for four weeks prior to the day of the term of court on which final judgment may be entered for the sale of said land, * * * which public notice shall be in the following form:" The specified form of notice contains this provision: "There shall follow a list of supposed owners, with a description of said delinquent lands and amounts due thereon respectively," etc.

The statute contains the further provision with respect to resident owners and occupied lands:

"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 when the defendant is in the county or when there is an occupant upon the land." Acts of 1895, c. 71, § 1, pp. 89, 90.

This court in *Van Etten* v. *Daugherty,* 83 Ark. 534, speaking of the proceedings authorized by this statute, said: "While the judgment is in the nature of a proceeding *in rem,* in that it can only be enforced against the lands and not against any other property or estate of the defendant, yet, in order to give the court jurisdiction to render the judgment, it is necessary that the mode of obtaining jurisdiction prescribed by the statute be strictly pursued. The proceedings for divesting the owners, resident and nonresident, known and unknown, of their estate in the lands subject to the levee tax derive their only sanction from the statute, and the court must see that its provisions as to jurisdic-

tion are complied with, or their judgments will be utterly void, and, of course, subject to collateral as well as direct attack."

In that case the court decided that such a judgment of condemnation, based on constructive service, was void on collateral attack where the defendant was a resident of the county at the time of the publication, or where there was an occupant of the land.

It follows that where land is unoccupied, and is owned by a nonresident who is not personally served in the county with process, it must be proceeded against in the manner pointed out by the statute, that is to say, by being described in the warning order so as to give the owner constructive notice of the pendency of the suit. In no other way can the court acquire jurisdiction, and the judgment of condemnation is void unless jurisdiction is thus acquired. It is not sufficient to serve a summon on some other person not the owner or occupant of the land. Nor does the court acquire jurisdiction by reason of the warning order containing the description of other lands proceeded against of the same owner, for the statute provides that the lands must be described in the warning order; and unless this provision of the statute be complied with, or the owner or occupant be summoned, the court fails to acquire jurisdiction.

We held in *Hall* v. *Morris,* 94 Ark. 519, that personal service of summons on a person gave the court jurisdiction to condemn all lands owned by that person, whether assessed and proceeded against in the name of that person or not. But that rule can not be extended so as to cover a case of this sort where the owner is only constructively summoned by publication of a warning order, for the statute requires that, in order to give the nonresident owner notice of the pendency of the suit, a description of the land must be contained in the warning order, and we cannot ignore this mandatory provision of the statute.

The fact that Henry Fleming held a certificate of purchase at tax sale did not authorize proceeding against him as the owner of the land. He was not the owner before the period for redemption expired.

Other principles so earnestly pressed by learned counsel for appellant need not be discussed, for we are of the opinion that a proper application of the principles announced by this court in

Van Etten v. *Daugherty, supra,* is conclusive of the questions now presented. So the decree of the chancellor is affirmed.

BONHAM *v.* JOHNSON.

Opinion delivered March 27, 1911.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—Appeals in equity cases are tried *de novo;* and where the chancellor's findings are against the weight of the testimony, they will be set aside. (Page 461.)
2. PAYMENT—APPLICATION.—Where a mortgage stipulated that the property should be insured for the mortgagee's benefit, this constituted an appropriation in advance of the insurance money to the satisfaction of the mortgage indebtedness; and this is true even though part of such indebtedness is not due. (Page 461.)

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

Anthony Hall, for appellant.

The findings of the chancellor are clearly not supported by the evidence.

The insurance money could not be applied on any other debt than the two notes due. The two debts and mortgages were separate and distinct, and the chancellor erred in applying the $1,000 to the payment of the notes sued on.

Robert J. White, for appellee.

1. The findings of the chancellor are sustained by the proof. If so, the payment must be applied to the debts due in exclusion of those not due, whether there was any appropriation by the payee or not. 44 Ark. 90; 54 *Id.* 444; 30 Cyc. 1237; 47 Ark. 111.

2. In the absence of any appropriation at all by either party, the law would apply the payment to the debts first falling due. 34 Ark. 285. But, there being only one debt, the payment must be applied to discharge the several items or notes in the order of their priority, and Bonham had no right of appropriation. 57 Ark. 595.

MCCULLOCH, C. J. Appellant, R. A. Bonham, sold and conveyed to appellee, Thos. J. Johnson, and to George and John

Reams, ten acres of land and a cotton gin and mill plant at Blaine, Oklahoma, for the price of $3,000, evidenced by two notes for $500 each, due and payable on November 15, 1907, and January 1, 1908, respectively, and two notes for $1,000 each, due and payable December 1, 1908, and December 1, 1909, respectively. The first two notes were secured by a mortgage executed by appellee Johnson and his wife on a tract of land in Logan County, Arkansas, and a team of mules and a surrey. The other two notes were secured by a mortgage on the property in Oklahoma which was the subject-matter of the sale. The last-mentioned mortgage provided that the mortgagors should keep the gin and mill plant insured in the sum of $2,000 payable, in case of loss by fire, to appellant as his interest should appear. The property was insured, and was destroyed by fire in November, 1908, before anything was paid on the notes. A settlement was made with the insurance company for $1,806, and this sum was paid over to appellant, and was by him, after deducting $100, which he had paid out on insurance premiums, credited on the two notes secured by the mortgage on the Oklahoma property.

Appellant instituted this action in the chancery court of Logan County against appellee, Johnson, and wife to foreclose the mortgage securing the two notes for $500 each.

Appellee defended below on the ground that, about the time the insurance money was ready to be paid over, appellant entered into an agreement with him to accept the insurance money and a reconveyance of the Oklahoma land and the old engine and boiler in satisfaction of all the notes and also to pay a debt of $150 which said appellee owed Speer Hardware Company, of Fort Smith, Ark.

The chancellor decided that the alleged agreement between appellant and appellee for satisfaction of said notes was within the statute of frauds and void, but that appellant accepted the insurance money pursuant to said agreement, and that said acceptance constituted payment on the first notes which became due, being the notes in suit. The court held, quoting from the decree, "that, in the absence of direction by the said partnership as to the application of said money as a payment, it was both the duty of plaintiff and the right of defendant to have the same applied

to the two first-named notes, not only because they, and not the others, were then due, but because they were secured by a mortgage upon his individual homestead property in Arkansas, as a part of said original transaction."

After careful consideration, we are of the opinion that the chancellor's finding that appellant agreed to accept the insurance money and a reconveyance of the remainder of the Oklahoma property in satisfaction of all the notes is clearly against the preponderance of the testimony, and can not be sustained. The testimony of appellee Johnson stands alone, while that of appellant is corroborated by two other witnesses whose testimony tended to show that no such agreement was entered into. The case comes to us for trial *de novo;* and where we reach the conclusion that the finding of the chancellor is against the preponderance of the testimony, it becomes our duty to set it aside.

Appellant was entitled to the insurance money as a payment on the two notes secured by mortgage on the insured property. The mortgage contained a stipulation that the property should be insured for appellant's benefit, and the amount named in the policy was, according to its terms, payable to appellant as his interest in the property appeared. His interest in the property was only to the extent of his lien to secure the payment of those notes. That was an appropriation in advance by the parties of the insurance money to the satisfaction of the two notes secured by the mortgage. When the money was paid over, neither of the parties had the right, without the consent of the other, to disregard the application of payment thus made in advance. *Greer* v. *Turner,* 47 Ark. 17; *Caldwell* v. *Hall,* 49 Ark. 508; *Fort* v. *Black,* 50 Ark. 256; *Faisst* v. *Waldo,* 57 Ark. 270.

The fact that one of the notes secured by the mortgage was not due when the insurance money was actually paid did not change the rule as to application of the payment; for, without the assent of both parties, that would not authorize either to apply the payment to a debt other than that to which it had been appropriated in advance by the terms of the agreement.

The decree is therefore reversed, with directions to enter a decree in accordance with the prayer of the complaint.

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

Opinion delivered March 27, 1911.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—In an action against a railway company by an employee to recover for injuries received by him in falling from a trestle, it was proper to direct a verdict for the defendant, where plaintiff's testimony showed that his injuries were occasioned by his own negligence in walking too near the edge of the trestle while engaged at night in preparing his meal.

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

STATEMENT BY THE COURT.

Appellant was an employee of appellee as a carpenter in its bridge and building department. He sued appellee for damages growing out of personal injuries, which he received by falling from a trestle for a distance of about 23 feet. Appellant alleged that he was directed by his foreman to occupy the watchman's car, which was placed beside the trestle approaching the bridge and near the bridge; that the appellee in accordance with its custom provided quarters for its employees while engaged in the work that appellant was doing; that the watchman's car was very unsafe; that no safe place was provided by appellee for appellant and other employees to do their cooking; that they had to do their cooking on a box of gravel on the end of a narrow platform adjoining the trestle; that appellant, while assisting in the preparation of supper, had to go upon the trestle between the rails of the track; that appellee had negligently left a quantity of clay spread between the rails which had been rendered exceedingly slippery by the rain which had been falling; that this condition was unknown to appellant, and, owing to the darkness, he could not with ordinary diligence have observed it; that, while engaged as above stated, he slipped on the clay, lost his balance, and fell upon some timbers lying on the ground below, and received severe injuries, which are described.

The appellee answered, denying all the material allegations and setting up contributory negligence and assumed risk as defenses.

Witness Orren testified that he and appellant were engaged in the work of "fireproofing" a bridge for appellee across the Ouachita River in November, 1908. They had been engaged in the particular work at the place where appellant was injured about one month. Appellant had assisted in putting down the boards and planks and in spreading the gravel and clay over the floor made in this manner; the work on the bridge and trestle at this particular point had been done two weeks before, and, while he may not have assisted in spreading the gravel at this particular place, he had passed over it constantly for two weeks while going from where they had been camping to the place where they were fireproofing other trestles and bridges and in returning to camp. That witness and appellant and one "Henry," under the directions of appellee's foreman, were occupying at night the watchman's car on the bridge near the trestle. The plank platform in front of the car was thirty feet long and six feet four inches wide out to the guard rail of the trestle or bridge, and from this guard rail to the other across the track was ten feet. The spaces between the bridge or trestle timbers had been closed by planks or boards so as to make a solid floor, and gravel and clay had been spread over this floor three or four inches deep, thereby forming a platform immediately in front of this car about thirty by sixteen feet. The surfacing on the trestle near the car consisted of more clay than gravel. When witness, plaintiff, and "Henry" "arrived at the car, it was dark, cloudy and raining." Witness indicated the location of the fire box, and described the accident as follows: "He (appellant) came out there with the potatoes and set them down. I said: 'Bring me that box,' and Henry said: 'Bring me a dish rag.' He brought me the box, and I set it down, and then he handed 'Henry' the dish rag, and I heard a noise, and looked around, and saw his (appellant's) foot hanging over the guard rail, and I grabbed up the lantern and held it down, and saw him struggling and went down the ladder to him." Witness further says: "Was seated between the firebox and the car door; Henry was sitting beside the fire box on the rail of the track or the guard rail of the trestle. Plaintiff, appellant, walked behind Henry and to the right of him to hand him the dish rag, when he fell." The accident occurred about 6:50 P. M. They had poor light, a small

railroad lantern and a sorry fire. It had been raining all evening. It was twenty-three feet from the ground to the top of the guard rail. Witness had worked for the defendant (appellee) two years. He had always occupied a car provided by the railroad. He was always subject to call, even outside of regular hours. If any one had desired to leave the watchman's car that night, he would have had to walk over the bridge in the dark. An examination after the accident showed that appellant's foot had slipped from the steel rail to the guard rail. Appellant testified as follows: That he worked from seven to six o'clock on the day of the accident. That his work was putting in strips between the ties for fireproofing bridges. That he started to Calion on a handcar, but when he got to the watchman's car the foreman made him get off there, in spite of his protests. He was told that his things were in the watchman's car, and they were crowded in the other car. That he knew of no place he could go that night. It was about 6:15. It was dark, cloudy and raining. The last he remembers is giving a dish rag to Young. He was then behind and to one side of Young, standing between the steel rail and the guard rail of the trestle. His next recollection is being in the hospital in Little Rock. The rest of his testimony describes his injuries and sufferings and his condition.

The testimony of the only other person present ("Henry") was substantially the same as the above. The court instructed the jury that, under the pleadings and evidence, appellant was not entitled to recover and directed a verdict for the appellee. Appellant duly prosecutes this appeal.

R. L. Floyd, for appellant.

This case should have been allowed to go to the jury and the court erred in directing a verdict for defendant. Where a railroad undertakes to provide accommodations for its employees, they are entitled to the same protection that the general public are. The employee must not be exposed to hidden dangers of which they are not aware, nor of dangers in the nature of a trap. Thompson on Neg. (2 ed.) § 968; 63 L. T. (N. S.) 837, cited 46 L. R. A. 58, note 2; 87 Am. Dec. 644; 46 L. R. A. 59, note col. 1; 114 Wis. 279; 29 Cyc. 453; 89 Ark. 122; 114 S. W. 1057; 76 N. Y. 92; 32 Am. Rep. 282; 96 Tenn. 164; 34 L. R. A. 615,

618 col. 1; 80 Me. 62, 77; 34 L. R. A. 619, col. 2; 77 Ark. 566; 125 S. W. 655; 89 Ark. 122; 48 Ark. 493.

Thomas S. Buzbee and *George B. Pugh,* for appellee.

1. There was nothing unsafe about the car as a place to sleep. The accident was due solely to plaintiff's own negligence.

2. The doctrine of assumed risk clearly applies if plaintiff was busy with the master's business. But he was not—he was busy about his own affairs. However, the rule governing assumed risks applies to a license where the accident results from a condition with which he is familiar. 82 Ark. 534; 85 Ark. 600; 89 Ark. 50; 90 Ark. 387; 30 N. E. 1016; 23 N. E. 233; 19 Atl. 939; 51 N. W. 1043; 30 N. E. 580; 35 Am. Rep. 202.

WOOD, J., (after stating the facts). The injury of appellant was the result of his own negligence. If it be conceded that it was the duty of the appellee to have exercised ordinary care to provide a safe place for its employees to lodge at night while engaged in the work of "fireproofing" bridges, the uncontroverted evidence shows that it had performed that duty. The watchman's car was perfectly safe as lodging quarters. There is no pretense in the evidence to the contrary. Appellant's injury was caused solely by his own carelessness in walking too near the edge of the platform while he was assisting in the preparation of a meal. But it was not the duty of appellee to provide the fire box where the meals were cooked, nor to direct the movements of its employees while they were preparing their meals. That was their own affair. There was ample room on the platform for all purposes in this regard. If appellant and his fellow workman placed the fire box too near the edge of the platform, so that there was not room to move around it in safety, the appellee is not responsible for that. Appellee too was not charged with the duty of seeing that its employees, while moving around upon and over the platform, had their "lamps trimmed and burning." That too was a matter for the employees. The conditions that surrounded appellant at the time of the injury were perfectly obvious to appellant, for he assisted in creating them or knew all about them. There was no danger to one who exercised ordinary care for his own protection. An adult in the possession of his faculties must have known that if he walked or slipped off a bridge or trestle twenty-three feet high he would likely suffer

bodily injury. He must have known, too, that this was likely to occur if he moved about on a platform without sufficient light to guide his footsteps. The facts are undisputed, and, when viewed in the light of common knowledge and experience, they necessarily show that appellant did not use the ordinary precautions and vigilance which a man of ordinary prudence would be expected to exercise under similar circumstances. It was therefore the duty of the court to direct a verdict for appellee. *Gaffney* v. *Brown,* 23 N. E. 233; *Johnson* v. *Willcox,* 19 Atl. 939; *Hilsenbeck* v. *Guhring,* 30 N. E. 580.

Appellee owed appellant no duty that it had not performed. There is no principle of law that would render appellee liable in damages under the facts of this record for the injuries sustained by appellant. The cases cited by appellant are not applicable to the facts presented by this record.

The court did not err in directing a verdict for appellee. The judgment is correct.

Affirm.

MAXWELL v. MAXWELL.

Opinion delivered March 27, 1911.

DEEDS—DELIVERY.—There is no delivery of a deed unless what is said and done by the grantor and grantee manifests their intention that the deed shall at once become operative to pass the title to the land conveyed and that the grantor shall lose dominion over the deed. Thus where a grantor executed a deed to her son, and left it at her lawyer's office, telling the grantee that it was there and promising to place it where he could get it if anything happened to her, and he without her knowledge or consent procured it to be recorded, there was no delivery.

Appeal from Independence Chancery Court; *G. T. Humphries,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This action was instituted by appellee against appellant to cancel a deed to certain lots in Charleston's Addition to the town of Batesville. Appellant was the son of appellee. She set forth certain facts which she alleged constituted fraud, deceit, misrepresentation and undue influence on the part of appellant by

which she was induced to sign the deed. The appellee further alleged that the deed was never "in fact delivered" to appellant; "that she left it with the notary to be delivered to Chas. E. Maxwell, for him to bring home to her, but that he had the same recorded, * * * that defendant's action in getting possession of this deed and having it recorded casts a cloud on her title." She set forth the deed, which recited that for the consideration of $100 she conveyed to appellant and unto his heirs and assigns forever certain lots which are described. The deed contained the following clause:

"This sale is on condition that I shall have and retain possession and control, as well as the exclusive use and enjoyment of the said premises during the remainder of my natural lifetime, and at my death the same shall go to and become the property of the said Chas. E. Maxwell, his heirs or assigns, but not before; it being my intention and purpose to reserve to myself a life estate in said lands."

The appellant denied all the allegations of the complaint. The testimony of appellee, concerning the delivery of the deed is as follows:

That she went alone to the office of Chas. F. Cole, the notary before whom the deed in controversy was executed and acknowledged, on both occasions of her visit there. "The first time Mr. Cole read the deed over to me and asked me if I wanted to change it in any particular; I asked him to fix it so that the property would not go to his daughter. A few days after that I went back to Mr. Cole's office and stayed there an hour or two, and Mr. Cole read the deed over carefully to me, and I said I didn't know whether I ought to sign it or not, and he said for me not to sign it unless I wanted to. He said, 'Charley is a pretty good boy, and I think he will come up to his promises.' When I left the deed with Mr. Cole, I pushed it back on the table and said: 'There it is.' I don't remember telling Mr. Cole what to do with it. I remember telling him there it is; and if Mr. Cole had not said what he did to me, I certainly would not have signed it. I expected Mr. Cole to hand Charley the deed, and he would bring it back to me. I thought I could have destroyed it if I changed my mind. I am sure I would not have destroyed it if Charley had come up to his promises. The land was worth about $2,500."

The testimony of appellant in regard to the execution and delivery of the deed is as follows:

"I assisted in taking care of the family prior to my father's death; after my father's death about 14 years ago I assisted in taking care of my mother and the children; she promised me a number of times that she would give me the home place, which is the place now in controversy; she made two or three wills giving me the place, and afterwards destroyed all but one of them. I went to her one time, and asked her if she would give me a contract and allow me to pay her a money consideration for the place. She said that she did not know, but that she would talk the matter over and see. We talked the matter over a number of times. One day when I went home to dinner, she met me on the back porch and says: 'Charley, I have a great mind just to sell it to you—give you a deed to the place.' She says: 'If I give you a deed to the place, will you keep it strictly to yourself?' I told her I would if she would place the deed where I could get it if anything happened to her. She said she would place it in that little black tin box of hers, and I could get it there. About a week after that I went home one day, and she said: 'Well, I have signed the deed.' I asked her where it was, and she said she had left it at Mr. Cole's office. I asked her why she did not bring it home, and she said she did not know whether it would suit me or not, because she had made some changes in it. I went to Mr. Cole and got it, and had it recorded and delivered it to my mother. I did not practice any fraud or deceit on my mother, and did not make any misrepresentations to obtain the deed. I did not use any undue influence over her, or do anything except what I have just stated. I furnished my father in his life time with money at various times in amounts ranging from $5 to $25. I can safely say that before his death I let him have at least $500. I can safely say that since my father's death and during the last fourteen years I have furnished my mother (the plaintiff) $1,000. I have paid the taxes on the property mentioned in the deed for five or six years. My mother said the place belonged to me, and I ought to keep the taxes paid on it. I offered to pay this $100 note before it was due, and she said she did not want it. The money I furnished my mother was furnished with the understanding that the place would go to me

at her death. This was her understanding and her statement to me. She frequently discussed the matter with me, and stated that that would be the disposition of the property."

C. F. Cole testified as follows: "I prepared the deed and took the acknowledgment to the deed in controversy in this suit. Mrs. Maxwell came to my office the first time about a week before the deed was executed. She was alone, and stated to me that she wanted to prepare a deed for her and Charley, as they had come to an agreement about her home place, and asked me some questions about whether she could retain a life interest or not. I told her it could be so arranged, and after some conversation with her she left the office without making any deed. Several days after this she came to my office alone. In the meantime I had prepared a deed according to my understanding of the agreement between Mr. and Mrs. Maxwell, and also a note for $100, which Mr. Maxwell had signed and left with me. She came to my office the second time alone, and I read to her the deed I had prepared, explaining fully every part and provision. She was in the office perhaps a half hour or more this time. She stated something about whether she really ought to sign it or not, and I told her if she did not feel like doing so she ought not to sign it. She afterwards signed and acknowledged the deed and handed it to me with the instructions to deliver it to Mr. Maxwell, which I did. When she gave me the deed, I gave her the note for $100 which Mr. Maxwell had left with me. She then left the office, and that was the end of the matter."

The court found that the deed was without adequate consideration, and that it was executed by reason of false representations made to the plaintiff by the defendant, and by reason of undue influence of defendant over the plaintiff. The court further found "that the allegations of plaintiff's complaint have been established." The court rendered a decree cancelling the deed.

Oldfield & Cole, McCaleb & Reeder, for appellant.

1. There was no fraud nor deceit and equity never decrees cancellation of an extended contract except in a clear case upon convincing proof. 97 U. S. 207, 24 Law Ed. 112; 121 U. S. 380; 56 Ill. App. 545; 41 Minn. 37; 112 Ala. 576; 77 Ia. 188; 9 Pa.

Dist. 59; 6 *Id.* 36; 2 Pom. Eq. Jur. § 928, p. 1669; 22 Ark. 92; 27 *Id.* 166.

2. The evidence does not show misrepresentations, nor were the promises any part of the consideration for the deed. 2 Pom. Eq. Jur. § 876; *Id.* § 890-1; 241 Ill. 521; 24 L. R. A. (N. S.) 735-737.

3. There was no undue influence. 13 Cyc. 585-6; 13 Cyc. 588; 52 S. W. 98; 21 Tex. Civ. App. 512; 118 Pa. 259; 5 Har. (Del.) 459; 72 Conn. 305; 28 S. W. (Ky.) 785; 132 Ill. 385; 39 Minn. 204; 26 Wis. 104.

4. There was no failure of consideration. The deed recites a consideration of past indebtedness.

Samuel M. Casey, for appellee.

1. The evidence shows fraud or deceit in obtaining the deed, and there was no delivery of the deed, nor intention on the part of the grantor to lose control of it. 109 Am. St. Rep. 310; 40 Am. Rep. 212; 50 Am. St. Rep. 188.

2. There was undue influence. 1 Story, Eq. Jur. § 307; *Ib.* 308; 3 Hare, Lead. Cas. in Eq. 140, 141; 17 Ill. 148; 26 Ark. 605; 38 Ark. 428; 40 Ark. 28; 84 Ark. 490.

WOOD, J., (after stating the facts). It is not necessary to determine whether or not the court erred in finding that appellant had induced appellee to sign the deed through misrepresentation and deceit, or by undue influence over her, for we are of the opinion that the evidence does not show that the deed was delivered to appellant, and therefore the judgment of the court cancelling the deed must be affirmed.

The testimony of appellant and appellee shows clearly that it was not the intention of either that the deed should be delivered to appellant so as to give him the control over the deed and to at once pass the title to him. According to the testimony of appellant his mother was to place the deed where he could get it if anything happened to her. This evidently means that the deed was to be placed where appellant could get it when his mother died. The place designated was "the little black tin box of hers." He could get it there. But, according to his own testimony, it was "where he could get it if anything happened to her." According to the testimony of appellee, she expected Mr. Cole to hand the deed to appellant, and that he would bring

it to her; "she thought she could have destroyed it" if she changed her mind. Her testimony shows that she expected, after the deed was made, to have absolute dominion over it. When therefore appellee made the deed and left it with Cole to be delivered, as he says, to appellant, it was for the purpose of allowing appellant to look over it to see whether it would suit him or not (as she had made some changes in it), and then he (appellant) was to bring it home to her. The recording of the deed by appellant was wholly unauthorized. It was not the intention of the grantor to give him any control over the deed to make it operate as a conveyance of title to him.

This is the only conclusion warranted by the evidence. This is the only conclusion that will give effect to the testimony of all the witnesses and make the testimony of all consistent.

There is no delivery unless what is said and done by the grantor and grantee manifests their intention that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor shall lose dominion over the deed. *Creighton* v. *Roe,* 109 Am. St. Rep. 310; *Byars* v. *Spencer,* 40 Am. Rep. 212; 13 Cyc. 748, f. note 56; 9 Am. & Eng. Ency. Law, p. 154; *Russell* v. *May,* 77 Ark. 90; *Cribbs* v. *Walker,* 74 Ark. 104. In the last case *supra,* it was held that the facts showed an intention on the part of the grantor to deliver the deed. No such intention is shown here.

The decree is therefore affirmed.

CHICAGO BUILDING & MANUFACTURING COMPANY *v.* STOKER.

Opinion delivered March 27, 1911.

1. PLEDGE—RIGHT OF PLEDGEE TO ENFORCE.—Where subscriptions to the capital stock of a corporation, amounting to $7,400, were pledged to a promoting company to secure an indebtedness of $6,500, and the promoting company seeks to recover on one of such subscriptions, the burden is on it to prove that its claim against the corporation has not been paid, as the residue of the stock subscriptions, after paying the $6,500, would belong to the corporation. (Page 478.)
2. SAME—RIGHT OF PLEDGEE TO ENFORCE—EVIDENCE.—Where a contract pledging the stock subscriptions of a proposed corporation stipulated that, after the secured debt was paid, the corporation should organize

under the State laws, the articles of incorporation were admissible, in an action to enforce such pledge, as tending to show that the debt for which the pledge was given had been paid, and hence that the pledgee had no right to recover on the pledge. (Page 478.)

3. SAME—RIGHT OF PLEDGEE TO ENFORCE—EVIDENCE.—Where a pledge of stock subscriptions in a proposed corporation stipulated that stock subscriptions in excess of the debt secured might be obtained, and that any remaining subscriptions after payment of such secured debt should be assigned to the corporation for a working capital, and the evidence showed that subscriptions in excess of such amount were secured, the record in a suit brought by the pledgee against one of the subscribers to stock was admissible in a suit against another stock subscriber as tending to prove that the pledge had been satisfied. (Page 479.)

4. SAME—EFFECT.—Under a pledge of the subscriptions to stock of a proposed corporation to pay a debt incurred by the promoters in a sum less than the subscriptions, the pledgee was entitled only to have its claim satisfied, and could not thereafter maintain an action to recover unpaid subscriptions. (Page 480.)

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

STATEMENT BY THE COURT.

The Chicago Building & Manufacturing Company, on the 27th day of January, 1909, filed its suit in the justice of the peace court of Brinkley Township against J. A. Stoker to enforce the payment of a subscription by J. A. Stoker to the Brinkley Creamery Association. The amount to which J. A. Stoker had subscribed to the Brinkley Creamery Association was one share, amounting to one hundred dollars, and the suit was to enforce the payment for his stock in the Brinkley Creamery Association.

On appeal to the circuit court, verdict and judgment were rendered in favor of appellee, and this appeal was duly taken. The appellant attached to the complaint the contract on which the suit was brought. Appellee did not answer, nor did he file affidavit denying the genuineness of the contract upon which the suit was brought. Appellant read in evidence the contract sued on, the material parts of which are as follows:

"That the first party hereto, until full and final payment of this contract, is a voluntary association of persons in and around the city of Brinkley, county of Monroe, and State of Arkansas,

now known as the Brinkley Creamery Association. This association will subsequently organize itself into a going corporation to own and conduct the creamery business as contemplated herein. The second party hereto is the Chicago Building & Manufacturing Company of Chicago, county of Cook and State of Illinois. On the 31st day of August, A. D. 1907, the said parties executed the following contract, to-wit: In consideration of the entire purchase price of six thousand five hundred dollars, which the first party herein pledges itself to pay in cash or equivalent note as hereinafter specified, second party and successors agree as follows: To devise, erect and equip a butter factory, and deliver title to said factory on receipt of price at any time within ninety days from date of final approval of said contract, unavoidable accidents and delays excepted.

"First party and successors further agree as follows: On notice from second party to appoint a building committee, consisting of not more than five (5) persons, with conclusive authority to represent first party from date of appointment till final settlement and permanent organization of the future corporation. Within three (3) days thereafter, said committee, at expense of first party, is to procure and purchase, in fee simple, suitable level land with good legal title, and to furnish thereon in time for the builder suitable water for direct connection with pump for the needs of said factory, and properly assign and describe said site to second party, to be held in trust for first party till full discharge of this contract agreement by first party. First party will inspect work and material during construction, and will specify in writing to second party any defects therein, if any, at occurrence, to be remedied within a reasonable time. At date of delivery said committee shall meet with a representative of second party and together compare the details of said factory, and if it is in substantial accordance with the within contract and specifications, with the machinery fixtures set up in a workmanlike manner, second party's discharge of this contract is complete and payment is due thereunder, and second party or successors may receive, receipt for and apply on the contract price any partial payment that any subscriber may desire to pay, and any subscriber who shall pay his subscription in cash or shall execute an equivalent bankable note satisfactory to second party

or successors, at legal rate of interest, shall be given a receipt in full of any further personal liability. For any unpaid or deferred balance of subscription, all delinquent subscribers are jointly liable, and the first party agrees that any failure in any of its covenants may be construed as a joint and total breach of the within contract.

"Stock subscriptions to said future corporation may be obtained in excess of the above price, but said total subscription shall be held and collected by second party until such time only as full cash payment has been made as above, and, when any payment is deferred, all necessary costs of collection and discount may be included, should second party so desire.

"Any remaining subscription or note balance, after said creamery association's entire indebtedness to second party has been so paid, shall be duly assigned to the said corporation for a working capital.

"Any remaining subscription or note balance, after said creamery association shall organize a co-operative society under State law, fixing aggregate amount of stock at not less than the amounts subscribed hereto, represented by stock certificates of $100 each. Said certificates will then be issued to each paid-up stockholder in proportion to his interest, it being specially agreed that there can be no default, withdrawal or transfer of subscription or stock until lawfully entered on the books of said corporation by its regularly elected officers. Pursuant to the laws of this State and these conditions, it is agreed that each stockholder shall be liable for the amount of stock subscribed by him and no more.

"Second party further agrees to provide, on written request and at the expense of future corporation, an experienced butter maker for one year, more or less, who may be hired if desired and approved by said corporation.

"It is agreed that one or more of these printed contract forms may be placed in the hands of special agents, representing both parties, for the purpose only of obtaining subscriptions hereto, and, when all such forms shall be attached together and approved by said second party, they shall constitute the only contract between said parties, with nothing supplementary unless actually attached hereto, printed or written.

"No change in parties, person, purpose, name or business

shall affect or impair the covenants or this contract, and the guarantor of faithful performance by second party of this contract has full authority to collect the contract price of same at the date for payment aforesaid.

"It is agreed between the parties hereto that each subscriber is only responsible for the amount subscribed by him individually, not jointly, and this contract is changed accordingly.

"The within read, approved and executed on the date first written.

"By Subscribers to the Brinkley Creamery Association."

Then follows the names of more than fifty parties who signed the contract, the names being signed under the following form:

Names of Subscribers	No. of Shares.	Amount of Stock.

In the column headed "Names of Subscribers" is found the names of the various parties, including that of appellee, and opposite his name and under the head of "No. of Shares" is "one," and under the head of "Amount of Stock" is "$100."

The contract concludes as follows:

"Date of final approval by second party, 14th day of September, 1907.

"Faithful performance by second party guaranteed..... Guarantor.

"The Chicago Bldg. & Mfg. Co. (Second Party)
"By Jessee Sigsworth, Agt.
"R. E. Sturgis."

Appellee was called as a witness for appellant, and testified that he signed the subscription list for stock in the Brinkley Creamery Association, that the Brinkley Creamery Association was not organized when he signed the paper. He was to pay the creamery company $100 if they got it up.

Witness Brown on behalf of appellant testified that he was one of the persons who assisted in the organization of the Brinkley creamery, and was one of the stockholders. "The creamery was erected and accepted. Appellant erected the creamery according to its contract, and it was accepted by a committee at the first stockholders' meeting. It was afterwards put in operation, and run for five or six months—from April 1 to October 1, 1908. The contract was signed before the creamery association

was incorporated. The association was incorporated after the building was erected and the machinery was installed." He further testified as follows:

"I cannot say why all these brads are in the contract; I had not noticed them, but that is the same contract I signed. I do not know whether Mr. Stoker signed it or not. The brads are in two or three different places, showing that the contracts were all bradded on the back. I think there was about $7,400 in all subscribed. We were to pay them $6,500, and when they did their work they notified us, and it was accepted and turned over to us, and then the corporation was organized. I think they would not turn over the plant until it was paid for. They turned it over to us in consideration of the contract being signed for $6,500. There was a little more than that subscribed, and we were to use the balance in operating the creamery, but we did not get anything. The creamery association did not have but one man's note for collection. That was Mr. O'Harra's. The contract was signed by the different parties agreeing to pay appellants the sum set out sometime before the organization of the creamery association. The appellant was to collect up to $6,500. I do not know whether they collected that amount or not. They collected mine."

Over the appellant's objection, appellee introducd in evidence the record in the suit of Brinkley Creamery Association *v.* O'Harra, showing that the creamery association claimed the note given by O'Harra for his stock subscription to said company.

Appellee also over appellant's objection introduced in evidence the articles of incorporation of the Brinkley Creamery Association, showing that the name of appellee did not appear on same anywhere.

Exceptions were duly saved to the rulings of the court in permitting the above as evilence. At the request of appellant the court gave the following instruction:

"1. The failure of defendant to be included among the number of stockholders incorporating the creamery or butter company is no defense to this action. If you find from the evidence that defendant subscribed and agreed to pay $100 to be represented by stock in the future corporation, and that the $100 was to be paid to the plaintiff upon the completion of the plant, instal-

lation of the machinery, etc., and you find from the evidence that such contract was complied with by plaintiff and the creamery plant was accepted, it is immaterial that the name of defendant does not appear among those who organized the Brinkley Creamery Association."

The court refused to give request of appellant for a peremptory instruction; an exception was duly saved. At the request of appellee the court gave the following:

"1. It devolves upon the plaintiff to prove by a preponderance of the evidence that the plaintiff has not been paid under its contract.

"2. If the plaintiff delivered the building and material to the Brinkley Creamery Association, they are presumed to do so under the contract, and can not recover unless they comply with their contract."

Appellant duly objected to the requests, and excepted to the ruling of the court in granting them.

G. Otis Bogle and *Manning & Emerson,* for appellant.

1. The court erred in admitting the record in the O'Harra suit, and the articles of association of the Brinkley Creamery Association. 90 Ark. 104.

2. Where a writing, etc., if filed with, met and referred to in a pleading, it may be read in evidence as genuine against a party unless he denies its genuineness under oath before the trial. Kirby's Digest, § 3108. The court erred, therefore, in giving instructions 1 and 2. The burden was on appellee. 65 Ark. 320-4.

3. It is not error to direct a verdict if there is no question of fact to submit to the jury. 69 Ark. 562-8. A condition resting in parol cannot be engrafted on a written stock subscription. 92 Ark. 504. The mutuality of an agreement being the consideration, it can not be varied nor contradicted by parol testimony, nor an oral condition engrafted upon it. 20 Ark. 443; 1 Cook on Corp. (6 ed.) § § 77, 81, 137; 1 Morawetz on Corp. 77; 2 Beach Priv. Corp. 531; 10 Cyc. 413-415; 26 A. & E. Enc. Law 911, and cases cited; 1 Cook on Corp. 531.

4. The verdict is against the law and the evidence.

Thomas & Lee, for appellee.

1. The articles of incorporation of the Brinkley Creamery Association were competent to show that the pledge of $6,500 had been paid. When paid, appellee owed appellant nothing. The record in the O'Harra suit was also properly admitted for the same reason. The jury found that appellant had been paid; there was evidence to sustain the finding, and this court will not disturb the verdict. 75 Ark. 111; 84 Ark. 406; 85 Ark. 193; 90 Ark. 103.

2. The pledge was merely a limited guaranty, and when the amount was paid all the guarantors were discharged. 136 Mass. 337; 72 Vt. 9; 137 Cal. 253; 6 Ohio Dec. (reprint) 819; 8 Am. L. Rec. 348; Rice L. (S. C.) 126; 23 So. Car. 354; 10 Wyo. 135; 11 Col. 50; 59 Me. 358; 72 *Id.* 345; 48 Minn. 3; 82 *Id.* 603; 74 Ark. 241.

WOOD, J., (after stating the facts). 1. Appellee did not deny the contract sued on, nor did he allege that he had paid his subscription to the capital stock of the Brinkley Creamery Association. His defense, as disclosed by his prayers for instructions, was that the burden was on the appellant to prove that it had complied with its contract, and that it had not been paid by the Brinkley Creamery Association.

Under the contract appellee would owe appellant nothing, even though he had not paid his subscription to the Brinkley Creamery Association, provided the latter had paid appellant the sum of $6,500, the amount due, when appellant had performed the contract on its part. Under the terms of the contract no subscriber to the capital stock of the Creamery Association was due appellant anything after it had been paid the sum above specified, including necessary costs of collection and discount. The remaining subscriptions or note balance after that belonged to the Brinkley Creamery Association, and not to appellant. Therefore, before appellant could recover from appellee, it devolved upon it to show, not only that it had complied with the contract, but also that the sum due it thereunder of $6,500 had not been paid. The failure of appellee to deny the existence of the contract sued on was not an admission on his part that it had been complied with by appellant. And, inasmuch as the contract sued on showed that appellant might have been paid the sum due it

under the contract by other subscriptions to the capital stock of the creamery company, the burden was on appellant to show that it was not so paid before it could hold appellee liable; for, if the creamery association had paid the appellant, through other subscribers, the amount due, appellee would not owe appellant anything, even though he had not paid his subscription. In that case, under the contract in suit, appellee would owe the Brinkley Creamery Association, and not appellant. Therefore the court did not err in giving appellee's prayers numbered 1 and 2.

2. The court did not err in admitting in evidence the articles of incorporation of the Brinkley Creamery Association. The contract provided:

"After payment and delivery has been made as above, said creamery association shall organize a co-operative society under State law fixing the aggregate amount of stock at not less than the amount subscribed hereto, represented by stock certificates of one hundred dollars each."

The articles of incorporation tended to show that payment of the contract price of $6,500 had been made by the subscribers to the capital stock of the Brinkley Creamery Association because under the above clause the creamery association was not to be organized until "after payment and delivery."

The court did not err in admitting the record in the suit of the Brinkley Creamery Association *v.* O'Harra.

The contract contained the following clause: "Stock subscription to said future corporation may be obtained in excess of the above price, but said total subscription shall be held and collected by second party until such time only as full cash payment has been made as above, and, when any payment is deferred, all necessary costs of collection and discount may be included, should second party so desire. Any remaining subscription, or note balance, after said creamery association's entire indebtedness to second party has been so paid, shall be duly assigned to the said corporation for a working capital."

There was evidence tending to prove that there were subscriptions to the stock of the creamery association amounting to $7,400. Under the above clause, the total subscription was to be held by appellant until such time only as full cash payment had been made, then the residue of subscriptions was to be assigned

to the Brinkley association. The record of the suit of the Brinkley association against O'Harra therefore tended to prove that full cash payment had been made to appellant, otherwise under the contract the O'Harra note for subscription to stock would not have been assigned to the Brinkley Creamery Association. At least, this was evidence competent for the jury to consider as tending to establish the fact that appellant had been paid.

Under the contract the pledge of the subscriptions amounting, as the jury might have found, to $7,400, to pay the less sum of $6,500 to the appellant was tantamount to a limited guaranty; and when the amount guaranteed was paid, as the jury found, the subscribers—guarantors—were discharged, at least, of any liability to appellant. See *First Nat. Bank* v. *Waddell*, 74 Ark. 241; *Carson* v. *Reid*, 137 Cal. 253; *Knowlton* v. *Hersey*, 76 Me. 345; *Cutler* v. *Ballou*, 136 Mass. 337; *Reed* v. *Fish*, 59 Me. 358; *Cushing* v. *Cable*, 48 Minn. 3; *Frost* v. *Weathersbee*, 23 S. Car. 354.

The judgment is affirmed.

HAYDON v. HAYDON.

Opinion delivered April 3, 1911.

1. ACTION—JOINDER OF CAUSES.—Where a complaint alleges that the plaintiff and her husband's estate each had an interest in a crop which defendant wrongfully converted, it was proper to permit plaintiff to sue in her own right and as administratrix of her husband's estate. (Page 482.)
2. PLEADING—DEFECTIVE ALLEGATIONS—REMEDY.—Where the allegations of a complaint lack certainty, the defect should be reached by motion to make more definite and certain. (Page 482.)
3. SAME—AMENDMENT.—Where the original complaint alleged that plaintiff's intestate owned the fee simple to the land from which it was claimed that defendant removed a crop which belonged to plaintiff and her intestate, a substituted complaint which alleged that plaintiff's intestate was a tenant of the land upon which the converted crop was grown did not state a different cause of action. (Page 482.)

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

E. F. Friedell, for appellants.

1. The demurrer should have been overruled. All persons who have an interest may be joined as plaintiffs. Kirby's Digest.

§ § 6005, 6229; 79 Ark. 64; 79 Ark. 181; Bliss, Code Pl. § 74; 50 Ark. 64.

2. The complaint states a cause of action. Kirby's Dig. § 6091.

J. D. Head and *Jeff T. Cowling,* for appellee

McCULLOCH, C. J. This is an action instituted in the circuit court of Little River County by Mattie Haydon in her own right and as administratrix of the estate of her deceased husband, Enoch Haydon, against the estate of D. R. Haydon, deceased, to recover the value of certain crops of cotton, corn and alfalfa, the property of the plaintiffs, alleged to have been wrongfully converted by said D. R. Haydon, to his own use.

It is alleged in the complaint that Enoch Haydon had, for several years prior to his death on April 11, 1905, been in actual possession as his home of the land on which said crops were grown; that he paid the rent of the land for the year 1905 by building fences and improving the land, and that "he had a crop partially planted and growing on the land" at the time of his death. It is further alleged that after the death of said Enoch Haydon the plaintiff Mattie Haydon continued, at her own expense, to have the said crop of 1905, which was begun by her husband, cultivated through her agents and employees," and that said D. R. Haydon "without right did enter into and upon the said tract of land, * * * and oust and eject these plaintiffs therefrom, and converted the entire crop for the year 1905 raised by the plaintiff Mattie Haydon on said land.

The complaint was substituted for one which alleged that said Enoch Haydon was the owner in fee simple of the land on which the crops were grown.

The defendant demurred on the grounds: "(1) That there is a misjoinder of parties plaintiff in this action. (2) That there is a misjoinder of causes of action. (3) That the complaint is insufficient to state a cause of action against the defendant. (4) Because the cause of action, as presented in the amended and substituted complaint, is a different cause of action from that set out in the original complaint herein."

The circuit court sustained the demurrer, and plaintiffs appealed.

The complaint stated a cause of action for conversion of the property described in the complaint.

It is also stated in the complaint that plaintiffs, Mattie Haydon and the estate of her deceased husband, each has an interest in the subject-matter of the controversy, and it was proper for both to join as plaintiffs in the action. Kirby's Dig., § 6005.

According to the allegations of the complaint, Enoch Haydon occupied the land as his home, and paid the rent for the year 1905, and planted a crop which was growing at the time of his death, part of which was a field of alfalfa from which defendant's testator wrongfully took and converted ten tons of alfalfa hay. This gave the estate of Enoch Haydon an interest in the crop. His widow was left in possession of the land, and she at her own expense cultivated the crops of cotton and corn to maturity. She had an interest therein which gave her the right to join in the suit.

The allegations of the complaint were sufficient, we think, to establish the right of the two plaintiffs to maintain a joint action for the value of the converted property in which both claimed an interest. If the allegations of the complaint lacked certainty, this should have been met by a motion to make more definite and certain.

The substituted complaint did not state a cause of action different from the one stated in the original complaint. The only difference was as to the character of Enoch Haydon's possessory right to the land on which the converted crops were grown. The value of the crops constituted the subject-matter of the action, and it was immaterial by what right Haydon held possession of the land, if his possession was rightful.

Reversed with directions to overrule the demurrer.

Southern Engine & Boiler Works v. Globe Cooperage & Lumber Company.

Opinion delivered April 3, 1911.

1. Sales—effect of warranty.—A stipulation in a written contract for the sale of machinery that if anything should be found broken or defective in the machinery the buyer should give notice to the seller

so that it might correct same was in effect a warranty that the machinery was in perfect condition at the time it was sold and delivered, but the warranty related only to the condition of the property at the time of the sale. (Page 485.)

2. SAME—WHEN TITLE PASSED—DELIVERY TO CARRIER.—Where, by the terms of a contract of sale, the property was to be delivered to a common carrier to be transported to the buyer, the title passed upon such delivery. (Page 486.)

3. SAME—NOTICE OF DEFECTS—WAIVER.—The failure of a seller of machinery to replace, as required by the contract, small parts thereof broken in transit, is not a waiver of the condition imposed on the buyer to give notice within a specified time of structural defects in the machinery. (Page 487.)

4. SAME—WARRANTY—WHEN BROKEN.—Where a contract of warranty in the sale of machinery provides that notice of defects must be given within a specified time, the condition is imperative, and the buyer will not be entitled to resist payment of the purchase money on account of any imperfection, of which he did not give notice, though the buyer did not discover the cause of the defect until the specified time had expired. (Page 487.)

Appeal from Cleburne Circuit Court; *Brice B. Hudgins,* Judge; reversed.

E. H. Mathes, for appellant.

1. No notice of any defects was given for nearly five months after the machinery was set up and used, hence there was no liability under the contract. 75 Ark. 206; 2 Mech. on Sales, § § 1380, 1384; 6 N. W. Rep. 46; 44 Iowa 237; 5 Neb. 482; 79 Mo. 264; 76 Ark. 74; 78 *Id.* 177.

2. No recovery can be had for the broken parts, because the contract was for delivery on board cars at Jackson, Tenn. Nor because the mill was idle, nor for money paid hands in attempting to run the mill after discovering it was not as represented. 2 Suth. on Dam. (2 ed.) § 705; 72 Ark. 275.

Bratton & Fraser, for appellee.

1. The only question presented is whether the law justifies or warrants a judgment upon the facts in the record. 33 Ark. 651.

2. Appellee *at once* notified appellant of the defects and parts broken and short. Under the contract appellant agreed to "correct" same, that is, make good any shortage, defects or overcharge.

3. One is not held to a strict compliance with a contract or performance of conditions precedent where a sufficient excuse is given for the failure to perform. 35 Cyc. 445; 130 Ill. App. 75. The defect could not be discovered. The cases cited do not apply, but this case is governed by 92 Ark. 310; 30 A. & E. Enc. Law (2 ed.) 217. Reasonable expenses incurred in consequence of defects in machinery are recoverable. 25 Ark. 164; 21 *Id.* 349.

Frauenthal, J. This was an action of replevin instituted by appellant for the recovery of certain sawmill machinery which it sold to appellee. The sale was made in pursuance of a written contract under which the appellee executed notes for the purchase money of the property, the last of which was past due and had not been paid. In the contract and notes it was stipulated that the title to the property remained in the appellant until the payment of the purchase money, with the immediate right of possession upon default in the payment thereof.

The appellee admitted the execution of the contract and notes and that the last note had not been paid. In its answer it alleged by way of counterclaim that it had been damaged by reason of a breach of an express warranty of the property contained in said contract in a sum far in excess of the amount of said note, and that on this account there was nothing due thereon.

The cause was, by consent, tried by the court, who found that the appellee was entitled "to damages growing out of the contract of sale of the machinery in question in an amount in excess of the amount found due as a balance of the purchase money for said machinery." It thereupon rendered judgment in favor of the appellee for said property.

The appellee bases its right to plead the above counterclaim for damages against a recovery in this action of replevin upon the principles announced in the following opinions rendered by this court: *Ames Iron Works* v. *Rea,* 56 Ark. 450; *Johnson* v. *St. Louis Butchers' Supply Co.,* 60 Ark. 387; *Ramsey* v. *Capshaw,* 71 Ark. 408.

Appellant does not contend that the appellee was not entitled to plead a recovery on said counterclaim in the event there was any legal evidence adduced upon the trial of the case upon which such damages can be based. On the contrary, it was expressly

agreed by appellant in the lower court that such counterclaim might be pleaded and a recovery thereon had in such event.

The appellant was located at Jackson, Tennessee, and the appellee conducted its sawmill business at Edgemont, Arkansas. In the written contract of sale it was provided that the property should be delivered by appellant to appellee free on board the cars of a common carrier at Jackson, Tennessee. Amongst other terms in said contract, it was expressly agreed that, if anything was found short, broken, defective or not as specified, notice thereof should be given in writing to appellant within ten days after the machinery was received by it that appellant might correct the same. The contract also contained the following express warranty:

"Warranty: The Southern Engine & Boiler Works guarantees said machinery and property shall be as represented herein, and of good material and workmanship—to do good work when properly set down and operated. And the parties of the second part agree to test the same within thirty days after received, and if, upon trial, said machinery should not prove as herein represented, the parties of the second part expressly agree to give immediate written notice to the said Southern Engine & Boiler Works, of Jackson, Tennessee, and to allow the company a reasonable length of time, after having received said written notice, to send a man to adjust said machinery, the purchaser agreeing at the time to give full co-operation, together with the necessary help. The use of said machinery, without giving the written notice as herein provided, shall be deemed and construed as an acceptance of and conclusive evidence that said property is as herein represented."

It appears from the undisputed testimony that the appellant, in December, 1908, in pursuance of said contract of sale, delivered said machinery to a common carrier at Jackson, Tennessee, duly consigned to the appellee at Edgemont, Arkansas, and that same was received by the appellee at said latter place in due course during the same month, and it paid the freight thereon. On January 4, 1909, and presumably within ten days after receiving the machinery, the appellee notified appellant by letter that some small items thereof were either broken or missing, amounting in the aggregate to $7.25, but we think the undisputed testi-

mony shows that such portions of the machinery were either damaged or lost while the property was in transit. In reply to this letter from appellee, the appellant wrote that it would send said items on receipt of the price thereof, and requested the appellee to make out its claim therefor against the railroad company and send to appellant and it would collect same for it. It also indicated in its letters that, in the event appellee would make a verified claim against the railroad company therefor, it would, on receipt of such claim, send the parts desired without payment. The appellee made no reply to this letter.

The testimony on the part of the appellee tended further to prove that immediately upon receipt of the machinery it set up and began operating the same, and that it would not do good work, but on the contrary it could not be successfully operated on account of a defect in the mandrel. It appears that the appellee attempted to operate the machinery continuously for a period of from four and one-half to five months after it was first set up before it discovered the particular defect in the machinery which caused it to fail to do proper work; but the testimony upon its behalf shows that, whatever may have been the cause, the machinery would not do good work immediately upon its being set up, and continued in this condition for four and one-half to five months thereafter. Under the undisputed testimony, however, the appellee never did give any notice, either verbal or written, to the appellant that there was any defect in the machinery or that it could not be properly operated. The testimony on the part of appellee tended to prove that by reason of the fault either of the machinery or the manner in which it was set down, lumber could not be properly sawed, and on this account it was operated during the above period at a considerable loss instead of a profit, and its manager testified that it was damaged thereby in the sum of $1,000. The defect which the appellee claims was in the mandrel consisted of a kink or crook therein, and when this was discovered a new mandrel was purchased by it at a cost of $49. The remainder of the damages, it is claimed, consisted in the loss of time and profits.

It is urged by the appellee that the appellant breached the warranties contained in said written contract of sale when it failed to send to it the broken parts referred to in the above letter,

and that appellee was thereby entitled to recover in damags the cost of said items. But we do not think that this contention is correct. It was provided by the contract that, if anything was found broken or defective in the machinery, the appellee should give notice to the appellant so that it might correct same. This, we think, was in effect a warranty upon the part of appellant that the machinery at the time it was sold and delivered was in perfect condition. But this warranty related only to the condition of the property at the time of the sale, and did not cover any future defects which were not then in existence. According to the terms of the contract, it was provided that the property should be delivered by the appellant to appellee to a common carrier at Jackson, Tennessee; and when the same was thus delivered by it, the title thereto at once vested in the appellee. *State* v. *Carl,* 43 Ark. 359; *Burton* v. *Baird,* 44 Ark. 556; *Hope Lumber Co.* v. *Foster & Logan Hardware Co.,* 53 Ark. 196; *Harper* v. *State,* 91 Ark. 422.

Under the undisputed testimony, the items of property mentioned in said letter of January 4th were broken or lost while the same were in transit, and therefore did not exist at the time same was delivered by appellant to the common carrier. The damage to the property in transit was the damage of appellee, and it alone had the right to recover such damage from the common carrier. The above agreement, warranting the property against being broken or being short, only related to the time when the delivery was made to the common carrier, and did not cover the period while the property was in transit and the damage done by another. 35 Cyc. 414.

It follows that the appellant did not breach said portion of the contract when it wrote to the appellee that it would furnish the items on receipt of the price thereof. But, in addition to this, it appears from the testimony that the appellant agreed to furnish these items without payment in event the appellee would make out its claim therefor against the carrier and forward same to appellant. This, we think, was a full compliance upon appellant's part with said portion of the contract.

It is urged by appellee that by reason of the defect in the mandrel it was greatly damaged, and it was entitled to recover said damages by reason of the above express warranty in said contract of sale. A warranty itself is not essential to a contract

of sale. It is an agreement that is only collateral thereto. Where the contract is reduced to writing, and has therein incorporated the express warranty, it contains everything of a contractual character which the parties finally intended should be binding. A contract of warranty may be continuing, or it may be limited. It may be conditioned, in the case of sale of machinery, upon a test or trial thereof to be made by the purchaser within a specified time, and in such case there will be no breach unless the condition is fulfilled. The agreement of warranty, when in writing, like any other written contract, is controlled by the language thereof. In the cases of contracts for the sale and warranty of machinery, it is common to provide expressly that the buyer, on receiving the property, shall test same within a specified time, and in case it proves defective will notify the seller in order to give him an opportunity to remedy the defect. It has been uniformly held that contracts of this sort are lawful and must be enforced as they have been made by the parties, and the test must be made within the time specified, and notice given according to the terms of the agreement. 2 Mechem on Sales, § 1384. Where the contract of warranty provides that the notice of defects must be given within a specified time, the condition is imperative; and if the buyer does not show a fair compliance with the terms of the contract in this regard on his part, he will not be permitted to enforce it against the seller. It has been well settled that where a purchaser of machinery has agreed that if it proves defective he will give notice thereof to the seller within a specified time, he will not be entitled to resist payment of the purchase money on account of imperfection of which he did not give notice. 2 Mechem on Sales, § 1396; Benjamin on Sales, § 703; 35 Cyc. 430; *Miller* v. *Nichols,* 5 Neb. 478; *Frick & Co.* v. *Morgan & Co.,* 69 S. W. 1072; *Case Threshing Machine Co.* v. *Lyon,* 72 S. W. 356; *Nichols* v. *Knowles,* 31 Mich. 489; *Nichols* v. *Larkin,* 79 Mo. 464; *Beasley* v. *Huyett,* 92 Ga. 273.

Now, the testimony in this case most favorable to the appellee tended to prove that immediately on receipt of the machinery it set the same up and began operation thereof, and that it would not work. The appellee thus knew, immediately after it had begun the test of the machinery, that for some reason it would not do good work. It continued thereafter to use and operate

the machinery for four and one-half or five months, during all of which time, it contends, it did not do good work. According to the undisputed testimony in the case, the appellee never did give notice to the appellant that the machinery did not do good work or that it was defective in any way after it began the operation thereof. Under the express terms of the above warranty, it was incumbent upon appellee to give written notice to the appellant that the machinery did not prove as represented or did not do good work. This notice, we think, under the terms of the agreement, was a condition to be observed and performed by the appellee before it could be entitled to insist that there had been a breach of the warranty by the appellant. It is urged by the appellee, however, that when, upon receipt of the machinery, it found that certain items thereof were broken, it at once notified the appellant in said letter of January 4, and requested that the same be corrected, which appellant failed to do; it contends that thereby the appellant breached the contract and all the warranties therein contained, and, on that account, it did not send to it notice that the machinery would not do good work. But, as we have before shown, it was not, under the terms of this contract, incumbent upon the appellant to send said items of the property without pay, and it did not breach any portion of the contract in failing so to do. Nor do we think that the failure on the part of appellant to send said items, even if under the contract it was required to do so, would constitute a sufficient excuse for the failure on the part of appellee to notify appellant that the machinery did not do good work under the 30-day test, for the reason that it was not sufficiently material to cause a waiver of the performance of that condition on the part of appellee. But appellee further urges that the cause of the machinery not working was due to a defect in the mandrel, and that it did not discover this specific defect until four and one-half or five months after it had operated the machinery, and that for this reason it was not required to give the notice. But, under the testimony in the case most favorable to appellee, it discovered immediately upon beginning the operation of the machinery that from some cause it did not do proper work, and the contract did not specify, nor do we think that it contemplated, that the appellee should have first learned the specific defect before it should give

notice that the machinery was not doing proper work. The contract itself stated that one of the objects in giving this written notice to the appellant was to give to it an opportunity to send one of its men to remedy the defect. From this it would appear that it was contemplated that the appellant and its employees understood the character of this machinery and were best able to discover what defect there might be in it, if any, and correct it. We think that the provisions of this warranty plainly show that it was the intention of the parties that the appellee should have 30 days in which to test the machinery, and, upon discovering that it would not do good work, whether it knew the cause thereof or not, it would give immediate notice of that fact to the appellant. Before it can be said that the appellant breached this express warranty of the contract, the appellee must first have shown that it gave notice to it as provided thereby. This it did not do. It follows, therefore, that the appellant did not breach the contract of warranty made by it, and that the appellee was not entitled to recover any damages based on that ground.

The finding and judgment made by the lower court was, therefore, contrary to the undisputed evidence adduced upon the trial of this cause. The judgment is reversed, and this cause is remanded for a new trial.

HILGER v. CHRISP.

Opinion delivered April 3, 1911.

1. BRIDGE—CONSTRUCTION OF ACT FOR BUILDING.—The act of May 23, 1901, authorizing the construction of a bridge across Little Red River by the county court, together with a majority of the justices of the peace thereof, contemplated that the county levying court, composed of the county judge and the justices of the peace, might make an appropriation and levy for such purpose, and that thereafter the county court, composed of the county judge alone, should have authority to proceed to build the bridge. (Page 493.)
2. NAVIGABLE WATERS—AUTHORITY OF STATE TO BUILD BRIDGE OVER.—A State may authorize the construction of bridges over navigable rivers, which are situated within its borders, provided they do not obstruct navigation and are not in conflict with congressional legislation relative thereto. (Page 493.)

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

J. N. Rachels, for appellants.

1. The only way the bridge could be built is under the act of 1901, § § 1, 2 and 4; Acts 1901, p. 291; Kirby's Digest, § § 548-9, 550-553. It must be built by the county court and justices of the peace. Kirby's Dig. § § 526-529, 548. The act of 1901 repealed S. & H. Dig. § § 526-529.

2. The river is a navigable stream, but *not* over 406 feet wide, and the county court had no authority to build the bridge. Section 548, Kirby's Dig.

3. The jurisdiction of the county court must be shown by its records, affirmatively, or its acts are invalid. 54 Ark. 627; 5 *Id.* 483; 64 *Id.* 108; 87 *Id.* 406.

4. The plans and specifications were not specific nor definite enough for intelligent competitive bidding. 54 Ark. 645; Const. art. 19, § 16; 72 N. W. 550; 18 *Id.* 85; 1 Ct. Cl. 28-34.

5. No authority from the U. S. Government was obtained under act March 3, 1899. 3 L. R. A. (N. S.) 1126.

Cypert & Cypert, for appellees.

1. The act of 1901 was repealed by a subsequent act. The Constitution gives the county court exclusive jurisdiction over *bridges,* etc. Const. art. 7, § § 28, 30, 40.

2. The river is over 400 feet wide. Kirby's Dig. § 548; 54 Ark. 645.

3. The necessary records were made by the court. The law authorizes commissioners to be appointed. Kirby's Dig. § § 549 to 552; 73 Ark. 524.

4. The specifications were sufficient to admit of competitive bidding. 73 Ark. 524.

5. It is shown that the permission of the United States Government was obtained; but even if it was not obtained, chancery courts of a State have no jurisdiction to enforce an act of Congress where no special damage is shown. High on Inj. § 158-535; 2 Wall. (U. S.) 403.

FRAUENTHAL, J. This was an action instituted by certain citizens and taxpayers of White County, plaintiffs below, against the county judge and other members of the board of Bridge

Commissioners of said county seeking to restrain them from entering into a contract for the construction of a bridge over Little Red River in White County.

The cause was heard in the lower court upon the pleadings and testimony adduced upon the trial before the chancellor, and a finding was made by him in favor of the defendants, and a decree was entered dismissing the complaint, from which the plaintiffs have appealed to this court.

In their complaint the plaintiffs set up a number of grounds upon which they based their contention that the proceedings taken in this matter for the construction of said bridge were unauthorized by law, and that the action of the county judge and board of bridge commissioners in letting and entering into the contract for the construction of said bridge was illegal and therefore should be enjoined. Upon this appeal, however, only two of said grounds are urged why said injunction should be granted. These are:

First. That said Little Red River is a navigable stream, and authorization was not obtained from the proper authorities of the United States government for the construction of the proposed bridge across said river; and,

Second. Because no proper plans and specifications for said bridge had been adopted.

By an act of the Legislature entitled "An act to authorize the construction of a bridge across the Little Red River in White County," approved May 23, 1901, it was provided that the county court of White County, together with a majority of the justices of the peace thereof, should be authorized to construct a bridge across said river in accordance with certain provisions of the statutes, which are now sections 549 *et seq.* of Kirby's Digest. (Acts 1901, p. 201; Acts 1903, p. 177.) In pursuance of said act of the Legislature, the county court, consisting of the county judge and the justices of the peace, at its October term of 1909, made an appropriation of $10,000 for the construction of said bridge, and at the same term of court made a levy of one mill on the dollar of all taxable property in said county for the construction thereof. Thereafter the county court, composed of the county judge alone, appointed a commission of two competent persons who, in conjunction with himself, constituted a board of

commissioners for the building of said bridge, and proceeded therein in manner provided by the above sections of Kirby's Digest.

It is urged that by reason of said act of the Legislature the county court, together with the justices of the peace of said county, was alone authorized to construct said bridge. But we do not think this contention is correct. Under the Constitution (art. 7, § 30) the full court, composed of the county judge and the justices, is a tribunal for the purposes alone of levying taxes and making appropriations for the expenses of the county, and the Legislature cannot authorize the justices to sit or act with the county judge in other matters. The county court, composed of the county judge alone, is authorized to proceed towards the construction of bridges in the county after an appropriation has been made by the levying court therefor. Constitution 1874, art. 7, § 28; *Worthen* v. *Badgett,* 32 Ark. 496; *Matter of Howell,* 36 Ark. 466; *Lawrence Co.* v. *Coffman,* 36 Ark. 641.

We think that the purpose of the above act was simply to authorize the county court, consisting of the county judge and the justices of the peace of the county, to provide for the construction of the bridge by making an appropriation and levy therefor, and that thereafter the county court, composed of the county judge alone, had full authority to proceed in manner provided by law towards the building of the bridge, and that in this respect the act is perfectly valid.

It is well settled that the State has full and complete jurisdiction over all navigable waters that are situated within its territorial limits, subject only to the paramount right of Congress to regulate commerce thereon. A State has the power to authorize the construction of bridges over navigable rivers which are situated within its borders, provided they do not obstruct navigation over such waters and are not in conflict with any Congressional legislation relative thereto. *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1; *Montgomery* v. *Portland,* 190 U. S. 89; *Langton* v. *New York,* 93 N. Y. 129; 29 Cyc. 295.

It is provided by act of Congress that bridges may be built under the authority of the Legislature of a State across rivers and other waterways, the navigable portions of which lie within the limits of the State, provided the location and plans thereof

are submitted to and approved by the chief engineer of the War Department and the Secretary of War before the construction thereof is commenced. 30 Stat. at L. 1151.

It appears from the testimony adduced in this case that the board of bridge commissioners of White County, after their appointment, employed an engineer to make the plans and specifications for the construction of the bridge across said Little Red River, and also made the location thereof, and that this location and these plans and specifications were submitted to the proper officials of the War Department of the Federal Government, which duly approved the same. There was testimony introduced at the trial of the cause tending to prove the above, and we think that it was sufficient to sustain the finding of the chancellor that this was done.

It is urged by counsel for appellant that the plans and specifications adopted by the said board of bridge commissioners were not so definite in detail as required by law. In the case of *Fones Hdw. Co.* v. *Erb,* 54 Ark. 645, it was held that, before the bidding for the contract for the construction of a county bridge can be made and such contract entered into, the plan of the work and the specifications according to which it is to be done must be adopted so that the only thing to be determined by the bidders shall be the price. To accomplish that purpose, the plans and specifications should not be merely of a general character, but they must be sufficiently definite in detail so that all bidders could base their bids upon the same thing that was to be undertaken.

It appears from the testimony that, before the said board of bridge commissioners advertised for bidders to make bids for the construction of this bridge, they located the same and employed an engineer who made the plans and specifications therefor. These plans and specifications were examined by the prospective bidders, and four companies, after such examination, made separate bids for the construction of the bridge according to such plans and specifications. It therefore appears that these plans and specifications were sufficiently definite and detailed so that these bidders understood them and from them made their bids for the construction of the bridge. They were prepared by an engineer, and it is not shown that he was not competent to do this work. The question as to whether or not these plans

and specifications are definite and detailed enough to comply with the law is really one only of fact. We have examined these plans and specifications, and we cannot say that they are not definite and detailed enough to base a competitive bidding thereon or to protect the county in the due construction of the bridge according to them. The fact that four bidders were able from an examination thereof to base their bids thereon is evidence that they are sufficiently detailed and definite.

It is urged that they are indefinite in some particulars relating to the quality of concrete that was to be used, the exact character of the lumber that was to be provided and to some parts of the superstructure. But we think, upon an examination of the plans and the specifications, this is fully covered by the terms of the specifications, which provide that the concrete should be of the best kind and the lumber of good quality, and by the plans, which, we think, make sufficiently definite the size and amount and kind of material which shall be furnished in the construction of this bridge.

Upon the hearing of the case below the witnesses appeared in person before the chancellor and gave their testimony, and after a careful examination of the record before us we cannot say that the finding made by the chancellor that these plans and specifications were approved by the proper officials of the War Department of the Federal Government, or that his finding that these plans and specifications are sufficiently definite and detailed as required by law, is against the preponderance of the evidence. It follows, therefore, that the decree of the chancellor should be affirmed, and it is so ordered.

BROWNFIELD v. DUDLEY E. JONES COMPANY.

Opinion delivered April 3, 1911.

1. SALE—RIGHT OF VENDEE TO COUNTERCLAIM DAMAGES.—A vendee, when sued for the purchase money of machinery, is entitled to counterclaim damages sustained by the vendor's failure to perform the contract relating to the sale of such machinery. (Page 497.)
2. TRIAL—TRANSFER TO EQUITY.—A cause pending in the circuit court on appeal from a justice of the peace cannot be transferred to equity. (Page 498.)

3. SALES—TIME OF DELIVERY.—Where a contract of sale leaves the matter of delivery subject to notice to be given thereafter by the vendee, the vendor has a reasonable time in which to deliver after notice from the vendee. (Page 499.)

4. SAME—DELIVERY TO CARRIER.—As soon as a vendor delivers property to a carrier, duly consigned to the vendee, the title passes to the vendee, and for any delay in shipment the vendee's remedy is against the carrier. (Page 500.)

5. SAME—DAMAGES—WHEN TOO REMOTE.—Where a vendor, in response to a telephone call, told the vendee that it was then shipping the machinery which it had sold to the vendee, and the vendee sent teams and wagons to the nearest railroad station to get the machinery and found that it had not arrived, the statement as to when the property was shipped was not part of the contract, but was independent thereof; but, if it were a part of the contract, damages incurred by reason of its falsity were not reasonably in contemplation of the parties. (Page 500.)

6. APPEAL AND ERROR—EXCESSIVE DAMAGES—REMITTITUR.—Where the circuit court, on appeal from a justice of the peace, entered judgment for damages on account of detention of personal property in excess of $100, the limit of jurisdiction in such case, the judgment below will not be affirmed except upon a remittitur of the excess. (Page 500.)

Appeal from Cleburne Circuit Court; *Brice B. Hudgins,* Judge; affirmed on remittitur being entered.

Bratton & Fraser, for appellant.

1. A counterclaim for damages is allowable in replevin. 56 Ark. 450; 42 Ark. 100; 60 *Id.* 387; 34 Cyc. pp. 1417-1418.

2. Replevin suits may be transferred to chancery on motion. 56 Ark. 450; 42 *Id.* 100; 71 *Id.* 408; 73 *Id.* 464. A case on appeal from the probate court cannot be transferred (70 Ark. 88), and in 46 Ark. 166 it was held there was no Code provision for transfer in appeal cases from a justice of the peace court. There is no statute forbidding such a transfer. Kirby's Dig. § § 5995, 1282.

3. It was error to refuse defendant the right to prove his counterclaim. 77 Ark. 237; 69 *Id.* 434; 85 *Id.* 445. Justice courts can administer equitable remedies. 54 Ark. 33; 44 *Id.* 381; 55 *Id.* 104.

4. The expenses to Kensett and damages caused by delay in shipment were proper elements of damage. Kirby's Dig. § § 6099, 4605, 4552, 2 subdiv.

5. The judgment for $150 is void, as justices have no jurisdiction to render judgment over $100. 61 Ark. 34; 44 *Id.* 377; 62 *Id.* 212; 69 *Id.* 434; 43 *Id.* 111.

Ratcliffe, Fletcher & Ratcliffe, for appellee.

1. A case appealed from a justice of the peace cannot be transferred to chancery. 44 Ark. 377; 46 *Id.* 163; 70 *Id.* 88.

2. The damages offered to be proved were speculative and too remote. 13 Cyc. 53, 54. If plaintiff was liable at all, it was for misrepresentation of an existing fact—a *tort*—enforceable only by action for deceit. This cannot be set up as a counterclaim. 27 Ark. 489; 40 *Id.* 75.

3. The judgment for $150 was simply an oversight. The judgment is not void, simply excessive, but is a proper case for a remittitur. 77 Ark. 152, 156.

FRAUENTHAL, J. This was an action of replevin originally instituted before a justice of the peace by Dudley E. Jones Company, the plaintiff below, for the recovery of a boiler and $100 damages for its detention. The property was sold by the plaintiff to the defendant under a contract whereby part of the purchase money was paid and for the balance defendant executed a note in which it was stipulated that the title to the property should remain in the plaintiff until its payment. The note was past due and unpaid at the time of the institution of this suit.

The defendant admitted the execution of the note, but pleaded by way of counterclaim certain damages which he alleged he sustained by reason of the failure on the part of plaintiff to ship the boiler at the time agreed upon, and alleged that such damages exceeded the amount of said note.

Upon an appeal of the case to the circuit court the defendant asked that it be transferred to the chancery court, which was refused. The cause by consent of both parties was then tried by the court, who made a finding and rendered judgment in favor of the plaintiff for the recovery of the property and $150 damages for the detention thereof, and from this judgment the defendant has appealed to this court.

The right of plaintiff to recover in this action the property which it had conditionally sold to the defendant depends upon whether there was anything due to it upon the note given there-

for. If the defendant was legally entitled to recover the damages set out in his answer, and if the amount of those damages was equal to or exceeded the amount of said note, then this would defeat the plaintiff's right to recover in this action, for the reason that there could then have been nothing due to the plaintiff upon said note. The defendant, therefore, had a right in this action to plead and to prove by way of counterclaim as a defense herein the damages which he had legally sustained by reason of any failure of plaintiff to perform on its part the contract relating to the sale of said boiler. *Ames Iron Works* v. *Rea,* 56 Ark. 450; *Johnson* v. *St. Louis Butchers' Supply Co.,* 60 Ark. 387; *Ramsey* v. *Capshaw,* 71 Ark. 408.

This case was pending in the circuit court only upon appeal from an inferior court, and on that account it was not proper to transfer it to the chancery court; but the defense by way of counterclaim set out in the answer was cognizable in a court of law if the defendant was legally entitled to recover the damages therein pleaded. The question to be determined then is whether or not the defendant was legally entitled to recover from plaintiff the damages he alleged he sustained under the testimony which was introduced or which could legally have been introduced upon the trial of this case.

The plaintiff was located at Little Rock, Arkansas, and under the terms of the contract of sale of the boiler it was to be delivered by it to a common carrier at that place and consigned to the defendant at Kensett, Arkansas. The contract was made some time prior to October, 1907, and it was agreed that the plaintiff would ship the property whenever the defendant should order it done. Some time about the 1st or 2d of October the defendant directed the plaintiff to ship the boiler to him in the manner above stated, and the testimony on the part of the plaintiff tended to prove that it immediately attempted to get a car from the common carrier at Little Rock, and that it obtained such car about the 7th or 8th of October, and immediately loaded the boiler thereon, and thereupon delivered same to the common carrier at Little Rock, duly consigned to defendant at Kensett, Arkansas, within a reasonable time after it received the notice from the defendant to ship same.

It appears that the defendant intended to locate said boiler at some distance from Kensett, and it offered to prove that about the 6th or 7th of October it communicated by telephone from Heber, Arkansas, with some one at the office of the plaintiff in Little Rock and made inquiry as to whether or not the boiler had been shipped, and that the party replied that the boiler had been loaded on the car. Thereupon the defendant on October 8th went to Kensett, a distance of 40 miles, with a number of teams in order to haul the boiler from Kensett to the point where he desired to locate it. He found that the boiler had not then arrived at Kensett, and he then went to Little Rock and saw the plaintiff. This was about the 9th of October, and the testimony on the part of the plaintiff tended to show that it had loaded the boiler on the car prior to his arrival and obtained the bill of lading therefor on the latter date. The property arrived at Kensett about the 14th of October.

The items of damages claimed by the defendant in his counterclaim consisted of the expenses which he incurred by reason of the trip made with the teams to Kensett in order to get the boiler on October 8th and the loss of profits in the use of same by reason of the delay in the shipment thereof.

The testimony on the part of the plaintiff tended to prove that only one message by telephone was received at its office, and that at that time it replied that it was loading the same on the car, and that this was true, and that any delay that occurred in the shipment of the boiler was caused by the common carrier. At least, there was some evidence warranting the finding of the court to that effect.

Now, before the defendant would be entitled to recover by way of counterclaim herein any damages, it was incumbent upon him to prove that such damages arose either because the plaintiff had not complied with some obligation of the contract which it made at the time of the sale or because it violated some duty imposed upon it by law relative thereto. At the time the contract was made for the sale of the boiler, there was no definite time specified when it should be shipped, but this was left subject to notification thereafter to be made by the defendant. The effect of this was that the plaintiff had a reasonable time in which to ship the boiler after receiving notification from the defendant, and

the evidence on the part of the plaintiff was sufficient to warrant the finding of the court that the plaintiff did ship the property within a reasonable time after receiving such notification. So that the plaintiff did not violate any obligation of the contract on its part. As soon as it delivered the property to the common carrier, duly consigned to the defendant, the title thereto vested in the defendant; and if there was any delay thereafter in the carriage of said property, his right of action for any damages arising therefrom was against the carrier and not against the plaintiff. But it is urged by the defendant that he was misled by the plaintiff as to the time when it had actually delivered the same to the common carrier, and on that account he was damaged in the expense of the teams which he sent to Kensett for the property. We do not think that the statement as to when the property was shipped, if it was made by the plaintiff, was a part of the contract; but it was independent thereof. In addition to this, however, if it was so connected with the transaction that damages would be recoverable upon account of its falsity, we do not think that the damages claimed by the defendant were reasonably within the contemplation of the parties so that recovery could be had therefor. There was no evidence showing that the plaintiff knew or had any notice that the defendant was going to send a number of teams to Kensett at once on account of receiving such information and would incur any expense on that account, nor that he would suffer any loss in profits by reason thereof. Such damages were, therefore, too remote to be recovered, even if the plaintiff made a false statement as to the time of the shipment of the boiler, and it should be deemed to be a part of the transaction.

It, therefore, follows that, under the law and under the testimony which was introduced, or that was offered upon the trial of this case, the defendant was not entitled to recover any damages herein from the plaintiff. There was no error, therefore, committed by the lower court in entering a judgment in favor of the plaintiff for the recovery of the property. But the court erred in rendering a judgment in favor of the plaintiff for the recovery of $150 damages for the detention thereof. The suit was instituted in the court of a justice of the peace, and the circuit court, upon appeal, could not enter any judgment that

could not have been rendered by the justice of the peace. The justice of the peace could not render a judgment for damages for the detention of the property in excess of $100. (Constitution of 1874, art. 7, § 40.)

It is true that the testimony in this case showed that the defendant had detained this property for a period of two years, and that the usable value of the property was $75 per year, but, inasmuch as the court was not justified in rendering a judgment for damages on account of detention of property in excess of $100, it committed error to the extent of rendering judgment in excess of that sum. But this error can be remedied by remittitur. *Beauman* v. *Wells, Fargo & Co. Express*, 77 Ark. 152. If, therefore, the plaintiff will enter a remittitur of said damages down to the sum of $100 within ten days, the judgment of the lower court will be affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

GIBBONS v. MOORE.

Opinion delivered April 10, 1911.

1. COVENANTS FOR TITLE—STATUTORY COVENANT.—Under Kirby's Digest, § 731, the use of the words "grant, bargain and sell" in a conveyance of land, without words of limitation, is equivalent to covenanting (1) that the grantor is seized in fee; (2) that he has good right and full power to convey; (3) that the grantee shall quietly enjoy the premises; and (4) that the premises are free from incumbrances done or suffered by the grantor. (Page 503.)

2. DEFINITION—INCUMBRANCES.—Incumbrances are any rights to interests in land which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of the fee of same by deed. (Page 504.)

3. COVENANTS—WHEN RUN WITH LAND.—A covenant for quiet enjoyment of land is a covenant which runs with the land, for breaches whereof the grantee, his heirs or assigns, may sue as if it were expressly inserted in the conveyance. (Page 504.)

4. SAME—WHEN BROKEN.—A covenant for quiet enjoyment, implied by virtue of Kirby's Digest, § 731, was broken where a title paramount to that of the grantee's was held valid in a suit against them to which their grantor was a party. (Page 504.)

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

STATEMENT BY THE COURT.

This was a suit for breach of warranty against John P. Moore, who on September 24, 1895, conveyed certain lands to J. W. Gibbons for a certain consideration by deed, the granting clause of which reads:

"The said first party hereto does by these presents grant, bargain, sell and deliver unto said second party the lands [describing them]. To have and to hold the aforesaid granted tract of land to said second party hereto * * * and unto his heirs and assigns in fee simple forever."

In 1866 the lands were conveyed to Mrs. Boush and her bodily heirs, and, she having died in 1907 without bodily heirs, her grantor sued and recovered the land. In the meantime she had mortgaged the lands, the mortgage had been foreclosed, and appellee purchased them at the foreclosure sale, thereafter conveying them to J. W. Gibbons by the aforesaid deed. There was no express warranty in the deed.

The court found that the lands were conveyed by a deed containing the words already set out, and that appellee was not at the time of the conveyance thereof to Gibbons seized of an indefeasible estate in fee simple, but only of a life estate therein, and that plaintiffs had been evicted by a judgment of court in the suit in which appellee was made a party adjudging a paramount title in another claimant, that there was no breach of the covenant of warranty contained in the deed from Moore to Gibbons, and that the damages occasioned by the eviction was the sum of $960; and rendered judgment, from which this appeal is brought.

T. K. Riddick, R. W. Nicholls and *Percy & Hughes,* for appellants.

1. The words "grant, bargain and sell" import a covenant of warranty, and there was a breach thereof whereby appellee became liable. Kirby's Dig. § 731; 24 Ark. 442; 74 *Id.* 348; 22 *Id.* 72; 1 *Id.* 323; 26 Miss. 599; 71 *Id.* 61.

2. The issues here were not raised in the former suit, and the plea of *res judicata* is frivolous.

P. R. Andrews and *J. M. Jackson,* for appellee.

The words "grant, bargain and sell" do not import a general covenant of warranty under sec. 731, Kirby's Digest. 22 Ark. 72; 2 Binn. (Pa.) 95; 11 Serg. & R. 109; 3 Penn. 322; 74 Ark. 348; 66 Tex. 387; 24 Ohio 466; 15 N. Y. 492; 4 Mass. 627; 71 Miss. 61; 13 So. 882; 82 Ark. 209.

KIRBY, J., (after stating the facts). It is contended that the grantor, having conveyed the lands by the use of the words "grant, bargain and sell," thereby created an express covenant of general warranty as effectually, because of the statute (section 731, Kirby's Digest), as though a general warranty clause had been inserted in the deed. The statute reads:

"All lands, tenements and hereditaments may be aliened and possession thereof transferred by deed without livery of seizin, and the words 'grant, bargain and sell' shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed." Kirby's Digest, § 731.

In *Davis* v. *Tarwater,* 15 Ark. 289, the court, discussing the covenants generally inserted in conveyances and substituted for the general warranty of title contained in ancient deeds which had been long disused, said: "These covenants are (1) that the grantor is seized in fee; (2) that he has good right and full power to convey; (3) that the grantee shall quietly enjoy the premises; (4) that the premises are free from incumbrances, and (5) that the grantor will make further assurance of title," etc. And further: "Under our statute the words 'grant, bargain and sell' import the first four covenants named, unless limited by express words."

In *Winston* v. *Vaughan,* 22 Ark. 75, the court only held that the covenant against incumbrances created by the use of said words was expressly limited by the statute to those done or suffered from the grantor," etc., saying: "If this question were not settled by the high authorities to which we have referred, we

should find no difficulty in holding, from what would seem to be the obvious reading of the statute, that the grantor is not responsible on the statutory covenant for incumbrances other than those done or suffered by himself."

"Incumbrances have been lucidly and briefly defined as any rights to interests in land which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of the fee of same by deed." 1 Warvelle on Vendors, § 312. See also Rawle on Covenants, § 75; 16 Am. & Eng. Ency. of Law, p. 158; *Seldon* v. *Dudley E. Jones Co.*, 74 Ark. 350.

The covenant for quiet enjoyment, like the covenant of warranty, is one that runs with the land. *Logan* v. *Moulder*, 1 Ark. 313. This statute says that the use of said words "grant, bargain and sell" "shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, * * * as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed."

There were no words in this conveyance limiting this covenant, and it was for quiet enjoyment "against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever," and in effect a covenant of general warranty, which is the same as one for quiet enjoyment." Rawle on Covenants for Title, § 114; 3 Washburn on Real Property, § § 2388-89; 2 Words & Phrases, 1697.

The grantee, his heirs or assigns, may assign breaches of this covenant in any action as if it were expressly inserted in the conveyance. Kirby's Digest, § 732.

Appellee having been brought into a suit against appellants on their motion as voucher, in which a title paramount to theirs received from said appellee was held valid and they were evicted by judgment therein from said lands, the breach of the covenant of quiet enjoyment and warranty created by the statute was established. It follows that the court erred in rendering the judgment it did, and that judgment should have been rendered for appellants in the sum of $960, the amount of damages found

by the court to have been suffered because of the breach of the covenant and eviction from the premises.

The judgment is reversed for said error, and a judgment for said sum will be entered here.

NIXON *v.* GRACE.

Opinion delivered April 10, 1911.

1. MANDAMUS—DISCRETION.—The discretion of a court cannot be controlled by mandamus. (Page 505.)
2. CRIMINAL LAW—ISSUANCE OF PROCESS.—Kirby's Digest, § 2256, directing the circuit court to issue process upon an indictment being found, is directory merely, and not mandatory. (Page 505.)

Mandamus to Jefferson Circuit Court; *Antonio B. Grace,* Judge; petition denied.

T. H. Nixon, pro se.

Taylor & Jones, for respondent.

The matter is within the sound discretion of the court and the statute is directory merely. Mandamus will not lie. 66 S. E. 629; 9 Am. Dig. § 61 (b), p. 1883; Kirby's Digest, § 2256; 1 West. Rep. 375; 4 Cent. Rep. 760; 39 La. An. 759; 10 West. Rep. 920; 123 Ill. 227; 3 L. R. A. 778; High, Ex. Rem. (2 ed.) § § 9, 13, 10, 156; 34 Ark. 394; 35 *Id.* 298; 12 Pet. 472; 7 Cowen, 523; 33 Ark. 715; Const. art. 7, § 11; Kirby's Dig. § § 1304, 1324; 34 Ark. 491; 21 *Id.* 331; 24 *Id.* 155; 25 *Id.* 101; 34 *Id* 263; 35 *Id.* 56; 6 *Id.* 401; 33 *Id.* 69; 2 *Id.* 33; 20 *Id.* 456; 12 *Id.* 218; 23 *Id.* 70; 16 *Id.* 32; 23 *Id.* 16, 347.

HART, J. This is a petition for a writ of mandamus to compel A. B. Grace, as judge of the circuit court of Jefferson County, Arkansas, to make an immediate order for process to be issued on certain indictments returned in said court.

Where a court has discretion, it can not be controlled by mandamus. This is conceded by counsel, and is too well settled to require a citation of authority to support it. The statute under which the petition is filed reads as follows:

"Upon an indictment being found, if the defendant is not in custody or on bail, the court shall forthwith make an order for process to be issued thereon, designating whether it shall be

for arresting or summoning the defendant; and if for arresting the defendant, and the offense charged is bailable, the sum in which he may be admitted to bail shall be fixed." Kirby's Digest, § 2256.

This section is a part of chapter 3 of our Criminal Code, entitled "Process on an indictment." Preceding sections of the chapter provide that the process on an indictment consists of writs for arresting or summoning the defendant, and that the process of arrest be issued by the clerk upon the order of the court. Subsequent sections of the chapter prescribe the form of the bench warrant and the summons and that the summons shall only be issued on indictments for misdemeanor, where the court has not ordered a bench warrant to issue. The last section of the chapter, which is section 2264 of Kirby's Digest, contains a provision that the court may, at its discretion, order a bench warrant to be issued on any indictment. Another section of the Code contains a clause that its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its objects. Kirby's Digest, § 7817.

The petitioner contends that section 2256, *supra,* is mandatory, and the respondent insists that it is directory merely. In other words, the petitioner contends that the circuit court must make an order for process to be issued as soon as the indictments are returned into court, and that he has no discretion in the matter. On the other hand, the respondent maintains that this is a matter within the sound discretion of the court.

It is difficult to lay down a general rule which will be a correct test in all cases to determine whether the provisions of a statute are mandatory or directory. In regard to the general rule, Mr. Justice Sharswood of the Supreme Court of Pennsylvania said: "When the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory." *Bladen* v. *Philadelphia,* 60 Pa. 466; *Spencer's Appeal,* 78 Conn. 301, 61 Atl. 1010; *Attorney General* v. *Baker,* 9 Rich. Eq. (S. C.) 521; 2 Lewis' Sutherland, Statutory Construction, p. 1117.

In determining whether the words shall have a mandatory

or directory effect ascribed to them, the purposes of the act, the ends to be accomplished, the consequences that may result from one meaning or the other and the context are to be considered. In the application of these rules to the statute under consideration, we have reached the conclusion that the language, "the court shall forthwith make an order for process to be issued thereon," is not mandatory upon the circuit court, but is directory merely. We are strengthened in this view when we consider that subsequent provisions relating to the same subject are manifestly directory.

In construing this statute, the court has already held that the court may indorse on the indictment, when it is returned into court, the amount of bail required and withhold the order from the records of the court for a time. *Humphries* v. *State,* 33 Ark. 713. If the statute is imperative in its terms, the court could not do that; for it must literally and explicitly obey the mandate of the statute, and has no discretion at all in the matter. It can not be consistently said that its terms are mandatory in part and directory in part. It seems to us that the provisions of the chapter of our Criminal Code on process on indictments, when considered together, prescribe the duties of the circuit court in relation thereto, and direct the manner of the exercise thereof; but do not create a limitation on the power of the circuit court in discharging the duties required of it by the statutes. In other words, as above stated, we hold that the part of the statute directing that "the court shall forthwith make an order for process to be issued thereon" is directory merely, and not mandatory.

It follows that the petition for a writ of mandamus will be denied.

KIRBY, J., dissenting.

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

Opinion delivered April 10, 1911.

1. REMOVAL OF CAUSES—PRACTICE.—On a petition to remove a cause from a State to a Federal court, where it appears from the whole record, down to and including the petition for removal, that a case

is removable, then it is the duty of the State court to accept the petition and bond, and proceed no further. (Page 511.)

2. SAME—WHAT MAY BE CONSIDERED.—In determining whether a cause should be removed to the Federal court the State court may look to the allegations of the complaint, when not in conflict with the statements of the petition for removal. (Page 511.)

3. SAME—WHEN DENIED.—A suit brought in a State court outside of the Federal district in which the plaintiff resides is not removable on the ground of diversity of citizenship on petition of the defendant, who is a citizen and resident of another State. (Page 512.)

4. CARRIERS—SHIPPER'S AGENT.—While a person who is carried without charge on a train in order that he may look after the property of a shipper is not technically a passenger, the carrier owes him the same duty as if he were a passenger. (Page 513.)

5. SAME—OKLAHOMA STATUTE.—Oklahoma Compiled Laws, 1909, § 428, providing that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage," refers to persons who are carried gratuitously, as on a free pass, and does not cover cases where persons are carried free in order that they may look after the property of shippers. (Page 516.)

6. SAME—FAILURE TO FENCE RIGHT OF WAY.—A statutory requirement that a railroad company fence its right of way is intended for the protection of all persons upon railroad trains who are exposed to dangers of travel, and a person injured by reason of the omission to comply with the statute is entitled to recover on account thereof. (Page 516.)

7. SAME—OPERATION OF TRAIN—NEGLIGENCE.—Where plaintiff's intestate was killed while riding on a freight train, which was being backed at a speed of from 12 to 15 miles per hour, it was proper for the jury to consider the speed of the train and the position of the engine in determining whether or not there was negligence in the operation of the train. (Page 517.)

8. SAME—WHERE CONTRIBUTORY NEGLIGENCE FOR JURY.—Where a shipper's agent, riding in a freight train, which was not engaged in a regular run, was injured while upon top of the office car, the question whether he was negligent in being there was properly left to the jury if the conductor acquiesced in his being there. (Page 517.)

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

W. F. Evans, T. S. Buzbee and *B. R. Davidson,* for appellant.

1. The petition to transfer to the Federal court deprived the State court of jurisdiction. 75 Ark. 116; Dillon on Removal of Causes, § 75; 18 Enc. Pl. & Pr. 338, 341; 176 Fed. 872; 81 *Id.* 518; 47 *Id.* 530; 213 U. S. 207; 215 *Id.* 437.

2. The deceased was not a passenger, not having been accepted by any one authorized to receive passengers. Hutchinson on Car. (3 ed.) § § 997-1000; 4 Elliott on Railroads, § § 1581-2! 96 Ark. 558; 85 Ark. 504-508; 76 *Id.* 106; 178 Fed. 894-899; 176 *Id.* 519. One cannot impress or impose the obligations of a carrier of passengers on a carrier by riding on a tie train. 4 Elliott, Railroads, § § 1581-2; Hutch. on Car. (3 ed.) 1000-1; 94 Ark. 566; 111 N. W. 379; 58 S. W. 548; 153 Mass. 188; 29 N. H. 9; 149 Mass. 204; 157 Ind. 20; 63 So. Car. 46; 64 S. E. 112; 165 Fed. 408. Deceased rode on top of a freight car, and was in no sense a passenger. 165 Fed. 408; 42 S. W. 855; 58 *Id.* 548; 25 *Id.* 229; 149 Mass. 204; 40 Ark. 298-322; 16 Am. St. 520; 34 S. W. 488. He was simply a licensee, and the company owed him no duty except not to wantonly injure him. 193 U. S. 442, 449, 450; 113 *Id.* 218; 56 Ark. 281-275; 45 *Id.* 246; 165 Fed. 408.

3. The company owed deceased no duty to fence its track or keep its right of way clear of weeds or brush. 6 N. E. 448; 160 Fed. 260; 165 *Id.* 488; 35 *Id.* 43. Deceased assumed the risks. The wire gate was left open by parties in no way connected with the company. 19 A. & E. R. Cas. (N. S.) 137; *Ib.* 149. The Oklahoma statutes do not make railroads liable to one injured on a work train for failure to fence. 15 S. W. 805; 16 N. E. 448; 57 S. W. 948; 81 Fed. 133; 165 *Id.* 448.

4. There was no evidence of improper rate of speed. Pence was not competent to testify. 38 Mich. 537; 92 N. W. 639; 120 Mich. 127; 38 Mich. 537; 93 S. W. 752.

5. There was no proof that the track was unnecessarily crooked. 122 U. S. 189; 152 U. S. 153.

6. Deceased assumed all risks, not having paid fare and riding in an improper place. 8 A. & E. R. Cas. 151; 91 S. W. 460; 85 Ark. 460; 89 *Id.* 84; 93 *Id.* 153; 76 *Id.* 520; 57 *Id.* 160; 178 Fed. 432; 176 *Id.* 57; 211 U. S. 459.

7. It was error to submit to the jury whether or not a reasonably prudent man would have ridden on top of a car. 40 Ark. 298-322; 46 *Id.* 528-533; 70 *Id.* 603; 41 A. & E. R. Cas. 72; 105 S. W. 744-746; 60 Fed. 370-378; 71 Ark. 590; 41 *Id.* 542; 46 *Id.* 528; 157 Fed. 347-357.

8. It is the duty of the court to give specific instructions as to the amount of damages when asked. Juries are not lawyers to judge of the court's instructions. 93 Ala. 359; 9 So. 870; 69 Ark. 134; 141 Fed. 247; 145 *Id.* 157.

9. The train was engaged in interstate business only (175 Fed. 28); the Federal laws do not apply. 113 Fed. 508; 176 *Id.* 524; 193 W. S. 451.

Manning & Emerson, for appellee.

1. No grounds of removal to the Federal court were stated. Const. U. S., art. 3, § 1; Rev. St. § § 629-639 (1878); U. S. Comp. St. (1901) p. 508, § § 1, 2, 3. A suit which could not have been originally brought in the Federal court is not removable. 150 Fed. 580; 152 *Id.* 168; 155 *Id.* 68; *Id.* 499; 168 *Id.* 105; 175 *Id.* 456; 181 *Id.* 248, 255; 203 U. S. 449; 210 U. S. 366-9; 34 Cyc. 1250. Before the jurisdiction of a State court can be disturbed, it must *affirmatively* appear that a *proper* petition and bond have been presented in due time. 117 U. S. 430; 6 Sup. Ct. 799; 29 L. Ed. (U. S.) 962; 68 S. E. 920; 66 S. E. 427; 133 S. W. 38; Foster, Fed. Pro. vol. 2 (4 ed.) p. 1584; 179 Fed. 318; 113 U. S. 742-6; 131 U. S. 240; 203 U. S. 449; Loveland, App. Jur. (1911) § 338; 204 U. S. 182; 50 Ark. 388; 87 *Id.* 139; Moon, Removal of Causes, § 131; 148 Fed. 73, 694, etc.

2. This case is governed by the laws of Oklahoma, which leaves the defense of contributory negligence and assumed risks to the jury. Const. Okl. art. 23, § 6; Comp. Laws, § § 1389, 1390. The cases, 96 Ark. 558, 76 Ark. 106 and 85 *Id.* 504 are not in point. See 176 Fed. 519. Deceased was a passenger. Ray on Negl. of Imposed Duties, § 2, p. 6; 4 Elliott on Railroads, § 1578; 4 Hutchinson on Car. § 997, 1018, 1019, 1022; 2 White on Pers. Inj. on Railroads, § 561-2-8; 56 Ark. 549; 67 Ark. 47-53; 67 Ark. 389; 6 Cyc. 537; 92 S. W. 339; 79 Fed. 561; 76 Alt. 613; 10 Mo. App. 197; 17 So. 503; 142 Ga. 587; 64 S. E. 686; 243 Ill. 482; 90 N. E. 1057.

3. The railroad was required to fence its track and for failure is liable. 50 N. E. 116; 119 N. Y. 472; 23 N. E. 1051; 60 Fed. 370; 124 Mo. App. 140; 27 S. W. 476; 115 U. S. 522; 77 S. W. 439; 104 N. Y. S. 972; 110 *Id.* 507.

4. A witness need not be an expert in order to give his

opinion on the rate of speed of a train and other familiar objects. 92 N. W. 639.

5. Whether it is negligence for a train to operate backward is for the jury. 57 N. E. 640; 74 N. E. 1097.

6. Deceased assumed no risk. The acts causing the death were the negligent failure of the company to comply with the common law and statutes of Oklahoma. 93 Ark. 119; 76 *Id.* 520; 87 *Id.* 109; 83 *Id.* 22; 24 Ark. 75; 126 S. W. 76. The railroad owes the highest degree of care consistent with the practical operation of its freight trains. Cases *supra.* Riding on top of a car is not contributory negligence *per se.* 177 Fed. 44; 3 Hutch. Car. § 1196.

7. There is no error in the charge as to damages. 96 Ark. 87; 74 Ark. 259; 91 Pac. 883.

McCULLOCH, C. J. The plaintiff, Cassie Kitchen, instituted this action in the circuit court of Crawford County against defendant railroad company to recover damages resulting from the death of her husband, George T. Kitchen, which is alleged to have been caused by negligence of defendant's servants while he, the said George T. Kitchen, was riding on one of defendant's trains in the State of Oklahoma. The trial of the case resulted in a verdict in favor of plaintiff, and defendant appealed.

The first question presented is upon the ruling of the trial court in refusing to enter an order of removal to the Federal court. It is alleged in the complaint that the plaintiff is a citizen and resident of the city of Little Rock, Arkansas. This city is within the territorial jurisdiction of the United States Circuit Court for the Eastern District of Arkansas; Crawford County, where the action was pending, is in the Western District. The petition for removal filed by defendant is in regular form, and states that the petitioner "was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Missouri, being a corporation created and organized under the laws of the said State of Missouri," and "that the plaintiff, Cassie Kitchen, was at the time of the commencement of this suit, and still is, a citizen and resident of the State of Arkansas."

When it appears from the whole record, down to and including the petition for removal, that a case is removable, then it is the duty of the State court to accept the petition and bond and

proceed no further. The allegations of the complaint may be looked to, when not in conflict with the statements of the petition for removal, in order to determine whether or not the case is removable. *Texarkana Tel. Co.* v. *Bridges,* 75 Ark. 116; *Burlington, etc., R. Co.* v. *Dunn,* 122 U. S. 514.

Here the statement of the complaint, in substance, that the plaintiff is a citizen and resident of the Eastern District of the Federal Court is not in conflict with the statement of the petition that the plaintiff is a citizen and resident of the State of Arkansas. For the purpose of determining the question of removability, the allegations of the complaint in this case may therefore be considered. This presents squarely the question whether or not a suit brought in a State court outside of the Federal Court district of the plaintiff's residence is removable on petition of the defendant, who is a citizen and resident of another State. The Federal statute provides (section 1 of the act of Congress of March 3, 1887, as amended by the act of August 13, 1888) that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Section 2 of the same statute, granting the right of removal, provides that "any other suit, of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section * * * may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."

The contention of the defendant is that a plaintiff, by bringing suit in a district other than that of his or her residence, waives the objection on that account to a removal, and that the defendant may remove it, notwithstanding the fact that the suit has been brought in the wrong district. We think this question has been decided adversely to defendant's contention by the Supreme Court of the United States in the case of Ex parte *Wisner,* 203 U. S. 449. The decision of that court on the question is, of course, binding upon us. Learned counsel for the defendant insist that the Wisner case has been overruled by later cases, but we do not think so. The Wisner case was one where a citizen of Michigan sued a citizen of Louisiana in a court of the State of Missouri. The defendant filed a petition to remove

the case to the Federal court. The Supreme Court of the United States decided that the case was not removable because of the fact that it could not have been instituted originally in the Federal court of that district, which was not the district of the residence of either the plaintiff or defendant. Chief Justice Fuller, in delivering the opinion of the court, said that

"In view of the intention of Congress, by the act of 1887, to contract the jurisdiction of the circuit court and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of parties."

In later cases, In re *Moore,* 209 U. S. 490, and *Western Loan Company* v. *Butte & Boston Mining Company,* 210 U. S. 368, the above-quoted language of the Chief Justice was held to be *dictum,* and was disapproved, but the decision upon the facts disclosed was not overruled.

In the Moore case it was held to be removable on the ground that the plaintiff, after the removal into the Federal court, had appeared in that court and taken substantive steps in the case which amounted to a waiver, and the case was distinguished from the Wisner case on that point. Judge Brewer, in the opinion in the Moore case, commenting on the difference between the two cases, said that "the plaintiff in that case never consented to accept the jurisdiction of the United States court, while in this case both parties had consented by their conduct."

Following those decisions, as we understand them, we hold that the case could not be removed.

Plaintiff's husband, George T. Kitchen, was, at the time of his injury and death, a tie inspector for the Chicago, Rock Island & Pacific Railway Company, and was riding on one of defendant's trains in the State of Oklahoma, which was engaged in loading on its cars, for transportation, railroad ties along the line of its road which were the property of the Rock Island Road. As the ties were loaded for transportation, Kitchen inspected and counted them for his employer. He was allowed to ride on the train, as it traveled from place to place for the purpose of picking up the ties, but he paid no fare. This particular train did not carry passengers, but was engaged exclusively in hauling the railroad ties. There was a box-car in the train called the "office car," which was fitted up with desks, etc., for the use of the men

in their work in connection with the shipment of the ties, and also with beds where the men, including Kitchen, slept. There was also a caboose. At the time plaintiff's intestate was injured the train was backing at a speed of 12 or 15 miles per hour. The caboose was in front, and the office car next, followed by the other cars of the train, twenty-one in all, and the engine last. Kitchen and one Nelson, an employee of defendant, who was called the foreman of the tie train, were riding on top of the office car, the foreman having gone there, presumably, on account of the excessive heat of the day, and Kitchen, when he went to the top of the car, remarked to one of his companions that he thought it was the safest place to ride. The conductor of the train was in the cupola of the caboose. It was in the evening about dark, or a little before, and the backing train struck a cow and a portion of the train was derailed, the office car being completely turned over. Kitchen was caught under it and instantly killed. It is alleged in the complaint that the railroad track along that place was considerably curved, that the defendant had negligently permitted grass and weeds to grow on the right of way high enough to obscure from vision of trainmen stock straying on the right of way and track, and that the servants of the defendant were guilty of negligence and violation of the laws of the State of Oklahoma in failing to keep its right of way properly fenced, on account of which negligence the cow, which caused the derailment of the train, was permitted to stray upon the right of way and the track. Negligence is also alleged in backing the train at a high rate of speed.

It is earnestly insisted by learned counsel for defendant that Kitchen was not a passenger, and that defendant owed him no duty except the negative one not to wantonly injure him. In support of this contention they stress the fact that Kitchen did not pay any fare and was not asked to pay fare, and that, in order to constitute himself a passenger, he must have tendered himself as such to be carried upon a train dedicated to the carriage of passengers, and must have been accepted by one who was authorized to receive passengers. We do not think this contention is a sound one. According to the undisputed evidence, Kitchen was permitted to ride on the train for the purpose of performing service for his employer, the Chicago, Rock Island &

Pacific Railway Company, for whom defendant company was then engaged in transporting railroad ties. He represented his employer, the shipper, and must be treated in the same light as if he, himself, was the shipper, and, as a part of the contract of carriage, was permitted to ride for the purpose of shipping his commodity. His relations with the defendant as a carrier were much the same as that of a shipper of cattle, riding on a drover's pass, or as that of an express messenger or railway mail agent who is being transported by the carrier under contract with its employer. Under such circumstances this court, and all other courts which have passed upon the question, so far as we are advised, have held that, while such a person is not, technically, a passenger, the carrier owes him the same duty as if he were a passenger, that is to say, the highest degree of care consistent with the practical operation of the train which he accepts as the means and mode of transportation. *Little Rock & Ft. Smith Ry. Co.* v. *Miles,* 40 Ark. 298; *Fordyce* v. *Jackson,* 56 Ark. 594; *Voight* v. *B. & O. S. W. Ry. Co.,* 79 Fed. 561.

In *Fordyce* v. *Jackson, supra,* which was a case where the person injured was an express messenger, Chief Justice COCKRILL, speaking for the court, said:

"It is true there was no express contract between the plaintiff and the railway company; but as the railway company undertook to carry him, it was bound to use every reasonable precaution to carry him safely. He could recover, therefore, in tort, just as any passenger may, for a violation of this general duty. All the cases upon this and analogous questions are to that effect."

Mr. Hutchinson says on this subject that "as a general rule, every one not an employee, being carried with the express or implied consent of the carrier upon a public conveyance usually employed in the carriage of passengers, is presumed to be a passenger." 4 Hutchinson on Carriers, § 997.

In another place the same learned author says this (sec. 1018): "It seems that if the person who is injured by the negligence of the carrier's employees is lawfully upon its conveyance, even though he is not strictly a passenger, he will be entitled, in the absence of a contract on his part to the contrary, to the same

care and diligence for his safety as when he is strictly a passenger."

Some reliance is placed, as to the degree of care, on the Oklahoma statute, which provides that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." Okla. Comp. Laws, 1909, § 428. No decision of the Oklahoma court construing that statute has been brought to our attention, but, manifestly, it could only refer to persons who are carried gratuitously, as on a free pass, and does not cover cases where persons are carried on contract, either express or implied, even though customary fare be not paid.

It is next insisted that the railroad company owed deceased no duty to fence its right of way, notwithstanding the requirement of the Oklahoma statute, and that it neither owed a duty to keep the right of way clear of weeds and brush, and that these omissions cannot be considered as the proximate cause of the injury.

It has been decided, under similar statutes, that the requirement is supposed to have been intended for the protection of all persons upon railroad trains who are exposed to dangers of travel, and that the person injured by reason of the omission to comply with the statute was entitled to recover on account thereof. *Missouri Pac. Ry. Co.* v. *Humes,* 115 U. S. 522.

Error of the court is assigned in giving the following instructions over defendant's objection:

"VI. The law requires the defendant to exercise the highest degree of care practicable in the running of its trains, both as to speed and the manner of running it with reference to the place the engine occupies in the train; and if the defendant in this case has failed to exercise that high degree of care, which is explained in these instructions, in the respect just mentioned, and this want of care caused or was one of the causes of the death of Kitchen at a time when he was exercising ordinary care for his own safety, you should find for plaintiff."

"XI. It is for you to say, among other things, whether or not Kitchen was wanting in ordinary care for his own safety, considering all the circumstances that surrounded him at the time. It is also for you to say whether or not the defendant is guilty of negligence in any of the respects assigned; that is, as

to the fence, the keeping of the right-of-way cleared, and the manner of running the train as to speed and position of the engine in the train. These are to be determined by all of the facts and circumstances in the case."

Error is also assigned in refusal of the court to give the fifth instruction requested by defendant:

"5. It is charged that the train was negligently backed in that it was backed too rapidly. I charge you that there is no evidence that would warrant you in concluding that the train was backed too rapidly. You will therefore not consider the rate of speed at which the train was moving as tending to prove negligence."

It is said that there is no evidence to show that it constituted negligence to back the train under the circumstances, and that for this reason the court erred in giving the instructions mentioned above and in refusing the one requested by defendant. It will be noted, however, that in the instructions given the court said nothing about the backing of the train, but submitted only the question as to the manner of running the train with reference to its speed and the position of the engine in the train. If we should hold that, under the evidence in this case, the question of the backing of the train was not one to be considered by the jury as an act of negligence, still there was no error in these instructions, because, under the evidence adduced, it became a question for the jury to consider the speed of the train, together with the position of the engine in the train, in determining whether or not there was negligence in the operation of the train.

The next question in the case, and one which has given the court most serious concern, is as to the contention that Kitchen was guilty of contributory negligence in riding on top of the train and that the trial court should have so declared that as a matter of law. Defendant relies upon the case of *Little Rock & F. S. Ry. Co.* v. *Miles, supra,* where, under a special finding of the jury that a shipper riding on a drover's pass was injured by reason of being on top of a car, this court held that he was guilty of contributory negligence which precluded a recovery of damages from the railroad company. Judge SMITH, in delivering the opinion in that case, said that "a passenger who voluntarily and unnecessarily rides upon the engine or the tender or

upon the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind and of ordinary intelligence."

That was a case, however, where the shipper was riding on a train which carried him as a passenger, where a place was provided for him to ride, and where he had, without authority from the conductor, deserted the place set apart for the carriage of passengers and had gone on top of the train. The facts of the present case are vastly different. Here the train was not carrying passengers and was not engaged on a regular run. It was going from place to place, picking up the railroad ties, first going backward and then forward. Those who were riding on the train had the right, to some extent, to consider the question of their own safety and to determine where the best place was for them to ride for their own safety and convenience. The foreman in charge of the train was on top of the car, and Kitchen went there with his consent or, at least, by his acquiescence, and the conductor was near them and acquiesced in their presence there. In the same case Judge SMITH said this:

"Another duty is to occupy a seat inside of the car provided for passengers when a seat is to be had. The conductor is charged with the administration of these rules, and doubtless if the passenger rides in an improper place, for example, in the baggage, express or postal car, or in a caboose attached to the train or on the platform, by the conductor's permission, or with his acquiescence, this would exempt the passenger from blame, and in case of accident to him resulting from the company's negligence he might recover damages."

The decision of the United States Circuit Court of Appeals for the Sixth circuit in the case of *Winters* v. *B. & O. Ry. Co.*, 177 Fed. 44, states the controlling principle here, where, under circumstances not dissimilar, it was held that the question should be submitted to the jury whether or not an injured party was guilty of negligence.

There are other alleged errors of the court pressed upon our attention; but, on consideration, we conclude that they are not well founded, and that they are not of sufficient importance

to call for discussion here. Suffice it to say, that the evidence is legally sufficient to sustain the finding of the jury upon the allegations of negligence which were submitted to the jury by the court in the instructions given. The instructions correctly submitted those questions to the jury and properly limited the consideration to the allegations of negligence which the evidence tended to sustain.

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

POWHATAN ZINC & LEAD MINING COMPANY v. HILL.

Opinion delivered April 10, 1911.

INTEREST—RATE.—An obligation for the payment of money on a certain day "bearing no interest" will be held to bear interest from the date of maturity at the rate of six per cent.

Appeal from Lawrence Chancery Court; *George H. Humphries,* Chancellor; affirmed.

C. T. Burns, for appellant.

Under the contract no interest could be charged. 22 Cyc. 1474, 1491; Kirby's Dig. § 5387; 53 Ill. App. 245; 9 N. W. Rep. 265; 36 Mich. 239; 51 Me. 376; 29 Am. Dig. 44, note K. Where no interest is specified "until paid," only six per cent. can be recovered from maturity until paid. Final judgments bear six per cent. interest unless a larger amount is agreed upon. Kirby's Dig. § 5387.

W. E. Beloate, for appellees.

The note drew 10 per cent. interest. All contracts bear six per cent. after maturity, unless the contract otherwise provides by saying "until paid." 36 Ark. 480; *Ib.* 364; 46 *Id.* 87.

McCULLOCH, C. J. The plaintiffs, Victoria Hill and J. M. Lester, instituted this action in the chancery court of Lawrence County against the defendant, Powhatan Zinc & Lead Mining Company, a domestic corporation, to recover the sum of $500, with interest, alleged to be due as a part of the purchase price of certain lands situate in that county, and to foreclose their lien, as vendors, on said lands.

At the first term of court thereafter the case was continued until the April term, 1910, when a decree purporting to be upon consent of parties was duly entered for said principal sum of money together with ten per cent. interest thereon, and sale of the lands was also decreed for the purpose of foreclosing the vendor's lien.

At the next term of court the defendant appeared and presented a petition asking that the decree be modified to the extent of striking out the item of interest, on the alleged grounds that the defendant had not been legally summoned in the action, that no one had been authorized to enter the defendant's appearance or consent to the decree, and that there was no contract for the payment of interest. On the hearing of that petition the court modified its former decree by reducing the rate of interest recovered from ten to six per cent., and the defendant appealed.

The plaintiffs have prosecuted a cross-appeal, on the ground that the court erred in modifying the decree at a term subsequent to its rendition.

The defendant has brought into the record the deed of conveyance executed by plaintiffs to defendant, which recites the obligation to pay the sum of $750 "due and payable October 1, 1907, bearing no interest," and insists that, upon a fair construction of this contract, it should be held not to bear interest at all.

We are of the opinion that the obligation bears interest from the date of maturity. In this State all contracts for the payment of money bear interest from the time they are payable. *Roberts* v. *Wilcoxson,* 36 Ark. 355; *Texas & St. Louis Ry. Co.* v. *Donnelly,* 46 Ark. 87; *Phoenix Insurance Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187.

This court has held that a stipulation in an obligation for the payment of a certain rate of interest, without adding the words "until paid," means until the maturity of the obligation to pay and not until payment. *Gardner* v. *Barnett,* 36 Ark. 476; *Johnson* v. *Meyer,* 54 Ark. 437.

For the same reason it must be held that the words in the present contract "bearing no interest" mean until maturity, for, as already stated, all contracts for the payment of money bear interest from maturity, and in order to change that rule it must

be expressly, or by fair implication, stipulated that the contract shall not bear interest until paid.

The plaintiffs insist, in support of their cross-appeal, that the court erred in modifying the judgment, but we conclude, from an inspection of the record, that the ruling of the court was correct. This, for two reasons: first, because the original complaint fails to state facts which justified the recovery of a higher rate of interest, and, second, because the court was warranted in finding from the evidence adduced at the hearing of the petition to modify, as it doubtless did find, that the defendant had not consented to the rendition of a judgment for the higher rate of interest.

Counsel for plaintiffs insist that the deed of conveyance which appears in the transcript is improperly there and should not be considered. The clerk has certified it up in the transcript as a part of the record; and as the clerk's certificate is not inconsistent with the recitals of the decree, we must accept it as true. We find in the record no other written obligation of the parties whereby the higher rate of interest was agreed upon, and the complaint does not set forth any other writing or state any fact which would warrant a recovery of the higher rate of interest. We are therefore of the opinion that the court was correct in modifying the decree.

Affirmed.

DE QUEEN v. FENTON.

Opinion delivered April 10, 1911.

1. MUNICIPAL CORPORATIONS—ORDINANCE FOR IMPOUNDING STOCK.—Under Kirby's Digest, § § 5450, 5451, impowering cities and towns to prevent the running at large within their corporate limits of stock and cattle, and to provide for the impounding of same, municipal ordinances providing for the enforcement of these statutory provisions are valid police regulations. (Page 523.)

2. INJUNCTION—VIOLATION OF MUNICIPAL ORDINANCE.—The violation of municipal ordinances prohibiting the running at large of stock and imposing punishment therefor is an infraction of the criminal law, which equity has no jurisdiction to restrain. (Page 523.)

3. SAME—CRIMINAL PROCEEDINGS.—A court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matter or acts which are solely of a criminal nature, or in any case not strictly of a civil nature. (Page 524.)

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

Abe Collins, for appellant.

The ordinance does not apply to nonresidents. It was a valid ordinance. The complaint charged a public nuisance, and that there was no adequate remedy at law. The demurrer should have been overruled. 81 Ark. 117; Act April 20, 1895, p. 202; 72 Ark. 8; 134 S. W. 890; Kirby's Dig., § 5525.

Otis T. Wingo, for appellee.

The remedy was by appeal. 85 Ark. 230. Injunction does not lie. 81 Ark. 117.

FRAUENTHAL, J. This was a suit brought by the city of De Queen seeking to enjoin the defendants below from permitting stock and cattle owned by them from running at large within the limits of said city. In the complaint it was alleged that two ordinances had been passed by the proper authorities of said city prohibiting the running at large of cattle and other stock within its corporate limits; one of these ordinances declaring it to be unlawful for the owner of such stock or cattle to allow same to run at large in said city, and providing for penalizing the owner and impounding said stock or cattle; and the other ordinance declaring the running at large of such stock or cattle within said city to be a nuisance, and imposing a fine upon the owner. The complaint further alleged that the defendants resided outside of said city and knowingly permitted their stock and cattle to run at large within the limits thereof in violation of said ordinances, thereby creating a public nuisance. It was alleged that the ordinances were difficult of enforcement, and that under the statutes of the State the defendant's cattle could not be impounded because the defendants resided outside of the city, and for these reasons it alleged that the city had no adequate remedy to protect its citizens against the depredations of these cattle and stock, and on this ground it based its right to obtain an injunction against the defendants.

The defendants interposed a demurrer to this complaint upon the grounds (1) that it did not state facts sufficient to constitute a cause of action, and (2) that the chancery court was without jurisdiction in the matter.

The court sustained said demurrer and dismissed the complaint. Did the court err in sustaining said demurrer?

By virtue of the statutes of this State, cities and towns are empowered to prevent the running at large within their corporate limits of stock and cattle, and to provide for the impounding of same. Kirby's Digest, § § 5450, 5451. Ordinances passed by municipal corporations providing for the exercise and enforcement of these statutory provisions are valid police regulations. *Fort Smith* v. *Dodson,* 46 Ark. 296; *McKenzie* v. *Newton,* 89 Ark. 564.

The violation of such ordinances is an infraction of the criminal law, and the police courts of cities and towns are the proper forums in which to pursue a criminal prosecution for the violation thereof. A chancery court has no criminal jurisdiction, and will not exercise its powers solely to enforce criminal laws. A complete and adequate remedy for the violation of the criminal statutes of the State and of municipal ordinances is afforded by the courts of law, and those courts have full power to pass upon the scope and validity of such laws and ordinances. It has been held by this court that the chancery court has no jurisdiction to restrain acts solely because they are criminal. *State* v. *Vaughan,* 81 Ark. 117; *Lyric Theater* v. *State, ante* p. 437.

From the allegations of the complaint it appears that there are two ordinances of the city of DeQueen prohibiting the acts complained of. Criminal prosecution can therefore be instituted against the defendants for these acts, which, it is alleged, are violations of these ordinances. If these ordinances have in fact and in law been violated by the defendants, there can be no legal difficulty in enforcing them.

But it is urged that by section 2 of an act entitled, "An act to regulate stock raising and to protect stock impounded in cities and towns," approved April 20, 1895 (Acts of 1895, p. 201), persons residing outside of the limits of cities and towns are not amenable to the provisions of the statute empowering municipalities to prohibit the running at large of stock and cattle within

their corporate limits, and it is contended that on this account there is no remedy by criminal prosecution against the defendants for the acts complained of.

By an act approved May 23, 1901, it was provided that cities of the first and second class and incorporated towns were authorized and empowered to prevent the running at large within their corporate limits of cattle and stock, and to impound same; and by the same act all laws in conflict therewith were repealed. In the case of *Benton* v. *Willis,* 76 Ark. 443, it was held that the above act of May 23, 1901, did not repeal section 1 of the above act of April 20, 1895, providing for and prescribing the manner of impounding stock and cattle running at large in cities and towns, holding that the two acts presented a complete system for impounding the animals named therein. But the court did not in that case pass upon the question as to whether or not said section 2 of the act of April 20, 1895, was repealed by the act of May 23, 1901.

In the case of *McKenzie* v. *Newton, supra,* it was held that such stock owned by a person residing outside of the corporate limits was subject to the impounding provisions of the ordinance of a city, passed under the authority of section 5451 of Kirby's Digest. It will thus be seen that it has not been determined that stock owned by a person who resides outside of the corporate limits of a municipality cannot be restrained and impounded in pursuance of an ordinance passed under the above statute.

The proper proceeding by which this question can be tested is by impounding such stock or cattle, or by criminal prosecution, the proper forum in which such prosecution should be instituted being the police court of the city or town. A court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matter, or acts which are solely of a criminal nature, or in any case not strictly of a civil nature. *State* v. *Lindsay,* 34 Ark. 372.

In the case of *Rider* v. *Leatherman,* 85 Ark. 230, it is said: "This court has often ruled that chancery courts will not interfere by way of injunction to prevent anticipated criminal prosecutions. The city through her citizens has the right to enforce the ordinance if valid. A court of chancery will not entertain a contest over the question as to the validity of the ordinance, and

restrain a prosecution pending the determination of that question, as the whole matter can be settled in a court of law where only the violations of the ordinance, if valid, can be punished."

It appears that the chief purpose of this complaint is to test the validity of the above ordinances of the city of DeQueen as applied to owners of stock or cattle residing outside of the limits of the city of DeQueen. As we have above seen, the courts having jurisdiction to enforce the criminal laws are the proper courts to pass upon this question on proper proceedings being instituted therein. A court of chancery will not exercise its jurisdiction for that purpose.

It follows that the lower court did not err in sustaining the demurrer to the complaint, and its decree is affirmed.

JOBE v. URQUHART.

Opinion delivered April 3, 1911.

STATE—SUIT AGAINST.—A suit against the Penitentiary Board to reform a contract for the purchase of a State convict farm is in effect a suit against the State within the inhibition of the Constitution (art. 5, § 19), providing that "the State of Arkansas shall never be made defendant in any of her courts."

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

STATEMENT BY THE COURT.

This suit was brought against the officials of the State who by law constitute the Board of Commissioners for the management of the Arkansas Penitentiary, to reform a contract of sale of certain lands to said board for the State for a convict farm. It was alleged that plaintiff sold to said Board two plantations in Lincoln County known as the Cummins place and the Maple Grove place, and that in writing up the contract of sale describing the lands particularly certain tracts were included by mistake that did not belong to plaintiff, and were not sold to said Board, and not intended to be described in said contract, and that certain other tracts that should have been included in said contract, and that constituted part of said farm, were omitted therefrom by

mistake, and that it was the intention of both parties that these certain tracts of land omitted were included in the sale, and should have been in the contract, and said certain tracts that were included were not sold and should not have been included in said contract.

Further, that plaintiff tendered a deed in compliance with the terms of the said contract and including all of the land contained in and constituting both the Cummins place and the Maple Grove place, but not including said tracts that were by mistake included in said contract of sale which should have been omitted therefrom, which deed the defendants, who were not members of the Board at the time the contract was executed and had no personal knowledge thereof, declined to accept because the descriptions therein did not agree with the descriptions of the land in the contract of sale.

The answer admitted the purchase of plantations except "that the land as particularly described in said contract called for a part of section 17, township 7, range 5." "That they have not sufficient knowledge upon which to form a belief as to whether this was a part of the Cummins plantation, but the defendants insisted that, as the contract called for all of section 17, the State is entitled to a deed for all of said section, whether it constituted part of the Cummins and Maple Grove plantations or not; denied sufficient knowledge or information upon which to form a belief as to whether a mistake was made or not in drafting said contract for the sale of land as alleged, also as to whether it was the intention of the grantor or of the Board to buy or sell less than all of said section; admitted that the land described in section 4 was, through a mistake, omitted from the contract of sale as alleged, and should be embraced in the deed tendered to the State; that plaintiff tendered a deed to all of the land described in the contract except said part of section 17 which he charged was included by mistake, and alleged that the deed was not in all respects in compliance with the terms of the contract of sale, and that they declined to accept same for that reason.

The testimony tended to show that the Board of Commissioners of the Penitentiary desired to purchase a State convict farm, and that W. H. Miller, agent of Urquhart, on the 19th day of September, 1902, proposed in writing to said Board, "I

hereby offer to sell you the Cummins and Maple Grove plantations in Lincoln County for the sum of $140,000," etc., and describing them in a general way. The Board at that time consisted of George W. Murphy, Attorney General; T. H. Bradford, Commissioner of Agriculture, etc.; T. C. Monroe, Auditor; J. W. Crockett, Secretary of State; and Jeff Davis, Governor. The last-named member did not participate in the negotiations.

On November 21 the record of the proceedings of the Board accepting the proposition of E. Urquhart shows: On motion the chairman appointed Messrs. Murphy and Bradford a committee to ascertain from W. H. Miller, as agent, the lowest price and best terms upon which the Cummins and Maple Grove plantations, Lincoln County, can be purchased by the State, and W. H. Miller, agent for E. Urquhart, came before the Board and was conferred with in their presence by the committee, and declined to modify the proposition heretofore made by him for Mr. Urquhart.

Gen. B. W. Green made a proposition to sell the State certain lands for use as a convict farm.

Mr. Murphy moved that the Board accept the proposition of Edmund Urquhart, as set forth in copy of contract read before the Board, to sell the State the farms known as the Cummins and Maple Grove, and direct the financial agent to pay the cash payment of $30,000, on the execution of the contract and acknowledgment of same by Edmund Urquhart; and that the president and secretary of the Board sign the contract as such, and that all other members of the Board who will do so sign the same.

This motion was adopted by the Board; and the following is a copy of the proposition submitted on November 21, 1902, and to which the contract was attached:

"Little Rock, Ark., Nov. 21, 1902.

"*To the Board of Commissioners for the Management of the "Arkansas Penitentiary:*

"Gentlemen: I herewith submit a proposition for the sale to your Board of the plantations known as the Cummins place and the Maple Grove place, which are fully set out and described in the contract accompanying this communication to your Board for a State convict farm. If the contract is accepted, I am pre-

pared to carry it out by delivering possession of the lands as soon as it can be executed and the cash payment made, subject to such possession, occupancy and control as may be necessary to enable me to gather, gin and bale the crop of cotton grown on the place during the present year.

"Very respectfully,

[Signed] "E. Urquhart."

The testimony was virtually undisputed that said plantations did not in fact include said certain tracts of land in section 17 that are alleged in the complaint to have been described in the contract of sale by mistake, and that same had never constituted a part of either of said plantations, and that the other lands in section 4 alleged to have been omitted by mistake from said contract of sale were in fact a part of said plantations sold.

The chancellor found that the said lands in section 17 were not intended to be sold or purchased, not being in fact a part of either of said plantations, and were included in the contract of sale by mistake, and that the other lands alleged to have been omitted by mistake were in fact sold and should have been included in the contract, and reformed the contract in accordance with the prayer of the petition. From this decree an appeal was taken.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* assistant, for appellee.

The court had no jurisdiction.

Moore, Smith & Moore, for appellee.

The jurisdiction to correct the mistake is unquestionable. 50 Ark. 179; 49 *Id.* 406.

KIRBY, J., (after stating the facts). We are confronted in this case with the proposition that the chancery court was without jurisdiction to hear or determine it because of the inhibition of the Constitution (art. 5, § 19): "The State of Arkansas shall never be made defendant in any of her courts."

It is true this objection was not formally raised by the Board below, but the pleadings and the testimony show conclusively that it is in effect and in fact a suit against the State. The Penitentiary Board is but an agency of the State, composed of certain officials thereof for the conduct and management of the

State Penitentiary and with authority to purchase a farm "upon which to work the State convicts," as provided in sections 5852-5855, Kirby's Digest. They had no authority to purchase these lands except as given therein, nor for any other purpose than a convict farm for the State, and bought them for the State, which alone could acquire and hold the title thereto. A new Board having come into power, composed of different persons from those constituting the Board at the time the purchase was made and the contract entered into, and without personal information thereof, declined to receive the deed tendered conveying to the State the lands purchasd by the old Board as a convict farm, because it did not contain certain tracts of land in section 17 shown by the said contract of sale with said old Board to have been included in the purchase.

This suit was against the State officers constituting the Board of Commissioners for the management of the Arkansas Penitentiary, not in their personal or individual capacity, but in their official capacity as said board, which the statute nowhere authorizes to sue or be sued, to reform the contract and in effect require the board to accept a deed to the State for less land in section 17 than was contained therein in the said contract of sale, and to pay therefor the price agreed upon and specified in the contract, thus completing the purchase of the convict farm for the State; and the court was without jurisdiction to hear it and render the judgment, and this without regard to whether the claim was just and meritorious or not. *Pitcock* v. *State,* 91 Ark. 527.

The court being without jurisdiction, its judgment was void, and the decree is reversed, and the cause dismissed.

Justices WOOD and HART dissent.

RACHELS v. DONIPHAN LUMBER COMPANY.

Opinion delivered April 3, 1911.

1. ATTORNEY AND CLIENT—CONTINGENT INTEREST IN SUIT.—NOTICE.—In an action by the attorney of one of the parties to a former suit, which has been compromised, to recover his fee from the opposite party, under Kirby's Digest, § 4457, the plaintiff should allege and prove that the defendant had either actual or statutory notice of his con-

tingent interest in the cause of action involved in the former suit. *Kansas City, F. S. & M. Rd. Co.* v. *Joslin,* 74 Ark. 551, followed. (Page 531.)

2. APPEAL AND ERROR—AMENDING PLEADINGS TO CONFORM TO PROOF.—On appeal the pleadings will be considered as amended to conform to proof introduced without objection. (Page 531.)

3. ATTORNEY AND CLIENT—ASSIGNMENT OF CONTINGENT INTEREST—VALIDITY.—A written assignment of an interest in a cause of action to the plaintiff's attorney, under Kirby's Digest, § 4457, although made before the suit was actually filed, was valid from the time of the filing of the suit and notice to the adverse party, either actual or statutory. (Page 532.)

4. SAME—REASONABLE FEE—HOW DETERMINED.—Under Kirby's Digest, § 4457, providing that "in case the plaintiff or defendant compromise any suit for liquidated or unliquidated damages, or any other cause of action after same is filed, where the fees or any part thereof are contingent, the attorney for plaintiff or defendant receiving consideration for said compromise shall have a right of action against both plaintiff and defendant for a reasonable fee, to be fixed by the court or jury trying the case," *held* that a "reasonable fee" is not a speculative or contingent fee, but one that is reasonable, considering the importance of the litigation, the benefit secured by it, the amount and character of the attorney's services, and his learning, skill and proficiency. (Page 533.)

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

J. N. Rachels and *Chas. E. Robinson, pro se.*

This suit was brought under § 4457, Kirby's Dig., and the court held there was nothing in existence upon which to base a contract for a fee. This was error. 74 Ark. 551.

S. Brundidge, Jr., and *H. Neelly,* for appellee.

At the time of making the contract there was nothing in existence capable of being contracted for. 66 Ark. 260; 30 S. W. 684.

KIRBY, J. Appellants, attorneys at law, brought suit under section 4457 of Kirby's Digest against the Doniphan Lumber Company to recover reasonable attorney's fees claimed to be due them because said company had compromised and settled two suits for unliquidated damages with their clients, who had transferred to them certain portions of their causes of action in consideration for their services as attorneys, with notice that their fees were contingent in said cases, and without their consent.

This court has already held what allegations are necessary to constitute a sufficient complaint under said statute, and that actual notice of the assignment of an interest in the cause of action is as effective to charge the company with notice of such transfer and assignment as a strict compliance with its terms by filing the written assignment properly acknowledged with the papers of the suit and causing it to be noted of record. *Fordyce* v. *McPhetrige,* 71 Ark. 327; *Kansas City, Ft. Scott & Memphis Rd. Co.* v. *Joslin,* 74 Ark. 552.

The sufficiency of the complaint was not questioned by demurrer in this case, and the allegations thereof were aided by the proof introduced without objection showing that the assignment of the cause of action was in writing, and will be considered amended to conform thereto. This statute provides:

"The sale of a judgment or any part thereof of any court of record within this State, or the sale of any cause of action or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer, which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and, when thus filed by the clerk, it shall be his duty to make a minute of said transfer on the margin of the record of the court where such judgment of said court is recorded, or, if judgment be not rendered when said transfer is filed, the clerk shall make a minute of such transfer on the docket of the court where suit is entered, giving briefly the substance thereof * * *; and this act shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of said transfer or not. In case the plaintiff and defendant compromise any suit for liquidated or unliquidated damages or any other cause of action after same is filed, where the fees or any part thereof to be paid to attorney for plaintiff or defendant are contingent, the attorney for the party plaintiff or defendant receiving a consideration for said compromise shall have a right of action against both plaintiff and de-

fendant for a reasonable fee, to be fixed by the court or jury trying the case."

In this case it was alleged that the appellee had compromised and settled with their clients two suits and causes of action in which they had an interest, by assignment under said statute, and of which interest and contingent fee it had actual notice before such compromise and settlements were made, and thereby became liable to them, under said statute, for a reasonable fee in each of said suits compromised, claiming in one $1,000 and $500 in the other. Upon the proof showing that the written transfers and assignments of part of said causes of action in consideration of their services as attorneys in the prosecution of the suits were made before the suits were filed, the court declared, as a matter of law, that same were void and of no effect, and directed the jury to find a verdict for the defendant. This action of the court was erroneous. The statute makes such causes of action assignable, requiring that the assignment thereof "shall be evidenced by a written transfer," which, when acknowledged, filed, etc., "shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not." The written assignment of the causes of action, although made before the suits were actually filed, was valid from the time of the filing of the suits and notice; also if filed with the papers in the case and noted in accordance with the statute; and binding against the defendant, without such filing and notation, if it had actual notice thereof. *Kansas City, F. S. & M. Rd. Co.* v. *Joslin, supra; Gulf, C. & S. F. Ry. Co.* v. *Miller* (Texas), 53 S. W. 709.

Said statute is practically a copy of the statutes of Texas down to the last sentence which gives the right of action against both plaintiff and defendant for a reasonable attorney's fee in case they compromise any suit for unliquidated damages, etc., after the same is filed, where the fee or any part thereof to be paid the attorney is contingent. In that State, after an attorney has taken the proper assignment of part of the cause of action and filed the same with the papers of the suit, his client cannot compromise or settle that part of the cause of action assigned to the attorney, and the attorney has the right, if a compromise and settlement has been made with his client, to proceed with the

suit in the client's name and collect the part of the cause of action assigned to him. *Texas & Pacific Ry. Co.* v. *Vaughan,* 40 S. W. 1065; *Texas Central Rd. Co.* v. *Andrews,* 67 S. W. 923; *Gulf, C. & S. F. Ry. Co.* v. *Miller,* 53 S. W. 709; *Powell* v. *Galveston, H. & S. A. Ry. Co.,* 78 S. W. 975.

Since this additional provision was made in our statute, giving the right of action for a reasonable fee to the attorney, who had a valid written assignment of an interest in the cause of action of which the party compromising the suit had actual or constructive notice under the statute against both parties to the suit, it was evidently the intention of the Legislature that such right should be in lieu of the one the assignee would otherwise have had to proceed under the assignment against the party compromising the suit as though it had not been settled. The difficulties that an attorney would encounter in proceeding to collect his part of a cause of action after his client had compromised and settled that part of it belonging to him without his attorney's consent, and had no further interest in the prosecution of the suit, nor in securing the payment of his attorney as conclusively shown by his settlement of the suit without the consent of his attorney, were recognized and understood by the Legislature, and caused the making of this additional provision.

If appellants had valid assignments of an interest in the two causes of action upon which suits were filed against appellee, and of which contingent fee and interest it had actual notice, as the proof tended to show, it became liable upon the compromise of said suits with appellant's clients, without their consent, to the payment to them of a reasonable attorney's fee in each case, to be fixed by the court or jury, upon proper proof, and the court erred in directing a verdict for appellee.

As to what is a reasonable attorney's fee, the court, construing the statute providing such fee for the prosecution of a suit against an insurance company for the collection of the amount due under a policy of insurance, said:

"This means such a fee as would be reasonable for the litigant to pay his attorney for prosecuting the case, and not a speculative or contingent fee based upon the uncertainty of the result of the litigation." *Merchants' Fire Ins. Co.* v. *McAdams,* 88 Ark. 556.

In *Clark* v. *Ellsworth,* 73 N. W. 1025, 104 Iowa 442, the court said: "It is a well-settled rule that the importance of the litigation, the success attained, and the benefit which it secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered." See also *Ottawa University* v. *Parkinson,* 14 Kan. 162. Not only the amount and character of the services and the results attained, but also the professional ability and standing of the attorney, his learning, skill and proficiency in his profession and his experience, may be considered in estimating the reasonable value of his services. *Davis* v. *Webber,* 66 Ark. 199; *Stanton* v. *Embrey,* 93 U. S. 548; *Randall* v. *Packard,* 142 N. Y. 56, 36 N. E. 823; *Allis* v. *Day,* 14 Minn. 516 (Gil. 388); *Vilas* v. *Downer,* 21 Vt. 419; *Eggleston* v. *Boardman,* 37 Mich. 16; Lawson, Rights, Rem. & Prac. § 198; Week's Attys. (2 ed.) 687. It is equally true that if an attorney through inadvertence or inexperience does useless work, he can not recover remuneration therefor. *Leo* v. *Leyser,* 73 N. Y. S. 941.

And in *Bell* v. *Welch,* 38 Ark. 149, it was held that a jury can only assess such fee upon proper proof, which may include the opinions of other attorneys as to what would be a reasonable fee under the circumstances, taking into consideration the value of the services actually rendered. *Head* v. *Hargrave,* 105 U. S. 45; *Ottawa University* v. *Parkinson, supra;* Weeks, Attys. 126, 140.

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

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

Opinion delivered April 3, 1911.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—Where plaintiff, a switch tender, in the performance of his duties and while standing in the middle of the track, signalled to the engineer of an approaching engine to slow up and pick him up, but the engineer negligently failed to obey such signal, and there was testimony that the plaintiff did not discover that the engineer had

disregarded the signal until the engine was so close as to frighten and confuse him, and he attempted to jump on the engine instead of jumping off the track, the question whether he was guilty of contributory negligence was for the jury.

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

STATEMENT BY THE COURT.

This is a suit for damages for personal injuries resulting from appellee's having been thrown violently against the front of the engine upon attempting to mount the pilot thereof in the discharge of his duty.

Complaint alleged "that he was a switch tender in the union station yards in Little Rock, and it was his duty to care for switches, and keep them lined up for trains going in and out; that it was customary and a part of his duties to ride the engine from one part of the yard to the other; * * * that on the morning of the 10th of February * * * he was at the south end of the yards in Little Rock in the performance of his duty to receive train No. 4, and, it being necessary to go to the other end of the yards, as was his custom and duty, he being on the track in front of the engine of said train for the purpose of stepping upon the pilot of said engine to ride to the other end of the yards, * * * gave the engineer the signal to slow down and pick him up; that said engineer failed to obey said signal and slow down, as was his duty, and, said engine being too close for him to leave the track in safety when he discovered that the engineer had refused to obey his signal, * * * was caught by the pilot of said engine and was thrown against the drawhead of said engine with great force and violence, permanently injuring him internally, and rupturing him at the lower extremities of the bowels," etc.

Appellant answered the complaint, denying all the material allegations, and pleaded contributory negligence and assumed risks as affirmative defenses thereto.

The testimony tended to show that Willard Funk, appellee, was 21 years of age, living in Little Rock, Ark. He began work for the company first as train caller, and in July or August prior to the accident he was bridge watchman for trains, stationed at one end of the bridge over the Arkansas River, and sending

trains across the bridge upon signal from the other end that it was clear. That he worked as such watchman until December, when he was transferred to the yard as highball man, where his duties were to bring trains into the yards and see that passenger trains got in on the right track, line up switches, cut baggage car off, etc. On the morning of his injury, the El Dorado train went out south at 8:22, and train No. 4, northbound, came in at 8:25, appellee holding No. 4 south of the Rock Island crossing until the El Dorado train got out, when he would give signal to No. 4 to come in. It was his duty to ride this latter train up beyond the station, take off the engine, put on a new engine, line up all switches, and "give it a clear shoot for St. Louis." He had been acting as highball man for two months from 5:30 A. M. until 6:00 P. M. daily, and riding the pilot of engine on No. 4 all the time, as a rule riding it every other morning. Engineer Fitzgerald in charge never came through at over four or five miles an hour. Appellee would get out on the track where he could be seen, and the engineer had always slowed up. He stated that on the morning in question he was standing on the side of the track, and gave the usual signal, while the engineer was looking straight at him for about 200 yards. He gave the signal to both fireman and engineer, and continued until the engine came right on up to him. It got so close to him before he realized that it was going so fast that he did not know what to do. After he realized the engine was not going to stop, he was afraid to attempt to leave the track, lest the pilot beam should strike him or his foot slip, and concluded to jump the pilot and take the chances, which he did, and was thrown up, and his stomach came down on the bumper, and his wrist was sprained. Seeing that the engine was not going to stop, he jumped off or sort of rolled off, lighting on his feet, and then walked up in the yards. Formerly, the same engineer had run up rather close to him and then stopped his train suddenly, when he would step on and give him the highball, and the train would proceed. He knew it was dangerous to be in front of the moving train, but was not taking a chance if the engineer had slowed up as he generally did. That Fitzgerald, the engineer, was running between 12 and 15 miles an hour, and had his hand on the air brake at the end of the yard, when he was about 250 feet away,

and appellee gave him the signal and then walked over and gave it to the fireman. Appellee judged that he was coming 10 or 12 miles an hour, and could not tell how fast he was coming when he got closer—no one could—and was expecting the engineer to stop every minute; that he had been riding the same engine every day for two months, and rode on an average four or five a day. He watched this train all the time for 250 feet after he gave the slow-up signal, and it was not as far as 20 feet from him when he first discovered it was not going to slow down. Fitzgerald was not working steam before he reached appellee, but when appellee hit the engine he "pulled her open."

It is conceded that the testimony was sufficient to sustain the finding that it was the duty of appellee to mount or board the incoming engine as alleged. The fireman testified that Engineer Fitzgerald was in charge, and that appellee was known to them as "highball man" in the yards; and that this was his duty and habit to board the engine and ride it to the depot. Sometimes he would step on the pilot and sometimes in the gangway, the engineer reducing the speed; that appellee was standing out on the track with his arms extended, giving the signal to reduce speed, some 200 feet ahead of the train, which was approaching at the rate of 12 or 15 miles an hour, and the engineer should have reduced the speed sufficiently for him to have boarded the engine in safety; did not notice him doing anything to reduce the speed; that he could have seen appellee at least 100 feet ahead. He also testified that he could tell whether an approaching engine was coming fast or slow enough to board it, and any experienced man could; that a man standing as appellee was could have escaped from the engine when it was within 50 feet of him; that he never stood on a track until an engine ran within 50 feet of him, but believed he could stand on the track and tell whether the train got under 10 miles an hour at that distance.

The superintendent of the Arkansas Division testified that there was nothing more dangerous than for a man to attempt to step on pilot when moving, because there was just a chance whether he fell from one side or the other; that a man could tell whether an engine was coming fast or slow when it was within 50 feet of him; that any man could tell approximately the speed of an engine when it got within 100 feet of him, and his ability

to determine the speed increases as it comes nearer. He could not see how any man could fail to know whether an engine was coming too fast for boarding, if he was looking at it.

A switchman standing 35 feet north of where Funk was injured saw the engine aproaching appellee standing near the middle of the track, giving a slow signal. The engine was running at such speed that witness with his experience would not have attempted to get on. Appellee fell over against the pilot beam, and thereafter dropped off and picked up his hat. Witness considered his mounting the engine a piece of foolishness, and also to appellee condemned vigorously the engineer for failing to obey slow signal. He said he could, and any other railroad man with experience could, tell, when standing in front of an approaching train, whether it was coming too fast to board, and that a train coming 15 miles an hour could, in his judgment, be avoided after it approached within 15 feet. Funk was standing at about the proper place. "Witness would have gotten off the track if he had been in his place. If he had slipped, that would have been a chance he would have taken."

The station master also testified that "if a man has any eyes, he can tell, when an engine is within 25 or 50 feet, whether it is approaching too rapidly for him to attempt to board it."

The court instructed the jury, and no objections to instructions given are urged or insisted upon here.

The jury returned a verdict for the plaintiff for $2,000, and defendant appealed.

W. E. Hemingway and *Lovick P. Miles,* for appellant.

1. The court should have directed a verdict for defendant. There were two ways to board the train, one practically safe, the other exceedingly dangerous. He was guilty of negligence in selecting the latter. 86 Ark. 65; 90 *Id.* 543; 1 White on Personal Injuries, § 400.

2. The doctrine *"res ipsa loquitur"* precludes a recovery. 90 Ark. 387.

Jeff Davis and *Frank Pace,* for appellee.

The question of negligence was settled by the jury on proper instructions. It was not contributory negligence to fail to select the place of greatest safety to board the train. 81 Ark. 11; 87 *Id.* 443, 86 Ark. 68, is not in point.

KIRBY, J., (after stating the facts.) It is strongly urged that the trial court should have directed a verdict for the defendant, and that the judgment is not sustained by the evidence. It is conceded that appellee was attempting to board the engine in the line of his duty, but insisted that, since there were two ways open for him to discharge this duty, one by standing on the track in front of the approaching engine and taking chances upon safely stepping upon an 8-inch toe plate upon the pilot of the locomotive, and the other by standing beside the track and mounting the gangway between the engine and tender, the latter being practically safe, and the other always fraught with more or less danger, as a matter of law he was guilty of such contributory negligence as would preclude his recovery by attempting to board the train in the more dangerous way, when a safer way was open to his selection at his own option; but under the circumstances of this case that was a question for the jury under proper instructions, and not one of law to be determined by the court. *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11; *Kansas City So. Ry. Co.* v. *Henrie,* 87 Ark. 443.

It was the duty of the engineer to slow up or reduce the speed of his engine upon the signal being given, as the uncontradicted testimony shows it to have been, and his failure to do so was negligence. The appellee had a right to rely upon the engineer slowing or reducing the speed of the engine, after the slow signal was given, as was his duty and had been his custom; and when appellee discovered his failure to do so, he was confronted with an emergency, because of such negligence, calling for the exercise of his judgment, and the jury found he was not guilty of contributory negligence in failing to discover that the engineer had not regarded the signal until the engine was so close as to frighten and confuse him, and make it necessary to decide whether it was safer to attempt to jump off the track or board the engine, nor in boarding it under the circumstances; and the testimony is sufficient to sustain their verdict. As already said, no objection to the giving or refusing of instructions is urged here.

The judgment is affirmed.

DELLA v. DELLA.

Opinion delivered April 10, 1911.

ADVANCEMENT—PRESUMPTION—REBUTTAL.—Where a husband delivers money to his wife, the presumption arises that it was a gift; but this presumption may be rebutted by antecedent or contemporaneous declarations and circumstances tending to prove a trust in his behalf.

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

L. C. Maloney and *Carmichael, Brooks & Powers*, for appellant.

1. The evidence does not support the finding of the chancellor. No resulting trust was created, as the evidence must be clear and convincing. 48 Ark. 169; 45 *Id.* 484; 64 *Id.* 162; 71 *Id.* 378. The same rule is true of real and personal property.

2. Where a husband gives or delivers property to his wife, it becomes, so far as he is concerned, absolutely her property. 23 Ark. 508; 73 *Id.* 282; 31 Conn. 134; 50 Mo. 262; 1 App. D. C. 240; 32 N. J. Eq. 174; 76 Ark. 390; Kirby's Dig., § 2684.

The law does not imply a promise on the part of the wife to repay the amount nor raise a presumption that a trust was created. 86 Ark. 451; 21 Cyc. 1297.

James A. Gray and *Geo. A. McConnell*, for appellee.

1. The cases cited by appellant do not apply. Conceding that the rule as to realty and personalty is the same, 89 Ark. 578 is fatal to the contention that no trust resulted. 64 Ark. 155, 160; 80 Ark. 37; 78 *Id.* 346; sec. 2684, Kirby's Dig.; 60 Ark. 70, 73; 88 Ark. 56.

2. There is abundant evidence to support the findings, and they should be sustained. 89 Ark. 309; *Id.* 132; 77 *Id.* 305; 67 *Id.* 200; 73 *Id.* 489; 71 *Id.* 605; 68 *Id.* 134, 314; 72 *Id.* 67.

HART, J. On the fourth day of April, 1910, Christine Della instituted a suit for divorce against John Della, and as grounds therefor alleged that defendant had offered such indignities to her person as rendered her condition in life intolerable.

The defendant answered, denying all the allegations of the complaint, and for grounds of cross complaint alleged that plaintiff was guilty of adultery. He also alleged that he had deliv-

ered to her certain moneys to keep for him, and asked that she be declared to hold same in trust for him. The prayer of his cross complaint was for a divorce and for an adjustment of the property rights between plaintiff and defendant. The chancellor entered a decree dissolving the bonds of matrimony between plaintiff and defendant; and adjudging that plaintiff pay to the defendant $1,850, and that when same is paid it shall be in full accord and satisfaction of all property rights between the parties. The plaintiff has duly prosecuted an appeal to this court.

It is conceded that the appeal does not seek to question the correctness of the decree for divorce; and only that part of the decree affecting the property rights of the parties is asked to be reversed.

Plaintiff and defendant were married in Pulaski County, Arkansas, in October, 1902, and lived together as husband and wife until about the time plaintiff instituted her suit for divorce. They had no children. Defendant was a gambler, and they also ran a boarding house during most of the period of their married life. Defendant claims that the boarding house was their joint venture, and plaintiff asserts that it was her separate business. Briefly stated, the testimony of the plaintiff shows that she had $850 or $1,000 when she married the defendant, and that the money and property she now has were accumulated by her own efforts in running a boarding house. She denies that defendant assisted her in running the boarding house or in accumulating the property. She says that he was quarrelsome, and that his conduct at the boarding house was detrimental to her business. She denies that defendant delivered to her any money, except small sums at infrequent intervals, and such sums were a gift to her. She also introduced witnesses, who testified that she conducted the boarding house, and that her husband did not assist her in running it.

Defendant admitted that he was a gambler, and said that he had something near two thousand dollars when he married plaintiff. He denied that she had any money at the time. He testifies that he made several hundred dollars per month from the percentage received by him in running a gaming house, and that he delivered all his earnings from week to week to his wife to keep for him. That same were to be kept by her in trust for

him to be used for their joint support in their old age. Defendant testified that he gave plaintiff as much as three hundred dollars on each of two separate occasions. His testimony also shows that he gave her to keep for him as much as twenty dollars per week for the period of time he ran the gambling house. He testifies that he was frugal in his habits, and that he assisted his wife in every way that he could in running the boarding house. He testified that his wife went to Denver, Col., during a part of the years 1906, 1907, 1908, and 1909, and that while she was gone he stayed at home and ran the boarding house. Other evidence was introduced which corroborated his testimony.

When a man purchases property and takes the title in his wife, the presumption is that it is a gift to her. *Ward* v. *Ward*, 36 Ark. 586; *Milner* v. *Freeman*, 40 Ark. 62.

"But this presumption is not conclusive. It may be rebutted by antecedent or contemporaneous declarations and circumstances which tend to prove the intention of the person who furnished the money to buy the estate that the grantee should hold as trustee and not beneficially for himself." *Milner* v. *Freeman, supra;* Perry on Trusts (4 ed.), § 147; 21 Cyc. 1297.

"In trusts of the second form, between family relatives, no evidence is necessary, in the first instance, to show the operation of the rule, since a presumption arises on the face of the transaction that a gift was intended, and that no trust results. This result, however is merely a presumption, and may be overcome. Extrinsic evidence, either written or parol, is admissible on behalf of the husband or parent paying the price to rebut the presumption of an advancement or gift, and to show that a trust results; and, conversely, such evidence may be used to fortify and support the presumption. In general, this extrinsic evidence, to defeat an advancement and establish a trust as against the party to whom the property is conveyed or transferred and those holding under him must consist of matters substantially contemporaneous with the purchase, conveyance or transfer, so as to be fairly connected with the transaction." 2 Pomeroy's Equity Jur., § 1041.

In this case the chancellor found that the defendant delivered money to his wife, and that the facts and circumstances accompanying the transfer show that it was not intended to be

a gift to her, but was intended to be a trust for him. Therefore, the appeal raises the question of whether the finding of the chancellor is against the preponderance of the evidence. The chancellor found that plaintiff had $3,700 in money, which should be divided equally between the parties to the action, and permitted her to retain as hers the hotel furniture, valued at about $5,000. In testing the credibility of the witnesses, the chancellor had the right to consider the whole testimony in the case—that upon the divorce as well as that affecting the property rights of the parties. Her acts and conduct since the marriage warranted the chancellor in not giving as much credence to her testimony as to that of the defendant. Moreover, her testimony that she had $800 or $1,000 at the time of her marriage is weakened by cross-examination.

We think it established by the evidence for the defendant that he delivered to plaintiff to be held in trust all his earnings, and that such earnings amounted to as much or more than the amount allowed by the chancellor. No useful purpose can be served by an extended discussion of the testimony. We deem it sufficient to say that our consideration of it convinces us that the finding of the chancellor was not against the weight of the evidence, and consequently that it should not be disturbed.

The decree will therefore be affirmed.

BOARD OF IMPROVEMENT OF SEWER IMPROVEMENT DISTRICT NO. 1 OF FAYETTEVILLE v. POLLARD.

Opinion delivered March 27, 1911.

1. IMPROVEMENT DISTRICTS—NECESSITY OF BENEFIT.—Special assessments for local improvements can be made and collected only on account of the special and peculiar benefits which such improvements bestow upon the property assessed. (Page 549.)
2. SAME—POWER TO CREATE.—The power to form local improvement districts and to levy assessments for the improvements made therein belongs primarily to the Legislature, which it may exercise directly or through local agencies which it may establish. (Page 549.)
3. SAME—CONCLUSIVENESS OF ASSESSMENT OF BENEFITS.—The determination by a city or town council of the amount of benefits to accrue to lands in improvement districts established by it is not beyond judicial review; and when assessments are levied on property regardless of

benefits, or where it is shown that no benefit can possibly accrue to the land from the improvement, relief can be sought in the courts against the collection thereof. (Page 549.)

4. SAME—PRESUMPTION OF BENEFIT.—As city councils are authorized to fix the boundaries of an improvement district, it is presumed that property included therein will be benefited by the improvement; and this presumption is conclusive save when the assessment is attacked for fraud or demonstrable mistake. (Page 549.)

5. SAME—FRAUD OR DEMONSTRABLE MISTAKE.—Fraud or demonstrable mistake in including property in an improvement district can occur only when the assessments are levied regardless of benefits or by reason of manifest prejudice against the owner or in a total disregard of his rights. (Page 550.)

6. SAME—VALIDITY OF ASSESSMENT OF BENEFITS.—An assessment of property in an improvement district is not void because the benefits assessed against it are exorbitant. (Page 550.)

7. SAME—IRREGULARITIES—LIMITATION.—Under Kirby's Dig., § 5685, where a landowner neglects to appeal to the city council within ten days after publication of the assessment list, or to begin legal proceedings, within thirty days after publication of notice of the passage of the ordinance, to correct or invalidate the assessment, he is barred from objecting thereafter to the assessment as being excessive. (Page 550.)

8. SAME—VALIDITY OF ASSESSMENT.—A chancery court cannot invalidate an assessment for local improvement upon the ground that the property was not benefited if it appears from any substantial testimony that the property receives any benefits from the improvement. (Page 552.)

9. SAME—NEW ASSESSMENTS.—The statutes do not provide for a new assessment to be made by the board of assessors of an improvement district after their assessment has been duly filed and has become effective. (Page 552.)

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

McDaniel & Dinsmore, for appellant.

1. The allegation in the complaint of the assessment and nonpayment of this local tax was all that was required of the plaintiff to make a *prima facie* case. Kirby's Dig. § 5691.

2. The statute is not in conflict with § 22, art. 2, Constitution of Arkansas, for § 23 of that article and § 27, art. 19, confer authority for such legislation. 42 Ark. 152; 69 Ark. 68; 59 Ark. 513. Ample opportunity is given to parties aggrieved to appeal to the city council and the courts to protect their rights. This

is "due process of law." Hence our law does not violate the Fourteenth Amendment. 140 U. S. 316; 42 Ark. 152.

3. No authority is conferred upon the board to make a new or second assessment. Kirby's Digest, § 5677; 86 Ark. 1.

4. No *fact* or *circumstance* of fraud or "demonstrable mistake" is shown. A general charge of fraud or mistake is bad on demurrer. 17 Ark. 445; *Ib.* 603; 34 *Id.* 169; 35 *Id.* 555. No lack of benefits is shown. 21 Ark. 60; 59 Ark. 513.

If the district is legally formed, the assessment cannot be defeated by showing no special or peculiar benefits. 84 Ark. 257; 90 Ark. 38, 39; 81 Ark. 217. Mere errors of judgment cannot be corrected by the courts. Cases *supra.*

LeRoy A. Palmer and *A. B. Stone,* for appellees.

1. The assessment was the result of fraud and demonstrable mistake. Whether or not property is benefited specially is a question of fact. 25 Ark. 39. The listing of lands for taxation raises a presumption of benefits, but this presumption may be rebutted. 21 Ark. 60. The assessment fails if it is shown that the land is *not* benefited.

2. The question of a second assessment is not involved in this case.

3. A second survey cannot make good the lack of benefits in the original plan. 50 Ark. 129. There can be no assessment for cost of sewers, etc., on property too remote to confer benefits 158 Ill. 280; 56 N. E. 1096; 23 Barb. 166; 33 Kan. 156; 5 Pac. 781; 11 Neb. 37; 140 Ill. 440; 163 Ill. 505; 177 *Id.* 459; 178 *Id.* 499. Nor can the possibility of pretended benefits to accrue in the future render property liable. 132 Ill. 100; 140 *Id.* 440; 147 *Id.* 327; 45 Kan. 312; 11 Neb. 37; 179 Penn. St. 490; 36 Atl. 209; 48 N. E. 155; 53 N. J. L. 330; 21 Atl. 453; 37 N. J. L. 330; 60 *Id.* 168; 37 Atl. 737; 46 N. Y. 178; 84 N. Y. 108; 44 Kan. 137; 24 Pac. 64. Assessments beyond actual benefits are void. Brown on Fourteenth Amendment, 158, 165; 172 U. S. 269; 92 Texas 685; 154 Ind. 467; 64 Ga. 783; 35 Mich. 155.

4. Where an assessment is made arbitrarily, capriciously and not in the exercise of a fair, unprejudiced judgment, it may be set aside, regardless of a narrow statutory remedy, which at best is intended to adjust merely administrative irregularities. 52

Wis. 98; 49 *Id.* 47; 42 *Id.* 108; 18 *Id.* 92; 97 Cal. 305; 89 Wis. 347. See also 71 N. Y. 311; 123 *Id.* 35; 32 Ill. 192; 29 N. J. Law, 449; 38 N. J. Eq. 190; 49 Cal. 229. An arbitrary assessment without benefits is a constructive fraud and can be relieved against by courts of equity. 103 Fed. 362; 172 U. S. 269; 133 Ala. 587; 101 Ga. 696; 121 Ill. 128; 137 Ill. 51; 154 Ind. 652; 56 Md. 1; 57 Miss. 378; 34 Ohio St. 551; 16 Or. 450; 44 Vt. 174; 95 Ill. 346; 98 Ill. 94; Cooley on Taxation, vol. 2, p. 1459. See also Page & Jones, Taxation, 677; *Ib.* 790; 32 Mich. 119; 119 Cal. 604; Cooley on Tax. (3 ed.) 1459; 187 Ill. 12; 64 Ga. 783; 131 Iowa 659; 1 Story, Eq. Jur. 186; Hamilton on Special Assessments, 241, 551-2-3-4-5. All these cases and many others hold that fraud and demonstrable mistake avoid an assessment. 118 Wis. 254; 95 N. W. 126; 106 Wis. 200; 99 *Id.* 129; 92 *Id.* 429; 2 Desty on Tax. 894; 2 Cooley, Tax. (3 ed.) 1209.

Appellees are not barred by our statutes. Kirby's Dig. § 5685; Const. art. 2, § 22 and § 24, art. 5; art. 26, § 13; Kirby's Dig. § 5780; 181 U. S. 32; 189 *Id.* 419; 188 *Id.* 239; 16 Pa. 256; 40 Wis. 324; 6 Ark. 358. Statutes of limitation cannot affect the general doctrines of equity. 49 N. Y. 362; 74 N. Y. 194; 154 N. Y. 570. The Legislature cannot interfere with the constitutional powers of a court of chancery. 75 Mich. 282-5; 15 Wall. 547; 6 Houst. (Del.) 108; 24 N. J. Eq. (10 C. E. Gr.) 200; 25 Neb. 345. Fundamental rules of equity forbid the assertion of such a statutory bar. 39 W. Va. 75; 27 Am. Rep. 548; 173 Ill. 205; 33 Kans. 156; 62 Md. 225; 53 Neb. 164; 24 Mo. 20; 44 Neb. 223; 93 Pac. 231; 115 N. W. 957.

5. Courts of equity are prompt to arrest the evil effects of statutes of limitation and conclusive estoppels. Cooley on Const. Lim. 522-3 (7 ed.); 8 Mich. 429; 39 *Id.* 168; 74 N. Y. 194; 59 Mich. 355; 4 Met. (Ky.) 292; 5 Munf. (Ky.) 364; 7 *Id.* 162; 6 Biss. (U. S.) 79; 135 N. Y. 159; 22 Ark. 332; 21 N. J. Eq. 424. Section 5685, Kirby's Digest, only applies to administrative irregularities. Usurpation by limitation laws will not be tolerated in equity. Equity abhors constructive limitations, forfeitures and estoppels and conclusive probative presumptions. 21 Ark. 60; 71 Ark. 17; 78 *Id.* 580; 80 *Id.* 462; *Ib.* 316; 81 *Id.* 80.

FRAUENTHAL, J. This was an action instituted by the Board of Improvement of Sewer Improvement District No. 1 of the City

of Fayetteville to recover the annual assessment for the year of 1909 levied upon the land of defendants situated in said sewer district for the benefits accruing thereto by reason of the construction of a sewer improvement. The defendants resisted the enforcement of the assessment upon the ground that said land received no benefit from the construction of said sewer system. They averred that the assessment of their land for such benefits was either the result of fraud or demonstrable mistake on the part of the board of assessors, and for that reason was void; and they sought to enjoin the collection of any future assessments thereon.

From the pleadings and testimony, it appears that this sewer improvement district was duly established by the city council of Fayetteville on September 19, 1906, and embraced the entire city; and that, after the filing of the requisite petition in manner prescribed by the statute, a board of assessors was appointed, who assessed the value of the benefits against the various lots and tracts of real estate situated therein. The provisions of the statute were duly complied with in the matter of filing said assessments, and thereafter, on July 26, 1907, the city council duly passed its ordinance levying upon each tract and lot the benefit so assessed, and providing that the annual installments thereof should be paid on the 25th day of September, 1907, and of subsequent years. The defendants made no appeal from the action of the board of assessors in making said assessment of their property, and filed no proceeding for the purpose of correcting or invalidating the same. It was alleged in the complaint that the annual assessment due September 25, 1909, only was unpaid, and it does not appear from the testimony that the defendants are in default in paying the assessments due for the years 1907 and 1908.

The land of the defendants is situated in the extreme southwest portion of the city, and the nearest point at which any sewer pipe or main approaches it is on Hill Street, about 500 feet from the eastern boundary of the land, and about 1,400 feet from the dwelling thereon. The land lies about 35 or 40 feet below the grade of Hill Street. The testimony on the part of the defendants tended to prove that on this account it would be impractical to connect the land with the sewer mains as now located, and that

for this reason the present location of the sewer improvement could in no possible way benefit the land.

On the other hand, the testimony on the part of the plaintiff tended to prove that a line of pipe could be run through the southeast corner of this land for a distance of probably 1,100 feet to a manhole on the town branch, the bottom of which is 50 feet lower than the elevation of this land, and that by this connection the sewage on this land could be practically and successfully drained therefrom. The establishment of this line, under the testimony, is contemplated by the plaintiff, although the testimony tends to prove that it would be quite expensive.

The testimony on the part of the plaintiff tended further to prove that by the construction of this sewer system in the proximity of the defendant's land benefits were received by it by reason of the improved sanitation.

The chancellor found that the property was not benefited by the improvement, and on that account the assessment thereof was made either through "fraud or demonstrable mistake," and thereupon entered a decree dismissing the complaint and enjoining the plaintiff from collecting any future assessments on said land.

It will thus be seen that the sewer improvement district was established in the manner provided by the statutes, and that the steps providing for the assessment of the benefits were taken in the time and manner therein prescribed. It is not urged by defendants that there was any illegality or irregularity in the formation of this district, or that any provision of the statutes was not complied with either in the time or manner of making the assessments. The sole contention made by defendants is that their lands did not receive any benefit from the construction of the sewer improvement, and on account of its location and the topographical conditions surrounding it it cannot receive any benefits therefrom. On this account they contend that the assessments made for these alleged benefits upon their land are illegal and void. On the contrary, the plaintiff contends that under the provisions of the statutes there was provided for the defendants a time and a forum in which to attack said assessments on account of any illegality or excessiveness thereof, and this they failed to do, and that they are now precluded from making objection thereto.

It has been repeatedly held that special assessments for local improvements can be made and collected only on account of the special and peculiar benefits which such improvements bestow upon the property which is assessed. As is said by Mr. Justice BATTLE in the case of *Rector* v. *Board of Improvement,* 50 Ark. 116: "They are based upon the assumption that the persons upon whose property they are imposed are specially and peculiarly benefited in the enhancement of their property by the expenditure of the money collected on the assessment." The principle upon which these assessments for local improvements are made is that by reason of the benefits received no pecuniary loss can be suffered by the owner of the property in paying therefor. Therefore, where no benefits can accrue, the property should not be made the subject of special assessment. *Kansas City, P. & G. Ry. Co.* v. *Waterworks Imp. Dist.,* 68 Ark. 376; *Kirst* v. *Street Imp. Dist.,* 86 Ark. 1.

The power to form improvement districts and to levy assessments for the payment of the improvements made therein belongs primarily to the Legislature; but the Legislature has the authority to exercise this power directly or through local agencies which it may establish, and it has imposed the duty of forming such improvement districts within the limits of towns and cities upon the various councils thereof. Such agencies, when authorized by the Legislature, have the same power to form such improvement districts and to levy the assessments upon the lands situated therein for the construction thereof; but they can have no greater power in this regard than the Legislature itself. It has been held by this court that the legislative determination of the amounts and benefits to accrue to lands in improvement districts established by it is not entirely beyond judicial review; and that when such assessments are levied on property regardless of benefits, or where it is shown that no benefit can possibly accrue to the land from the improvement, relief can be sought in the courts against the collection thereof. *St. Louis S. W. Ry. Co.* v. *Red River Levee Dist.,* 81 Ark. 562; *Coffman* v. *St. Francis Drainage Dist.,* 83 Ark. 54; *Moore* v. *Board of Directors, ante* p. 113. And this likewise applies to local improvements in towns and cities. But the city council is invested by law with the authority to fix the boundaries of improvement districts; and, when it has acted, it is

presumed that the property included therein will be benefited by the improvement. In the case of *Little Rock* v. *Katzenstein,* 52 Ark., 107, Mr. Justice SANDELS, speaking for the court, said that the action of a city council in including property in an improvement district is conclusive of the fact that it is adjoining the property to be affected, except when attacked for "fraud or demonstrable mistake." But such fraud or demonstrable mistake can occur only when the assessments are levied on land entirely regardless of the benefits and by reason of a manifest prejudice against the owner or in a total and reckless disregard of his rights. If the property is benefited to any extent by the improvement, then it can be included in the district; and the mere fact that the benefits assessed against it are exorbitant or excessive would not invalidate the assessments thereon. This view has been expressed several times by this court. In the case of *Lenon* v. *Brodie,* 81 Ark. 208, the court quotes the following language of Judge Cooley with approval: "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits can not be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying the court that no special and peculiar benefits are received."

When an improvement district has been established in the manner provided by the statutes, and its boundaries fixed by the city council, it then under the statute becomes the duty of the board of assessors to ascertain the benefits accruing to the lands therein from such improvement. If such board has made a mistake of judgment in the amount of such benefit, then it is provided by the statute that the owner may appeal therefrom to the city council, and his grievance there be heard. It is further provided that the owner shall have a right to begin legal proceedings at any time within thirty days after the publication of the ordinance levying the assessment for the purpose of correcting or invalidating the same. Kirby's Digest, § § 5679, 5685.

By these provisions, a time and a forum is given to the aggrieved owner to correct any mistake of judgment made by the board of assessors in its determination of the benefits accruing to his land, or to invalidate such assessment thereon. By the same statutes it is provided that, if such objection is not made by

the owner within the time therein prescribed, "he shall be forever barred and precluded." Kirby's Digest, § 5685.

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

It has been repeatedly held that these statutes provide a reasonable opportunity for the property owner to be heard, and that mere mistakes of judgment relative to the assessment of the benefits upon the land in an improvement district cannot be reviewed by the courts. If any benefit accrues to the land by reason of the improvement, then the owner is precluded after the time given him by the statute from raising any objection thereto. *Lenon* v. *Brodie, supra; St. Louis S. W. Ry. Co.* v. *Red River Levee Dist., supra; Board of Imp.* v. *Offenhauser,* 84 Ark. 257.

It is said in 2 Page & Jones on Taxation (§ 1027): "In many statutes provisions are found which point out the method in which the property owners must object to defects or irregularities in the proceedings. It is generally held that if a fair and ample opportunity is given to the property owner to be heard by virtue of such statutory provision, he must make his objections in the manner pointed out by the statute; and that if he does not object he cannot subsequently resist or attack the assessment for reasons which he might have urged in the method provided for by statute." *Hibben* v. *Smith,* 191 U. S. 310; *Dickson* v. *Racine,* 61 Wis. 545.

The board of assessors has authority, under our statute, to

determine whether or not the property in the district is directly benefited by the improvement, and the amount thereof, and, in the event it has made an error of judgment, the landowner can secure relief therefrom in the manner provided by statute. *Poulsen* v. *Portland,* 1 L. R. A. 673. The mere fact that the amount of the benefits assessed by them is excessive is not sufficient to show either that it was made through fraud or such a mistake as will invalidate the assessment.

Nor will it be sufficient to show by a preponderance of the evidence only that the property was not benefited by the improvement. If it appears from any substantial testimony that the property receives any benefits from the improvement, then the assessment thereof made by the board cannot be invalidated by the court, but the owner can only obtain relief therefrom by proceeding in the manner prescribed by the statute. In such event it cannot be said that the assessment was made either "through fraud or through demonstrable mistake." *Board of Imp.* v. *Offenhauser, supra.*

In the case at bar, while the chancellor found that the property of the defendants was not benefited by the improvement, and his finding is sustained by a preponderance of the evidence, nevertheless there was substantial testimony adduced upon the part of the plaintiff showing that the property received actual benefits from improved sanitation, and that it could be connected with the sewer system so as to successfully drain the sewage from this property and thereby receive benefits. Under such circumstances, the assessment made by them cannot be invalidated or set aside in this proceeding.

It follows, therefore, that the chancellor erred in holding that the assessment of benefits upon this land was void, and in enjoining the collection thereof.

It was also urged by the defendants that in 1909 a new assessment was made of the benefits by the board of assessors, and on this account no recovery could be had upon the original assessment. But the statute does not provide for a new assessment to be made by the board after their assessment has been duly filed and become effective in the manner provided by the statute. It is only provided by the act approved May 28, 1907 (Acts of 1907, p. 1023), that the assessments may be annually readjusted

according to additional improvements placed upon lands, and for the purpose of correcting erroneous descriptions thereof. *Kirst* v. *Imp. Dist., supra.*

The decree is therefore reversed, and this cause is remanded with directions to enter a decree in favor of the plaintiff.

PARKER v. WILSON.

Opinion delivered April 3, 1911.

1. GUARDIAN AND WARD—RIGHT OF WARD TO SUE BY NEXT FRIEND.—A minor, by next friend, may sue his guardian to surcharge and falsify his accounts as guardian. (Page 561.)
2. PLEADING—DEMURRER—WAIVER.—Where a cause has proceeded to final adjudication without judgment of the court upon demurrer filed in same, the demurrer will be considered to have been waived. (Page 561.)
3. WILL—CONSTRUCTION.—In construing the provisions of a will the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, it must govern. (Page 561.)
4. SAME—CONSTRUCTION.—The intention of the testator is to be gathered from all parts of the will, and such construction given as best comports with the purposes and objects of the testator. (Page 561.)
5. SAME—WHEN TRUST CREATED.—Where a testatrix appointed her husband as guardian of her infant son, to whom she left all of her property, and directed the husband to take and hold all such property in trust to manage and direct and to bargain, sell and convey until the son should be of age, the husband became a trustee for the benefit of the son during his minority. (Page 562.)
6. SAME—TRUST—RIGHT OF TRUSTEE TO POSSESSION.—Where a testatrix left her entire estate to her infant son, and appointed her husband as guardian and trustee to take and hold the son's property so devised, her administrator, there being no debts, was justified in paying over her estate to her husband as such trustee. (Page 562.)
7. GUARDIAN AND WARD—LOAN OF WARD'S MONEY—LIABILITY.—Under Kirby's Digest, § 3809, providing that "no guardian shall be personally responsible for any money belonging to his ward and loaned out by him under the direction of the court, and on security which may have been approved by the court, in case of the inability of the person to whom such money may have been loaned, or his security, to pay the same," *held,* that where a guardian loans the ward's money without first obtaining an order of court authorizing him to make the loan, he assumes the responsibility, and no subsequent order of the

probate court confirming his action will relieve him from liability if loss occurs. (Page 564.)

8. SAME—LOAN—DIRECTION OF COURT.—Where a guardian testified that, some time before making a loan of his ward's money, he presented a petition to the probate judge for authority to make the loan, and that the judge indorsed on the petition: "Examined and allowed," and the guardian put it among the files of the guardianship papers, but did not give it to the clerk to be recorded, a finding of the chancellor that the guardian did not obtain an order of the probate court authorizing him to make the loan will not be disturbed. (Page 566.)

9. SAME—UNAUTHORIZED LOAN—INTEREST.—Though a guardian, without an order of the probate court, loaned the money of his ward at ten per cent. interest, but upon insufficient security, he will be charged with interest at the legal rate only, in the absence of proof that he could have obtained a higher rate upon sufficient security. (Page 569.)

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

STATEMENT BY THE COURT.

This action was instituted by Marie A. Justice as guardian and next friend of Earle M. Wilson, a minor, in the chancery court against H. A. Parker as guardian of said Earle M. Wilson and W. K. Sims, T. H. Jackson and H. A. Carter as sureties on his guardian's bond to surcharge and falsify his account as such guardian.

The defendants demurred to the complaint, and subsequently filed an answer, denying the allegations of the complaint.

The facts are as follows: Mary A. Wilson died at Brinkley in Monroe County, Arkansas, on December 17, 1891, leaving surviving her two children, Earle M. Wilson, born October 17, 1888, and Ollie H. Wilson, born in October, 1891; and her husband, Sidney J. Wilson. Ollie died in November, 1892, without issue, and left surviving him, his brother Earle as his sole heir at law. Earle and his father, Sidney J. Wilson, are both living. Mary A. Wilson left a will, which is as follows:

"In the year of our Lord, 1890, on the 6th day of May, in the full possession of all my faculties, I make this my last will and testament, revoking all former wills I may have made before this date. And in the name of God I do write these lines declaring them to be my will incontestable under the law now and forevermore. Unto my beloved husband, Sidney J. Wilson, I do give and bequeath the sum of ten ($10.00) dollars. This to be

paid out of the first money accruing from my estate. With the exception of the ten ($10.00) dollars given to my husband, Sidney J. Wilson, I do give and bequeath unto my beloved and only son, Earle Malcolm Wilson, all my earthly possessions. All lands, houses, house furniture, notes, bonds, mortgages and ready money that I may possess at my death or that may come to me after my death by division of estate or otherwise, I do give and bequeath unto him. I furthermore appoint my husband, Sidney J. Wilson, sole guardian of my son and his property. He is to take entire charge of both, managing the one and educating the other as he sees fit. As a mark of my esteem and affection, I require no bond and hold him free of the law. Therefore, he is to take and hold all my son's, Earle Malcolm Wilson's, property in trust to manage and direct, to bargain, sell and convey in my son's name until the latter is twenty-one (21) years of age. Then my husband, Sidney J. Wilson, is to render unto my son all I die possessed of, with legal rate of interest thereon, less expense of raising and educating. But in that settlement I hold my husband accountable to no one save my son and his Maker. In the event of my having further issue, children born to me in this marriage, my husband shall be sole guardian of them all, and that my children, let them be one or many, shall share and share alike in all I die possessed of with my son, Earle Malcolm Wilson. Should I not have further issue in this marriage and should my son, Earle Malcolm Wilson, die before he is twenty-one (21) years of age, then one-half of all I die possessed of I do give and bequeath unto my youngest brother, G. M. Deadrick, and the other half to Mrs. A. W. Parks, my husband's sister. Should my brother inherit one-half of my property before he becomes of age, I appoint my husband his guardian till he is twenty-one (21) years of age and without bond. Of my own will and accord I have written these lines, and that it is my will that such disposition be made of my property witness my hand and seal below. Should any one, friend, foe or kindred, on any grounds or technicalities whatsoever endeavor to set aside or break this my last will and testament, let them stand defeated before the law and accused before all mankind.

"Mary A. Wilson, May 6, 1890.

"Attest: Mrs. E. P. Forte, E. P. Forte."

The will was admitted to probate at the October term, 1893, of the probate court of Monroe County. On the 23d day of February, 1892, letters of guardianship upon the estate of Earle M. Wilson, a minor, were granted to H. A. Parker. He executed a bond as such guardian in the sum of $2,000, with W. K. Sims, T. H. Jackson, S. J. Price and H. A. Carter as his sureties.

In February, 1892, H. A. Parker was also appointed guardian of Ollie Houck Wilson and executed a bond as such guardian. These letters of guardianship were granted in Monroe County in September, 1893. H. A. Parker was granted letters of administration upon the estate of Ollie Houck Wilson, who died as above stated in November, 1892. He gave bond as such administrator in the sum of six hundred dollars. At the October term, 1892, of the Monroe Probate Court, H. A. Parker was granted letters of administration upon the estate of Mary A. Wilson, deceased, and executed a bond in the sum of $3,000. The defendants in this action were not sureties on any of said bonds except the bond of H. A. Parker as guardian of Earle M. Wilson. On the 15th day of October, 1906, Marie A. Justice was appointed guardian of Earle M. Wilson by the probate court of Greene County, Arkansas. The said Earle M. Wilson was at that time 18 years old, and resided in Greene County.

The complaint in this action was filed on July 22, 1908. Earle M. Wilson became of lawful age while the suit was pending, and was substituted as plaintiff in the action.

The decree in the case was rendered on October 5, 1910.

When Mary A. Wilson died, there was a balance due her on the purchase price of a house and lot in Brinkley, Ark., which she had conveyed to Lora N. Campbell. This balance amounted to $1,280.20, and was paid to H. A. Parker as her administrator in May, 1893. She had no other estate except her personal effects, and a few household goods, of little or no value. Her life was insured for $2,000, and her children were named as beneficiaries in the policy. On March 9, 1892, H. A. Parker, as guardian of said minors, collected the full amount of said insurance policy.

On May 13, 1892, H. A. Parker loaned to J. B. Hughes the sum of $850 out of the amount received on said insurance policy. He took Hughes's notes therefor, payable on or before January 1,

1893, to himself as guardian of Earle and Ollie Wilson with interest at the rate of 10 per cent. per annum from date until paid. Hughes was a farmer in Monroe County, and gave certain rent notes and other notes as collateral. Subsequently Hughes became insolvent, and it is conceded that Parker never collected any part of said note except $280, nor realized anything on the collaterals. At the July term, 1893, of the Monroe Probate Court, Parker filed a settlement of his guardianship of Earle and Ollie Wilson. He charged himself with the amount of the insurance received, viz., $2,000, and credited himself with amounts which left the estate of the minors indebted to him in the sum of 67 cents. Among his credits appears the following:

"Your guardian loaned to J. B. Hughes $850, which was more than he should have loaned under the circumstances, which was loaned on the 13th day of May, 1892.....$850.00
Interest to May 13, 1893..... 85.00

"Total principal.....$935.00
May 13, 1893, by amount paid by Hughes..... 280.00

"Balance due from Hughes.....$655.00"

His account was approved and confirmed at the October term, 1893, of said court.

H. A. Parker was the principal witness in the case. His testimony is very voluminous, and we shall only set out such portions as we deem necessary for a proper understanding and determination of the issues involved in this suit.

Parker lives at Clarendon, Ark., and has been a practicing lawyer there for 30 years. In regard to the Hughes loan, he testified that he went to Judge Mayo, the then county and probate judge, and advised with him before he made the loan; that Judge Mayo had lived in the neighborhood where Hughes resided, and knew all about him and his circumstances; that Judge Mayo approved the loan made to J. B. Hughes, and ordered him as guardian of said minors to make it. We quote from Parker's testimony the following:

"Q. And Judge Mayo was at that time judge of the probate court of Monroe County? A. Yes, sir. I then drew up the petition, as stated, and it was examined and allowed, and it, with

all the Wilson papers, was burned at the fire. I never knew whether it was on or off the record until this suit had been filed. I heard the testimony of Mr. Hinton saying it had never been put on record, which was nothing uncommon for the clerk at that time. At that time Mr. Albert Hinton was deputy, acting for Mr. Mills, who was in the campaign. He began the campaign for Auditor in January or February, 1892, and remained in the campaign until the last of June, 1892."

Parker concedes that he did not account for the balance of purchase money of the Brinkley lots in his guardian's settlement. He testifies that he paid that amount to Sidney J. Wilson, the father of Earle M. Wilson at various times, and in detail gives the time of such payments and the circumstances connected therewith.

Additional facts will be stated or referred to in the opinion.

The demurrer to the complaint was never acted on by the court, and the chancellor, after hearing the evidence, charged Parker with the sum of $1,280.20, with 10 per cent. interest thereon from May 1, 1893, which amount is the balance due on the purchase money of the sale of the house and lot at Brinkley. The chancellor further charged him with the sum of $655 with 10 per cent. interest thereon from May 13, 1893, "which was the amount of the loan made to J. B. Hughes by the guardian H. A. Parker without any order from the Monroe Probate Court to make such loan."

A decree was accordingly entered against all of the defendants for amounts, both principal and interest.

The defendants have appealed.

J. W. House and *Ratcliffe, Fletcher & Ratcliffe,* for appellants.

1. The probate court had no jurisdiction to appoint Mrs. Justice guardian. 72 Ark. 299; 80 *Id.* 351; 32 *Id.* 92; Kirby's Digest, § 3757; *Ib.* 3771-2, 3773-4-5.

2. The loan to Hughes was sanctioned by the probate court. 33 Ark. 294. In the absence of fraud, chancery will not interpose for mere errors, *however gross.* 33 Ark. 575, 581; 34 *Id.* 63, 72; 36 *Id.* 383, 390; 43 *Id.* 171; 47 *Id.* 413; 77 Ark. 351.

3. The will vested the title to all her property in her husband in trust for the minor. No authority was needed from the

probate court. The order probating the will was all that was necessary. 33 Ark. 759. The father is the natural guardian. Kirby's Dig. § 3757. Parker has settled with the trustee for more than he collected from the Campbell notes. Kirby's Dig. § § 110-129.

4. No one except Sidney J. Wilson could sue Parker for an accounting.

5. It was error to charge Parker with 10 per cent. interest. Kirby's Digest, § 3806; 63 Ark. 450.

6. There could be no liability against the sureties beyond $2,000, the amount of the bond, nor for more than 6 per cent. interest. 35 Ark. 93; 33 *Id.* 658; 63 *Id.* 218.

C. F. Greenlee, for the sureties.

1. There was no default until Parker was ordered to pay over the amount found due. 35 Ark. 93; 33 *Id.* 658; 63 *Id.* 218.

2. The probate court authorized the loan to Hughes. But these sureties are not liable for any misapplication of Ollie Houck Wilson's funds.

3. They are not liable for any moneys that came to Parker's hands as *administrator.*

4. Nor could they be liable for more than two thousand dollars, the limit of the bond. 65 Ark. 415-417; 18 N. Y. 35; 73 Me. 384; 64 Ark. 477.

5. The evidence does not sustain the judgment.

Thomas & Lee and *Johnson & Burr,* for appellee.

1. Mrs. Justice sued as next friend of the minor. 71 Ark. 258. So, whether she was guardian or not, she represented the minor. Besides, Earl Wilson became of age, and the court ordered the suit to proceed in his name. 4 S. W. 311; 102 S. W. 820. But Mrs. Justice was properly appointed. Kirby's Digest, § § 3759, 3758.

2. The loan to Hughes was never sanctioned by the probate court. Kirby's Dig., § § 3512 to 3517, 3804 to 3809; 62 Ark. 597; 60 *Id.* 355; 45 *Id.* 527; 12 A. & E. Enc. Law, (2 ed.) 570. Parker is liable. 164 Fed. 685; 90 S. W. 69; Kirby's Dig., § § 3804-3809; 15 Am. & Eng. Enc. Law (2 ed.) 107.

3. Except as guardian, S. J. Wilson could exercise no con-

trol over Earl's person or property. No bond was given by Wilson. Mansf. Dig., § 3471; Kirby's Dig., § § 3763, 3757.

It is a rule never to appoint a trustee of an infant's estate without requiring security. 28 Am. & Eng. Enc. Law (2 ed.) 975.

4. Parker was not entitled to credit for the amount of the vouchers for amounts paid S. J. Wilson. These expenditures were never allowed by the probate court, nor could they exceed the income of the infant's estate. Kirby's Dig., § 3792; 63 Ark. 450. The statute is mandatory. 83 Ark. 223; 53 *Id.* 545, 559. The $655 balance of the Hughes loan was never "accounted for." 172 Ill. 284; 50 N. E. 144; 77 Mo. 310; 100 Mass. 232; 42 N. H. 74.

6. Parker was liable for 10 per cent. interest. Mansf. Dig. § 3514.

7. The sureties are liable for an amount equal to the face of the bond and *interest* thereon. 65 Ark. 415. An order to pay over is not necessary in cases of final settlement. 74 Ark. 520; 48 *Id.* 251; 45 *Id.* 505; 33 Ark. 727, 729, 730. The sureties were properly sued in the same suit with Parker. 33 Ark. 727 to 730. A failure to account for moneys received is a legal fraud, and the court had jurisdiction. 77 Ark. 351, 354.

8. Parker is liable for the $1,650 collected from Mrs. Campbell. 5 Gill 60; 27 Am. Dec. 460; 86 Md. 176; 51 Md. 352; 86 *Id.* 176; 6 Dana 3; 12 Mo. 365; 78 Ill. 192; 1 Rich. L. (S. C.) 351; 2 Hawks (N. C.) 497.

Ratcliffe, Fletcher & Ratcliffe and *J. W. House,* for appellant in reply.

1. Where two or more provisions in a will are repugnant, the last should prevail. 107 Ill. 443; 12 Wend. (N. Y.) 602; 6 Ind. 293; 22 Me. 430; 89 Ill. 246. The general intent of the testator will prevail over expressions indicating a different particular intent. 8 W. Va. 1; 9 Paige 107; 78 Pa. St. 40; 50 Miss. 15; 7 Md. 8; 109 Ind. 506; 68 Ill. 594. The intention must be gathered from the whole will. 68 Ill. 594; 58 N. Y. 592; 8 Bush 434; 55 Ill. 160. Mrs. Wilson clearly intended to vest her entire estate in her husband as trustee.

2. A settlement with the trustee released Parker. Wilson only could bring this suit against Parker. Kirby's Dig., § 6002.

An action on a guardian's bond does not accrue until final settlement and order to pay over. 39 Ark. 145; 21 *Id.* 447; 35 *Id.* 93; 48 *Id.* 261; 25 *Id.* 108. Nor are the sureties liable beyond the penalty of the bond. 65 Ark. 415. Chancery has no jurisdiction to vacate allowances in the probate court which are merely erroneous. 39 Ark. 256-7; 36 *Id.* 389; 42 *Id.* 189.

3. The testator had the right to dictate that her husband should not give bond. 120 Ind. 94; 12 N. J. Eq. (1 Beas.) 289; 129 Mass. 339; 125 Ala. 135; 28 Am. & Eng. Enc. Law (2 ed.) 975.

HART, J., (after stating the facts). 1. It is first insisted that the appointment of Marie A. Justice as guardian of Earle M. Wilson by the Greene Probate Court in 1906 was void because the guardianship of H. A. Parker was pending. It is not necessary to consider this point, for Mrs. Justice also brings the suit as next friend of the minor. *St. Louis, I. M. & S. Ry. Co.* v. *Haist,* 71 Ark. 258.

2. It will be noted that the demurrer to the complaint was not acted upon by the court. In the case of *Kiernan* v. *Blackwell,* 27 Ark. 235, it was held (quoting from syllabus): "Where a cause has proceeded to final adjudication, without judgment of the court upon demurrer filed in same, the demurrer will be considered to have been waived." Recent decisions of this court have recognized and applied the rule. Therefore the case is presented to us just as if the defendant had assented to the jurisdiction of the chancery court to try the case, and had made no objections to the suit proceeding to determination against them.

3. It is next contended by counsel for defendants that the property of Mary A. Wilson, deceased, never came into the possession of H. A. Parker as guardian of her minor children, and that he was not accountable to the probate court as such guardian. This brings us to a construction of her will. It is set out in the statement of facts and need not be restated here. The power of one, legally competent to make a will, to dispose of his property as he sees fit, subject to the restrictions provided by the statutes, is a legal incident to ownership. In construing the provisions of a will, the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of

the will, and such construction be given as best comports with the purposes and objects of the testator, and as will least conflict.

These canons of construction are so firmly established as to need no citation of authority to support them.

It will be noted that Mary A. Wilson bequeathed to Earle M. Wilson, her son, all her earthly possessions. Continuing, the will provides: "I furthermore appoint my husband, Sidney J. Wilson, sole guardian of my son and his property. He is to take entire charge of both, managing the one and educating the other as he sees fit. As a mark of my esteem and affection, I require no bond and hold him free of the law. Therefore, he is to take and hold all my son's, Earle Malcolm Wilson's, property in trust to manage and direct, to bargain, sell and convey, in my son's name until the latter is twenty-one (21) years of age."

A subsequent clause of the will provides that future issue of her marriage shall take equally and in like manner with Earle M. Wilson. Ollie Houck was subsequently born unto her. The testatrix had the right and the power to leave her property in trust for her children during their minority and to name such trustees as she saw fit.

In her will she expressed the object and purpose of the trust and defined explicitly the powers of the trustee. In the application of the rules of construction above announced, we are of the opinion that, under the terms of the will, the testatrix intended something more than to make her husband guardian of her minor children; or to give him power to manage her property, but that she intended to place her property in trust for her children during their minority. She does not stop with directing him to manage the property, but goes further and uses the word "hold," which has a technical meaning as expressing tenure. He is given power to bargain, sell and convey. Hence, instead of merely intending to appoint her husband guardian of her children and to give him power to manage the property for them, we are of the opinion that, by direct and express terms, she made him trustee of her property during their minority with power to sell same, and that the legal title thereto during the trust term was in him as trustee. *Fay* v. *Taft*, 12 Cush. (Mass.) 448.

It follows, then, that Sidney J. Wilson, under the will, became entitled to take and hold possession of the property of Mary A.

Wilson at her death unless he was for some reason incapacitated from executing the trust. It also appears from the testimony of Parker himself that Sidney J. Wilson was somewhat improvident, and also that he was arrested and tried for the murder of his wife. He was, however, acquitted of the charge in 1892, and the presumption is that he was innocent. Parker says that he did not know of the existence of the will at the time letters of administration on the estate of said Mary A. Wilson were granted him. If he had known of its existence, of course there would have been no necessity for the administration; for it does not appear that any debts were probated against her estate. It is true Parker turned over the money belonging to her estate to Sidney J. Wilson at various times; but he is no more liable on that account than if he had turned it all over at one time. He was entitled to the property under the terms of the will, and, there being no necessity for an administration of Mary A. Wilson's estate, there was likewise no need for Parker to procure an order of the probate court directing him to turn the property over to the trustee. The trustee being entitled to it under the will, no one else could complain except creditors of Mrs. Wilson's estate, and there are none. Without going into detail, it is sufficient to state that Parker has fully accounted for the whole of Mary A. Wilson's estate. He has given in detail the amounts paid over to the trustee and the purposes for which they were paid. It seems from his testimony, which is not contradicted, that all these amounts, except $100, were paid to the trustee to be used for the benefit of the minor child, Earle M. Wilson. Therefore, we hold that Parker is not liable for the $1,280.20, the amount received by him as belonging to the estate of Mary A. Wilson, deceased. In reaching this conclusion, we have not allowed him the $100 paid by him to one of the attorneys of Sidney J. Wilson. We think that the other amounts paid the trustee exceed the amount received.

4. Of course, the amount of the insurance did not become part of the estate of Mary A. Wilson at her death; for her children were named as beneficiaries in the policy. The amount of this policy, viz., $2,000, vested in the children upon the death of their mother.

It will be noted that Earle M. Wilson became of legal age during the pendency of the suit, and before the decree was ren-

dered. Upon arriving of age, he was substituted as plaintiff. Parker had made a settlement of his accounts as such guardian in the probate court at its July term, 1893, and his settlement was confirmed at the next term of the court. One of the objects of this suit is to surcharge and falsify that account. We have not set out the account in full for the reason that the chancellor found in favor of Parker as to all the items except the Hughes notes, and no appeal has been taken by Earle M. Wilson from his decision. Hence it will only be necessary for us to consider the item of the Hughes note.

The chancellor charged Parker with the loss resulting from the non-collection of the loan made to Hughes. Counsel for Parker strongly insist that the chancellor erred in so holding. Our statutes contain provisions authorizing the money of the ward to be loaned and directing the guardian to report the disposition of the money. Section 3604 of Kirby's Digest provides that if at any time the guardian shall have on hand money of the ward beyond what is necessary for his education and maintenance he shall loan same under the direction of the court. Sec. 3806 contains a provision in regard to the rate of interest and the kind of security required. Sec. 3807 makes it the duty of the guardian at every annual settlement to make report of the disposition made of the money of the ward, and, in case it is loaned out, to report the name of the person to whom loaned, the description of the real estate security and where situate, and its value. Sec. 3809 provides that "no guardian shall be personally responsible for any money belonging to his ward and loaned out by him under the direction of the court, and on security which may have been approved by the court, in case of the inability of the person to whom such money may have been loaned or his security to pay the same."

The first question that presents itself is whether or not these statutory provisions are mandatory. The precise question has never been passed upon by this court.

In this connection it may be stated that we have a statute which provides that, unless the direction of the probate court is obtained therefor, "the guardian shall not be allowed in any case for the maintenance and education of the ward more than the clear income of the estate." Kirby's Digest, § 3792. This section has been construed to be mandatory, and the court held that

it takes from the probate court the discretion to approve expenditures of a guardian for the support and education of the minor, which are in excess of his income, unless the expenditures have been made under an order of the court previously obtained. And that a bill in chancery will lie to surcharge and falsify the guardian's account, where he has been allowed credit in his annual settlements for amounts so expended in excess of the income from the ward's estate. *Campbell* v. *Clark,* 63 Ark. 450.

While the language of the provisions under consideration is not as strong and positive as that in the section last referred to, we think that it should be construed to be mandatory. The money belongs to the ward, but he is not consulted, and has no voice in regard to the loaning out of his own money. The statute contemplates that it shall be done under the direction and orders of the probate court. It is true the guardian may assume the responsibility and loan it out without an order of the court, but in such case he acts at his own peril. If he imprudently loans the ward's money upon inadequate security, without having first procured an order of the court to loan it, he must suffer the loss occasioned thereby, even though he may have acted honestly in the matter.

In discussing a similar statute the Supreme Court of New Jersey said:

"In cases coming under this act trustees may take the responsibility of loss upon themselves, or they may throw it on the court. If the latter course is pursued, the directions of the statute are plain. They must obtain leave and direction for the purpose of putting out the money, not put out the money first, and at some future day, when difficulties are foreseen or loss apprehended, go to the court and obtain a decree of confirmation. No such power is given to that court; nor have the administrators or trustees any authority under the statute to make such application. This may appear to be a rigid and harsh construction of the act, and I confess it appears so at first sight; but I think a moment's reflection will satisfy us of the propriety, if not necessity, of construing the power of the orphan's court in this respect strictly. It was doubtless the intention of the Legislature that the trustee, in putting out minors' money, should be implicitly governed by the direction of the court. In all such cases the court derives its information

mostly from the representations of the trustees themselves, who can or ought to have no possible temptation to impose upon the court. One common motive should govern all—that the minor's money should be safely invested. But so construe this statute as that trustees may invest money at their own risk, and at any time afterwards come before the court to seek a confirmation which shall shelter them from all danger, and be conclusive upon the rights of those who are not able to be heard, and who are reposing in the security afforded by the wholesome provisions of the law, and we place them before the court in a very suspicious attitude. Their object for coming there will be their own safety alone, and not that of the fund. You place them under strong temptations, such as many men are not able to resist; and any one who is conversant with the ordinary mode of doing business in that court must be satisfied that the greatest imposition would often be practiced, and the grosses frauds committed. I feel satisfied, therefore, to say that this order is not made in pursuance of any authority vested in the court, and, not within its jurisdiction, and therefore is no protection to the administrators." *Gray* v. *Fox,* 1 (Saxton, Ch. Rep.) N. J. Eq. 259. See, also, *Guardianship of Caldwell,* 55 Cal. 137.

In the application of these principles, we hold that where a guardian loans the ward's money without first obtaining an order of court authorizing him to make the loan, he assumes the responsibility, and no subsequent order of the probate court confirming his action will relieve him from liability if loss follows.

As we have already seen, our statutes protect the guardian from personal responsibility where he loans the ward's money under an order of the probate court. This brings us to the question: did Parker obtain an order of the probate court authorizing him to make the loan to Hughes?

Parker himself states that the order was made by the judge, and it does not appear on the records of the court. Then, too, in his accounts, Parker recognizes that he made a mistake in making the loan, and does not refer directly or indirectly to the fact that it was made under the order of the probate court. On the contrary, his statement about the matter as contained in his account filed in a year after the loan was made places the whole responsibility upon himself. No reference is made to previous

order of the court ordering or directing him to make the loan. Parker states that he went to Judge Mayo, and consulted with him about making the loan; that Judge Mayo directed him to draw up a petition, and that he would approve it. Parker further said: "I did draw up a petition and presented it to Judge Mayo. In my presence, he turned it over and indorsed it on the back, 'Examined and allowed,' and I put it in the files of the Wilson papers, and it was in those files until the fire occurred, when they were burned."

It will be noted that Parker does not state that the petition was given to the clerk so that the order might be placed upon the records of the court; but states that the petition was placed among the Wilson papers and remained there until they were burned. This negatives the idea that it was an order of the court, and that it was made in term time. It is conceded that the records of the probate court were not burned, and that the order does not appear thereon. It seems that Parker went no further than to seek the approval of the county and probate judge. From this testimony the chancellor found that Parker did not obtain an order of the probate court authorizing him to make the loan to Hughes, and a majority of the judges are of the opinion that the finding of the chancellor is not against the weight of the evidence, and consequently should not be disturbed.

I agree with my brother judges that conversations between the guardian and the probate judge, and the verbal or written advice of such judge that the loan should be made, can not operate as an order of the court as contemplated under the statute; but I am also of the opinion that Parker was speaking colloquially in his testimony, and that when he referred to the probate judge indorsing his petition on the back "Examined and allowed." he meant the probate court. He was a lawyer of experience and familiar with the statutes governing such matters. He would hardly have gone to the trouble of preparing a written petition to present to the judge in vacation. I am strengthened in this belief by the fact that in his annual settlement he complied with the statute in such matters by reporting to the court the details connected with the loan. I think it fairly deducible from his whole testimony that he obtained an order from the probate court to make the loan, and that by inadvertence such order was not

spread upon the records of the court. If my view is correct, it follows that the order of court protects him from the loss that followed; for the testimony shows that he was not negligent in collecting the loan; but that the loss was occasioned by financial misfortunes and reverses which overtook Hughes after the loan was made. See *Jacks* v. *Kelley Trust Co.*, 90 Ark. 548.

5. But the court is of the opinion that it by no means follows that because Parker is liable for the whole amount of the Hughes loan the sureties on his bond as guardian of Earle M. Wilson are also liable for the full amount of the loan. Counsel for plaintiff invoke the rule that if a person occupying the dual relation of guardian and administrator holds funds in the latter capacity, which are due and payable to his ward, the sureties on his guardian's bond are chargeable with his failure to account therefor as guardian. The theory on which the rule proceeds is that, after the time for the administration to close under the statutes has passed, the presumption is that the person transferred the funds from himself as administrator to himself as guardian, and that by operation of law he becomes liable as guardian for such funds, and in like manner the sureties on his guardian's bond also become liable. We do not decide whether the rule obtains in this State; for we hold that under the facts of this case there is no place for the application of such rule.

It is true that Parker was guardian of both Earle M. and Ollie Houck Wilson, and that he administered on the estate of Ollie Houck Wilson when he died, and that Earle M. Wilson was the sole heir-at-law of Ollie Houck Wilson. Parker, however, gave separate bonds in each case, and his co-defendants only signed his bond as guardian of Earle M. Wilson.

It will be remembered that the loan to Hughes was made on May 13, 1892; that Ollie Houck Wilson did not die until November, 1892, and Parker did not become administrator of his estate until September, 1893. It is apparent then that he never had any part of the Hughes loan in his hands as administrator of the estate of Ollie Houck Wilson, for Hughes had obtained the loan several months prior to the death of Ollie Houck Wilson. Hence we hold that sureties on the bond of Parker as guardian of Earle M. Wilson are only liable for half of the amount loaned to Hughes, that being the amount that belonged to Earle M. Wilson

when the loan was made, and was all that should have been in his hands at that time.

6. We next come to the question of interest. Parker having lent the money without an order of court and upon insufficient security, we have held him personally liable. He then stands before the court as if he had kept the money himself and neglected to obtain an order of the court to lend it.

In the case of *Merritt* v. *Wallace,* 76 Ark. 217, the court held (quoting syllabus): "Where a guardian, after being ordered by the probate court to lend out his ward's money, waited for ten years without lending the money, and without making any report to the court of his failure to do so, it was not error, after allowing him reasonable time to do so, to charge him with interest thereafter at the legal rate." The court said:

"The general rule is that the guardian must exercise reasonable skill and diligence to loan the money; and if he fails to do so, he is liable therefor at legal rate of interest; and if the ward can show it could have been loaned at a higher rate, he is chargeable with what he could have obtained."

It is true, the loan to Hughes was at ten per cent., but it is shown to have been a very injudicious loan. Hence we do not think it sufficient evidence to show that Parker could have obtained a rate higher than the legal one if he had made a loan on good security. No other testimony on the point appears in the record. Hence we hold that the court erred in charging Parker with interest at a greater rate than 6 per cent., the legal rate.

The decree will, therefore, be reversed and the cause remanded with directions to the chancellor to render a judgment against the defendant, H. A. Parker, for $655 with 6 per cent. interest from May 13, 1893, and against the other defendants for half that sum with interest at the same rate and from the same date.

DEMPSEY v. DAVIS.

Opinion delivered April 3, 1911.

1. DEEDS—CONSTRUCTION.—A deed must be construed according to the intention of the parties, as manifested by the language of the whole instrument, giving all parts of the deed such construction, if possible, that they will stand together; but where there is a repugnancy between the granting and habendum clauses, the former will control the latter. (Page 573.)
2. SAME—FEE TAIL.—Where a deed conveyed land to the grantee and her children, "the natural offspring of her body," the effect thereof at common law was to create an estate tail, but under Kirby's Digest, § 735, a life estate was created in the grantee with fee in the person or persons to whom the estate tail would first pass at common law, towit, the heirs of the grantee's body; and if there be none such, the estate would revert to the grantor. (Page 573.)
3. SAME—GRANTING AND HABENDUM CLAUSES.—Where a deed created a fee tail at common law, Kirby's Digest, § 735, applies, though the habendum clause is "to hers (the grantee's) and their own proper use, benefit and behoof forever in fee simple." (Page 574.)

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; reversed.

STATEMENT BY THE COURT.

This cause involves the construction of the following deed:
"State of Arkansas.
"County of Columbia.

"Know all men by these presents that we, William A. and Selestia Ann Beasley, for and in consideration of the love and affection that we have to our daughter, Selestia Ann Jinett Dempsey, wife of John Dempsey, we do hereby give and bequeath and convey unto our said daughter and her children, the natural offspring of her body, all the right, title and interest with the possession of the following property, towit, the west half of section two, and the northeast quarter and the east half of the southeast quarter and the northwest quarter of the southeast quarter of section three, containing about five hundred and eighty acres of land, all in township sixteen south, range twenty-two west, with and singular the right, title and appurtenances thereunto belonging to hers and their own proper use, benefit and behoof forever in fee simple.

"And we, the said William A. and Selestia Ann Beasley, for ourselves and heirs, administrators and executors, will warrant and defend the right, title and interest of and possession of the same unto them to be free from our claim or the claims of any other person or persons claiming the same for us or under us or for our use or benefit forever, as witness our hands and seals this October, 1875."

The deed was duly acknowledged and recorded, and is made an exhibit to the complaint in this cause. The children of Selestia Ann Jinett Dempsey are the plaintiffs in the action, and they allege:

"4. That the purpose and effect of said conveyance was to convey to the said Selestia Ann Jinett Dempsey, who was then the wife of John Dempsey, now deceased, a life estate in said lands with the remainder of the fee therein to such children as were the issue of her body, and that the said Selestia Ann Jinett Dempsey entered into the possession thereof and held the same and now holds the same for her benefit and her said children; that at the time the aforesaid lands were deeded to the said Selestia Ann Jinett Dempsey she had no children; that the plaintiffs were born since the making of said deed.

"5. That during the year 1889, and till the year 1900, inclusive, at various times the said Selestia Ann Jinett Dempsey and her said husband, John Dempsey, sold and conveyed unto the defendants their interest in the pine timber standing on said land.

"6. That, during the time mentioned in the fifth paragraph of this complaint, the defendants were well and fully advised and informed as to the interest of these plaintiffs in said land, but wilfully disregarded plaintiff's rights of inheritance therein, and cut, removed and appropriated to themselves all the merchantable pine timber thereon."

The prayer of the complaint is that defendants be made to account for the value of the timber cut and removed from the land by the defendants, and that a master be appointed with power to take testimony for the purpose of ascertaining and stating the amount and value of the timber so cut and removed. They further pray that, if the court finds that they are not now entitled to recover the value of the timber cut and removed, the value thereof be impounded and invested for the benefit of such plain-

tiffs as may take the estate of inheritance in said lands after the life estate of Selestia Ann Jinett Dempsey be terminated.

The defendants, J. M. and V. M. Davis, demurred to the complaint, which was sustained by the court.

The plaintiffs refused to plead further, and, a decree having been entered dismissing their complaint for want of equity, they have appealed.

Wade Kitchens and *C. W. McKay,* for appellants.

1. The deed gave to Selestia Ann Jinett Dempsey a life estate with remainder to her children to be born. 5 Cyc. 679; 137 Fed. Rep. 822. The intent will prevail, taking the instrument as a whole, and the deed will not be declared void unless the various clauses are so repugnant as to leave no other course. Devlin on Deeds, § 836; 3 Am. Dec. 507; 18 Cal. 137; 58 Fed. 438; 78 Ark. 231; 64 Ark. 240-243; 137 Fed. Rep. 831. The deed created an estate tail at common law, which under our statute gave a life estate to the mother, remainder in fee to her *children.* 4 Kent, Com. 225; Tiedeman on Real Property, 425; Cooley's Blackstone, vol. 1 (4 ed.) 629; Tiffany on Real Prop. par. 25, 434; 13 Cyc. 662; Washb. Real Prop. vol. 2 (6 ed.), § 1616; 68 Ark. 369; 1 Ind. 107; 14 S. W. 904; 12 Ky. 27; 28 Ala. 314; 84 Am. Dec. 519; 2 Grant, Cas. 249; 161 Pa. 643; 73 S. W. 109; 68 Ark. 369; 47 Md. 513; 87 S. W. 1120; 137 Fed. Rep. 823.

2. If the words "her children, the offspring of her body," are words of limitation (see cases *sup.*), then the mother took a life estate with remainder in fee to her children—a fee tail at common law. 1 Washb. on Real Prop. (6 ed.) 84, § § 178, 195; 1 Kerr on Real Prop. 452; 1 Tiedeman, Real Property, § 47; 1 Kerr on Real Prop. § 460; 67 Ark. 520; Cooley's Blackstone (4 ed.) 515, 578, 580; 58 Ark. 313; 4 Kent, Com. (14 ed.) 236, 408.

3. The interest of appellants being that of remaindermen, the appellees are liable for waste. 128 S. W. 581.

Hamby, Haynie & Hamby and *Powell & Taylor,* for appellees.

1. The word "children" is often construed to be synonymous with "heirs." 68 Ark. 369; 72 Ark. 539. "Children" will

be construed to be words of limitation and mean "heirs" when no children were in being at date of the deed. 6 Coke 16a; 14 Gray 174; 16 East 399; 85 Ill. 242; 11 B. Mon. 32; 13 N. J. Eq. 236; 98 Ky. 285; 51 S. W. 173; 8 Bush 434; 149 Ind. 51; 48 N. E. 630; 11 S. C. 294; 57 N. C. 334; 3 Ga. 551; 80 Ga. 391; 24 Miss. 343; 165 Pa. 645; 166 U. S. 83. The after-born children took as heirs, and the deed passed a fee simple estate. 58 Ark. 303. There is no repugnancy in the granting and habendum clauses—the latter enlarges the fee tail to a fee simple estate.

2. The habendum may enlarge or extend, but not abridge, the estate limited in the premises. 53 Ark. 107; 78 Ark. 230; 82 *Id.* 209; 92 *Id.* 324; Elphinstone, Interp. Deeds, rule 66, p. 217. If the premises and habendum contain different express limitations, the limitation in the latter, if possible, will be considered explanatory of the granting clause; but, if repugnant, they will be considered in the manner most beneficial to the grantee. Cases *supra;* 2 Black. Com. 288; 2 Bacon, Abr. 260; 9 S. W. 798; 102 Pa. St. 347; 50 Mo. 192; 57 N. E. 238; 104 N. W. 579; Coke, Litt. 299a; 2 Sanders, Uses & Trusts (4 ed.), p. 318; Brewster on Conv. par. 131.

3. All deeds shall be construed to convey a complete estate unless expressly limited by words in the deed. Kirby's Digest, § 733. The word "heirs" is no longer necessary to create an estate in fee simple. *Ib.*

HART, J., (after stating the facts). A deed must be construed according to the intention of the parties, as manifested by the language of the whole instrument; and it is our duty to give all parts of the deed such construction, if possible, as that they will stand together; but where there is a repugnancy between the granting and habendum clauses, the former will control the latter. *Whetstone* v. *Hunt,* 78 Ark. 231.

Bearing in mind these fundamental rules of construction, it is clear that the words "children, the natural offspring of her body," are synonymous with "bodily heirs" or "heirs of her body," and exclude the idea that they are synonymous with the general word, "heirs." When so construed, the estate granted is controlled by the decision in the following cases: *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18; *Wilmans* v. *Robinson,* 67 Ark. 517; *Horsley* v. *Hilburn,* 44 Ark. 458. That is to say,

according to the rule announced in those cases, the effect of the granting clause was to create an estate tail, which under our statute gave a life estate to Selestia Ann Jinett Dempsey and the remainder in fee simple to the person or persons to whom the estate tail would first pass according to the common law.

The persons to whom the estate tail would first pass, according to the course of the common law, under the granting clause of the deed are the heirs of the body of the life tenant. If there are none such, the estate will by operation of law revert to the grantor. *Corbin* v. *Healy,* 20 Pick. (Mass.) 514; *Fales* v. *Currier,* 55 N. H. 392.

It is contended by counsel for defendants that the use of the words, "to hers and their own proper use, benefit and behoof forever in fee simple," enlarged the estate to a fee simple in Selestia Ann Jinett Dempsey.

Mr. Washburn says "that the test to be applied to an habendum in a deed is, whether it can be construed so as to stand with the premises, or is so repugnant in its operation as to be irreconcilable with the latter. In the one case it limits and explains the grant; in the other it is rejected as of no effect." 3 Washburn on Real Property (5 ed.), p. 469.

In the application of this rule in the case of *Corbin* v. *Healy, supra,* the court held that where an estate tail is given the fact that the habendum of the deed creating it is to the grantee and his heirs will not enlarge the estate to a fee simple; nor will the entail be destroyed by a warranty to the grantee "and his heirs as aforesaid." There the habendum clause was to have the same, and the court held it to mean the limited estate in the land before granted which was an estate tail, otherwise it would have been repugnant to the granting clause, instead of explanatory of it.

As we have already seen, by the common law, Selestia Ann Jinett Dempsey became seized of an estate tail under the granting clause of the deed in question, which by our statute was converted into an estate for life.

Now, at common law, the words "heirs" was necessary to convey a fee simple by deed, and in the case of *Hardage* v. *Stroope,* 58 Ark. at p. 313, the court said: "An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word 'heirs.'" Hence, by the

rules of the common law, the habendum clause in the present deed does not enlarge the granting clause, but when used to explain it refers to the limited estate granted, and means that the heirs of the body of the life tenant take the remainder in fee simple. If the words used in the granting clause are to be given their common-law meaning, so, too, the words in the other parts of the deed should be construed by the rules of the common law.

As stated in *Corbin* v. *Healy, supra,* the covenants only extend to the estate granted; and where there is no peculiar language to warrant such a construction, they do not enlarge the estate granted. See also *Patterson* v. *Moore,* 15 Ark. 222.

In this way all parts of the deed harmonize with each other; otherwise the granting and habendum clauses will conflict, and the latter must give way to the former. There are many decisions on the construction of deeds, but each is made with reference to the peculiar words used in the deed and the statutes, changing the rules of the common law. We believe the construction we have given the deed under consideration gives effect to every part of it, and is in harmony with our other decisions which bear on the principles decided. This case is not governed by *Hardage* v. *Stroope,* 58 Ark. 303. In that case the deed did not, as does the one under consideration, create an estate at common law, and therefore did not come within section 735 of Kirby's Digest, which abolished fees tail and creates a life estate in the first taker with a remainder over in fee simple to the one to whom the estate tail would first pass according to the course of the common law under the deed. *Black* v. *Webb,* 72 Ark. 336.

It follows that the court erred in sustaining the demurrer. The decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PARKER *v.* STATE.

Opinions delivered April 10, 1911.

1. FALSE PRETENSES—INDICTMENT.—An indictment for false pretenses should allege the pretense, that it was false and known to the defendant to be so, that it was made to the person named in order to defraud him, and that by means of the false pretense the written instrument or thing of value was obtained. (Page 577.)

2. INDICTMENT—STATUTORY CRIME.—An indictment for a statutory crime need not follow the precise words of the statute, but words of similar import may be used, even though they may be of more extensive significance. (Page 578.)

3. FALSE PRETENSE—INDICTMENT.—A false pretense is a fraudulent representation of an existing fact or past event by one who knows it to be untrue, and of such nature as to induce the party to whom it is made to part with something of value; and the facts constituting such false pretense should be stated with due certainty. (Page 578.)

4. SAME—SUFFICIENCY OF PRETENSE AS INDUCEMENT.—The alleged false pretense need not be the only inducement to cause the party defrauded to sign the instrument or part with his goods, but it may be combined with other motives. (Page 578.)

5. CONSPIRACY—CIRCUMSTANTIAL EVIDENCE.—A conspiracy may be inferred where two or more persons by their acts pursued the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected. (Page 579.)

6. EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATOR.—Any act done or declaration made by one of two conspirators in furtherance or preparation of the conspiracy, though in the other's absence, may be shown as evidence against the other conspirator. (Page 581.)

7. FALSE PRETENSE—EVIDENCE.—Where defendant is charged with false pretense in securing a power of attorney to execute an absolute deed with $50 as consideration from the prosecuting witness by pretending that it was an authority merely to execute a mortgage for that amount, it was competent to show that the prosecuting witness had been offered $100 for the land on the day before the deed in question was executed, and that she had fixed a price of $300, as such facts were circumstances tending to show that she did not intend to authorize the execution of an absolute deed. (Page 581.)

8. SAME—INSTRUCTION.—It was not error to instruct the jury, in a prosecution for false pretense, in effect that defendant was not guilty if the prosecuting witness was not deceived by defendant's alleged representations. (Page 582.)

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

Ira D. Oglesby, for appellant.

1. The indictment is *bad* for uncertainty and ambiguity as to parties, offense, county and circumstances. 35 Ind. 419.

2. The instructions are erroneous, and the court erred in admitting testimony.

3. The testimony is at variance with the indictment. In

false pretenses it is necessary to set out the false statements and prove them as alleged. 60 Ark. 142.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. The indictment is sufficient under our statute. 17 Tex. App. 213; 25 Ohio St. 217; 115 Mass. 481; 34 N. Y. 351; Kirby's Dig. § 1689; 60 Ark. 13; Kirby's Dig. § § 2228-9, 2241-2243.

2. Where the offense is stated with such certainty that the accused knows what he is called upon to answer, and the court and jury the issue they are to try, and an acquittal might be pleaded in a subsequent prosecution, the indictment is sufficient. 5 Ark. 444; 19 *Id.* 613; 84 *Id.* 487; 81 *Id.* 25; 95 Ark. 48; 93 Ark. 406; 92 *Id.* 413; 94 Ark. 65; 81 Ark. 25.

3. There is no error in the instruction, and the evidence sustains the verdict.

4. The statements of Owens were admissible to show a conspiracy. 77 Ark. 44.

FRAUENTHAL, J. Defendant, Moses Parker, was jointly indicted with one R. B. Owens, charged with the crime of false pretenses. A demurrer was interposed to the indictment upon the grounds, (1) that the facts therein stated did not constitute a public offense; (2) that the indictment charged more than one offense; and (3) that the allegations were too vague, uncertain and conflicting to apprise defendant of the exact accusation brought against him. The demurrer was overruled, and thereupon the trials were severed at the instance of the defendants, and upon his separate trial Parker was convicted, and has appealed to this court.

The indictment was founded upon section 1689, Kirby's Digest, which provides that "every person who, with intent to defraud or cheat another, shall designedly or by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, right of action or other valuable thing or effects whatever," shall be guilty of this offense. In order to cover the elements of this offense, the indictment should allege the pretense, and that it was false and known by the defendant to be so, and that it was made to the person named in order to defraud him, and that by means of the false pretense the

written instrument or thing of value was obtained. 2 Bishop, New Crim. Law, § 163.

It is not necessary that the precise words of the statute should be followed, but words of similar import may be used, even though they may be of more extensive signification. The facts, however, should be stated with that degree of certainty and particularity as will apprise the defendant of the charge that is brought against him; but the indictment will be sufficient if it sets forth in language that may be readily understood all the elements of the offense. By the provisions of our Code, an indictment is sufficient if it contains "a statement of the acts constituting the offense in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended," and if 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." Kirby's Digest, § § 2243 and 2228.

The false pretense itself is a fraudulent representation of an existing fact or past event by one who knows that it is not true, and of such a nature as to induce the party to whom it is made to part with something of value; and the facts constituting such false pretense should be stated with due certainty. But the false pretense need not be the only inducement to cause the party defrauded to sign the instrument or part with his goods; the pretense may be combined with other motives or be partly founded upon some promise. It is sufficient if the false pretense operated either alone or with other causes. Therefore it will not invalidate an indictment to allege other facts, promises or causes in conjunction with the false pretense which is specifically set forth, if such false pretense is sufficient. 2 Bishop, New Crim. Law, § 1461; 19 Cyc. 421; *State* v. *Vandimark,* 35 Ark. 396; *Johnson* v. *State,* 36 Ark. 242; *Donohoe* v. *State,* 59 Ark. 375.

The indictment in this case, though somewhat loosely and informally drawn, contains an averment of every fact necessary to constitute the offense charged, and we think with sufficient clearness that, taken as a whole, the defendant would understand and be apprised of the nature of the accusation brought against him. We do not deem it necessary to set out this indictment *in extenso;* it is sufficient to say that in language that can be under-

stood it charges that the defendant induced one Jessie Byrd to sign a power of attorney authorizing and impowering his co-defendant, Owens, to sell her land, by falsely representing that the instrument was only a power of attorney authorizing and impowering said Owens to mortgage the land in order to secure a loan of fifty dollars for her; that the representation was false, and known by the defendant to be so, and was made with the intent to obtain her signature to the instrument in order to defraud her, and that through this inducement it was signed and delivered and the party defrauded. The indictment contains other allegations, but they only constitute a recital of acts done or promises made by the defendants in conjunction with the above alleged false pretense. These further allegations were unnecessary, but they did not charge any other or different offense, and were not so vague or conflicting as to involve in uncertainty the above specific charge of false pretense made against defendant. We do not think that the court erred in overruling the demurrer to the indictment.

It is urged by the defendant that the court committed error in permitting the introduction of certain testimony which he claims was incompetent. This testimony complained of refers chiefly to statements that were made by said Owens in the absence of the defendant. It appears from the testimony that the party Jessie Byrd owned twenty acres of land in the State of Oklahoma, and on the day the offense is alleged to have been committed she came, in company with her mother and said Owens, to the city of Fort Smith for the purpose of selling her land. She valued it at three hundred dollars, and, after arriving at Fort Smith, Owens informed her that he did not think that it could be sold at any price which she was willing to take therefor. It was then suggested by her and her mother that they would like to borrow some money by giving a mortgage thereon, and about this time the parties met with the defendant Parker. It appears that Jessie Byrd had known defendant Parker for a number of years, and that he had been her teacher when she was a young girl.

Owens stated that, in order for him to negotiate the loan, it was necessary for Jessie Byrd to execute to him a power of attorney authorizing him to execute the proper papers to secure the loan, and thereupon the defendant Parker suggested that they

go to the office of a stenographer whom he knew, and who could draft the necessary papers. The testimony on the part of the State tended to prove that when these parties arrived at the office of the stenographer Owens and defendant Parker directed him to draft the power of attorney, which he did. It appears that Jessie Byrd was 18 years old, and that she and her mother were very ignorant; but they stated that the only power of attorney which they wished to sign was such as would only authorize Owens to give a mortgage upon the land in order to secure the fifty dollars, and that, after the instrument was drafted, Jessie Byrd hesitated about signing it at the suggestion of her mother, and thereupon the defendant said to her that the instrument was only a power of attorney authorizing Owens to mortgage the land, and that he could not sell it thereunder; and further reminded her that he had been her teacher, and said that he had never taught her anything wrong, and urged her to touch the pen in order to sign the instrument, and assured her that it was as he had indicated, and that Owens could not sell the land thereunder. Induced by these representations, Jessie Byrd signed the instrument and delivered it to Owens; and as the parties left the stenographer's office Owens told Jessie Byrd and her mother to go to a hotel until he should obtain the money. This latter statement was not made in the immediate presence or hearing of Parker, but he was near by, and thereupon left in company with Owens. Some time later in the day Owens went to the hotel where Jessie Byrd and her mother had gone, and there paid to them $49 which he claimed he had borowed by giving a mortgage upon the land; and Parker, while not then immediately present, was seen at the door of the room where the parties were, and during the time the money was being counted came in and thereafter remained with the parties.

The power of attorney which Jessie Byrd actually signed gave full power and authority to Owens to sell the land and to execute a deed therefor; and after it had been signed by Jessie Byrd, and prior to the time Owens paid over to her the above money, he executed a deed for the land to the defendant Parker, who thereupon sold the land and executed a deed therefor to one Alford, receiving $80 therefor.

We think that the testimony in this case was sufficient to

show that there was a conspiracy between the defendant and Owens to obtain from Jessie Byrd the power of attorney to sell this land, and thereby to defraud her. In order to establish a conspiracy, it is not necessary to prove the unlawful combination between the parties by direct evidence. It may be shown by circumstances.

In the case of *Chapline* v. *State,* 77 Ark. 444, it is held that a conspiracy may be inferred, although no actual meeting among the parties is proved, if it be shown by the testimony that two or more persons pursued by their acts the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected; and in the same case it is held that any act done or declaration made by one of the conspirators in furtherance or perpetration of the alleged conspiracy may be shown as evidence against his fellow conspirators.

The testimony in this case shows that there was a concert of action between the defendant and Owens in securing from Jessie Byrd the execution of the power of attorney, and that in pursuance of that conspiracy Owens executed a deed for the land to the defendant, who thereupon sold and conveyed the land to Alford and collected the money therefor. All the statements made by the parties up to the time the money was paid to Jessie Byrd upon the alleged mortgage were but parts of the transaction by which the fraud was perpetrated. We think, therefore, that the statements made by Owens, even if it should be considered that they were made in the absence of the defendant, were competent as evidence against the defendant.

It is also urged that certain testimony given by the mother of Jessie Byrd that they had been offered one hundred dollars for the land by Alford on the morning before they met Parker, and also that they had fixed a price of three hundred dollars on the land for the sale thereof, was incompetent because the transactions were not had in the presence of the defendant. But we think that these statements were competent in order to show that Jessie Byrd and her mother considered the land as being worth more than the sum of $50, and therefore as a circumstance to show that they did not knowingly and understandingly sign the power of attorney to sell the land, but that they understood the

instrument which she signed was only a power of attorney to mortgage it, when they received only the sum of fifty dollars.

Defendant complains of other testimony that was introduced; but he did not preserve his objection thereto in the motion for a new trial, and must therefore be held to have abandoned same.

It is urged that the court erred in giving the following instruction to the jury at the request of the State: "If the jury believe from the evidence that the power of attorney was drafted by the witness Parmalee at the request of Jessie Byrd, or at her request in conjunction with her mother and Owens; that it was written by Parmalee as he was requested to do so by said Jessie Byrd or her mother or by Owens with their consent, and that he explained it to said Jessie Byrd, and that she understood the nature and character of the instrument she was signing, and that she was not deceived by Owens's and Parker's representations as to the nature of said instrument, the defendant would not be guilty as charged."

It is contended that this instruction is misleading, and makes defendant's guilt depend, not upon the false representation charged in the indictment, but upon whether Jessie Byrd "understood the nature and character of the instrument she was signing." But we do not think that this instruction is open to this objection. Before the defendant could be convicted, it was essential to prove that Jessie Byrd did not understand the nature and character of the instrument she was signing. The false representation which the indictment charges the defendant made was that the instrument was of a different nature and character from what it really was, and that by reason of such false representation she was induced to sign it. Before defendant could be convicted, it was necessary for the State to prove, not only that he made false representations, but also that such false representations induced Jessie Byrd to sign the instrument. Therefore, if she understood the nature and character of the instrument before signing it, she could not have been induced to do so by reason of any false representations made by the defendant. We think, therefore, that the above instruction was not erroneous, but was a correct statement of the law, though somewhat favorable to the defendant.

It is also urged by the defendant that the evidence introduced upon the trial of this case was not sufficient to warrant a convic-

tion of the defendant. There is a conflict in the testimony as to what occurred at the office of the stenographer when the instrument was drafted, and as to what occurred at the office of the notary public when the same was acknowledged. The testimony of the stenographer and of the notary public tended to show that the instrument was read over to Jessie Byrd; but we think there is ample evidence to show that the defendant and Owens made the false representations to her as to the nature and character of the instrument she signed, and that she did not understand the true character thereof, but was induced to sign same by reason of said false representation.

We think that there was sufficient legal evidence introduced upon the trial of this case to sustain the verdict of the jury, and it therefore becomes conclusive upon this appeal.

The judgment is accordingly affirmed.

GULLEY v. BACHE.

Opinion delivered April 10, 1911.

1. APPEAL AND ERROR—ABANDONMENT OF CROSS APPEAL.—A cross appeal which is not argued by the cross appellant will be treated as abandoned. (Page 587.)
2. DEPOSITION—ADMISSIBILITY IN ANOTHER SUIT.—In order that a deposition taken in one suit may be admissible in another suit, it must appear that the latter suit is between the same parties and regarding the same issues. (Page 589.)

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

STATEMENT BY THE COURT.

The plaintiff, Boyce L. Gulley, trustee, instituted this action in the chancery court against Franklin Bache to recover an unpaid stock of the face value of $5,000 in the Witteville Coal Company, for which it is alleged the defendant subscribed, and upon which it is alleged he has only paid $2,000, leaving an unpaid balance of $3,000.

The Witteville Coal Company was a corporation organized on the 22d day of December, 1906, in the Indian Territory under an act of Congress approved February 18, 1901. One hundred

shares of stock of the value of $25 each was subscribed and paid up. The names of the subscribers, and the number of shares subscribed by each are as follows: H. J. Fowler, 20 shares; G. H. Witte, 20 shares; Joseph M. Spradling, 39 shares; Heber Denman, 20 shares; Geo. W. Dodd, 1 share.

The object of the corporation was to buy, own, lease and sell coal and other lands; to operate coal mines and deal in general merchandise. During the first year of the organization, defendant purchased for $500 a one-fifth interest in the corporation, and thereafter assisted in conducting the business of the corporation in the venture. No shares of stock were issued to him. In a few months thereafter, the company ceased to do business and distributed its assets. Defendant received his $500 back and $200 profits.

In the first part of July, 1907, Witte, Spradling and Fowler determined to begin the operation of a coal mine at Panama, Okla., which also had on hand a stock of goods, valued at $5,000. They leased the property and bought the stock of goods for $5,000 in the name of the Witteville Coal Company. On the 2d day of July, 1907, the board of directors passed a resolution, reciting that the authorized capital stock of the corporation was $15,000. That only $2,500 of it was paid up. That the president and secretary be impowered to sell the unsold stock and issue certificates of stock for same. On July 10, 1907, the following report was made:

"We sold the following stock at 40c:

G. H. Witte, Poteau	100 shares	$1,000
H. J. Fowler, Poteau	100 shares	1,000
H. Denman, Midland	100 shares	1,000
F. Bache, Fort Smith	100 shares	1,000
J. M. Spradling, Fort Smith	100 shares	1,000

and certificates in accordance therewith were issued and delivered. The amount in actual cash, $5,000, was received and paid into the treasury."

Defendant was not present at either of these meetings, and testifies he had no knowledge of either the resolution or the report.

The defendant testified that Judge Spradling told him that he had taken a lease on the Panama mine for $5,000 in the name

of the Witteville Coal Company, and he wished to know if Denman and defendant would not take the same interest in the new lease that they had in the old, viz.: a one-fifth interest each. That he took the matter up with Denman, who declined to invest any more money in the Witteville Coal Company. That he did not give Judge Spradling a definite answer about the matter until August, 1907, at which time, being in New York preparing to sail for Europe, he received a wire pressing him for a definite answer, and in response he wired Judge Spradling that he would take a two-fifths interest. That he paid for same by taking up Judge Spradling's note in bank for $2,000. That, upon his return some two months later, Judge Spradling handed him a certificate of stock in the Witteville Coal Company, which he put away, assuming it to represent the two-fifths interest that he had paid for. That he never examined the certificate until some time in 1908, when he had a conversation with Judge Spradling about the affairs of the company. He then found out that the certificate represented 100 shares of stock and the stock was not fully paid up.

Defendant testified that, had he known that stock of the face value of $5,000 was to be issued to him, he would not have purchased same. In short, he says that he thought he was purchasing stock fully paid up and non-assessable.

The Witteville Coal Company was adjudged a bankrupt on the 11th day of March, 1909, and Boyce L. Gulley as trustee in bankruptcy instituted this action as above stated. Other facts will be stated or referred to in the opinion.

The court decreed that the plaintiff should recover from defendant the sum of five hundred dollars, finding as follows:

"But the court doth find that said defendant did not intend to purchase more than $2,000 par value of said stock, and doth further find that 100 shares of stock were issued to him, delivered to him and stood upon the books of the company in his name; that said defendant is estopped to deny that he is the owner of same; and that there is a balance of $500 due on said 100 shares, but that said defendant is not liable for any other or greater amount."

The plaintiff has appealed.

Falconer & Woods, for appellant.

1. The trustee in bankruptcy is the proper party to collect unpaid stock subscriptions from stockholders of a bankrupt corporation. 91 U. S. 45, 56, 65; 3 A. B. R. 194; 14 *Id.* 349; 15 *Id.* 214; 70 Pac. 286; 1 Remington on Bankruptcy, § 976, p. 547; Cook on Stockholders, § 47.

2. Bache subscribed for 200 shares of stock. A contract of subscription is construed as any other contract, and the *intention* of the parties as evidenced by their acts will control. The evidence establishes the purchase. 1 Thompson (2 ed.) § § 545, 559; 1 Cook (6 ed.) § 52; 114 Ind. 381; 16 N. E. 642; 5 Am. St. 627; 11 Wis. 334; 78 Am. Dec. 709; 19 Wall. 241, 22 L. Ed. 83; 91 U. S. 56. A subscription need not be in writing. 1 Thompson (2 ed.), § 573; 77 Md. 92; 26 Atl. 113; 39 Am. St. 396; 72 S. W. 1125; 96 Va. 352; 31 S. E. 511.

3. The agreement to issue fully paid and non-assessable stock for less than its face value is void as against creditors, and the trustee can recover the difference between the face value and the amount actually paid in. 105 U. S. 143; 91 U. S. 56; *Id.* 45, 65; 14 Am. Bankr. Rep. 349; 15 *Id.* 214; 25 Am. St. 65; 54 L. R. A. 376; 109 Fed. 68; 35 N. J. Eq. 501; 79 N. W. 409; 54 Ark. 576; 71 *Id.* 379; 128 S. W. 1028; 133 *Id.* 828.

4. Spradling's testimony was admissible and conclusive. 1 Gr. Ev. (16 ed.) § 163, 164. Broad latitude is given on cross-examination. 16 Cyc. 1089; 16 Col. 103; 26 Pac. 331; 36 N. H. 575; 177 N. Y. 69; 36 N. H. 575, 580. Evidence taken before a referee satisfies the rule. 69 N. C. 548; 6 Ohio Dec. 834; 13 Pa. St. 90; 16 Cyc. 1095.

Read & McDonough, for appellee.

1. Defendant did not subscribe for any stock; he acquired an interest through his dealings with Spradling. He was not a stockholder. There is no contract unless the parties thereto assented, and they must assent *to the same thing in the same sense.* 1 Parsons on Cont. (9 ed.) p. 475. No one can be a stockholder without his consent. Thompson on Corp. (2 ed.), § § 545, 546; Morawetz on Corp. § 62. The consent must be *mutual.* *Id.* § 61, p. 59; 61 Atl. 481.

2. Pleadings were construed most strongly against the

pleader at common law, but the rule was abrogated by the Code. 31 Ark. 657.

3. The assets received by the corporation in exchange for stock were worth more than the stock issued. The Constitution recognizes the right to issue stock for property (Const. art. 12, § 8), and, in the absence of a statute requiring *cash,* the stock may be paid for in property. Thomp. on Corp. § 3965 (2 ed.); Cook on Stockholders (6 ed.) § 18; 79 Mo. 22; 45 Ore. 553; 78 Pac. 693. The only proviso is that there be no fraud and a fair value placed upon the property. Where the directors act in good faith, *no one* has a right to complain. 45 Ore. 553; 54 Fed. 569, 575; 119 U. S. 343.

4. Corporations sometimes have the right to sell stock at less than par. 119 U. S. 96; 139 *Id.* 118; *Ib.* 417.

5. The trust fund doctrine does not apply. 59 Ark. 562; 150 U. S. 371; Cook on Corp. (2 ed.) § 9; 143 Ind. 550; 42 Minn. 327; 48 *Id.* 174; Thompson on Corp. (2 ed.) § 3422.

6. Spradling's deposition was not competent, nor was that of Bache impeached.

HART, J., (after stating the facts). The contention of counsel for the plaintiff is that, because the board of directors of the Witteville Coal Company authorized the issuance and sale of $12,500 of capital stock, defendant purchased two-fifths of that amount of stock when he purchased a two-fifths interest.

They insist that their contention is sustained by the following quotation from the testimony of the defendant himself: "Q. Did you think you were acquiring a two-fifths interest in the company? A. Yes. Q. If, instead of losing money, the company had made $10,000, what would you have expected to receive for your interest? A. Two-fifths of it. Q. In that case would you have returned the certificate you did receive without asking for the two-fifths you say you were to receive? A. If the company had made money, I would most certainly have insisted on getting all that was coming to me."

We do not think so. It will be noted that defendant had no knowledge whatever of the passage of the resolution of July 2, 1907. He knew nothing whatever of the adoption of the report of July 10, 1907, showing that the stock had been sold for 40 cents on the dollar. On the contrary, it appears from his testi-

mony that he was purchasing stock at its par value. When he purchased an interest in the first venture, only $2,500 of capital stock had been subscribed and issued. Defendant purchased a fifth interest then and paid $500 for it. Now, 500 is one-fifth of 2,500, and when that lease was sold out defendant was given back his $500 and one-fifth of the profits of the venture. He was informed by Judge Spradling that the lease on the Panama mine and a stock of goods there, valued at $5,000, could both be purchased for $5,000. He understood that only $5,000 of stock would be issued and sold, and that he was purchasing a two-fifth interest in this. That $2,000 would give him two-fifths of this at par value is obvious. In this way his testimony is reasonable and consistent with itself, and is not contradicted. We think it fairly deducible from his testimony, when considered as a whole, that he understood that he was buying $2,000 of stock at its par value, and that it was fully paid and non-assessable. That he spoke of it as a two-fifths interest because he understood that only $5,000 in stock was to be issued and sold. It is evident that the defendant understood that only stock of the par value of $5,000 was to be issued and sold, and that when he purchased a two-fifths interest he intended and understood that he was purchasing two-fifths of this amount. This being true, the stock purchased by him was fully paid up.

A certificate for 100 shares of stock was issued to defendant, and delivered to him by Judge Spradling. Defendant says that he put the certificate away without looking at it, supposing it to represent the $2,000 of stock he had purchased. It appears that he never examined the certificate until some time afterward when he was informed by Judge Spradling that the corporation was in danger of becoming insolvent. Under these circumstances, the chancellor held that he was estopped from claiming that he had not subscribed for the whole 100 shares, and rendered judgment against him for $500, the balance due on said shares. Defendant prayed a cross-appeal; but he has not favored us with an argument on it, and his cross-appeal will be treated as abandoned.

2. It is insisted that the defendant in his answer admits his liability. We do not think so. The answer is lengthy, and we have not set it out. It contains, however, in substance the

matters which the defendant narrated in his testimony, and we have already held that it does not show that defendant was liable

3. When the cause was heard in the court below, Judge Spradling was dead, and plaintiff offered to introduce in evidence his deposition taken by the referee in bankruptcy, which the chancellor refused to consider. This was not error. The object of the examination there was to inquire generally into the affairs of the bankrupt corporation. The referee had no power to adjudicate the question at issue here, and no identity of issues exists. In order for the testimony to be admissible, the plaintiff must establish that the deposition was taken in a suit between the same parties regarding the same issues. *McTighe* v. *Herman,* 42 Ark. 285; 16 Cyc. pp. 1088-1094.

The decree will be affirmed.

EDGEWOOD DISTILLING COMPANY *v.* RUGG.

Opinion delivered April 17, 1911.

1. EXECUTIONS—REDEMPTION FROM SALE.—Under Kirby's Digest, § § 3294-6, authorizing a judgment creditor to redeem the debtor's land by paying to the officer the amount of the purchaser's bid, with 15 per cent. thereon per annum, and authorizing the execution purchaser to bar such redemption by paying same amount to the officer, the officer to whom the payment is to be made is the sheriff who holds the execution, and not the clerk to whom the execution is returnable. (Page 591.)
2. ESTOPPEL—ACQUIESCENCE.—Where an execution purchaser, with the acquiescence of the attorney for a judgment-creditor who sought to redeem the debtor's land from such execution sale, paid the amount of such judgment-creditor's bid to the clerk, instead of to the sheriff, in order to bar such redemption, the judgment-creditor will be estopped to assert that the statute had not been complied with. (Page 593.)

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

J. B. Wood, for appellant.

1. The right of redemption, being purely statutory, must be exercised in the manner prescribed by the statute. 17 Am. & Eng. Enc. of L. 1034; 17 Cyc. 1335; 71 Am. Dec. 268; 132

Fed. 417; 21 Cent. Dig. tit. "Executions," § 861, cases cited; 23 Barb. 278; 34 N. Y. 225; 56 N. Y. 507; 68 N. Y. 473; 28 Ark. 359; 31 Ark. 334, 339; 40 Ark. 124; 41 Ark. 57, 61; 30 Ark. 720; 69 Ark. 591; 55 Ark. 30; 70 Ark. 410; *Id.* 326; 71 Ark. 318, 322; 84 Ark. 208; 57 Ark. 195. The sheriff and not the clerk is the proper officer to whom a judgment creditor's bid for the redemption of land sold under execution should be paid. Kirby's Dig. § § 3294, 3295, 3296, 3298, 3293.

2. Appellee's mistake was one of law, and a court of equity will not relieve against such mistakes. 17 Cyc. 73; 67 Pac. 982; 13 Ark. 128; 46 Ark. 178; 86 Pac. 7; 52 S. E. 653; 16 Cyc. 74, 75.

Greaves & Martin, for appellee.

1. The money was properly paid by the purchaser to the clerk rather than to the sheriff. Kirby's Dig. § § 3292 to 3296 inclusive; Black on Interpretation of Laws, Hornbook Series, 56; 39 Am. St. Rep. 234.

2. If it be held that the statutes require the money to be paid to the sheriff and not to the clerk, equity will, in this case, grant to the purchaser relief, because, the statute being vague and ambiguous and as yet not judicially construed by this court, he has in good faith done all in his power to comply with it and within the time required by law. Moreover, appellant's solicitor was present at the time the money was paid to the clerk and had knowledge of sufficient facts to give him notice that it was so paid. Appellant could not have been misled. 17 Am. & Eng. Enc. of L. 1036; 67 Pac. 982.

3. As to when equity will grant relief against mistakes of law, see 2 Pomeroy's Eq. Jur. § 844; 16 Am. Dec. 667, 669; 13 Ark. 128-135; 55 Am. St. Rep. 488; 43 *Id.* 508-512; 5 *Id.* 816; 51 *Id.* 767; 30 *Id.* 458-461.

McCULLOCH, C. J. The controversy in this case is between a purchaser of land at an execution sale and a judgment creditor of the original owner as to redemption from the sale. The statute on the subject provides, in substance, that where land has been sold under execution, another judgment creditor of the original owner may, within twelve months after the sale, redeem the land by paying the amount of the purchaser's bid, together with 15 per centum thereon from date of sale, and all charges thereon, and by offering to credit on his judgment, as his bid

for the land, a sum equal to at least 10 per centum of the amount for which the land sold; that, unless the purchaser shall within a certain time pay to the proper officer the amount so bid by the judgment creditor, the same shall operate as a redemption, and the judgment creditor shall succeed to all the rights of the purchaser, but that if the purchaser shall, within the time allowed, pay to the proper officer the amount so bid by the judgment creditor it shall bar such redemption.

Appellee, D. C. Rugg, purchased the property in controversy at a sale under execution against one Mazzia. Appellant was a judgment creditor of Mazzia, and redeemed the property in accordance with the terms of the statute. Appellee then, within the time allowed by statute, attempted to bar the redemption by paying to the clerk of the court whence both executions were issued the amount of appellant's bid.

Appellant insists that the payment, in order to be effectual, should have been made to the sheriff who held the execution, instead of the clerk. The statute on this subject reads as follows:

"Sec. 3294. At any time before the expiration of twelve months from the sale of any land under the provisions of this chapter, which has not been redeemed, any judgment creditor may redeem the same in the manner following: such judgment creditor shall sue out an execution upon his judgment, and place the same in the hands of the proper officer, and pay to said officer the amount for which said premises were sold and fifteen per cent. per annum thereon from the date of such sale, and all charges thereon, for the use of the purchaser, and shall offer to credit his execution with a sum at least equal to ten per cent. of the amount for which said land sold, which offer shall be regarded as his bid; all of which shall be indorsed upon said execution, and a statement thereof filed with the execution upon which the land was sold; whereupon the clerk shall indorse in the proper place upon the execution book that such creditor has bid for the redemption of such property, which shall be dated, and may be in substance as follows:

" 'A. B., a judgment creditor bids ———— dollars for the redemption of the property sold on this execution.'

"Sec. 3295. Unless the purchaser, within thirty days from the filing of the statement and the making of the indorsement

mentioned in the preceding section, pay to the officer the amount so bid by the judgment creditor, the same shall operate as a redemption of said property by such judgment creditor, and he shall succeed to all the rights and liabilities of such purchaser. But if such purchaser shall pay to such officer, within the time allowed, the amount so bid by the judgment creditor, it shall bar such redemption; and the right of redemption of such judgment creditor, as against the purchaser or any one redeeming from him, shall be forever foreclosed. But if the purchaser shall fail to pay over to the officer the amount of such bid, as provided in this section, the officer shall pay over to the purchaser the amount so paid by the judgment creditor, and credit the execution of the judgment creditor with the amount so bid by him, after deducting costs and commission, and shall execute to him a certificate of sale, in which shall be included, as the price paid, the amount paid to the purchaser and the amount of the bid of such judgment creditor; and such judgment creditor shall, for all purposes of this chapter, be regarded as the purchaser of said property at the price mentioned in the certificate to him, and any other judgment creditor may in like manner redeem from him, or each succeeding judgment creditor who may redeem under the provisions of this section; but no such redemption shall be allowed after twelve months from the day of the original sale.

"Sec. 3296. If any purchaser shall pay the amount bid by the judgment creditor, the officer shall pay the same to such judgment creditor, together with the amount paid by such judgment creditor to the officer. The right of redemption shall be in the order of priority of judgment; but if any judgment creditor shall, for thirty days after a sale or redemption upon a judgment prior to his, fail to pay off prior bids, and bid for the redemption of such property, as provided in this chapter, he shall be deemed to have waived his priority as against others who have complied with the provisions of this chapter."

We conclude that the sheriff who holds the execution of the judgment creditor, and to whom the latter has paid the amount due the purchaser in redemption, is the officer who is to receive from the purchaser the amount of the bid of the judgment creditor. He still holds, at that time, the money paid into his hands by the judgment creditor, to await the expiration of the time

allowed the purchaser, either to accept the redemption money or to pay to the officer the amount of the bid of the judgment creditor, in which latter case the officer pays back to the judgment creditor the amount of the redemption money which has been paid to him for the purchaser, and also pays over to the judgment creditor the amount of his bid which has been paid by the purchaser. Reading the above quoted sections together, the conclusion is irresistible that the sheriff is the proper officer to receive the money.

Counsel for appellee argue that the clerk of the court is the officer referred to in the statute to receive the payment; for, as they say, the statute requires the sheriff to return the execution immediately. so that the clerk can make the indorsement specified in section 3294 on the execution book. They are mistaken, however, in this construction of the statute. The statute does not require an immediate return of the execution, but it requires the officer to indorse the bid of the judgment creditor on the execution and to file a statement thereof "with the execution upon which the land was sold." From this statement the clerk obtains his direction to make the indorsement on the execution book and not from the return on the execution, for the execution may still be in the hands of the sheriff.

The payment by the appellee was not made to the proper officer, but it does not follow that appellant can, under the circumstances, decline to accept the money and assert that its redemption was not barred. Appellee consulted an attorney, who advised him it was doubtful, under the statute, which officer was authorized to receive the money, but that he thought the clerk was the proper officer to receive it. Appellee then went to the clerk's office for the purpose of paying the money, and found appellant's attorney there, who saw him hand the check to the clerk for the amount. Appellee asked the attorney if he would make any objection to a check being used, instead of currency, and he replied in the negative. The attorney testified that he saw appellee deliver the check to the clerk and agreed that the check could be used, instead of currency, but that he did not know at the time whether the check was payable to the clerk or to the sheriff. He said nothing to appellee about the check being delivered to the wrong officer. We think that under those cir-

cumstances appellant is estopped by the conduct of his attorney to assert that the payment was to the wrong officer. It was done in his presence, and the circumstances called on him to speak if he expected to take advantage of the fact that the payment was not being made to the proper officer. His silence, when he should have spoken, must be treated as an approval of the payment, or at least, as acquiescence in the method of payment, which estops appellant to assert it was not the regular method of payment. It is true that redemption statutes must, ordinarily, be strictly followed in order to gain an advantage which they afford; but this case was tried in a court of equity, and we perceive no reason why settled principles of equity may not be applied in this matter to work an estoppel where a party has kept silent when he should have spoken. After all, the purpose of the statute is to require the payment of the money to a responsible officer, where it may be safely kept until the judgment creditor calls for it, and where he is informed that it is in waiting for him. If, by his conduct, he induces the purchaser to pay the money to the wrong officer, or, being present when the payment is made, he acquiesces in the payment to the wrong officer, he cannot be heard, at least in a court of equity, to complain. It is undisputed that the money is in the hands of the clerk, ready to be paid over to appellant when the latter is willing to accept it. A court of equity will not dispense with the plain requirements of the statute respecting redemption of lands from execution sale, nor will it sanction a mode of redemption not authorized by statute, but a party may, by his conduct, estop himself to assert that the terms of the statute have not been complied with. For these reasons we think the decree of the chancellor is correct, and the same is affirmed.

WOOD, J., disqualified; KIRBY, J., dissents.

McCLINTOCK v. ROBERTSON.

Opinion delivered April 17, 1911.

APPEAL AND ERROR—EFFECT OF ORDER REMANDING CAUSE.—Under an order on former appeal remanding a chancery cause with directions to deny appellees therein the right to redeem, the court properly declined to reopen the cause for matters which were known to such appellees when the suit was instituted.

Appeal from Lee Chancery Court; *C. F. Greenlee,* Special Chancellor; affirmed.

P. D. McCulloch and *Norton & Hughes,* for appellants.

S. H. Mann, for appellee.

The issue on former appeal, 86 Ark. 255, was the right of appellants to redeem, and it was remanded to the lower court "with directions to deny to appellees (appellants here) the right to redeem." They had no right to raise the same issue again by an amendment to their motion to redeem, and appellee's demurrer thereto should have been sustained. 79 Ark. 193; 13 Pl. & Pr. 861 and cases cited.

HART, J. This is the second appeal in this case. The opinion on the former appeal is reported in 86 Ark. 255 under the style of *Robertson* v. *McClintock,* and reference is made thereto for a statement of the case. The decree was reversed, and the cause remanded "with directions to deny appellees the right of redemption." Upon the remand of the cause, McClintock and Roleson filed a supplemental pleading in which they set up facts which they alleged estopped Robertson from claiming title to the lands in controversy. It is not necessary to set out the matters constituting the alleged estoppel. It is sufficient to say they were matters existing and known to the parties at the time the suit was instituted.

Robertson demurred to the amended pleading. Subsequently he filed an answer thereto. Upon the hearing of the cause, the chancellor found that McClintock and Robertson were not entitled to redeem the land, and a decree was entered confirming the sale of the commissioner to Robertson. McClintock and Roleson have appealed.

The decree of the chancellor was right. That this court has the power, in furtherance of justice, to remand any cause in

equity to be opened is settled by the decisions in *Carmack* v. *Lovett,* 44 Ark. 180; *Gaither* v. *Gage,* 82 Ark. 51; *Carlile* v. *Corrigan,* 83 Ark. 136, and other reported cases of this court. But this cause was remanded with directions to deny McClintock and Roleson the right to redeem. The matters of their supplemental pleading existed when the suit was instituted, and could have been pleaded and considered on the first submission in the chancery court. The issue there was the right of McClintock and Roleson to redeem, and they should have presented all the defenses they had to the confirmation of the sale. "On final judgment they must be held to have litigated all the questions that could have been settled that were necessary for the determination of the issue presented." *Hollingsworth* v. *McAndrew,* 79 Ark. 185; *Hill* v. *Draper,* 63 Ark. 143.

Therefore, after the cause was remanded with directions to deny them the right to redeem, the court had no jurisdiction to open the case.

The decree will be affirmed.

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

Opinion delivered April 17, 1911.

APPEAL AND ERROR—FINAL ORDER.—An order continuing a case until the plaintiffs' right to prosecute it can be determined in the probate court is not final or appealable.

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

Trimble, Robinson & Trimble, for appellant.

G. W. Hendricks, for appellee McPherson.

PER CURIAM. Letters of administration on the estate of O. H. McPherson, deceased, were issued by the probate court of Lonoke County to appellant, J. R. Harrod, who instituted an action in the circuit court of that county against the St. Louis, Iron Mountain & Southern Railway Company to recover damages alleged to have been sustained by the estate and next of

kin of said decedent on account of the negligent acts of the employees of said railway company.

On August 1, 1910, Mrs. Annie McPherson, widow of said deceased, O. H. McPherson, filed her interplea in said action, alleging that she and her child were the only ones to be benefited in the event of a recovery of damages; that appellant had procured his letters of administration through false representations that he was a creditor, and that he should not be allowed to prosecute said suit as administrator. She prayed that she be permitted to manage the case, so far as it affected herself and child, and that the case be not tried until she had had her rights to administer on said estate adjudged.

The court made the following order, from which appeal has been prosecuted:

"It is, therefore, ordered and adjudged that the interplea be sustained, and that this case be not tried until she can have her rights to administer on the estate adjudged in the court to which she may appeal in her application for letters of administration, and that she now have control and management of this action for the death of her husband, Oscar McPherson."

The order in question did not terminate the action nor finally adjudicate appellant's rights to prosecute the same. The effect of the order was merely to continue the case until the widow could have an opportunity to procure the removal of appellant as administrator and to obtain for herself letters of administration on the estate of said decedent. It was not a final order from which an appeal could be prosecuted.

The appeal is therefore dismissed.

NATIONAL BANK OF WICHITA v. SPOT CASH COAL COMPANY.

Opinion delivered February 27, 1911.

1. CORPORATIONS—RIGHT OF FOREIGN CORPORATION TO SUE.—A foreign corporation may sue in this State upon a contract entered into within another State without complying with the statutes imposing conditions upon foreign corporations seeking to do business in this State. (Page 605.)

2. SAME—LIABILITY OF OFFICERS OF FOREIGN CORPORATION.—Where a foreign corporation does business in the State without having com-

plied with the statutory requirements, its officers will not be treated as partners as to business so done in the State. (Page 605.)

3. FIXTURES—LEASE—MACHINERY.—Under the mining law mining machinery and appurtenances placed upon leased property by the lessee are not regarded as fixtures, but may be removed as personal property of the lessee. (Page 606.)

4. SALES OF CHATTELS—VENDOR'S LIEN—PRIORITY.—A mortgagee of a mining lease takes the leasehold estate free from a vendor's lien upon any fixtures attached to the freehold where it had no notice thereof. (Page 606.)

Appeal from Logan Chancery Court, Northern District; *J. V. Bourland,* Chancellor; reversed.

STATEMENT BY THE COURT.

The appellant, the National Bank of Wichita, a foreign corporation of the State of Kansas, brought suit against the Wichita Coal & Material Company, a corporation organized under the laws of Kansas and doing business at Paris in the State of Arkansas, for the sum of $3,672.09, the balance due on a promissory note for the sum of $5,000, executed to it by said coal company on the 3d day of April, 1908, and to foreclose a mortgage given to secure the payment of said note on the following described property:

"All of improvement and machinery, consisting of engines, boilers, mine rails and pit cars and all mining equipments, including engine house, wash house and tipple house, located on the northeast quarter of the southeast quarter of section 2, township 7 north, range 26 west, in Logan County, Ark."

The mortgage was exhibited with the complaint.

The Wichita Coal & Material Company made no answer.

The Spot Cash Coal Company filed an intervention and cross complaint, and denied that the Wichita Coal & Material Company was a corporation organized under the laws of Kansas and engaged in business in Paris, Ark., and that said company complied with the laws of the State of Arkansas in any manner as foreign corporations were required to do; that it had ever complied with the laws of the State of Arkansas in such manner as to entitle it to do business in the State; and alleged that it was doing business in the State as a partnership, and that E. T. Battin and E. E. Balling are partners, with other partners unknown to the intervener, composing said partnership; denies

that defendant for such reason executed the mortgage sued on, and that it was of any validity; alleged that the Wichita Coal & Material Company did not execute the mortgage and note sued on; that the same were not its act and deed, and that they were executed by E. E. Battin without the lawful consent of said company; and further "that the note and mortgage sued on in this action is not the contract of the defendant, the Wichita Coal & Material Company, and are void and not binding upon them, and are not the property of the plaintiff;" that the plaintiff has no right to sue upon or foreclose the same; that they are the property of E. T. Battin; "that said E. T. Battin executed the said note and mortgage with the fraudulent intent and purpose of covering up the property of the defendant, the Wichita Coal & Material Company, and that the same, if it was a binding obligation, has been fully paid off and settled by money received from the sale of coal and property of the said defendant, and is now being held and foreclosed for the purpose of defeating this intervener in the collection of its debts;" that said defendant, if a corporation, is insolvent and unable to pay its debts; that, as a partnership, defendant, nor either of the partners have any property in the State held in their own name, except the property purchased from this intervener, a greater part of which the defendant has embraced in the mortgage set out in plaintiff's complaint, which intervener alleges was executed for the purpose of defeating them in the collection of their debts.

Intervener further alleged that on the date set out in defendant's interplea in the case at law by the Bank of Paris against the Wichita Coal & Material Company in the Logan Circuit Court, Northern District, and transferred to this court, it contracted to sell the defendant the property herein described, towit: the exclusive right to mine coal from under the northeast quarter of southeast quarter section 2, township 7 north, range 26 west, also all machine fixtures, erection and improvements and all property herein situated, used for the purpose of mining coal for the sum and price of ———, which still remained unpaid. That it was the intention of the intervener, which was well known to the said E. T. Battin, who was then partner of plaintiffs' concern and their so-called president, that the title to said property should be retained until the debt was fully paid, and alleged that the

title was retained for said purpose, and if the title was not retained it was by the mistake of the president, who wrote the contract therefor, and that all the parties to the transaction intended that the title should be retained by the intervener until all such debts were paid; and that said E. T. Battin, the so-called president of plaintiff's concern, was aware of these facts, and is estopped from taking advantage of said mistake.

Further, that said E. T. Battin, at the time of the execution of this mortgage and note sued on by the plaintiff, was the president of plaintiff bank, and knew that the property purchased from intervener had not been paid for to the company, and that they intended to and thought that they had retained the title thereto, and, with the full knowledge of these facts, said Battin took said mortgage as president of said bank. E. T. Battin paid all the indebtedness of the defendant to plaintiff and took this mortgage and note, with the fraudulent intent to defeat the intervener's claim. That said note was also signed by said E. T. Battin, who is the president of plaintiff bank and president of defendant company, and that he is wholly solvent; that he signed said note with the full knowledge of the transaction; that as partner or stockholder in said concern, holding a large majority of stock or interest therein, he received the benefit of the sale by intervener to the defendant and therefore, if the transaction should be held valid, the plaintiff, holder of the note and mortgage, should be required to proceed against said E. T. Battin, one of the payers of same, and leave the said mortgaged property to the said intervener's debt and a vendor's attachment lien, since it had no other security out of which to collect this debt.

It alleged further that the top of the soil of the land described was bought with the defendant's money or the money of said E. T. Battin, and was taken in the name of his wife for the purpose of hindering and delaying the intervener in the collection of his debts; alleged that Battin as president and secretary of the defendant Wichita Coal Company had neglected to make the annual financial statement for said company and was personally liable for its debts because of such failure.

Prior to the filing of this suit, the Bank of Paris filed suit against the Wichita Coal & Material Company, and attached the

property now in controversy. The Spot Cash Coal Company filed interplea in that suit, setting up the same defense as herein. In that interplea they asked personal judgment against E. T. Battin and E. E. Balling, and obtained personal service upon Battin. The Bank of Paris dismissed its complaint, and the cause was continued against Wichita Coal & Material Company and E. T. Battin. E. T. Battin, defendant, filed separate answer, denying he was in partnership with E. E. Balling, and that the partnership purchased or leased interest in the said lands, and that he executed his promissory note to said Spot Cash Coal Company for the purchase money, and that he ever operated a coal mine in this State in partnership with any one; that he was indebted to the Spot Cash Coal Company in any sum whatever.

The Wichita Coal & Material Company filed a separate answer, alleging it was a corporation under the laws of Kansas and had complied with the laws of Arkansas authorizing it to do business in the State; that the Spot Cash Coal Company was interested and dealt with it; admitted purchase of lease and mine property and execution of notes for purchase price, making a contract of sale; denied all allegations of fraud and each and all allegations in the cross complaint.

The cause was transferred to equity and consolidated with the case of National Bank of Wichita, Kas., against the Wichita Coal & Material Company, and both were tried together.

Appellant bank filed answer to the interplea and cross complaint, denying all the allegations thereof.

On October 12, at the instance of appellee, a receiver was appointed to take charge of the property in litigation. The property was ordered sold, and the mine and lease privilege to be valued separately, and the machinery and building to be valued separately. The lease and machinery was sold on March 22, 1910, for $3,200. On February —, 1910, the receiver's expenses were allowed in the sum of $308.03.

The testimony tended to show that E. T. Battin was a director in appellant bank and president of the Wichita Coal & Material Company, a corporation organized under the laws of the State of Kansas. Said company borrowed $5,000 from the National Bank of Wichita, and secured the payment of same by chattel mortgage on its personal property located at Paris, Ark.,

and with its president's personal indorsement. That $1,500 was paid by the Wichita Coal & Material Company on said note, leaving a balance of $4,092.76 due. That said Wichita Coal & Material Company failed, owing about $20,000 and about nine-tenths of its indebtedness had been settled at 20 cents on the dollar, which exhausted the company's assets. The assets consisted of a coal mine lease and coal mining machinery and equipment, which cost the company about $15,000, and sold at the sheriff's sale for $3,200. That the money borrowed from appellant bank went into the general fund of the Wichita Coal & Material Company, and that said company owed the stated balance of $4,096.72 at the time it became insolvent.

The mortgage was introduced in evidence and described the property as it was in the complaint.

M. H. Johns, the president of the Spot Cash Coal Company testified that it was organized for mining coal on the M. E. McVeagh tract of 40 acres of land near Paris, and that, acting for said company, he sold its mining property to the Wichita Coal & Material Company on the 17th day of September, 1906, and conveyed the same by the following agreement:

"Know all men by these presents that the Spot Cash Coal Company of the county of Logan and State of Arkansas, for and in consideration of the sum of seven thousand five hundred dollars ($7,500), four thousand of which is paid before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, and the balance, three thousand five hundred dollars, secured by notes running one, two, three, four and five years from the date of these presents, with interest at the rate of six per cent. per annum, payable annually, do hereby sell, assign and transfer to the Wichita Coal & Material Company, a corporation organized under the laws of the State of Kansas, and its assigns, to the proper use and benefit, all my right, title and interest in and to a certain indenture of lease, bearing date of November 29, 1904, originally made by Mrs. M. E. McVay, party of the first part, and G. A. Vines, Leon Brown and J. W. Moore, parties of the second part, all of Paris, Ark.; the same lease having been heretofore transferred by these parties to the Spot Cash Coal Company of certain lands and premises therein described, with their appurtenances and certain rights and privi-

leges of mining and taking out coal from the lands therein described. To have and to hold unto the said Wichita Coal & Material Company and its assigns from and after the seventeenth day of September, 1906, for and during the rest, residue and remainder of the terms of ten years mentioned in the said indenture of lease. The said Spot Cash Coal Company hereby agrees to and with the said the Wichita Coal & Material Company that the said assigned premises are now free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances whatsoever, but hereby reserve the right to a lien on the property to secure the payments of the notes given as a part of the purchase price of the property."

That he sold the entire mining plant, including the mine and all its fixtures, machinery and everything the company owned, which consisted of an unexpired ten-year lease upon the lands owned by Mrs. M. E. McVeagh, giving the right to mine coal, together with the shafts, some entries and some rooms upon the land, mining machinery and other appurtenances used in the operation of the mine. The consideration was $7,500, $4,000 of which was paid in cash, the remainder to be paid in five equal installments of $700 each. The Wichita Coal Company executed five promissory notes for the balance due, drawing 6 per cent. interest each, and the first and second were paid. That no part of the other three had been paid.

G. A. Vines, a stockholder in the appellee company, testified that E. T. Battin came out to the mine where he was at work, and wanted to lease the mine on the McVeagh lands to him and two others, at the time telling him that he had a right to lease it; that he had paid off the mortgage held by the National Bank of Wichita, and that the bank had agreed to collect it for him; that it was his property. "After talking with my attorney, he came back and said he had advised with his attorneys and thought it was not best to do anything more about it. That he had settled all the debts of the Wichita Coal Company at 20 cents on the dollar except Mr. Cherry's, and would have settled that if he had not found out that said company had not complied with the corporation laws of the State of Arkansas; that he, Battin, was indi-

vidually liable, and Cherry knew it. Mr. Brown testified about the same way."

The cashier of the Bank of Paris testified that at the time of the failure of the company he paid off a draft on the coal company for about $1,050 drawn on the American State Bank of Wichita, Kansas, in favor of the Bank of Paris. This draft was protested and never paid. That he went to see said Battin and discussed the matter with him, but could get no information, and had the second interview with Mr. Battin, and was told by him that Battin had bought the McVeagh lease of lands and held it in his wife's name.

It was shown that some of the machinery of the mining outfit was replaced by the Wichita Coal Company, some stationary boilers and other articles being put in; that the improvements were fixed firmly to the earth.

A certified copy of the articles of incorporation of Wichita Coal & Material Company of Kansas, with certificates of appointment of agent and amendments thereto, as filed in the office of Secretary of State of Arkansas, was introduced in evidence.

The court found that the intervener or appellee on September 17, 1906, by written contract, sold and conveyed to the defendant company, the Wichita Coal & Material Company, the 10 year lease on the northeast quarter of the southeast quarter, section 2, township 7, range 26 west, with the coal mine thereon and all appurtenances thereunto belonging, for $7,500; that $4,000 was paid in cash and five promissory notes given for $700 each for the deferred payments, two of which were afterwards taken up. That said deferred payments were recited in the contract of sale, and a vendor's lien was expressly retained for their payment; that the Wichita Coal & Material Company was a corporation organized under the laws of Kansas and doing business in this State, without having complied with the laws of the State authorizing foreign corporations to do business here, and that it was a partnership at the time of the purchase of the lease of the coal mine; that on the 3d day of April, 1908, it executed its promissory note to the appellant for the sum of $5,000 due and payable 120 days after date, and to secure the payment of the same executed a mortgage upon the tipple house, engine house and all the machinery, fixtures and appurtenances belonging to the coal

mine and attached thereto, situated on the land and lease as above described; that $3,672 of which is unpaid; that the vendor's lien of the intervener herein is superior to the mortgage lien of the plaintiff; that there was due the intervener $2,342, and the plaintiff-appellant the sum of $3,933.99 secured by the mortgage; that the property covered by the vendor's lien and mortgage was sold by the commissioner of the court for the sum of $3,200. That E. T. Battin was a stock owner and partner in the Wichita Coal & Material Company. The court decreed that the appellee have judgment against the Wichita Coal & Material Company for its debt $2,342 and interest, and a vendor's lien on all the property in litigation to be satisfied as a first lien out of said funds in the hands of the Commissioner; that the National Bank of Wichita have judgment against the Wichita Coal & Material Company for its debt for the balance due; that its mortgage lien was subsequent to the vendor's lien upon the fund in the hands of the commissioner, and ordered the commissioner to pay the costs of the suit and apply the proceeds of the sale of the property to the debt and judgment of the intervener, and the overplus, if any, to the appellant as satisfaction of their judgment, and gave judgment in favor of the Spot Cash Coal Company against E. T. Battin, jointly as a partner of the Wichita Coal & Material Company for the amount of its debt against the said company.

From this judgment this appeal is brought by appellant.

Appellant, pro se.

Robert J. White, for appellee.

KIRBY, J., (after stating the facts). It was not important in this case to show that the Wichita Coal & Material Company had complied with the laws of the State of Arkansas authorizing foreign corporations to do business here, although the proof was probably sufficient to show that it had, for the reason that the mortgage and note sued on were executed to said bank in the State of Kansas, the domicil of both corporations, where the money was borrowed; nor would the doing of business in this State by a foreign corporation that had not complied with our laws, prescribing conditions upon which such corporations may do business here, have the effect to dissolve such corporation and

render said corporation in effect a partnership and its officers partners as to such business done within the State, as was held by the lower court.

The lease from Mrs. McVeagh of the right to mine coal upon the 40 acres of land does not show that any mining machinery was established upon said tract; nor was there anything in the instrument conveying or assigning said lease to the Wichita Coal & Material Company upon the sale of the mining machinery and lease to it that would indicate that the machinery was included in the terms of the lease and subject to the vendor's lien retained therein, except it be the word, "appurtenances." Under the mining law, mining machinery, apparatus and appurtenances placed upon the property by the lessee are not regarded as fixtures that pass with the soil and lease as appurtenances, but as personal property of the lessee that may be removed by him, in the absence of an express stipulation in the lease to the contrary. 2 Snyder on Mines, § 1320; White on Lines & Mining Remedies, § 135.

The Wichita Coal & Material Company, having bought the lease and mining equipment, mortgaged the latter, as it had the right to do, after having replaced a great deal of same with new machinery, to secure the money borrowed from appellant bank, which mortgage was duly recorded and constituted a lien from the date of the filing for record thereof. There was no mention or description of any of this mining machinery or equipment in the assignment of the lease to the Wichita Coal & Material Company that would have put a person on notice that it was included within the terms of it, nor was such assignment of lease reserving a vendor's lien, if it be held that it was more than an agreement to, and did, reserve a lien, recorded, nor did appellant bank have any notice whatever of any claim of or lien for purchase money of appellee upon said machinery when and upon which it took the mortgage and advanced the money. The bank's lien, acquired by the mortgage, duly filed and recorded, was therefore superior to the vendor's lien of appellee for the balance of the purchase money upon the property included in the mortgage.

It follows that the court erred in declaring the vendor's lien superior to the mortgage lien of the bank and adjudging that the proceeds of the sale of the lease and machinery be first applied to the satisfaction thereof and afterwards to appellant's

judgment against the Wichita Coal & Material Company. Also in adjudging said company and E. T. Battin a partnership and rendering a judgment against said E. T. Battin for the amount of the purchase money still due appellee company upon the lease sold by it to said Wichita Coal & Material Company. The proceeds of the sale of the mining machinery and equipment described in the mortgage must be first applied to the payment of the judgment of appellant upon its debt secured thereby, and the overplus, if any, to the satisfaction of appellee's debt.

For the errors indicated the judgment is reversed, and the case remanded, with directions to enter a decree in accordance with this opinion.

APPENDIX

I.

OPINIONS NOT REPORTED.

Lemoin *v.* Sullivan; appeal from Pulaski Circuit Court, Second Division; F. Guy Fulk, Judge; affirmed, February 13, 1911; *per* Hart, J.

Ramsey *v.* Weedman; appeal from Monroe Chancery Court; John M. Elliott, Chancellor; affirmed, February 20, 1911; *per* Hart, J.

Coopwood *v.* Jeffries; appeal from Monroe Chancery Court; John M. Elliott, Chancellor; reversed, April 3, 1911; *per* Hart, J.

Doyle *v.* Price; appeal from White Circuit Court; Hance N. Hutton, Judge; affirmed, April 3, 1911; *per* Wood, J.

Owens *v.* State; appeal from Sebastian Circuit Court; Daniel Hon, Judge; affirmed, April 10, 1911; *per* Frauenthal, J.

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Argenta *et al. v.* F. Guy Fulk, Judge; Pulaski Circuit Court, Second Division; judgment entered pursuant to stipulations, March 13, 1911; *per curiam.*

Seamore *v.* State; Johnson Circuit Court; George W. Hays, Judge, on exchange; appeal dismissed on appellant's motion, March 27, 1911; *per curiam.*

Presley *v.* St. Louis, Iron Mountain & Southern Railway Company; White Circuit Court; Hance N. Hutton, Judge; settled and judgment entered pursuant to stipulations filed, March 27, 1911; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company; Marion Circuit Court; Brice B. Hudgins, Judge; appeal dismissed, April 10, 1911, on sustaining appellee's motion to vacate the judgment rendered by this court on December 19, 1910, appellee not having been served with summons to defend against the appeal; *per curiam.*

Arkansas Central Railroad Company *v.* Maggie Newman; Sebastian Circuit Court; Fort Smith District; Daniel Hon, Judge; settled and appeal dismissed, February 27, 1911; *per curiam.*

Everett *v.* State; Garland Chancery Court; J. P. Henderson, Chancellor; appeal dismissed on appellant's motion, March 6, 1911; *per suriam.*

Kinsella *v.* State; Mississippi Circuit Court, Osceola District; Frank Smith, Judge; two appeals, each dismissed for noncompliance with rule ten, March 6, 1911; *per curiam.*

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