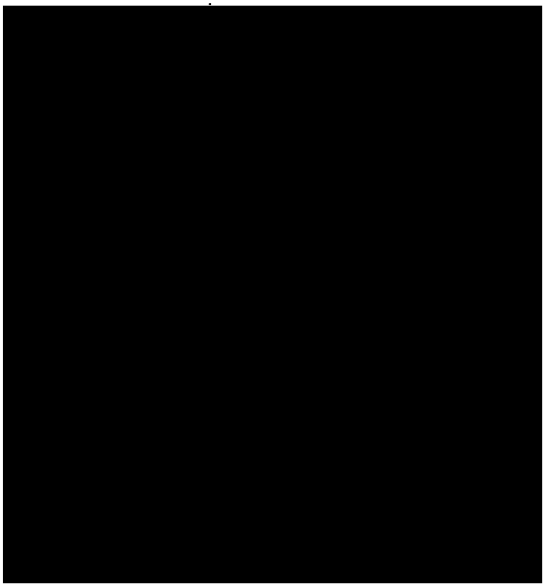

[redacted]

JERNIGAN, BANK COMMISSIONER *v.* BROWNE.

4-5257 121 S. W. 2d 520

Opinion delivered November 21, 1938.

[redacted]

Brooks Bradley, for appellant.

Clark & Clark, for appellee.

SMITH, J. This is a suit upon a promissory note, executed by appellee to Faulkner County Bank & Trust

Company, on June 19, 1930, for $4,411.75. As collateral for this note there was pledged certain shares of capital stock of the Bank of Conway and of the Conway Compress Company. The Faulkner County Bank borrowed a large sum of money from the Bankers Trust Company of Little Rock, and pledged to it, with other securities, the above-mentioned note of appellee. Shortly thereafter the Faulkner County Bank was taken over by the State Bank Commissioner for liquidation, and the Bankers Trust Company began the collection of the notes held by it as collateral security to the Faulkner County Bank note. Three payments of $100 each were made on appellee's note in 1930.

Appellee was also indebted to the Bank of Conway, and to strengthen its note the Bank of Conway, on June 15, 1931, paid the Bankers Trust Company $3,500 for the release of the Bank of Conway and the compress stock. Before releasing said stock the Bankers Trust Company required appellee to assign to it the deposit of appellee in the Faulkner County Bank. By reason of said assignment dividends were paid to the said Bankers Trust Company and applied on appellee's note, which reduced the principal thereof to $430.01. The Bankers Trust Company was itself later taken over by the bank commissioner for liquidation, and that official has sued to collect this balance, with interest thereon.

Several interesting questions have been raised in the respective pleadings filed by the parties, which we find it unnecessary to consider, inasmuch as the question of appellee's present liability was decided by the jury's answer to the following question of fact: "Was the payment of $3,500, and the assignment of approximately $1,150 deposits in the Faulkner County Bank & Trust Company, insolvent, made by the defendants to the Bankers Trust Company, in full settlement of the $4,111.75 balance due on the note held by said Bankers Trust Company, or was said payment merely a partial payment, with the assignment, as collateral, for the balance due?"

The verdict of the jury imports the answer that the assignment was not as collateral, but in payment of the note.

For the reversal of the judgment pronounced upon this verdict it is insisted that the testimony is not sufficient to sustain the finding and verdict of the jury. The answer to this question is, in our opinion, decisive of this appeal.

In this connection, and upon that issue, it is insisted that a different verdict might and probably would have been returned had the court not refused to give, over appellant's objection and exception to that action, an instruction reading as follows: "You are instructed that whether the assignment is in payment or as collateral security is a question of intention depending upon the testimony in the case. In the absence of testimony tending to show an intention of tender for and receipt of as payment in whole or in part, the law presumes that it is only assigned as collateral. The burden of establishing the contrary rests upon the debtor. The circumstances that the assignment is absolute in form is of no consequence on the question of intention, because the assignment simply operates to transfer title."

We think no error was committed in refusing this instruction. It will be observed that the instruction declares the law to be that "The circumstances that the assignment is absolute in form *is of no consequence* on the question of intention, because the assignment simply operates to transfer title." Had the instruction read that the circumstance that the assignment was absolute in form "was not of controlling effect," instead of saying that it "is of no consequence," it would have been a correct instruction. In the form requested the instruction was a charge upon the weight to be given the evidence, and was erroneous for that reason. It was not a correct declaration of the law, for the reason that the jury had the right to consider the form of the assignment in determining the purpose of its execution.

Cases are cited by appellant to the effect that, in the absence of evidence tending to show an intention to pay and receive the securities assigned as satisfaction of the debt, in whole or in part, the law presumes that they were assigned only as collateral. But here there is no absence of evidence showing an intention to pay the note

by the assignment. On the contrary, evidence was offered to that effect, which the jury has accepted as true. It was also competent to show that the assignment was intended only to transfer title so that the proceeds of the collateral might be applied, not as payment of the note, but as credits thereon, and much testimony was offered to that effect, but the jury found to the contrary.

It is also insisted that the jury might and probably would have made a different finding of fact had the court not erroneously excluded a letter from C. E. Crossland, of the Bankers Trust Company, to George Shaw, of the Bank of Conway. This was a transmittal letter from the one bank to the other, in which the assignment of the deposit and of the compress stock was referred to as collateral. But this letter was not written to nor received by appellee. The rule, *res inter alios acta,* renders it immaterial against appellee. *Royal Neighbors of America* v. *McCullar,* 144 Ark. 447, 222 S. W. 708; *Davison* v. *Harris,* 165 Ark. 518, 265 S. W. 67.

There was much testimony to the effect that the assignment was by way of collateral, and not as payment. The preponderance of the testimony appears to be to that effect. One of the strongest circumstances having that effect is a letter written a short time before the institution of this suit, in which appellee proposed a settlement pursuant to prior negotiations, and no contention was there made that the note had been previously paid. Appellee offered the explanation, however, that he thought the transaction had long been closed by payment. as it was then six years old, but when a liability of about nine hundred dollars, including interest, was asserted against him, he proposed to pay about four hundred dollars by way of compromise, and that he did this because he thought a suit would impair his credit, and that he could better afford to pay four hundred dollars than to be sued. This explanation that his letter was not intended to be an admission of liability and was merely an offer of compromise was, of course, a question of fact for the jury. Appellee testified as follows: He did not owe the Bankers Trust Company anything, but he made Mr. Crossland of that bank a proposition which was first

declined, but later accepted, to the effect that "If I could get hold of $3,500 and give it to him and assign the deposit in the Faulkner County Bank, we would settle on that basis," and that later he was notified by the Bank of Conway that if he would assign certain compress stocks and certain Bank of Conway stock, the Bank of Conway would loan him the $3,500 necessary to make good his proposal to the Bankers Trust Company, and that the Bankers Trust Company would settle for said payment and the assignment of the deposit in the Faulkner County Bank, and that without further negotiations the Bankers Trust Company sent up an assignment to him to execute in accordance with his proposal. The matter was closed on this basis, and he considered the note paid in full, and that thereafter he had no interest in the dividends paid on his deposits with the Faulkner County Bank, the dividends on the deposits being paid to the Bankers Trust Company.

In explaining this transaction Mr. Shaw, of the Bank of Conway, testified that "We worked out a two or three way deal."

The fact that appellee did not demand or receive his note here sued on upon its alleged payment is a strong circumstance tending to discredit his version of the transaction; but we cannot say that it is conclusive of the question. It was a circumstance to be weighed and considered by the jury in connection with other testimony offered at the trial.

Upon the whole case we are unable to say that the verdict of the jury finding that the note was paid is without sufficient testimony to support that finding. The judgment must, therefore, be affirmed, and it is so ordered.

THE W. T. RAWLEIGH CO. *v.* WILKES.

4-5230 121 S. W. 2d 886

Opinion delivered November 7, 1938.

[redacted]

Williams & Williams and *Ingram & Moher,* for appellant.

Woolsey & McKenzie, for appellee.

MEHAFFY, J. The appellant entered into a contract with appellee, James A. Wilkes, under which Wilkes purchased merchandise on a credit during 1932. When

the contract expired Wilkes owed appellant on January 1, 1933, $452.39. They then entered into a renewal contract. Appellees, E. H. McKay and Garland Hamm, entered into a contract with appellant as sureties for Wilkes. The contract was terminated during the month of May, 1933, at which time Wilkes owed appellant a balance of $449.17.

Under the contract, the appellant agreed to sell quantities of its products to Wilkes at the current wholesale prices and on time. Wilkes agreed to pay for the products and to pay the balance due when the renewal contract was entered into. McKay and Hamm signed a bond making themselves jointly and severally liable for any and all goods, wares and merchandise sold to the buyer under the contract entered into between appellant and Wilkes. The contract is quite long, and it would serve no useful purpose to set it out in full.

The appellant sent Wilkes a form which specified the territory as Marion county, Arkansas, and tributary territory was described as that part of Marion county south of the Missouri Pacific Railroad, including all towns having a population of less than 300. In this same instrument there was mentioned the amount of business expected, and was signed by Wilkes.

After the contract had been entered into and after it had been signed by the sureties, the appellant wrote a letter to Mr. Dennis W. James which is as follows:

"Memphis, Tenn.,
"March 20, 1933.
"In reply refer to—

"Mr. Dennis W. James,
"Route No. 2,
"Harrison, Ark.

"Dear sir:

"The investigation of your contract has been completed, and we are pleased to notify you of our acceptance. Enclosed you will find:

"Bulletin 665 'Notice of Accepted Contract.'

"Form R. 2034 'Letter enclosing first order, advance payment, etc.'

"According to your application you prefer South Marion county. That locality is still available. We sent you a sales estimate on March 13. Rawleigh Products have been sold there for a long time, and the locality offers a good opportunity for the right man to build up a successful business.

"This is an ideal time of the year to get your business started, so we will depend upon you to order your products and supplies at once. The enclosed suggested order will show you the stock of products you will need with which to start properly. You can make a good saving on your first shipment by using the special orders for insecticides and tonics and alteratives.

"Expecting to receive your first order for products and supplies in an early mail, we remain,

"Yours truly,
"The W. T. Rawleigh Company
"By B. L. Knober.

"BLK/L."

On September 5, 1934, the appellant brought this suit in the Franklin circuit court against the appellees, J. H. Wilkes, E. H. McKay and Garland Hamm, alleging the contract with Wilkes, and that McKay and Hamm became sureties for Wilkes. It asked judgment against Wilkes and his sureties, McKay and Hamm, in the sum of $449.17.

A copy of the contract was attached to the complaint as an exhibit, and also affidavit of J. R. Jackson, secretary of appellant company. There was also filed with the complaint the account with Wilkes, showing debits and credits and balance due.

The appellees filed answer denying the material allegations in the complaint, and alleging that, before the appellant would approve the contract, it required Wilkes to select territory within which to sell Rawleigh products, and that the appellee, Wilkes, selected all that part of Marion county, Arkansas, south of the Missouri Pacific Railroad, etc., and that appellant in a separate and subsequent contract, appointed Wilkes as its dealer in all of said territory with the exclusive right of selling

goods in said territory; that appellant breached its contract to the damage of Wilkes in the sum of $800, and asked for judgment for said sum.

On application of appellant, the court made an order to take the deposition of J. R. Jackson by interrogatories. Notice was served on appellees and Jackson's deposition was taken.

There was a trial by jury, and the following verdict was rendered: "We, the jury, find for the defendant, Jim Wilkes, damages to the court of $449.17, and on the whole case we find for the defendant." The verdict was signed by the foreman of the jury.

The case is here on appeal.

The contracts and letter above referred to were introduced in evidence. Wilkes testified in substance that when he signed the contract the appellant required him to select the locality and sign its statement showing the territory that he was to sell in, and that it would not accept the proposition until he did this. This letter, designating the locality was a part of the contract.

"The principal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." 6 R. C. L. 835.

When different instruments are executed at the same time, but are all parts of one transaction, it is the duty of the court to suppose such a priority in the execution of them as shall best effect the intention of the parties. The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance. 6 R. C. L. 850, 851.

The evidence in this case shows that the contract was sent to the appellant, signed by the appellee, Wilkes, and that the appellant declined and refused to accept it until they received a signed statement by him indicating the locality where he would sell the goods. It is true

that the secretary of the appellant company says that this was simply for the purpose of advising the company where the buyer intended to sell the products; but he also testifies that they would not give one buyer a locality that was already occupied by another buyer of appellant. There can be no question, but that the two instruments constitute one contract, and are binding on both parties.

This court has many times held that in ascertaining the intention of the contracting parties, courts may acquaint themselves with the persons and circumstances mentioned in the contract, and may place themselves in parties' situation. In this case the appellant was the manufacturer and seller of many products. It made contracts not only all over this country, but other countries. One witness testified that it was the biggest concern of its kind in the world. It was constantly making contracts of this kind. It prepared the contracts itself, and the other party must either sign the contract prepared by it, or no contract would be made. This is not only true of what they call the contract, but it is also true of the letter designating the locality. Courts have always construed contracts most strongly against the party that prepared them. On the other hand, there was this farmer, Wilkes, who had nothing to do with making of the contract, was not accustomed to business of this sort, and certainly would not have made a contract and given security for its performance if some other person were given the same territory in which to sell the same products.

The contract made between appellant and Wilkes was accepted January 3, 1933. Wilkes testified, and this is not disputed, that he signed the contract before Mr. Stewart, did, and when he signed it returned it to the company. He had no acceptance of the contract at that time, but it had the signature of both McKay and Hamm. He also testified that the company sent to him a contract to select his territory, and required him to sign that. Before the company would approve his contract, it required him to select the territory in which he

would sell the products. He signed said agreement, and mailed it to the company. While he did not have a copy of this particular contract, he did have a copy of the one signed in 1932, which was a similar document. The statement selecting territory in 1932 is the same as the contract made in 1933, except as to dates. That instrument shows that the territory selected was Marion county, Arkansas.

On March 20, 1933, after Wilkes had signed the contract on January 3, 1933, the company wrote to Mr. Dennis W. James a letter in which was stated: "According to your application you prefer south Marion county. That locality is still available. We sent you a sales estimate on March 13. Rawleigh Products have been sold there a long time, and the locality offers a good opportunity for the right man to build up a successful business."

When it said the locality was available, it necessarily meant that it could be assigned to James. Wilkes testified that James came into the territory occupied by Wilkes. He testified that the territory designated in the letter introduced, which had been written to James, described the same territory that had been selected by him, and that thereafter James sold Rawleigh Products in that territory. Witness had been selling Rawleigh Products under his contract in that territory. He testified that, after Mr. James had received the above letter, he moved there for the purpose of selling Rawleigh Products, and that Mr. James' selling products in that territory effected his business, so that he could not collect what he had out, and it naturally cut his sales; that the population south of the railroad in Marion county is 7,000 or 8,000. Wilkes testified that he lost $800, because Mr. James came in there and set up his business. Wilkes did not dispute the indebtedness to the company, but claimed that the company, in breaching its contract and permitting another person to sell in that territory, damaged him in the sum of $800. He claimed that he had an exclusive agency and stated that he had two letters from the Rawleigh Company, and the company manifested displeasure, because he had overstepped his territory.

Mr. J. R. Jackson, secretary of appellant company ever since its incorporation in 1895, testified that he had charge of the books, and that the orders of customers were promptly and properly filled; that Wilkes carried an account under the written contract introduced in evidence. He testified that the terms of the contract between the company and Wilkes had not been altered at any time; that the balance due the company from Wilkes was $449.17, and that the sureties for Wilkes were E. H. McKay and Garland Hamm, and that the amount due by the sureties was the same as that due by Wilkes. This witness testified that at the time Wilkes and appellant entered into the contract the company had a form that is usually sent to their prospective new dealers if he expects to establish his business in a certain locality, but he said this was simply to keep their records so that they could keep track of the localities where the dealer selected to establish his business. Wilkes signed such form. This form is merely advisory and not considered as in any way a part of the contract or binding on any party. The sureties were not supplied with copies of this form. This witness testified that, after the contract was received, it was investigated and accepted, and that the company sold merchandise according to the contract; he presumes Wilkes furnished them with an application to become a Rawleigh dealer. He testified that it was not the policy of the company before approving contracts to require them to select certain territory, but they so advise where they expect to establish their business, so that the company will not go to the trouble of securing another dealer for that locality. He was asked if they did not have in their advertisements "First come, first served," and he said that had been issued in some of their literature. He said the term "available locality" or other similar terms had perhaps been used inadvertently in some of their literature, and he presumes that where the term "available locality" is used, it is intended to mean a locality where, so far as the company knows, there is no regular dealer. He does not remember about the letter to Mr. Dennis W. James and says he does not have

his files, and says if the letter contains a statement "the locality offers a good opportunity for the right man to build up a successful business," he thinks the statement speaks for itself.

We think it clear from the testimony that in this case they did agree on a certain locality and would not accept the contracts until this was determined; these contracts were signed on January 3rd, and in March they gave James the same territory, thereby depriving Wilkes of profits which he would have made if James had not come into the territory. The sureties signed the bond after the first contract was signed and sent to the company, and thereafter the company contracted with James, permitting him to sell in the same territory, and this was such a modification or change of the contract that it released the sureties. It actually appears from the evidence, that the company had a contract with Wilkes in 1932, and at the close of that year he owed the company something over $400. The company immediately set to work to make a new contract, and the sureties undertook not only to see that Wilkes paid the indebtedness, if any, of 1933, but undertook to assume the indebtedness that was contracted in 1932. Shortly after the company got the bond of the sureties, they communicated with Mr. James telling him that that territory was available.

It would make no difference what Mr. Jackson or his company thought about their advertising, or whether it was done inadvertently or not, the company would in any event be bound by their conduct.

We think the evidence is ample to sustain the verdict. The appellant, however, complains that the court erred in giving and refusing to give instructions. We do not set out the instructions, but have very carefully considered them, and we are of the opinion that the court did not err in giving or refusing instructions.

We find no error, and the judgment is affirmed.

Opinion delivered November 7, 1938.

[redacted]

Elton A. Rieves, Jr., Lamb & Barrett and *Mann, Mann & McCulloch,* for appellant.

Shafer & Gathings and *John D. Martin, Jr.,* for appellee.

BAKER, J. The appellants in this case may be referred to as such, or, for brevity, the Perkins Oil Company of Delaware may be called merely the oil company, and C. H. Caldwell may be designated merely as Caldwell, while the appellee may be referred to as such, or as the plaintiff, or by name, as the occasion may suggest.

The oil company owns and operates a large cotton seed oil mill at West Memphis, in Crittenden county, Arkansas. C. H. Caldwell was an employee of that company and is referred to in most instances as the superintendent in the operation of the plant. Fitzgerald was a young man between twenty-one and twenty-two years of age, employed at that plant as a helper in the installation of some of the machinery, including the particular machine upon which he was hurt, which is called in the complaint and evidence a "cotton seed cleaner." He had worked for several weeks during which the plant

was not in operation, and, at the time the season opened and the plant began operations, he was employed as an oiler. Many electric motors were employed in the plant and these produced the energy to drive the different units of machinery in the manufacture of cotton seed oil and by-products from the cotton seed. In fact, because so many of these different units were located in different parts of the plant it was deemed necessary to have a separate employee responsible for the proper lubrication of all these different or separate units, and it was primarily, at least, the job for which Fitzgerald was employed; that is to say, he was the oiler. According to the record this was not the only duty he owed to his employer, but it was the principal one. Since the appellee is entitled to have the facts, as established by the proof and reasonable inferences therefrom, construed in a light most favorable to him to sustain the verdict and consequent judgment rendered in this case, an effort will be made so to state the facts, omitting, however, as nearly as possible whatever is not deemed absolutely essential to a full discussion and determination of the issues involved. It is the purpose of this form of presentation to avoid as nearly as possible elaborate quotations from evidence as no good purpose may be served by an argument of disputed facts. Such a discussion would tend to prolong the opinion. Perhaps, it may be suggested that the verdict of the jury has settled all these disputed matters and the plaintiff is thereby entitled, in every instance, where there is substantial evidence, to the most favorable conclusions and inferences possible, though we will not attempt to go to that extent in this presentation. The plaintiff has alleged in his complaint, and established by his proof, that Caldwell was his superior, the superintendent in charge from whom he received such instructions as were given him. He was put to work and instructed to fix any machinery he saw broken down or clogged up. This direction or order was given about ten days before the accident, at a time when they were starting the motors, or running them to test them to see if they were in good condition. To use the language as abstracted, the appellee

says that "he told me in the lint room that my duties of oiling the motors would carry me all around the mill, and that in the course of my duties I would have to pass all or practically all of the machinery there, and if I saw anything wrong with the machinery, anything broken down or clogged up, to fix it if I could, and if I didn't think that I could fix it to call the machinist or millwright." The foregoing statement is quoted for the reason that the appellee says that this is all the instructions or directions given him in the performance of his duties.

The appellee had grown up as the stepson of an employee of an oil mill, had been about oil mill plants a great deal. He had worked perhaps some in the yard of a mill at Dallas, Texas, before the family moved to West Memphis, where the stepfather of the appellee was employed as a night superintendent. He had worked as a helper in the installation of machinery for several weeks prior to the time of his injury, but had been working as an oiler only a day and a half when he was hurt. The injury complained of grew out of the attempted performance of that part of the instructions to the effect that if he saw anything broken down or clogging up to fix it if he could. At the time of the accident, Fitzgerald testified in passing the said cleaner he saw that it was choking up with seed as the seed passed through the conveyor; that he looked for the attendant who served the particular machine and did not see him and then attempted himself to restore the normal operation of the machine and inserted his hand in the slot or opening where it was choked. This place, according to the description he gave of it, was perhaps ten to eighteen inches below a revolving cylinder on which there were blades or ribs, and by which his hand was caught as he was attempting to clear the machine of the congested or choked condition. He says no instructions had been given to him as to the manner of unchoking or clearing the machine, and that he had seen nobody else perform that service. Employees who usually performed that service, it was testified by others, used a stick or shovel, but may safely use the hand if the hand is kept in the conveyor part of the ma-

chine and not inserted in the upper part containing the revolving cylinder, which was covered or hidden by the outer casing and front part of the machine. That outer casing, or front part of the machine, may serve as a guard to prevent one from sticking his hand directly in a place where it will be caught by the cylinder, but it also serves to conceal the cylinder which the evidence shows turns sufficiently fast that twenty of these blades or ribs would strike a given point per second. Though it seems unreasonable, yet plaintiff testifies that he did not know of the revolving cylinder prior to the time of his injury; that no one had told him of it.

The evidence is not exactly clear as to why or how the plaintiff came to reach one of his hands above the place in the conveyor where the machine was choking and insert it into the machine at the point where the revolving cylinder caught it. It may be that the excruciatingly torturing pain, the anguish occasioned by the accident were such that plaintiff never clearly remembered the exact process used and movements of his hand in unchoking this machine that caused him to come into contact with the dangerous part of it. No logic or analysis can supply any missing fact in that respect, but we are bound by the statements that the plaintiff had no instruction in regard to the proper manner to perform this service required of him and bound also to accept his statement that he was acting in response to a direct command given him by one in authority, and that while performing this service in close proximity to dangers he did not know, had not observed and, therefore, did not anticipate the accident happening in which one of his hands was caught, and drawn into the flailing machinery. In attempting to extricate himself from the machine by holding himself back, his other hand slipped and was in like manner caught so that both hands and arms were drawn into the machinery, and both so badly mangled that one was amputated above the elbow and the other just below.

This accident occurred on the 23rd day of August, 1934. Thereafter, on the 15th day of January, 1935, the plaintiff signed a release in consideration of the sum of

$5,000 paid him at that time. The particular details in regard to this release will be set forth in a discussion of the error assigned in regard to that matter.

The voluminous pleadings may be narrowed or shortened by merely stating that the only negligence established and finally relied upon arises out of the failure of the superintendent, Caldwell, to give proper instructions for the performance of the duties required of Fitzgerald, or a failure to warn him of the concealed or hidden dangers in the machine, which he was required to service and which injured him while attempting to perform and discharge a duty required of him by the superintendent having control over him. There was no defect in the machine alleged or proven. It is argued, and we think correctly, according to the undisputed proof in this record, that in the conveyor of the seed cleaning machine, where it is said to have choked, there was no hidden or concealed danger, if there was any at all, and it was also urged that Fitzgerald was more than twenty-one years of age, a graduate of the Dallas High School, more than ordinarily apt, and above the average in point of intelligence, and that he must be presumed, as a matter of law, to have assumed the risk of the employment, and in the discharge of the duties which he was attempting to perform.

In response to this argument it is also shown and, we think beyond question, that one standing in front of the machine at the place where he could insert his hand into the conveyor to unchoke or relieve the congested condition of the seed, as the plaintiff was doing, could not see or observe the cylinder and it is not unbelieveable that, although he helped install this machinery, he had not observed this cylinder, or if he had he may not have known its particular function and may not have understood that there was the probability or even a possibility of inserting his hand into a place so destructively dangerous as were the ribs upon this cylinder. Pictures of this machine appear in the record. It is described by several witnesses as well as by the plaintiff himself who seems able to give a most minute, as

well as accurate description of it. But we cannot say, as a matter of law, that because plaintiff, at the time of the trial, was able to give this minute description of the machine and its functions he could have done so prior to the time of the accident. Doubtless he learned many facts from the horrible in-drawing and flailing of this cylinder as it destroyed both his hands and arms, but he may have learned others since that accident which enabled him to become a witness apparently more observant than laborers ordinarily might be presumed to be who perform such services as he was at that time. It may also be argued that since he had worked at this mill after it had begun operations only a day and a half prior to the injury, had he been apprised or warned of the hidden or concealed danger in this revolving cylinder, he would not have believed that he could have relieved the abnormal condition, but would have waited and called for the usual attendant to perform such service.

So it must appear, we think, that it was the duty of the appellant company, and the superintendent having charge of this servant, and who knew according to his own testimony that he was inexperienced in the performance of such a duty, to give proper directions or instructions as to the best or approved method of servicing the machine as it was done by other employees who had experience and training; that if required to perform the service there followed the legal duty not only to instruct as to the proper method of performing it, but also to warn of the hidden or concealed danger. This is more apparent when it is considered that this revolving cylinder was above the slot or opening in the front of the machine into which the appellee inserted his hand, and that this slot or opening is perhaps a foot or eighteen inches below eye level, and where it may not be observed except by one attempting to make a minute or careful inspection. We think it may well be conceded that it is the duty of the master to give proper instructions and warning to young and inexperienced servants regarding duties required of them and to explain dangers necessarily incident to such performance of duties, and we do not under-

stand in this case that appellants insist that merely because the appellee was more than twenty-one years of age the master did not owe this duty on that account. While it may be true that in most instances wherein an adult applies for and obtains a position he may be presumed to understand the conditions that prevail and will be deemed to have assumed the ordinary risks of his employment, this is not a hard and fast rule that frees a master from the duty to instruct and warn one whom he orders to perform and render services, the master knowing at the time that he gave such orders and instructions that the employee is inexperienced and does not appreciate the attendant dangers. In such a case there can be no presumption that supplies experience or furnishes a warning of danger. This statement is made, having in mind the testimony of Mr. Caldwell who was one of the defendants, and who stated unequivocally that Fitzgerald was too inexperienced to have attempted to perform such duties without proper instructions, experience, or warning. We are not saying that, because of the youth or the inexperience of the servant, he must in every instance be warned, but in this case there were all the elements of youth and inexperience, as the young man had barely reached his majority, and there was the admitted fact of inexperience, and the two combined certainly enjoined upon the master the duty and obligation to instruct and give warning. It was so held in *Southern Lumber Co.* v. *Green,* 186 Ark. 209, 53 S. W. 2d 229, and, also, in the cases of *Ward Furniture M'f'g Co.* v. *Mounce,* 182 Ark. 380, 31 S. W. 2d 531; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Inman,* 81 Ark. 591, 91 S. W. 832; *Des Arc Oil Mill, Inc.,* v. *McLeod,* 137 Ark. 615, 206 S. W. 655.

Perhaps a dozen other cases might be cited, but we have selected these especially because relied upon by the appellants, and the doctrines announced therein are not inconsistent with, nor impaired in the least by such a decision or opinion as that announced in *Williams Cooperage Co.* v. *Kittrell,* 107 Ark. 341, 155 S. W. 119, for the rule there announced is that as a matter of law one who

shall have arrived at his majority should be deemed as mature and be treated as the ordinary or average intelligent servant rather than the young and inexperienced servant. But we think it must be appreciated and fully understood that there is quite a difference in that class of cases where the master knows both of the youth and inexperience and consequent unfitness of the servant to perform the duties required of him, and not one in which by reason of the maturity of age, and by reason of intelligence, he may be presumed to have assumed the ordinary risks of employment sought by him. Where the master has actual knowledge, no presumption may obtain. Where it is known that both youth and inexperience make the servant unfit to perform a particular duty, no presumption can arise by reason of maturity or by reason of average intelligence. We are impairing in no sense doctrines announced in such cases as *Railway Co.* v. *Torry*, 58 Ark. 217, 24 S. W. 244, wherein it is announced that the master ordinarily owes to a servant of mature years and average intelligence no duty to warn and instruct. The very distinction we are attempting to make was made by this court in the case of *Louisiana & Arkansas Railway Co.* v. *Miles*, 82 Ark. 534, 103 S. W. 158, 11 L. R. A., N. S. 720. Without quoting from that opinion, but deducing therefrom the reason for the rule announced, its application may well apply to the instant case. In part it states that in case of the immature age and inexperience, it is the duty of the master to instruct as to patent, as well as to latent, defects, if, by reason of youth and inexperience, the servant does not know or appreciate the danger incident to his employment, and if the master knows or ought to know or take notice of his youth and inexperience.

We have attempted to make clear, and we think we have presented in a way that it may not be mistaken, that, in this case the master did know of the immature years, of the inexperience of the plaintiff, such inexperience being the result of his youthfulness though he had attained his majority. We can see no difference, and we do not think the law makes any distinction, in a case where

in the master must take notice on account of youth and inexperience, and in a case where there is actual knowledge of such conditions. The law may not be deemed so unreasonable, so unnecessarily contradictory of ordinary humanitarian requirements.

Appellants rely upon another case, the opinion in which was prepared by the writer. *Ward Ice Co.* v. *Bowers,* 190 Ark. 587, 80 S. W. 2d 641. There is quite a distinction in the principle involved in the Bowers case and in the instant case. It is a distinction conditions make, one that we are insisting upon here, that is, that mere youth in itself would furnish no right of recovery where every danger was patent, was known and observed by the servant. In the scoring machine described in that case, Bowers could see the saws into which he stuck his foot, testified he knew it would injure him if he touched it. Yet, notwithstanding that fact and condition, he carelessly kicked his foot into it and was injured. Quite a different condition would have been present had the saws been hidden or concealed, or if he had not known the location of saws concealed in the frame. So, in this case, the cited authority appears neither applicable nor controlling, because the dangerous cylinder with the blades or ribs which did the injury were hidden. In addition, the appellee testified that at the time of the injury he did not know of its location or its danger. Numerous other authorities are cited and relied upon by the appellants, but we think it unnecessary to take these up separately for any kind of analysis as our foregoing statements and conclusions must necessarily be supported by the weight of authority invoked to determine the controversy presented on this question of liability, which is settled by the great weight of authority against the contention of the appellants.

The next question seriously argued arises out of the release executed by the appellee on January 15, 1935. It is most seriously presented and contended that although he was hurt on August 23rd, he was not rushed into any kind of settlement, but that he received and accepted the $5,000 paid to him after full and free deliberation

and should be held to be bound thereby. The appellee, however, contends that this settlement was not entered into freely and voluntarily, but that it was made under a form of compulsion, so great that he found it to be irresistible under the circumstances that prevailed at the time. It is contended by him that shortly after his injury he was advised by both Mr. Jasspon and by Mr. Caldwell that he would be helped or aided by the employees of the company to recover a sum commensurate with the disabilities he had suffered, it being suggested by one of them, it is immaterial which, that he should have $100,000, and by the other that he should have a sum sufficient to enable him to live throughout the remainder of his life without having to work at anything. He had consulted, after the injuries received, and prior to the date of settlement, lawyers eminent in the profession, of admittedly great ability; and, only a day or two before the release was executed, he had received a letter from one firm, with whom he had conferred, asking him to return for another consultation. He gave us his reason for not going back, which he says was also the reason for the execution by him of the release, threats which he alleged were made by Mr. Jasspon, who was one of the owners of the cotton seed oil mill properties, and who was in the active charge thereof, to the effect that if he did not accept the $5,000, which was the extent of the contractual liability of the insurance company carrying the risk for the appellant, immediately upon the filing of the suit or employment of attorneys, the stepfather of the appellee would be discharged, and that every influence possessed by Mr. Jasspon would be exerted to prevent his re-employment by any other corporation in a like business. He says that Mr. Jasspon told him he knew the condition of the family; that his stepfather and his mother and his brother, who had an invalid wife, as well as himself, were all wholly dependent upon the labor and earning of his stepfather; that Mr. Jasspon also advised him that his company had employed eminent counsel and that they would be able to defeat a recovery, or, if not, to delay it for a period of

perhaps ten years. He says these threats, or similar ones were made on two or three different occasions, at one time when he was alone with Mr. Jasspon, or perhaps accompanied by his mother, and at another time when he had returned to the office with a young lady friend, who had insisted, after he had told her of these threats, that she be permitted to go with him for another interview with Mr. Jasspon. His statements were corroborated in part, at least, by the young lady mentioned by him, and, also, by some other facts tending to show that at about that time Mr. Jasspon and other officers, or agents of the appellant company discovered that the liability of the insurance company was limited to $5,000. This evidence in regard to this settlement and release was disputed by Mr. Jasspon, and, of course, the facts became an issue to be determined by the jury, if the contentions stated by the appellee were in law sufficient to vitiate or avoid the settlement and release. We cannot think there is any necessity for arguing the foregoing proposition. However forceful Mr. Jasspon may have been in the denial of the charge made by young Fitzgerald, the question of whether he made the statements, or threats was still a proposition properly to be submitted to the jury and to be determined by them, if Fitzgerald's contentions were worthy of consideration. Since the jury has settled this matter adversely to the contention of the appellants, we must determine now, as a matter of law, if these statements so proven and established were in law sufficient to vitiate or void the release.

We think it unnecessary to copy or set forth the release executed by James Fitzgerald, but deem it sufficient to say that it was executed by him, and that it is sufficient in form to operate as a complete release and discharge of the defendants unless it was entered into under some form of compulsion or duress sufficient in law to destroy its effect.

We think it may not be of any benefit to set forth and discuss matters so forcefully argued by the appellant company to the effect that young Fitzgerald had prior to the date of this settlement made a complete and de-

tailed statement of the facts in regard to his injury; that he had conferred with several attorneys, and that at least some of them had advised him that it would be to his best interest to make or accept the settlement offered. He agrees that, at least, one attorney did so advise him, but says this was after he had actually made the settlement. But all this, however forceful it may seem as a matter of argument, was properly submitted and determined as a jury question.

It is now argued that there are three causes or reasons whereby the release or contract may be set aside (a) those that were induced by fraud or misrepresentation on the part of the releasee, (b) where there is a mutual mistake of fact, and (c) where the act of plaintiff in signing the release was induced or resulted from duress or coercion practiced on the plaintiff by the defendant.

There can be no insistence in this case that there was fraud or misrepresentation nor was there any mutual mistake. The remaining question to be determined is whether the facts stated show that the release was the result of duress or coercion practiced by the appellant company. We are cited to the case of *Burr* v. *Burton,* 18 Ark. 214. In that case the court said that duress by threat, such as to render the contract void, must be sufficient to excite a fear of some grievous wrong as of death or great bodily harm or unlawful imprisonment. Without attempting to distinguish this case from others of like character, but without neglecting the effect of this case, we next examine *Bosley* v. *Shanner,* 26 Ark. 280. It was there held that in order to render a contract void, because of threats or menaces, it was necessary that the threats and circumstances be of a character to excite the reasonable apprehension of a person of ordinary courage, and the promise, contract or statement should be made under the influence of such threats or menace. Also that doing a thing one had a legal right to do would not be such cause. We think it apparent from this announcement, made only a short time after the declaration of law in the case of *Burr* v. *Burton, supra,* shows a progressive tendency toward a more lib-

eral consideration of causes that would tend to avoid a contract.

We are, also, cited to the case of *Ellis* v. *First National Bank of Fordyce*, 163 Ark. 471, 260 S. W. 714. In that case the defendants set up in their answer that they were forced and coerced by the plaintiff to sell certain lumber at a price less than the actual value and that the draft was the result of such coercion. The demurrer to the answer was sustained. On appeal this court said: "It is not duress to threaten that which a party has a legal right to do, and the fact that a party threatens to bring suit to collect a claim constitutes neither duress nor fraud and a compromise of such a claim is binding in law."

The case of *Gus Blass Co.* v. *Tharp*, 194 Ark. 255, 106 S. W. 2d 608, is cited as controlling in this case. This was a release which was sought to be set aside on the ground of fraud and mistake. The facts in the case were that a short time after the accident the injured party was paid $40 to sign full release. About four months later he claimed that the release was void because it was signed before he had an opportunity to discover the extent of his injury. He was then paid an additional compensation of $90 and executed a second release. He sought to set that aside because he said at the time it was signed he was in ignorance of the extent of his injuries. The defendant, however, made no misrepresentation of any kind. It was held that the release was a complete defense.

We think it unnecessary to set forth the language of this court in reaching the conclusion set out under the foregoing stated facts. The discussion, however, is interesting and the authorities cited are numerous, as is also in the case of *Kansas City Southern Ry. Co.* v. *Armstrong*, 115 Ark. 123, 171 S. W. 123.

In no one of these last-cited cases does there appear to be any mistake or any fraud or duress practiced to secure the execution of the release. As set forth in one of the discussions, it is stated: "Nor is it a case where there was fraudulent representations as to the contents of the written instrument, or any trick or subterfuge

whereby the papers were substituted so as to induce the contracting party to execute it, as in *Hot Springs Railroad Co.* v. *McMillan,* 76 Ark. 88, 88 S. W. 846." Otherwise stated the defendant company did not in any manner by fraud or by over-reaching, or by duress, in any form, induce the execution of the contract or release relied upon. Although the contract was held to be an improvident one the court was impelled to support it.

To the same effect were numerous cases cited and discussed, all of which we have examined and determined that they arrive at, or reach the same uniform conclusions as those wherein such contracts were fairly and openly entered into without fraud, mistake, deception or any form of duress. They were ordinarily held to be good. But in those cases in which these contracts were induced by some form of fraud, by over-reaching, by deceptive promises, relied upon, or by some form of duress, sufficient under all the prevailing facts and circumstances to impair the deliberate judgment to the extent that it might be determined that although the contract had been signed, it had not been agreed to, such contracts have uniformly been held voidable at the instance of the injured party.

One of the most recent of the cases of the type mentioned is *Harper* v. *Bankers Reserve Life Company,* 185 Ark. 1082, 51 S. W. 2d 526, and a still more recent one is *The National Life & Accident Ins. Co.* v. *Blanton,* 192 Ark. 1165, 97 S. W. 2d 77. In the Harper Case, first above mentioned, we find the court's statement of facts to be as follows: "On that date, accompanied by a notary public of Corning, Arkansas, said agent called upon appellant, told her the policy was void because her husband had misrepresented his physical condition in the application, that his statements in this regard were warranties, were false, and that, because of such false warranties, the policy was void. He offered to return the premium paid, about $29, which she refused, and he finally offered her $100, stating that if she refused she would get nothing."

This court in regard thereto said: "In determining the question here, we view the evidence in the light most favorable to the complaining party. . . . Appellant

is a woman of moderate education, not unlettered or ignorant, but inexperienced in business matters, . . . She was not well at the time. Dow told her the company didn't intend to pay the policy, and that he had brought the premiums, about $29, and would pay that back, and wanted to take up the policy. . . . He told her Mr. Harper 'lied' in his application, and that he had cancer of the rectum at that time, and the policy was null and void. She told him if she couldn't collect the policy she would lose her home, and that he talked to her so she broke down and cried; told her again the return of the premium was all he would pay."

She finally accepted an offer of $100. Finally the court, in deciding the case, said: "But the question here is, was the settlement conclusive of appellant's rights as a matter of law under the evidence, or was it a question for the jury? We think the question one for the jury as to whether the release was procured by fraud or coercion." A much more liberal theory than that announced in the early case of *Burr* v. *Burton,* 18 Ark. 214. So, also, is the case of *National Life & Accident Ins. Co.* v. *Blanton, supra.* In that case there is a discussion of the elements constituting duress under the facts there stated and under the decisions of this court. The Blanton Case, perhaps, did not go or reach the same degree of liberality as did the last-cited case, *Harper* v. *Bankers Reserve Life Co.,* but, at least, under that case, as well as under the Harper Case, a favorable statement to support the position of Fitzgerald is that according to his evidence he believed Mr. Jasspon would not only discharge his stepfather and render the family, including his mother, and his brother who had an invalid wife, comparatively helpless; that by reason of his influential position he could prevent the re-employment of the stepfather after such discharge; that all of them were wholly dependent upon the earnings of the stepfather, and that in addition he held his stepfather in the very highest regard or had for him the same love that children have for their parents; that he had in fact never known any other father; that he had been sent for by Mr. Jasspon, who had delivered this message to him as a kind of ultimatum, though he

did not use that expression, presenting to him, under that threat, the most serious consequences that he thought were possible to happen in his afflicted condition, where he was a helpless cripple, a burden on the parents, as well as was the brother with the invalid wife. He says that he was told when he employed counsel to maintain his suit, if he failed to accept the $5,000, the discharge of his stepfather would immediately follow and that the litigation would be extended for a period of ten years. It certainly takes no great powers of reasoning to reach the conclusion that young Fitzgerald says he reached; that is, that he was confronted with poverty and distress, not only for himself, but for all others whom he loved and who were responsible for his own existence and maintenance. Under these circumstances and facts, which are as stated, concluded by the verdict of the jury, it would be impossible to declare, as a matter of law, that this release was signed free from the influence of the coercion or duress imposed by the conduct established. It is argued that this testimony is unbelievable. The answer is that it was submitted to the jury and that the jury believed it and that is finality. Supported as this verdict is by the evidence, not only of Fitzgerald, but by others, the barrier is formed which we would not dare to pass.

Appellants present for our consideration instruction No. 1 given at plaintiff's request, and which it is insisted is inherently erroneous. That instruction is as follows:

"You are instructed that releases and contracts, to be valid, must be voluntarily made; and, where executed under such circumstances as would enslave the will, the release or contract is void; because consent is of the essence of the contract or release, and where there is compulsion, there is not consent, for this must be voluntarily. Such a release is void for another reason. It is founded in wrong or fraud. It is not, however, all compulsion which has this effect; it must amount to duress. But this duress must be actual violence, or threat. Duress, by threats, exists not wherever a party has made a release under the influence of a threat, but only where such a threat excites a fear of some grievous wrong."

We cannot agree with appellant in this respect. We think, however, that this instruction is most inexpertly worded or inaptly expressed, but that condition might have been corrected by a specific objection calling attention thereto. Appellants take particular exception to the words: "such a release is void for another reason. It is founded in wrong or fraud."

The release discussed by the trial judge in this instruction to the jury and which he said is void is not the release under consideration in this case, but it was the hypothetical release described by him in the foregoing part of the instruction, and we think that it is the only interpretation susceptible under the circumstances. We cannot think that the jury understood otherwise. There was no specific objection calling attention to these matters and the apparently incorrectly stated proposition is not one in fact. Under a specific objection, however, the method of expression might have been improved, but we do not think that the instruction was inherently wrong.

Finally, the appellants argue that Fitzgerald should not have been permitted to sue or maintain his suit except upon condition that he restore the $5,000 paid him for the release. The weight of modern authority decides this question adversely to appellants' contention. *National Life & Accident Ins. Co.* v. *Blanton, supra; Chicago, Rock Island & Pacific Ry. Co.* v. *Matthews,* 185 Ark. 724, 49 S. W. 2d 392; *Harper* v. *Bankers Reserve Life Co., supra.* There are many others.

We have attempted to discuss the material matters presented upon this appeal. In doing so this discussion has perhaps been too long. Other matters of less importance have been duly considered, although not presented here in this discussion. Upon the whole case there appears to be no error in any one of the several matters urged by the appellants. It may be said that it is also argued that the verdict of $45,000 is excessive. We do not think so. This young man is injured to the extent that both arms have been removed by amputation, one just below and the other just above the elbow. It appears that although he has been given artificial arms, he is still unable to dress himself, or to wait upon himself, he

must always be a burden upon someone else to render himself the services required, on account of his affliction, and that, to maintain himself in the future, there is a practical necessity that he must maintain someone else to do for himself, the things impossible now to be performed by him. This condition is brought about solely on account of the injuries suffered by him. He has an expectancy of 41 years plus. During that time, with earning capacity unimpaired with only reasonable advancement, he might have earned approximately that sum. The recovery, of course, should compensate for pain and suffering, for humiliation and the anguish on account of the loss of limbs, the impaired earning capacity, as well as the increased expense of living occasioned by the injury. These things are too patent to require argument or citation of authority in support of the conclusion we have reached, that the verdict and judgment are not excessive.

The judgment is affirmed.

DOUGLAS *v.* FERRIS.

4-5239 122 S. W. 2d 558

Opinion delivered November 14, 1938.

Arthur L. Adams and *Frank C. Douglas,* for appellant.

Shane & Fendler, for appellee.

DONHAM, J. Appellee has owned and has been in possession of certain lands in Mississippi county, Arkansas, for more than twenty-four years. These lands are within the St. Francis Levee District and are, therefore, subject to the levee taxes imposed by said district. The lands became delinquent for the taxes of the years 1926 to 1932, inclusive. The Levee Board started separate proceedings to foreclose the tax lien of the district for each of the first four years. The proceedings for these four years were consolidated and one decree entered covering the entire period. The Levee Board filed a separate suit to foreclose its lien for the taxes of the years 1930 to 1932, inclusive, one decree being taken for the entire period.

In 1937, the lands of appellee were sold by the Levee Board to appellant. No deed had been procured by the Levee Board under said foreclosure proceedings but the sales had been confirmed. On September 27, 1937, appellant appeared in the chancery court and requested the approval of a deed to the Levee Board in pursuance of said foreclosure decrees. The deed which appellant prayed that the court approve contained an order directing the issuance of a writ of assistance to place the Levee Board, or its purchaser, in possession. Appellee appeared through his solicitors and requested permission to intervene for the purpose of setting up his exceptions

to said foreclosure proceedings. This request was granted and appellee was given time in which to file his petition setting up his exceptions. Within the time allowed, he prepared and filed his petition and cross-complaint, setting up various reasons why said foreclosure decrees, the sales in pursuance thereof and all proceedings thereunder, were void and should be canceled and set aside as clouds upon his title.

In compliance with the law, appellee offered to pay appellant all sums which he had paid out as taxes, or otherwise, and which he was entitled to recover back in case appellee succeeded in obtaining the relief prayed in his petition.

Specific allegations were set out in the petition of appellee to the effect that the mandatory provisions of the law with reference to the recording of the delinquent lists by the chancery clerk were not complied with, in that the record failed to carry the certificate of the clerk with the date of the recording, and that it also failed to show the clerk's official seal. There were other allegations with reference to alleged defects in the record, such as the incorrect spelling of the name of appellee, some of the records giving the name as "S. D. Ferrie" and others giving it as "S. D. Feeie." It was, also, alleged that the record for some of the years in question did not carry a signed notice to landowners; that for the year 1927 one-half of the tract of land involved was described as being in the wrong section, the record showing that the land was in section 7, instead of correctly showing it as being in section 9; that for the year 1928 the record showed that one-half of appellee's land was in section 19, instead of correctly showing it as being in section 9.

To all of these allegations contained in the intervention petition of appellee, the appellant answered, alleging that the St. Francis Levee District Board brought foreclosure suits against appellee's lands for the unpaid taxes of the years 1926 to 1932, inclusive, after the collection books were properly opened and closed and delinquent lists filed and recorded for said years as re-

quired by law. It was further alleged that if there were any defects in the proceedings involving the return of the delinquent lists by the collector and the recording of same by the clerk, such defects were immaterial and did not make the decrees and sales void, and that "appellee is now cut off from raising any objection to the issuing of deeds to the St. Francis Levee District; that this is not a direct attack upon the decrees, but is a collateral attack and not brought within proper time; that said decrees are now final and deeds should be issued to the Levee Board, and that appellee is barred by laches."

Appellee filed an amendment to his complaint, asking that Harvey Morris, chancery clerk, be made a party-defendant; and that the records of delinquent lists be corrected to show other and different dates as to filing, recording and certifying by the clerk, alleging that these records are false. Morris was made a party to the suit and entered his appearance.

Appellee took many depositions for the purpose of varying dates shown by the record with reference to the filing of the delinquent lists by the collector of the district and their recording by the clerk. Appellant filed a motion to quash these depositions, alleging that they were offered for the purpose of varying and changing permanent records in the clerk's office, contrary to law. Upon a hearing on this motion, the court held that the depositions could not be considered for the purpose for which they were offered.

Upon a final hearing, the court rendered a decree in favor of appellee, holding that the foreclosure decrees and sales in pursuance thereof were void, because the clerk failed to record and certify the delinquent lists on or before January 1st, as required by law; and that the appellee should recover for the 1937 rents and should pay to the appellant the amounts he had paid for the land and for the taxes paid by him. Appellant prayed and was granted an appeal.

The trial court found, quoting from the decree, "that it is unnecessary to examine any of the contentions as

to the validity of the sales, except that concerning the allegation and proof regarding the failure of the chancery court clerk to record the list and to certify the same on or before the first day of January in the proper year as required by statute and to attach his official seal to the certificate; that the records show that the clerk failed to comply with the statute in the manner just mentioned and that for that reason the foreclosures and sales in question are void and should be canceled as clouds upon the title of intervener."

The court thereupon ordered, adjudged and decreed that "the foreclosures and sales to the St. Francis Levee District and by the district to F. C. Douglas, involving delinquent taxes for the years of 1926 to 1932, inclusive, be, and the same are hereby, canceled, set aside and for naught held in so far as they affect the lands hereinbefore described, and that the title of S. D. Ferris in and to said lands be, and the same is hereby, quieted and confirmed against said St. Francis Levee District and F. C. Douglas."

The main question presented by the record is whether the proceedings to foreclose the levee district's liens for taxes were void for failure to comply with certain provisions of the law with reference to recording the delinquent tax lists for the years 1926 to 1932, inclusive. As heretofore stated, it is contended by appellant that such failures as are shown by the record with reference to recording these delinquent tax lists are immaterial and that they do not render the foreclosure decrees and sales made in pursuance thereof, void, and that in any event appellee is now barred from raising any objection by reason of the five-year statute of limitations. On the other hand, appellee contends that a failure on the part of the clerk of the chancery court to record said list and to subscribe upon the record of the same his certificate, over his signature and seal of office, within the time required by law, renders any proceeding to foreclose the tax lien of the district void.

After providing for the recording of said lists on or before the first day of January next after the filing

of same, act 455 of 1917, and act 15 of the Special Session of 1920, both provide as follows: "And next thereafter and on the same date the said clerk shall subscribe upon said record his certificate, over his signature and seal of office, to the effect that the foregoing delinquent list, as recorded, is a true and correct copy of said list as filed with him by said collector of said board of directors, and the date of such certificate shall be evidence that said list and notice were indorsed upon the record on that date."

As to whether a failure to comply with this provision of the law is sufficient to set aside a tax sale, pertinent provisions of act 455 of 1917, and act 15 of the Special Session of 1920, are as follows: "Whenever the validity of any decree rendered in any action instituted for the enforcement of the collection of the alleged delinquent levee taxes due said district for the year 1917, or any subsequent year, and the penalty thereon, shall be brought into question in any judicial proceedings, it shall be competent and sufficient for the purpose of vacating said decree and canceling said sale, notwithstanding the proceedings may be a collateral attack on such decree, and notwithstanding the recitals of such decree, to show that the levee taxes, the collection of which was sought to be enforced by said decree, had in fact been paid before the date of the decree, or that the collector's delinquent list had not been verified or filed within the time prescribed; or had not been recorded or certified within the time prescribed; provided, that the fact that such delinquent list was not verified or filed or recorded or certified within the time prescribed may be shown only by evidence appearing on the face of the record of such delinquent lists kept by the clerk; provided, further, that no action shall be brought to set aside any decree or cancel any sale on the ground that the taxes had already been paid unless such action be begun within five years next after the confirmation of such sale." Section 11, act 455 of 1917, and § 12, act 15 of the Special Session of 1920.

In addition to the above-quoted provisions, § 18 of act 15 of the Special Session of 1920, provides that the provisions of said act are mandatory. Of course, if failure

to comply with the requirements of the act with reference to the certificate of the clerk is sufficient to vacate the decree to foreclose the tax lien and to cancel the sale in pursuance thereof, then such failure is mandatory and jurisdictional. As will be noted, both of said acts above referred to provide that "it shall be competent and sufficient for the purpose of vacating said decree and cancelling said sale, notwithstanding the proceedings may be a collateral attack on such decree, and notwithstanding the recitals of such decree, to show . . . that the collector's delinquent list had not been verified or filed within the time prescribed; or had not been recorded or certified within the time prescribed."

It seems that there is no escape from the conclusion that compliance with the provisions of said acts as to recording the delinquent tax lists and certifying the record is necessary to valid proceedings to foreclose the tax lien of the district. The trial court specifically found that the chancery court clerk did not record and certify the delinquent lists for the years in question within the time and in the manner prescribed by law, and upon this finding, decreed that all foreclosure proceedings and sales had in pursuance thereof were void.

Our attention has been called to the construction we have placed upon act 534 of the Acts of 1921, same being a general act applying to road improvement districts, fencing districts, levee districts and drainage districts alike. This act requires the county collector to file with the chancery court clerk a duly, verified copy of the delinquent list by the second Monday in June, and further requires that the clerk file and record said list on or before July 1st, and also requires that the clerk attach his certificate to the recorded list. The act makes the certificate conclusive evidence that such list was filed and recorded as stated in the certificate. It is true that we have held that a failure to file such a delinquent list or to record and certify it within the time limit is not jurisdictional, and that improvement districts may proceed with foreclosure proceedings, notwithstanding such

failure to file and record the delinquent list. *Moore* v. *Long Prairie Levee District,* 153 Ark. 85, 239 S. W. 380; *Beasley* v. *Hornor,* 173 Ark. 295, 292 S. W. 130; *Miller* v. *Coleman et al.,* 192 Ark. 932, 96 S. W. 2d 449.

Act 534 of the Acts of 1921 contains no provision that failure by the collector to file the delinquent list within the time required by law shall be sufficient to vacate a decree foreclosing the tax lien and to cancel a sale in pursuance thereof. Nor does the act contain any provision that failure by the clerk to record and certify the delinquent list shall be sufficient to set aside foreclosure proceedings to enforce the lien of the district for taxes. Therefore, we have held that the provisions of said act are not mandatory. Unlike this act, act 455 of the Acts of 1917, and act 15 of the Special Acts of 1920, both contain provisions that it shall be sufficient for the purpose of vacating a foreclosure decree and cancelling the sale in pursuance thereof to show "that the collector's delinquent list had not been verified or filed within the time prescribed; or had not been recorded or certified within the time prescribed." In addition to these provisions, § 18 of act 15 of the Acts of 1920, provides: "The provisions of this act are mandatory." In other words, the provisions of acts applicable in the instant case are clearly mandatory and jurisdictional, whereas the provisions of act 534 of 1921 are not mandatory or jurisdictional.

Section 12 of said act 15, and § 11 of said act 455, provide that "the fact that such delinquent list was not verified or filed or recorded or certified within the time prescribed may be shown only by evidence appearing on the face of the record of such delinquent lists kept by the clerk."

In its finding that the chancery clerk had not complied with the law with reference to recording said delinquent lists and attaching his certificate thereto, the court excluded all testimony except that shown upon the face of the record. Testimony was introduced by way of depositions of several witnesses to the effect that said lists were never recorded before the expiration of the

time provided by law. All this testimony was excluded because the statute provides that a failure to record and certify the list within the time required by the statute may be shown only by evidence appearing on the face of the record of such delinquent lists kept by the clerk. It is not necessary for us to decide whether the court committed error in excluding this evidence. The trial court did not hold that the record could not be corrected when vitiated by fraud.

It is contended by appellant that appellee is barred by limitations. We know of no statute of limitations that would bar appellee from maintaining his action to cancel the foreclosure proceedings and deeds issued in pursuance thereof as clouds upon his title. We have a five-year statute of limitations providing that "all actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." Section 8924, Pope's Digest.

This court has held, however, that this statute does not apply as against one in possession of land in controversy. *Phillips* v. *Jones,* 79 Ark. 100, 95 S. W. 964, 9 Ann. Cas. 131.

This court has held that this section of the statute does not apply to a void sale by an improvement district. *Dupree* v. *Williams,* 172 Ark. 979, 291 S. W. 84. This court also held in said last above case that § 5644 of Crawford & Moses' Digest, limiting the time for redemptions from sales for improvement taxes to five years, did not apply to void sales by improvement districts.

In the case of *Wildman* v. *Endfield,* 174 Ark. 1005, 298 S. W. 196, this court said: "This court has decided several times that the two-year statute of limitations (§ 13883, Pope's Digest, relied on by appellant in this case, has no application as to jurisdictional matters or vital defects in the proceedings relating to a tax sale, but only to irregularities."

Section 11 of act 455, Acts of 1917, and § 12, act 15 of the Special Session of 1920, provide: "That no action shall be brought to set aside any decree or cancel any sale on the ground that the taxes had already been paid, unless such action be begun within five years next after the confirmation of such sale."

It is clearly seen that this limitation does not apply to a case wherein the sale is shown to be void because of non-compliance with mandatory provisions of the law.

As heretofore stated, the record shows that appellee had owned and had been in possession of the lands involved in this case for more than twenty-four years. He was in possession of said lands at the time of the filing of his intervention and according to the record is still in possession, except for a semi-receivership proceeding under which the solicitors of the appellant and appellee are renting the lands and collecting the rents and profits. The decrees foreclosing the liens of the levee district being void, because of failure on the part of the chancery clerk to comply with mandatory provisions of the statute, appellee had a right to attack the foreclosure proceedings and ask for a cancellation of deeds issued in pursuance thereof at any time for the purpose of having said decrees and deeds canceled as clouds upon his title.

We agree with the trial court that the decrees of the chancery court foreclosing the district's tax liens and all deeds issued in pursuance thereof are void because of failure on the part of the chancery clerk to comply with mandatory provisions of the law in regard to recording and certifying the delinquent tax lists. We further adopt the view of the court that failures of said clerk in these respects, sufficient to cancel said foreclosure proceedings and deeds issued in pursuance thereof, are shown upon the face of the record.

The trial court decreed that appellant was entitled to recover of and from the appellee the sum of $100.42, this being the difference between the sum total of the amounts paid the levee district by him for deed which he had received from the Levee Board, plus the, 1937, state and county taxes, also plus the sum of $40 drainage taxes for

the year 1937 paid by appellant. The trial court decreed that appellant was entitled to judgment against appellee for the sum of $100.42, this being the excess of amounts paid out by him as consideration for the deed executed by the Levee Board and for taxes over and above the amount of rents he had received, this net amount to bear interest at the rate of 10 per cent. per annum from the date of the decree. A lien was also decreed upon said lands to secure the payment of the amount due appellant. The court retained jurisdiction of the cause for the purpose of winding up the receivership hereinabove referred to and to enforce the written agreement existing between the parties with reference to repairs, improvements and rents. The decree was otherwise by agreement of the parties made final and appealable.

No error appearing of record, the decree of the court is affirmed.

SMITH, MCHANEY and BAKER, JJ., dissent.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* MEYER, GUARDIAN.

4-5244 121 S. W. 2d 873

Opinion delivered November 14, 1938.

Horace Chamberlin, McKinley & Thompson and *Lee Cazort,* for appellant.

Bradley & Patten, for appellee.

HUMPHREYS, J. This is an intervention filed on August 28, 1937, by William F. and Leora E. Meyer, minors, by their guardian in the matter of the American Exchange Trust Company, insolvent, pending in the chancery court of Pulaski county, wherein appellees made the Fidelity & Deposit Company of Maryland, a defendant, seeking to recover from G. S. Jernigan, as State Bank Commissioner in charge of the assets of the insolvent American Exchange Trust Company and said Fidelity & Deposit Company of Maryland the sum of $1,434.73 with interest at the rate of 6 per cent. per annum from the date of filing said intervention by falsifying and surcharging the final account and settlement of the American Exchange Trust Company as guardian and curator of the estate of said minors. It was alleged in the intervention that the American Exchange Trust Company, as such guardian, purchased from itself a note for the sum of $1,000, and a mortgage given to secure same executed by L. B. Siegel; that L. B. Siegel went into bankruptcy and was finally discharged, and that Ora Lee Meyer, as guardian of such minors, was given an undivided one-fifth interest in an undivided 20/39 interest in lots 1, 2 and 3, block 2, Rectortown Addition to the city of Little Rock; lot 4, block 4, Russell's Addition to the city of Little Rock; that this was the sole benefit received from said Siegel note and mortgage, and that same was of little value; that the Siegel note for $1,000 was one of a series aggregating $9,750, and that the investment by the guardian in said note was without authority of law and without an order first obtained from the Pulaski probate court, authorizing such guardian to invest funds in such note; that said guardian knew that such note was of little value, and that it was

guilty of gross neglect and fraud upon the minors in making such investment without an order of the probate court.

The Fidelity & Deposit Company filed an answer admitting that the American Exchange Trust Company was appointed guardian and curator of the estate of William F. and Leora E. Meyer, minors, on February 27, 1930, and that it received assets belonging to them of the value $3,645.73, and that the Fidelity & Deposit Company of Maryland executed a bond as surety for the American Exchange Trust Company in the penal sum of $2,500; that on March 22, 1930, the American Exchange Trust Company, as such guardian, purchased from itself with funds of said minors a $1,000 first mortgage real estate note bearing 6 per cent. interest executed by Louis B. Siegel and wife, said note being due and payable on the 14th day of April, 1931; that it made this purchase without first obtaining an order from the Pulaski probate court to do so; that in November the American Exchange Trust Company became insolvent, and was placed in the hands of the State Bank Commissioner for liquidation; that on February 26, 1931, at the instance of Mrs. Ora Lee Meyer who was the mother of the minors, the Pulaski probate court removed the American Exchange Trust Company as guardian and curator on account of its insolvency and was herself appointed guardian and curator for them, and that on March 14, 1931, the American Exchange Trust Company through the Bank Commissioner filed its final report as such guardian and curator and received and receipted for the assets including the Siegel note and mortgage. It denied, however, that the American Exchange Trust Company knew that the Siegel note was of little value or that it was guilty of gross neglect and fraud upon the minors in making such investment without an order of the probate court first obtained.

By way of further defenses it interposed the five-year statute of limitations as a bar to the intervention and estoppel on the part of Mrs. Ora Lee Meyer, and the minors to prosecute the action.

The testimony introduced covered the administration of the estate of said minors by their original guardian, the American Exchange Trust Company, and their guardian in succession, the bankruptcy proceedings in part of Louis B. Siegel in the Federal court, and part of the proceedings of the Bank Commissioner in liquidating the assets of the American Exchange Trust Company, with a large number of exhibits attached which we deem unnecessary to set out in detail or in substance to determine the questions involved on this appeal.

After hearing all the evidence the chancery court rendered the following decree: "It is, therefore, by the court, considered, ordered, adjudged and decreed, that Ora Lee Meyer, as guardian and curator of William F. and Leora E. Meyer, minors, do have judgment for and recover of and from G. S. Jernigan as State Bank Commissioner in charge of the American Exchange Trust Company, insolvent, and, the Fidelity & Deposit Company of Maryland, collectively and severally, the sum of $1,304.45, together with interest thereon from this date until paid, at the rate of 6 per cent. per annum, for which execution or garnishment may issue as upon a judgment at law against the Fidelity & Deposit Company of Maryland only, and with the understanding that this judgment is now an adjudicated and liquidated claim for such amount, in favor of the intervener as a common creditor of the insolvent bank.

It is further considered, ordered, adjudged and decreed by the court that any and all right, title and interest and equity of William F. and Leora E. Meyer, minors, and as to Ora Lee Meyer, as an individual and as guardian and curator of William F. and Leora E. Meyer, minors, in and to an undivided one-fifth interest in and to an undivided 20/39 interest in and to the following property situated and located in Pulaski county, Arkansas, to-wit:

Lots 1, 2 and 3, block 2, Rectortown Addition to the city of Little Rock, Arkansas, and lot 4, block 4, Russell's Addition to the city of Little Rock, Arkansas, be and the same are hereby divested out of William F. Meyer and

Leora E. Meyer, minors, and out of Ora Lee Meyer, as an individual and as guardian and curator of William F. and Leora E. Meyer, minors, and be and the same are hereby invested in either G. S. Jernigan, as State Bank Commissioner in charge of the American Exchange Trust Company, insolvent, or in the Fidelity & Deposit Company of Maryland, whichever shall pay said judgment."

From the findings and decree, G. S. Jernigan as State Bank Commissioner in charge of the American Exchange Trust Company, insolvent, and the Fidelity & Deposit Company of Maryland prayed an appeal to this court which was granted, and the interveners excepted to that part of the decree reducing the interest rate from 6 per cent. to 4 per cent., and prayed an appeal to this court which was granted.

The record reflects that on February 27, 1930, the American Exchange Trust Company was duly appointed curator of the estate of William F. and Leora E. Meyer, minors, and who are still minors, by the Pulaski county probate court, and that the Fidelity & Deposit Company of Maryland executed a bond as surety for the faithful performance of the duties of said guardian in the penal sum of $2,500; that said trust company took possession of said assets appraised at $3,645.73; that at the time it owned a note for $9,750 executed by Louis B. Siegel and wife secured by a mortgage on the lots heretofore described; that it invested $1,000 of the assets of the minors in one of the Siegel notes in the sum of $1,000 secured by the mortgage that the Siegel note was due and payable on the 4th day of April, 1931, and that it made this investment without getting an order from the probate court to do so; that in November, 1930, the American Exchange Trust Company became insolvent, and the Bank Commissioner took over its assets for liquidation; that on account of the insolvency of said trust company, Mrs. Ora Lee Meyer, the mother of the minors, by petition to the probate court requested the removal of the American Exchange Trust Company as curator which

petition was granted and she, herself, was appointed curator for the estate of said minors on February 26, 1931; that said curator was ordered to make a final report, and to turn over the assets of the minors to her which it did through the Bank Commissioner; that included in these assets was the Siegel note and mortgage which she received and receipted for as guardian of said minors; that on June 3, 1931, the report was approved and confirmed by the court, and the American Exchange Trust Company and the Fidelity & Deposit Company were discharged; that after receiving the Siegel note in 1931, Louis B. Siegel went into bankruptcy and later received his discharge; that he had not listed the Siegel note and mortgage in the bankruptcy proceedings, and that on March 1, 1933, Mrs. Ora Lee Meyer, as guardian in succession for the minors, filed a petition in the United States District Court to reopen the bankruptcy proceedings, alleging ownership of the $1,000 Siegel note, and that same was a valuable asset; that pursuant to her request and that of other creditors interested in the $9,500 note the court opened up the proceedings to the end that she and the other owners of said notes might foreclose the mortgage securing same; that judgment was recovered on the notes, the mortgage foreclosed, and the property ordered sold to pay the judgment; that same was sold by the commissioner of said court and the holders of the respective notes purchased the lots and received a commissioner's deed for their respective interest therein; that Mrs. Ora Lee Meyer recorded her commissioner's deed on March 16, 1937, and that she conveyed the undivided interest in said lots to the minors by quitclaim deed and recorded the deed; that subsequently she filed a petition in the Pulaski county probate court stating that she had this valuable asset, and that it was needed for the support and maintenance of the minors which order was granted, and that the property was sold pursuant to an order of the court after proper advertisement and sold to George H. Burden for $1,800, which sum was the highest bid and was three-fourths of the appraised value of the property; that later the pro-

bate court confirmed the sale and authorized Mrs. Ora Lee Meyer, as guardian of the minors, to convey by proper instrument the lots to George H. Burden; that all the appraisements of these lots in the process of the administration of the guardianship show that said property was worth more than the note of $1,000 which the American Exchange Trust Company purchased for the minors out of the minors' assets after it was appointed curator for them.

After a careful reading of the testimony we find no evidence in the record showing that the American Exchange Trust Company or any of its officers made any misrepresentations or practiced any deception upon the probate court or its successor to the guardianship of the estate, Mrs. Ora Lee Meyer, in the final report it filed or in securing the discharge of itself and bondsmen from liability in the administration of the estate of said minors during the time it acted as guardian for them or that it or any of its officers knew that the property described in the mortgage securing the Siegel note was of little value. In fact the record does not reflect what the value of the security was when the American Exchange Trust Company turned the security over to Mrs. Ora Lee Meyer as guardian in succession for said minors nor its present value. The mortgage of the property, and the character of the property accepted by her as guardian was known to her, and the fact that the investment had been made without first obtaining an order of the probate court was necessarily known to her. She had every opportunity to except to this item in the account at the time she procured the removal of the American Exchange Trust Company as guardian. She could then have excepted to the item, and could have appealed from the approval and confirmation of the final report of the American Exchange Trust Company, but instead of doing this she later went into the Federal court as guardian for said minors and reported the property to be a valuable asset and foreclosed the mortgage, purchased the property at the sale, accepted the commissioner's deed, and thereafter conveyed the property to the minors. She later procured a sale of the

property in the probate court for the support and maintenance of the minors and sold same for $1,800. It seems that on account of some provision in the will made by William F. Meyer, deceased, the sale was not perfected, and that the title to the lots is still in the minors and under the control and management of Mrs. Ora Lee Meyer, as guardian for them.

For nearly six years after she received this property as guardian in succession for the minors it was treated as a valuable asset, and to the extent that Mrs. Ora Lee Meyer as guardian for said minors foreclosed the mortgage in the Federal court in the bankruptcy proceedings of Louis B. Siegel pending therein, and that at the foreclosure sale purchased same for the minors and thereafter conveyed same to them; and that subsequently, acting for the minors, she applied to the probate court alleging that the property was valuable, for an order to sell same for the support and maintenance of the minors, and that she procured the order and actually sold it for $1,800.

We think the conduct of Mrs. Ora Lee Meyer acting in behalf of the minors relative to the Siegel note and mortgage clearly estops her and the minors she represented from prosecuting this suit to falsify and surcharge the final account of the American Exchange Trust Company as to this item, on the allegation and proof that the American Exchange Trust Company invested the minors' money in the Siegel note without first procuring an order from the Pulaski probate court to make the investment. No actual loss is shown to the estate on account of the investment. If this illegal act of making the investment, without first procuring an order to do so is the character of fraud which will be relieved against in a court of equity, which we doubt, the guardian and minors are certainly estopped after nearly six years from prosecuting this suit. In *Woodall* v. *Moore,* 55 Ark. 22, 17 S. W. 268, this court has laid down the rule which we think peculiarly applicable to this case, which rule is as follows: "When infants by their guardian or next

friend come into court to assert their rights, they proceed under the eye of the court, and are supposed to enjoy its care and protection, and conclusions therein reached are as binding upon them as upon persons *sui juris.*"

Every proceeding in the course of the administration relative to the property in question was done under the eye of the court and under its care and protection, and in view of this fact the action of the guardian in holding and treating this asset as valuable for all these years under such supervision is attributable to the minors, and that both the minors and the guardian are clearly estopped in good conscience from prosecuting this suit, especially is this true in view of the fact they have not produced any evidence of actual fraud which caused them to lose anything, and simply upon the ground that an order to make the investment was not first procured from the probate court.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to dismiss the intervention.

GRAHAM AND SEAMAN *v.* STATE.

4104 121 S. W. 2d 892

Opinion delivered November 14, 1938.

Jack Holt, Attorney General, and *Jno. P. Streepey,* Assistant Attorney General, for appellee.

DONHAM, J. The Prosecuting Attorney of the Twelfth Judicial Circuit filed information against appellants in the circuit court of Sebastian county accusing them of the crime of stealing cattle. They were convicted and Graham's punishment was fixed by the jury at five years in the penitentiary, and Seaman's at three years in the penitentiary.

It was alleged in the information that the appellants on the 14th day of December, 1937, in the county of Sebastian, state of Arkansas, did unlawfully and feloniously steal, take and carry away, one cow, the property of the Fort Smith District of Sebastian county.

Motion for new trial was filed and overruled and appellants have appealed.

For reversal appellants contend: (1) That the evidence is not sufficient to sustain the verdict; (2) that the court committed error in refusing to grant the petition of appellants for severance; (3) that the court committed error in refusing to give appellants' requested instructions; (4) that the court committed error in giving appellee's instructions.

Without setting out the evidence of the several witnesses in detail, suffice it to say that we have carefully reviewed the record and find that the evidence is sufficient to sustain the verdict of the jury.

As to the second assignment of error of appellants, being the one with reference to refusal of the court to grant their motion to sever, the statute, § 3976 of Pope's Digest, settles their contention in this regard against them. This section is as follows: "When two or more

defendants are jointly indicted for a capital offense, any defendant requiring it is entitled to a separate trial; when indicted for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court. When separate trials are ordered in any case, the defendants shall be tried in the order directed by the court."

It is not shown that there was any abuse of discretion on the part of the court.

Appellants next contend that the court erred in overruling their requests for instructions. There are some instructions in the record denominated "defendants' instructions refused." But the record does not show that the trial court made any ruling as to these instructions. The bill of exceptions recites that the only instructions asked, given or refused were the ones requested by the state. The record is not sufficient to present this contention of appellants to the court. *Boatright* v. *State,* 195 Ark. 611, 113 S. W. 2d 107. Besides the record does not show that there was any exception to the refusal of the court to give said instructions, if the court did refuse to give them.

It is true that at the end of the testimony for the state appellants asked the court for a directed verdict of not guilty. If, however, the evidence was sufficient to sustain the verdict of the jury, and we hold it was, of course, there was no error in refusing to give this instruction.

For their final objection, appellants contend that the instructions given at the instance of the state are erroneous. The exception of appellants to these instructions was an exception *en masse;* also the assignment of error in the motion for new trial was *en masse.* Therefore, if any one of the instructions should be found to be correct, the exception of appellants could avail them nothing. *Dunnington* v. *Frick Co.,* 60 Ark. 250, 30 S. W. 212; *Walnut Ridge Mercantile Co.* v. *Cohn,* 79 Ark. 338, 96 S. W. 413; *Kansas City Southern Ry. Co.* v. *Morris,* 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; *Kansas City South-*

ern Ry. Co. v. *Belknap,* 80 Ark. 587, 98 S. W. 366; *Ward* v. *Sturdivant,* 86 Ark. 103, 109 S. W. 1168; *Newport Stave Co.* v. *Hall,* 102 Ark. 625, 145 S. W. 528; *Oliphant* v. *Hamm,* 167 Ark. 167, 267 S. W. 563.

The first two of these instructions to which appellants objected and excepted *en masse* follow the wording of the statute relating to larceny, as defined by § 3129 of Pope's Digest. The third of these instructions told the jury that the fact that appellants did not testify could not be considered against them. The fourth is on the presumption of innocence; the fifth on the burden of proof; and the sixth on the credibility of the witnesses. There seems to be no error in any of these instructions. They have been frequently given by trial courts and this court has approved them many times.

It seems from the record before us that the appellants have had a fair and impartial trial. Since the record reflects no error, the judgment is affirmed.

ST. LOUIS-SAN FRANCISCO RY. CO. *v.* HILL, GUARDIAN.

4-5245 121 S. W. 2d 869

Opinion delivered November 14, 1938.

J. W. Jamison, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

E. E. Alexander, Harrison, Smith & Taylor, for appellee.

MEHAFFY, J. Complaint was filed in the Mississippi circuit court by the appellee against the appellants for damages for injury to A. C. Houston, incompetent. It was alleged that Houston was knocked to the ground, head, face, body and limbs broken, bruised and lacerated and skull fractured, requiring a serious operation; that large sums of money had been expended for medical and

hospital attention, nurses, etc.; that he suffered great pain and anguish, and that he is totally incapacitated. It was alleged that the persons operating the train failed to keep a proper lookout for persons and property on or near the track; failed to blow the whistle or ring the bell or give other warning of the approach of the train, and that the train was operated at an excessive rate of speed; that there was failure to exercise ordinary care to discover the peril of Houston, and failure to exercise ordinary care to avoid injuring him after his peril was, or should have been, discovered.

Appellants answered denying all the material allegations in the complaint and pleading contributory negligence of Houston.

There was a trial, verdict and judgment for the appellee in the sum of $3,000. The case is here on appeal.

Parvin McDearman testified that he was standing about 300 feet from the crossing, and that the train passed about one o'clock at night; when it left the depot it whistled the highball whistle, a couple of shorts; it did not whistle any more until it was stopping; it had crossed the crossing; never noticed the bell ringing; Houston had come into the Sternberg gin where witness was working wanting work, but witness would not let him work because he had an infection in one hand; it was around 11:30 when Houston came to the gin; Houston left with a boy, Joe Waldrup, about 12 o'clock going south; witness then went over to a restaurant and saw Houston there eating a hamburger and drinking a Coca-Cola; saw him after the train passed on the side of the railroad gasping for breath and unconscious; witness saw something coming down the track that looked like a shadow, and it looked like something grabbed him on the side of the train, and the train sucked him into it; he was close to it; he knew what he saw was a man by the train stopping; the train stopped about 200 or 220 feet with the rear end of the train that distance from the crossing, and there is where he found Houston; there were flood lights on the gin, scales and office; several

trucks around there bringing cotton to be ginned; the crossing has been there ever since witness can remember and been used as a public crossing; Houston was found on the west side of the track; some of the train crew went back to where Houston was and the train stayed there about 20 minutes; Houston's head was at the end of the tie lying on his right shoulder; he was awfully close to the rail headed north when witness saw him; when witness first saw him it was something like 40 or 50 feet down the track; when it was struck it was even with the crossing signboard, four or five feet south of the crossing; the depot was about a quarter of a mile from where witness was standing; train stopped at the station ten or fifteen minutes.

Joe Waldrup testified that he saw Houston between 12 and 12:30 at the gin; he and Houston separated, he went one way and Houston the other.

Mrs. McDearman testified about Houston coming to the restaurant between 12 and 12:30.

R. L. Hill testified that he saw Houston and when Houston left he went towards the railroad; that he was looking at him when the train hit him; there was nothing else there to hit him; when Houston left witness he went straight out to the railroad; he heard a couple of short whistles after the train crossed the crossing; if it whistled before it hit Houston witness did not hear it; the bell was not ringing; the track is straight a good piece south of the depot to the north of the gin; no obstructions to keep those in the engine cab from seeing down the track; does not know whether he got hit at or below the crossing.

McDearman also testified that there was nothing to keep the engine men from seeing Houston if they had been keeping a lookout; they did not slow up or show any sign of stopping before they hit him; Houston was not moved from where he was lying until the ambulance came.

R. L. Hill testified, also, that he supposed he was struck by the engine, but did not know; it was dashed

in there in a moment and struck him; does not know whether Houston walked right into the train; he was right at the crossing or south of it.

The engineer and fireman testified that they were keeping a constant lookout and saw no one on the track; but that the fireman informed the engineer that a man was lying by the side of the track and the engineer immediately applied the brakes and stopped; stopped the train as quickly as he could and walked back and saw the man lying there; engineer inspected his engine and the side of the train and found nothing to indicate that the man had been struck; Houston was 15 or 20 feet south of the crossing; the headlight was sufficient for them to see 1,000 or 1,200 feet ahead. The conductor testified that he could not hear the bell or whistle because cars are air-condition and air-tight; when the train stopped, conductor got off and met the engineer, who told him they had run over somebody or something; made no inspection of the train.

The car inspector at Hayti, Missouri, testified that he made an inspection of the train; looked the train over, inspected the cab and found no blood or hair on any part of it or anything to indicate that a man had been struck.

J. I. Stovall testified that he found Houston with a wound in the back of his head lying on the west side of the track about eight steps south of Kentucky street crossing.

At the close of the evidence the appellants asked for an instructed verdict, which the court refused to give.

Appellants first contend that there is no dispute that the lookout required by the statute was kept. No witness testified, of course, that a lookout was not kept; but the evidence shows that Houston walked onto the right-of-way; that persons on the engine could see from 1,000 to 1,200 feet down the track, and that Houston was walking there when the train came, and after the train passed he was found lying about 18 inches from the rail, injured as described by the witnesses. There was nothing else that could have struck him. In addition to this, Hill testified that he saw the train strike him.

If the jury believed the witnesses for appellees, they were bound to reach the conclusion that Houston walked onto the right-of-way and track, and that if the engineer and fireman had been keeping a lookout, they could have seen him.

Appellee's witnesses testify to facts contradicting the evidence of the engineer and fireman. The jury had a right to believe these witnesses. It was the province of the jury to pass on the credibility of the witnesses and the weight to be given their testimony. The engineer and fireman admit that they could see ahead from 1,000 to 1,200 feet; they had a headlight in good condition, and it is common knowledge that one can see, not only on the track immediately ahead of the train, but for some distance on the right-of-way on each side of the track.

Appellants, however, say that prejudice to the defendants arises from the different operation of the two principles of law. If killed under certain circumstances, contributory negligence would not be a defense; under other circumstances, it would be a defense, and it would be the duty of the jury to reduce the amount of damages. But no prejudice could arise because of this. If the jury believed that the appellants discovered Houston's peril, or by the exercise of ordinary care could have discovered it, contributory negligence would be no defense. But if the jury believed that Houston was injured as a result of appellants failing to give the statutory signals, and find that Houston was also guilty of negligence, this negligence of his would not bar his recovery, but it would be the duty of the jury to diminish the damages in proportion to such contributory negligence. Certainly there is no conflict and no necessary confusion about these two principles. The evidence justified the submission of each question to the jury. The suit was brought for $3,000, and the jury returned a verdict for that amount. Houston's injuries were sufficient in extent to sustain a much larger sum.

No abstract instructions were given by the court. Appellant calls attention to *Kimbrough* v. *Johnson,* 182

Ark. 522, 32 S. W. 2d 154. The court in discussing the instruction in that case said: "We do not think under appellee's own testimony that this issue should have been submitted to the jury."

In this connection appellants, also, call attention to the case of *M. P. Rd. Co.* v. *Kirby,* 152 Ark. 90, 237 S. W. 687. It is true that the court reversed the judgment in that case. There is, however, nothing in that case that sustains the argument of appellants in this case.

It is argued, however, by appellants that there are three theories; two opposing theories by plaintiff's witnesses. We do not agree with appellants in this contention. It is true that there was a conflict in the testimony of the witnesses as to which direction Houston was traveling, but it was the duty of the jury to consider all the evidence and determine from that what caused the injury. It is argued that the cause of the injury is unknown. This argument overlooks the positive evidence of Hill, who said he saw the train strike him, and the fact that he was found immediately after the train passed with his skull crushed, and there is no speculation about these facts.

Appellants requested the court to instruct the jury in effect that if Houston left the gin premises and walked in the direction of the crossing at the gin, turned south on the track and was injured by a northbound train with the headlight brightly burning, Houston was guilty of negligence of an equal degree with the negligence of the railroad company. It was not the province of the court to pass on the evidence and determine the degree of negligence of each, but it was the province of the jury.

The next instruction that the court refused was to the effect that if Houston was injured south of the crossing, the railroad company owed him no duty except not to willfully and wantonly injured him after discovering his peril. This instruction ignores the law that it is their duty to keep a lookout in order to discover persons and property on the track.

The objection to instruction No. 1 given by the court is that it fails to take into account the testimony of the

witnesses that Houston was a trespasser. The instruction, in fact, tells the jury that if he was injured at a public crossing at a time when he himself was in the exercise of due care, he would have a right to recover. Of course, if he was at a public crossing he would not be a trespasser, and there was no error in giving this instruction.

There are some other objections made by appellants to instructions given and refused, but after a careful examination of all the instructions we have reached the conclusion that there was no error committed by the court in giving or refusing to give instructions.

Appellants complain because they say that instructions 2, 3, 6 and 7 are abstract. Instructions 3 and 7 objected to were not mentioned in appellants' motion for a new trial.

Appellants call attention to the case of *St. L.-S. F. Ry. Co.* v. *Pace,* 193 Ark. 484, 101 S. W. 2d 447. There was no evidence in that case that he was hit by the train.

Appellants call attention to a number of cases which we do not discuss separately, but attention has been called to no case where there was substantial evidence that the train struck the injured party. There is that evidence in this case. Hill testified positively to seeing the train strike Houston.

"It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established." *Castile* v. *Yantis-Harper Tire Co.,* 183 Ark. 475, 36 S. W. 2d 406; *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243.

In the instant case there is not only no circumstance from which an inference against the testimony of Hill can be drawn, but there is the evidence of several witnesses that he walked to the railroad from the gin, and the circumstance that he was found with his skull

crushed, and there is no other way shown by which this could have been done, except being struck by the train.

If the jury had believed appellants' witnesses, they would necessarily have found for appellants, because the engineer and fireman testified that they were keeping a constant lookout, and had a good headlight and saw no one ahead on or near the track. However, this evidence, as we have said, is contradicted by not only the evidence of Hill and other witnesses, but by all the circumstances in the case, and it is the province of the jury to pass on the credibility of witnesses and weight of their testimony, and when they have done this and reached a verdict, this court has no right to set such verdict aside if it is sustained by substantial evidence. It cannot be said that the evidence of appellee's witnesses is not substantial.

The judgment is affirmed.

SMITH, BAKER and DONHAM, JJ., dissent.

METROPOLITAN LIFE INSURANCE CO. *v.* BAKER.

4-5241 122 S. W. 2d 951

Opinion delivered November 14, 1938.

Daily & Woods, for appellant.

Rains & Rains, for appellee.

MEHAFFY, J. This suit was brought in Crawford circuit court to recover on an insurance policy issued to John W. Baker. May Belle Baker was the beneficiary in the insurance policy, and the plaintiff in the suit.

It appears from the record that the beneficiary lived in Franklin county, and this was her husband's home before his death, and the assured died in Sebastian county.

The appellant filed motion to quash the summons issued in the case, and alleged that the insured, at the time of his death, was a resident of Sebastian county, and that his death occurred in Sebastian county.

Section 7675 of Pope's Digest reads as follows: "When any loss shall occur by fire, lightning or tornado, in the burning, damage or destruction of property upon which there is a policy of insurance, or when any death has occurred of a person whose life shall have been insured, or in case of death or injury of any one having a policy of accident insurance, the assured or his assigns, in case of fire insurance, may maintain an action against the insurance company taking the risk, in the county where the loss occurs. And the beneficiary, or his assigns, in case of life insurance, may maintain an action against the insurance company that has taken the risk, in the county of the residence of the party whose life was insured, or in the county where the death of such party occurred."

This motion to quash was filed before appellant had entered its appearance and specially stating in the motion that it appeared specially for the motion and for no other purpose, and without entering its appearance in this action. The motion to quash was overruled, and the defendant filed answer reserving in its answer the objection contained in its motion to quash.

There was a trial and judgment for appellee. The case is here on appeal.

The statute above set out localizes actions of this kind and provides that such actions may be brought in the county where the beneficiary resides or where the insured died. Since he lived in Franklin county and died in Sebastian county, the Crawford county court, under the above statute, had no jurisdiction. This rule has been followed by this court for many years.

The appellee contends that this court has sufficiently passed on this matter in the case of *Mutual Benefit Health & Accident Association* v. *Moore,* 196 Ark. 667, 119 S. W. 2d 499. The court in that case, however, said: "The question raised by the motion to quash service of summons will be rather summarily disposed of for the reason it is shown that prior to the filing and presentation of this motion the insurance company had filed a motion for subpoenas *duces tecum* and had procured an order directing certain doctors to bring into the court records made in regard to examination and condition of health of insured. Furthermore prior to filing motion to quash, the appellant prepared an agreement to take depositions in Omaha, Nebraska, upon the merits of the litigation, and such agreement had been signed by counsel for both parties.

"Since it is generally held that any action on the part of the defendant is an entry of appearance, except to object to the jurisdiction of the court; or forced to proceed unless all rights are preserved under proper objection, will be treated as a general appearance. The motion becomes unimportant."

In the instant case, however, appellant had not entered its appearance, but filed its motion entering its appearance for no other purpose and preserved its objection in all proceedings thereafter, and it is not contended that it entered a general appearance.

This court held: "There is no doubt but that where a party, who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person, and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest, he can not be said to have waived his objection to the jurisdiction of his person." *Spratley* v. *Louisiana & Ark. Ry. Co.,* 77 Ark. 412, 95 S. W. 776.

Our statute provides that where stock is killed the owner may sue the railroad company in the county where the killing or wounding occurred. Section 11148, Pope's Digest.

This court said in construing the statute last mentioned: "Therefore, to give the court jurisdiction it was necessary for the plaintiff to show that the animal was killed in the county where the court was sitting. The failure to show the venue was fatal to the judgment." *Little Rock & Ft. Smith Ry. Co.* v. *Jamison,* 70 Ark. 346, 68 S. W. 28.

This court also said: "The statute requires that actions against railway companies for injuries to stock by train shall be brought in the county where the injury occurred." *St. Louis, Iron Mt. & So. Ry. Co.* v. *James,* 70 Ark. 387, 68 S. W. 153; *Continental Casualty Co.* v. *Toler,* 188 Ark. 139, 64 S. W. 2d 322; *Duncan Lbr. Co.* v. *Blaylock,* 171 Ark. 397, 284 S. W. 15.

This court has also said: "The allegations of the complaint were sufficient without alleging the county of the residence of the insured and where his death occurred; since in fact he was a resident of that county and his death occurred there, and it could and would have been shown upon a motion to make the complaint more definite and certain, or upon an objection to the jurisdiction of the court on that account." *Woodmen of Union of America* v. *Henderson,* 186 Ark. 524, 54 S. W. 2d 290.

There are numbers of other cases to the same effect, but it is unnecessary to cite further authorities.

We are of opinion that suits of this character must be brought in the county where the assured lived, or where he died.

We do not discuss or decide any of the other questions raised. For the reasons stated above the judgment of the circuit court is reversed, and the cause is remanded with directions to sustain the motion to quash.

BAKER, DONHAM, JJ., dissent.

THE STOUT LUMBER COMPANY *v.* PARKER.

4-5242 122 S. W. 2d 180

Opinion delivered November 14, 1938.

M. P. Morton, Jr., and *S. F. Morton,* for appellant.

Compere & Compere, for appellee.

GRIFFIN SMITH, C. J. The Stout Lumber Company sold certain lands in Calhoun county, retaining varying interests in the mineral rights. The tax assessor extended assessments against such mineral rights, the taxes amounting in the aggregate to $892.14. Over objections of the Lumber Company assessments were made, al-

though the company furnished the assessor a list of descriptions.

M. P. Morton, manager of appellant company's land department, testified that shortly after April 10, 1936, he received a letter from the assessor regarding the property; that other letters followed, and that there were personal contacts. October 23, 1936, the descriptive lists were sent in, but they were not acted upon at the assessor's office until the Board of Equalization had adjourned.

Appellant contends there was no authority October 23rd to make the assessments; that inclosed with the descriptive lists was its letter disavowing an intent to assess; that from April until October 23rd the assessor took no action, although deeds were a matter of record in the county; that when notified of the assessments there was no opportunity to be heard thereon; that in fact appellant did not know what had been done until the collector supplied a list of the Company's taxes, in the spring of 1937.

Suit was brought to restrain the collector from returning the property delinquent in 1937 under the assessments of 1936; to enjoin the county clerk from advertising such delinquencies, and to restrain the collector from selling the mineral rights. The chancellor refused to issue the orders, and the Lumber Company has appealed.

Appellant contends (1) that the manner of assessing the property is violative of art. 2, § 8, of the Constitution of Arkansas, and that it violates the due process clause, Fourteenth Amendment to the Federal Constitution. (2) That the assessments violate art. 16, § 5, of the State Constitution. (3) That the court erred in refusing to hear testimony offered by appellant to show that the mineral rights had no actual value at the time assessed.

Section 13666 of Pope's Digest, with respect to property omitted from the assessment rolls for any cause, makes it the duty of the assessor to prepare a special list or assessment thereof and file the same with the county clerk, if such omission is discovered before the collector closes his books for collection of taxes for the year in

which such property was due to have been assessed, and the county clerk "shall thereupon place the same upon the tax books and extend the taxes and penalty thereon for the year."

Appellant contends it was the duty of the assessor to complete his rolls between the tenth of April and the third Monday in August as to all real and personal property not assessed by or on behalf of the owner between the first Monday in January and the tenth of April; that having failed in this duty, the assessor could not make the assessments at a period so advanced in the assessment calendar as to automatically deprive a taxpayer of his right to be heard with respect to valuations or contested ownership.

Although appellant, in its brief, insists that the assessor was availed of facilities of the public records to make the assessments, without requiring that descriptive lists be supplied, the witness Morton, in testifying to conversations had with members of the Equalization Board, said: "There had been no assessments made [October 23rd]. I knew the assessor could not do it. There wasn't any way in the world for him to do it unless I gave him the lists. . . . I could have refused to furnish them and [the assessments] would never have gone on the books."

From this testimony it seems that appellant thought that by withholding the lists it could circumvent assessments; but Morton, having in the course of his correspondence with the assessor promised to supply the lists, eventually did so; but at a time and in circumstances apparently sufficient to prevent taxation for the current year.

Attention is directed to *Central of Georgia Railroad Company* v. *Wright,* 207 U. S. 127, 28 S. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463, where the Supreme Court of the United States, in rejecting the construction placed upon a Georgia tax statute, said: "The system provided in Georgia by the statutes of the state as construed by its highest court requires of the taxpayer that he return all his property, whether its liability is fairly contestable

or not, upon pain of an *ex parte* valuation against which there is no relief in the tax proceedings or in the courts except in those cases where fraud or corruption can be shown in the action of the assessing officers. . . . We feel constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard which it was the intention of the Fourteenth Amendment to protect against impairment by state action."

It is not necessary in the instant case to decide whether the assessment statute, if invoked in the manner complained of by appellant, would be violative of the Fourteenth Amendment and other constitutional provisions to which attention is called. It is our view that appellant was not deprived of its day in court. True it is that the assessment was not made until after October 23rd; but efforts were being constantly exerted by the assessor to secure co-operation. Appellant, no doubt honestly, took the position that the interests were not assessable. Yet, during the entire period of correspondence, Morton was informed that the Board of Equalization entertained a different view. Under the law the mineral rights, if severed from the fee, should have been declared, even though appellant regarded them as of no value. Section 13652, Pope's Digest.

Although denying that he went before the Equalization Board to discuss the assessment of mineral rights, Morton said:

"Q. Did you discuss the matter with the Board? A. Yes, sir—with the distinct understanding they were not in session. I had written the Equalization Board, asking for an opportunity to present another matter. In my remarks on this matter to the members of the Board I made it very clear to them that I wasn't talking to them as a Board, but as individuals. Q. Then, as I get it, while the Equalization Board was in session, and while you were with them to present another matter, you did discuss with them at that time the question of the assessment of these mineral interests. A. That is true. . . . I knew the members of the Board and thought I could

talk to them as individuals. . . . The discussion with the members was while the Board was in session. . . . There had been no assessment made at that time."

In its brief appellant says: "Again, it appears from the evidence that no assessment was made against the undivided interests in mineral rights owned by appellant where they amounted to less than 50 per cent. In fact, no *bona fide* effort was made to assess these small interests, no matter by whom held. If the 50 per cent. undivided interest owned by the Stout Lumber Company was worth 25c per acre, lesser interests owned by them and other people were worth something. They should have been assessed in the same proportion that they bore to the value of the fee."

In his letter of September 11 to the assessor, Morton said: "I find that the work of getting up a list of our mineral holdings in Calhoun county is much bigger than I anticipated, and it will be some time yet before I can furnish you with the list. . . . There are some tracts of land in which our mineral interest is negligible. We own as low as one-sixteenth in some lands. In some we own one-eighth, and in some, fifteen per cent. I do not believe you want me to furnish you a list of these small fractional interests."

Appellant is in no position to complain that the fractional interests were not assessed, and to urge that for this reason there is lack of uniformity; nor was there a lack of uniformity within constitutional meaning.

There was no allegation in the complaint, or in either of the amendments, that the assessment statute contravened the due process clause of the Federal Constitution.

Appellant assumes that, because the Equalization Board had finally adjourned when the assessments were made, its right of redress was gone. This is not correct. There was the right, by certiorari from the circuit court directed to the county clerk, to have the record brought up for review and correction. Section 2865, Pope's Digest.

Affirmed.

4-5363 122 S. W. 2d 182

Opinion delivered November 21, 1938.

[redacted]

Jeff Bratton, for appellant.

Kirsch & Cathey, for appellee.

DONHAM, J. Appellant, Cicero Thompson, and appellee, G. S. Self, were rival candidates for nomination for the office of county and probate judge of Greene county in the 1938 primary election. According to the certificate of the county democratic central committee, it appears that Self received twenty-seven more votes than Thompson. Thompson instituted a contest by filing a complaint in pursuance of the statute in the Greene circuit court, alleging that many persons were permitted to

vote whose names did not appear upon the poll tax list and that many others were permitted to vote who had attained their legal age prior to the election and who were not required to have a poll tax receipt and that these persons were permitted to vote without giving the necessary information to show that they were legally entitled to vote without a poll tax receipt. Thompson further alleged that he had reason to believe that he received votes in certain townships which were not counted for him; and that if the illegal votes in said townships were thrown out, it would result in his being the lawful democratic nominee for the office of county and probate judge.

It was necessary that Thompson, in compliance with the statute, support his complaint by the affidavit of ten qualified electors who were members of the democratic party, and that the complaint, so supported, should be filed within ten days of the certification of which complaint was made. Section 4738 of Pope's Digest as amended by act 123, § 6, Acts of 1935.

The filing of the required affidavit within the ten-day period is jurisdictional. If the affidavit is insufficient at the close of the ten-day period, the contestant will not be permitted after the expiration of that time to amend the affidavit so as to confer jurisdiction upon the trial court. *Logan* v. *Russell,* 136 Ark. 217, 206 S. W. 131; *McLain* v. *Fish,* 159 Ark. 199, 251 S. W. 686; *Culpepper* v. *Mathews,* 167 Ark. 253, 267 S. W. 773.

The right to question the sufficiency of the affidavit, although it may appear sufficient on its face, is given the contestee under the law governing primary elections. *Kirk* v. *Hartlieb,* 193 Ark. 37, 97 S. W. 2d 434.

The supporting affidavit attached to the complaint of appellant bears the names of eleven persons. At the beginning of the trial, appellant conceded that one of these was not a qualified elector and agreed that his name might be stricken from the affidavit. This was done and only ten names were left. The record shows that one of the affiants, Wilder Carpenter, did not believe that he was under oath at the time he signed the affidavit. He testified that there was nothing in his signing to lead him

to believe that he was under oath. Another, C. E. Tennison, testified that he did not even know that the party before whom the affidavit was signed was a notary public until after he had signed the affidavit and left her office. Three others testified that they were called over the telephone by the notary public and asked if they had signed the affidavit. Two of them admitted that they had signed it and the third stated that he had not signed the affidavit, but that his son had signed it for him. It seems that all the notary would ask those whose names appeared as affiants was whether they had signed the affidavit and would swear to their signature.

In 1 R. C. L., p. 765, we find the following: "To make a valid oath or affirmation there must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and an intention to administer it on the other; for, even though such intention actually did exist, if it was not manifested by an unambiguous act, perjury could not be based thereon. If the attention of the person making the affidavit is called to the fact that it must be sworn to, and, in recognition of this, he is asked to do some corporal act, and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities."

In American Jurisprudence, Vol. 1, §§ 2, 13, 14, title, affidavits, the following statements appear: "An affidavit is any voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation. It is made without notice to the adverse party and without opportunity to cross-examine. . . . Under the definitions of an affidavit given above, it is essential to the validity of an affidavit that it be sworn to, or affirmed before, some officer authorized to administer oaths or affirmations. There must be something which amounts to the administration of an oath or affirmation; this requires concurrent action on the part of the affiant and an authorized officer. . . . The chief essentials of an affidavit are that it be in writing, and that it be sworn to, or affirmed before, some legally authorized officer."

In American Jurisprudence, Vol. 1, p. 943, § 13, we find the following statement of the law: "In making an affidavit, the law requires that the affiant and the paper sworn to be in the personal presence of the officer administering the oath. Accordingly, the oath of the affiant cannot be taken over the telephone."

In the recent case of *Kirk* v. *Hartlieb, supra,* this court quoted with approval the foregoing quotations taken from §§ 2, 13, 14 of the chapter on affidavits appearing in Vol. 1 of American Jurisprudence, and there specifically held that where signatures were obtained as they usually are in ordinary petitions and then carried to an officer authorized to administer oaths who signs his name to the jurat, such purported affidavit, in an election contest, is insufficient.

The trial court held that the supporting affidavit attached to appellant's petition was insufficient and sustained appellee's motion to dismiss the complaint. We agree that the trial court was correct in so holding. No error appearing, the judgment is affirmed.

GRIFFIN SMITH, C. J.; SMITH and MEHAFFY, JJ., dissent.

SMITH, J. (dissenting). The "Motion to Dismiss and Strike Out Plaintiff's Complaint" reads as follows: "Comes the defendant, G. S. Self, and moves the court to dismiss and strike out the complaint of the plaintiff herein and for ground thereof states that said complaint is not supported by an affidavit of at least ten reputable citizens of Greene county, Arkansas, as by law required, and that no ten signers thereof have the requisite qualifications to make the same. Wherefore, defendant moves the court to dismiss and strike out plaintiff's complaint and for all other further relief."

The original primary election law required that "The complaint shall be supported by the affidavit of at least ten reputable citizens" (§ 3772, Crawford & Moses' Digest), and several of our cases defined who "reputable citizens" were within the meaning of the statute. See, *Bowers* v. *State,* 155 Ark. 35, 243 S. W. 864, and cases there cited.

This section, 3772, Crawford & Moses' Digest, was amended by § 6 of act 123 of the Acts of 1935, p. 339. This amendatory section reads as follows: "Hereafter when any election contest has been filed by any candidate in any legalized primary election under §§ 3772 and 3773 of Crawford & Moses' Digest of the Statutes of Arkansas, it is hereby declared that the only inquiry which can be made into the qualifications of the supporting affiants mentioned in § 3772 of said Digest must be confined to the question as to whether or not the said persons are qualified electors and members of the party holding said primary election under the rules prescribed by said party so holding the election and have in fact made the affidavit provided by the said § 3772. Qualified elector is hereby construed to mean any person who is entitled to vote in said election or has assessed and paid a poll tax as required by law." Under this section the only qualifications imposed upon affiants are that they be qualified electors and are members of the party holding the primary election sought to be contested. They must, of course, make the affidavit. The motion to dismiss does not raise the question that the affidavits were not made. The objection is that ". . . no ten signers thereof have the requisite qualifications to make the same." There were eleven affiants, and it is conceded that one of these did not possess the requisite qualifications. Ten remained, and no attempt was made to show that any of these ten were not qualified electors and members of the party holding the said primary election. There was, therefore, no testimony to support the objection made to the supporting affidavit, and the motion to dismiss should have been overruled for that reason.

It is insisted, however, that several—probably as many as five—of the alleged affiants did not in fact "make the affidavit." As we have shown, no such question was raised in the motion to dismiss, but, even so, the testimony is not sufficient, in our opinion, to sustain that contention.

Both parties cite, rely upon, and quote from the case of *Cox* v. *State,* 164 Ark. 126, 261 S. W. 303. The quotation from that opinion appearing in both briefs reads as

follows: "So here we think if appellant signed the affidavit for the purpose of swearing to it, knowing that the clerk regarded his act of signing the affidavit as a method of making affirmation, the jury was warranted in finding that appellant was sworn. *Fortenheim* v. *Claflin, Allen & Co.*, 47 Ark. 49, 14 S. W. 462.

"At § 8 of the chapter on Affidavits, in 1 R. C. L., p. 765, it is said: 'To make a valid oath or affirmation there must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and an intention to administer it on the other; for, even though such intention actually did exist, if it was not manifested by an unambiguous act, perjury could not be based thereon. If the attention of the person making the affidavit is called to the fact that it must be sworn to, and, in recognition of this, he is asked to do some corporal act, and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities.' See, also, § 48 of the chapter on affidavits in 2 C. J. 337, the notes to the texts cited."

This Cox Case, from which we have just quoted, was an appeal from a judgment sentencing Cox to a term in the penitentiary under an indictment charging him with the crime of perjury, and the question upon which the decision turned was whether Cox had made an affidavit upon which to obtain a license to marry a girl under the age of fifteen years. The facts, as there stated, were that the clerk "then tendered to appellant (Cox) for his signature an affidavit which recited the girl's age to be eighteen. Appellant signed the affidavit and the license was issued, although appellant was not otherwise sworn." Upon these facts we held that an affidavit had been made and affirmed the conviction of Cox for perjury, committed by making a false affidavit.

There is no question here as to the sufficiency in form of the affidavit, nor is there any question that the officer attaching her jurat had that authority. It was held in the case of *Lanier* v. *Norfleet*, 156 Ark. 216, 245 S. W. 498, that the supporting affidavit required by the primary election law may be made before a duly qualified notary public.

Except as to Ed Gill there is no question but that all the affiants signed the affidavit. Gill, when asked, "Is this your signature?" answered, "That is Charlie's, my son, but I authorized him to sign it."

In the very recent case of *Harris* v. *Hall, Secretary of State,* 196 Ark. 878, 120 S. W. 2d 335, we had occasion to consider when one may adopt as his own a signature written by another at the request of the person whose name was signed. That opinion recognized as valid such signatures, although the adopted signatures in that case were held invalid for the reason that under the provisions of the I. & R. Amendment, there invoked, there was a statutory inhibition against a person signing any name other than his own to an initiative petition. Our attention has not been called to any inhibition applicable to affidavits such as the one here under review, nor are we aware of any such statute which would prevent one from adopting such a signature as his own. It is our opinion that Ed Gill "signed" the affidavit.

It appears that three of the affiants did not personally appear before the notary, but were sworn over the telephone. It is insisted, and the court below held, that those persons were not sworn, for the reason that they did not personally appear before the notary. We think this was error.

There appears at page 3626, Pope's Digest, a form for an acknowledgment of a deed by one grantor, which has appeared in all the digests of the statutes, and which is in universal use throughout the state. Section 1830, Pope's Digest, is given as authority for the use and sufficiency of the form of knowledgment there appearing. This recites that the grantor "appeared in person." Section 1830, Pope's Digest, provides that "The acknowledgment . . . shall be by the grantor appearing in person before such court or officer having the authority by law to take such acknowledgment, . . ." Notwithstanding this statute, we have held that an acknowledgment, even by a married woman, of a conveyance of her homestead, over the telephone, was a good acknowledgment. *Abernathy* v. *Harris,* 183 Ark. 22, 34 S. W. 2d 765; *Jolley* v. *Meek,* 185 Ark. 393, 47 S. W. 2d 43. In the case

last cited a number of cases were cited to the effect that the acknowledgment of a signature as one's own was effective even though the signature had not been previously authorized. The theory being that the telephone conversation was a personal appearance.

In the case of *Kirk* v. *Hartlieb,* 193 Ark. 37, 97 S. W. 2d 434, cited and relied upon by appellee the facts were, as there stated, "that the signatures were obtained just as they usually are to ordinary petitions, and often when twelve or fourteen signatures had been thus obtained the paper was carried to the circuit clerk, who signed his name to the jurat. None of the alleged affiants appeared before him." There was, of course, no appearance before the clerk whatever in that case.

The most equivocal testimony in the case was given by Wilder Carpenter, who admitted signing the affidavit in the presence of a notary public, but denied that he had been sworn. He testified, "Now, listen, I don't know what I done." When asked if, at the time he was signing, he thought he was under oath, he answered, "No, I didn't. I just didn't think nothing about it, paid no attention to it any more, I just signed it, because Cicero (the contestant) said—I just signed it." When asked if the stenographer, who was the notary public, swore him he replied, "I don't think she did." When asked, "You went with him (contestant) for the purpose of signing this affidavit," he answered, "Yes, sir, I signed it. I would have signed if she had swore me as quick as the other way." The court asked witness: "You didn't think you were under oath at that time." The witness answered, "No, when Mr. Kirsch came up there and asked me, did I swear to it, I said, No, I thought, when you swore to anything, you held up your hand and swore like you swear here in court. I paid no attention to it." These questions and answers make apparent the fact that the witness did not think he had been sworn because his hand had not been uplifted. This was not essential, as was decided in the Cox Case, *supra.*

The testimony of the affiant, C. E. Tenison, was less equivocal. He testified: "I signed before Mr. Bratton's stenographer (the notary), but so far as holding up my

right hand and being sworn I didn't know." Tenison further testified: "After I came down (from Bratton's office) I asked them, was that a notary public. She asked me did I thoroughly understand the affidavit. I told her I did." And when asked, "Were you intending to swear to that at the time you signed it?" he answered, "Yes, sir." Witness had previously read the affidavit, and when asked, "You thought at the time you were signing it it was an affidavit?" and he answered: "I suppose the affidavit would be sworn to, yes, sir." And when the witness was further asked, "Who was it told you it was an affidavit? Where does it say affidavit on it—that is, if it was an affidavit?" he answered, "Mr. Thompson (contestant) told me he was getting an affidavit."

We are of the opinion, therefore, that all five of the affiants whose affidavits are questioned had "made affidavit" in a manner sufficient to comply with the requirements of the law.

It must be remembered that a contest will not be entertained unless the complaint shall be supported by an affidavit filed within ten days of the certification of the result of the election, and we have several times held that this requirement is jurisdictional, and the contest will not be entertained unless the affidavit is made within the time limited. It cannot be made thereafter. It would appear, therefore, that the door for fraud and imposition might be opened wide if persons who apparently had made affidavit upon which the contest might be based could, after the time when other affidavits could be procured, be permitted to say that they had signed the affidavit, but had done so with mental reservations and did not consider that they had been sworn because the oath had not been administered in the manner which they thought the law required.

There appear no formalities required in making affidavits except that § 5215, Pope's Digest, is as follows: "Every affidavit shall be subscribed by the affiant, and the certificate of the officer before whom it is made shall be written separately, following the signature of the affiant. Civil Code, § 605." The affidavit here found defective fully complies with this statute. Following this

section the digester has the following annotation: "The requirement that the affidavit shall be subscribed by the affiant is merely directory. *Gill* v. *Ward,* 23 Ark. 16; *Mahan* v. *Owen,* 23 Ark. 347."

There is no intimation of fraud in this case, but if these affiants may defeat this contest upon the testimony offered, the perpetration of fraud in some other case may be easily accomplished. The partisans of a successful candidate, knowing that a contest is about to be instituted, could make the essential affidavit, and then, when it was too late to secure other signatures, show the reservations entertained by them, when they had made the affidavit, and thus defeat the contest.

For the reasons stated the writer, the Chief Justice, and Mr. Justice MEHAFFY dissent from the opinion of the majority holding that a proper affidavit had not been made.

MISSOURI PACIFIC TRANSPORTATION CO. *v.* JONES.

4-5261 122 S. W. 2d 613

Opinion delivered November 21, 1938.

House, Moses & Holmes, Eugene R. Warren, for appellant.

J. H. Lookadoo, for appellee.

MEHAFFY, J. This action was instituted by appellee against the appellant in the Clark circuit court for damages for personal injuries alleged to have been received because of the negligence of appellant.

The appellant is a foreign corporation operating buses in the State of Arkansas. It operated a bus from Little Rock to Texarkana, and on November 1, 1937, appellee flagged appellant's bus just north of Friendship in Hot Spring county, Arkansas. It is alleged that when appellee stepped up to get on the bus his right foot was on the bottom step, he reached up and took hold of the hand rail to pull himself up and his right foot slipped because the appellant, its agents and employees, had negligently and carelessly left a banana peeling on the bottom step which caused appellee's right foot to slip out from under him. The complaint then described the injuries received by appellee, and prays damages in the sum of $3,000.

The appellant answered denying specifically each allegation in the complaint; denying that appellee was injured, and pleaded contributory negligence.

There was a jury trial and verdict and judgment for appellee in the sum of $2,500. The case is here on appeal.

Motion for new trial was filed and overruled. There are a number of assignments of error in the motion for new trial, but the appellant urges only one; that the court erred in refusing to grant its request for a directed verdict on the ground that the evidence is not sufficient to sustain the verdict. It is also stated by appellant that the appellee was guilty of contributory negligence.

Appellee's evidence is to the effect that he lived at Friendship, Hot Spring county, about 11 miles from Arkadelphia; he is 31 years of age, raised in Clark county; that on November first he came to Arkadelphia; going from his home to the highway, he flagged appellant's bus

at a place where he had caught the bus many times; followed his usual custom in stopping the bus, paying his fare, and coming to Arkadelphia; the bus came by where appellee got on a little after two o'clock; when he flagged the bus, it pulled up and stopped at the edge of the concrete and he caught hold of the bar with his left hand; the driver opened the door from his seat, and he placed his right foot on the bottom step; when he started to raise his left foot his right foot slipped out from under him, jerked him loose from the bar he was holding and he hit the ground on the end of his back bone and left hip; something slick caused his foot to slip out from under him; this object was on the step; after he fell he got up and got on the bus and went in and sat down; paid his fare to the driver; after he got to Arkadelphia he was suffering so much that he went to see Dr. Bourland; the doctor gave him some rest tablets and liniment and then appellee went down to his brother's; later that day he came back into town and went to see a lawyer, after which he went home and went to bed. He then describes his injuries and suffering. It is unnecessary, however, to set out this testimony, because it is not contended that the verdict is excessive.

The testimony of Mr. McMahan, who lives at Friendship, shows that Jones came to his house to get on the bus to go to Arkadelphia; it was between one and two o'clock when he came, it was a clear day, and he was with Jones on the north side of the highway. The bus came along about two o'clock and Jones walked out and flagged it; the driver opened the door of the bus and as Jones put his foot on the step and started to lift his left foot, his right foot went out from under him; he fell to his left on his hip; after he fell he got up and went on the bus; witness saw something when Jones' foot slipped out from under him and went and picked it up; it was about a half of a banana peeling; it was not a fresh peeling, looked like it was about two or three days old; it was dark, or dark brown; the steps of this bus were also dark, and the banana peeling was something of the same color. He did not see the banana peeling on the step, but saw something fall on the ground and wanted to know what Jones

had stepped on that threw him; he took the banana peeling to the house and kept it until Jones came back and saw what caused him to fall like he did; showed the banana peeling to several persons; one of them was Mr. Charlie Garrett.

Charlie W. Garrett testified in substance that he saw appellee and as he stepped up with his right foot on the first step; about the time his left foot was leaving the ground he slipped backwards and fell on his left side; went up to the place where he fell after the bus left and Mr. McMahan showed him a banana peeling he had in his hand.

Dr. Bourland, a physician, of Arkadelphia, testified about treating appellee and the extent of his injuries.

The driver of the bus testified that the bus was inspected at Little Rock and there was no banana peeling on the step then. There is no evidence of any inspection of the steps from the time it left Little Rock until appellee's accident. The driver says that he is in sole charge of the bus after it leaves Little Rock, and that the bus stopped about five minutes in Malvern, which is several miles from Arkadelphia; that in that five minutes he inspected the tires, but did not give the bus a general inspection; he thinks he would have seen a banana peeling if one had been on the steps.

A number of other witnesses of appellant testified about the inspection of the bus in Little Rock.

When appellee attempted to get on the bus, he put his right foot on the lower step and slipped on something slick which was on the step. McMahan saw him slip and saw some small object fall from the step to the ground and immediately went out to where the bus had stopped and picked up a part of a banana peeling.

There is no dispute about the fact that appellee attempted to get on the bus and slipped and fell, although the driver testified that he did not know he had fallen. It is also undisputed that he stepped on something slick which caused him to fall. It is also shown from the evidence that the banana peel fell from the step as the appellee slipped, and that McMahan picked it up; that the

step and the banana peeling were practically the same color.

Appellant calls attention to a number of decisions of this court and other courts, and says: "It is the well settled doctrine in this state that a jury's verdict cannot be predicated upon conjecture and speculation" and that is true. It is not sufficient for a person to show that the defendant may have been guilty of negligence. The evidence must point to the fact that it was guilty of negligence. But this does not have to be shown by direct testimony, nor to a mathematical certainty.

In testing the sufficiency of the evidence to support the verdict of a jury this court must view the evidence with every reasonable inference arising therefrom in the light most favorable to the appellee, and this court is bound by the most favorable conclusion that may be arrived at in support of the verdict rendered by the jury, and can only determine whether or not there was substantial evidence to support the verdict.

"We have many times held that this court, on appeal, in determining the sufficiency of the evidence, will consider the evidence in the light most favorable to appellee and will indulge all reasonable inferences in favor of the judgment." *Mutual Benefit Health & Accident Ass'n.* v. *Basham,* 191 Ark. 679, 87 S. W. 2d 583; *St. L.-S. F. Ry. Co.* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440; *Union Security Co.* v. *Taylor,* 185 Ark. 737, 48 S. W. 2d 1100; *Ark. Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45; *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798; *Ft. Smith Traction Co.* v. *Oliver,* 185 Ark. 227, 46 S. W. 2d 647; *S. W. Gas & Elect. Co.* v. *May,* 190 Ark. 279, 78 S. W. 2d 387; *S. W. Bell Tel. Co.* v. *Balesh,* 189 Ark. 1085, 76 S. W. 2d 291; *Arkadelphia Sand & Gravel Co.* v. *Knight,* 190 Ark. 386, 79 S. W. 2d 71; *Roach* v. *Haynes,* 189 Ark. 399, 72 S. W. 2d 532; *Sovereign Camp, W. O. W.* v. *Cole,* 192 Ark. 326, 91 S. W. 2d 250; *Reed V. Baldwin, et al, Trustees, Mo. Pac. Rd. Co.,* 192 Ark. 491, 92 S. W. 2d 392; *Mo. Pac. Rd. Co., Baldwin, et al, Trustees* v. *Westerfield,* 192 Ark. 558, 92 S. W. 2d 862; *Safeway Stores, Inc.* v. *Mosely* 192 Ark. 1059, 95 S. W. 2d 1136; *D. F. Jones*

Const. Co., Inc. v. *Lewis,* 193 Ark. 130, 98 S. W. 2d 874; *Loda* v. *Raines,* 193 Ark. 513, 100 S. W. 2d 973.

In a recent case the late Justice BUTLER, speaking for this court, said: "We agree with the appellants that the record seems to present a case where the preponderance of the evidence is against the verdict. A number of witnesses, who were present at the time of the alleged incident from which the injury is said to have grown, contradict in round terms appellee's testimony to the effect that no accident happened and the appellee was not injured as he contended. The verdict must rest on the uncorroborated testimony of the appellee. The question as to where lies the preponderance of the evidence is not for us to say. That is the duty of the trial judge, who, by his refusal to set aside the verdict, has set his seal of approval upon the truthfulness of the testimony given by the appellee. This conclusion, under settled principles of law, we are forced to adopt. We, therefore, treat the testimony of appellee as true and view it in the light most favorable to him, and if it appears from that testimony that there is substantial evidence to support the verdict, we, too, must approve it." *Norton & Wheeler Stave Co.* v. *Wright,* 194 Ark. 115, 106 S. W. 2d 178.

A case very much like the instant case was decided by this court and we said: "We think, under the rule of ordinary care to prevent injury to passengers, contended for by appellant as the correct rule, that there is ample evidence in the record to sustain the verdict and judgment. All the evidence tends to show that appellee slipped and fell upon a banana peel lying either upon the steps or floor of the vestibule. The fact that the porter cleaning up the vestibule and the conductor and "news-butch" failed to observe it a short time before arriving at Wister, does not conclusively establish the fact that the banana peel was not there and had not been there for some time. The jury might have reasonably inferred that it was negligently overlooked by all of them. A part of a banana peel is a small thing, and might easily have escaped the force of the broom in sweeping or the inspection of the "news-butch" and conductor through carelessness on their part, under the rule contended for by

appellant." *St. L.-S. F. Ry. Co.* v. *Daniels,* 170 Ark. 346, 280 S. W. 354.

In the case of *Mo. & N. A. Ry. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478, we said: "We will not reverse the judgment because of the insufficiency of the evidence, for as we view this evidence, it is not physically impossible that appellee was injured as a result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner."

The late Chief Justice HART, speaking for this court, said: "In considering whether or not the court should have directed a verdict for the defendant, every fact and inference of fact favorable to the plaintiffs, which the jury might believe to be true, must be accepted as true, and every fact unfavorable to the plaintiffs which the jury might reject as untrue must be rejected." *Hines* v. *Betts,* 146 Ark. 555, 226 S. W. 165.

Under the rules announced by this court in the above cases the judgment must be affirmed. It is the established rule of this court that the jury and not this court determines the facts, and when they have done so, if there is any substantial evidence to support their finding, it cannot be disturbed by this court.

The judgment is affirmed.

BURNS *v.* FIELDER.

4-5212-4-5213 (consolidated) 122 S. W. 2d 160

Opinion delivered November 21, 1938.

S. E. Gilliam and *Cockrill, Armistead & Rector,* for appellant.

Robert C. Knox and *M. P. Matheney,* for appellee and cross-appellants; *Mahony & Yocum,* and *W. A. Speer* for certain cross-appellees, and *Jeff Davis,* for other cross-appellees.

GRIFFIN SMITH, C. J. The question is, Did the grantee in a deed and the parties who executed and delivered it, such deed being absolute in form, intend that it should be a mortgage?

Although numerous litigants appear in the record, some as cross-appellants and some as cross-appellees, it is not necessary, in the view we take of the case, to refer to all of them, or to review their contentions. The principals are W. A. Burns and J. M. Fielder.

Fielder married Burns' daughter, Eva, and the couple had for a long time resided on the rural property owned by Fielder, which he either inherited or acquired by will from his mother. Burns, a fairly well-to-do farmer, lived four or five miles distant.

A reasonable conclusion to be drawn from all the evidence is that Fielder, either because of poor health or inability—or both—was not a good manager. He was unable to meet some of his obligations, and had received financial accommodations from his father-in-law. He owed $400 to National Bank of Commerce, El Dorado, and early in 1930 the bank was pressing for payment.

Burns interceded for Fielder, but without avail. Thereupon, they applied to First National Bank of El Dorado for a loan, which was granted.

February 1, 1930, Fielder and his wife borrowed $700, evidenced by notes for $300 and $400. To the $300 note was added interest of $24, while $32 in interest was added to the $400 note. The total indebtedness as reflected by these transactions was $756. The $300 note was signed by Burns as co-maker. It was also secured by a mortgage on Fielder's 60 acres of land. The mortgage secured any other indebtedness the makers might owe the bank. The $400 note, as expressed by G. M. Wade, cashier of the bank, "was secured by the indorsement and co-signature of W. A. Burns."

There were a number of renewals of the notes. March 20, 1931, the $300 obligation, with interest, amounted to $330; and it was paid by Fielder. The $400 note, as renewed with interest, matured November 15, 1932, for $440.

Wade testified that he wrote Fielder to come in and pay the remaining note; that Fielder explained he had been sick, had not done any farming, and could not pay the interest.

Failing to obtain satisfaction from Fielder, Wade wrote to Burns, and the latter paid the note April 13, 1933. To secure funds with which to make the payment, Burns pledged 35 bales of cotton to the bank, and procured $615.21.

Wade's recollection was that several days prior to April 13 Burns and Fielder came to the bank and talked with him, "and the decision arrived at was that Fielder was to make the deed to Mr. Burns. . . . I had written Mr. Fielder to come and make some arrangements, and they came in and said Mr. Fielder wanted to make a deed—Mr. Burns told me they had come to that decision. I think this was probably four or five days before the [Burns] note was executed."

Wade had offered to take the land for the debt, but preferred to make a loan on Burns' cotton and have the obligation paid. He was positive nothing was said about the deed from Fielder to Burns being a mortgage:

"I am sure it was a deed. There wasn't any mention of a mortgage."

At the trial Burns was unable to produce the $440 Fielder note, but in an affidavit attached to a petition to open the decree—a proceeding in the nature of a bill of review—Burns stated that the note had been discovered, and that the indorsement thereon was: "Paid by note of W. A. Burns, 4/13/33." In connection with this same proceeding G. M. Wade executed an affidavit saying he had seen the cancelled note, and that the "paid" indorsement was in the handwriting of an employee of the bank.

Mrs. Fielder was in the bank at the time her husband's note was paid, but apparently took no part in the conversations. The deed from Fielder to Burns was prepared in the bank, and was signed by Mrs. Fielder.

In its decree the court cancelled the deed to Burns, but held that subsequent purchasers were protected. Judgment went against Burns for money he had received from the sale of leases and minerals, less the amount found to be due Burns by Fielder. The chancellor apparently treated Burns' payment of Fielder's note as a loan to the latter. Burns did not surrender the mortgage. The deed was not filed of record until May, 1936.

Fielder contends that when the bank insisted upon payment of the $440 note, Burns came to him and suggested that he deed the property to the bank; that he demurred, explaining that if he forced foreclosure he would have a better opportunity to redeem; that Burns finally said that if he (Fielder) would make the deed to him (Burns), the opportunity to redeem would be better. "He also said he wanted the money, and any way we could raise the money I could redeem the land, and we agreed to make the deed under that condition, under those terms."

On cross-examination Fielder stated that "Burns refused to give me the land back in 1933"; that in 1933 when a man named Lagrone wanted to rent a part of the place he (Fielder) didn't know whether he could rent it or not "because they might foreclose"; that he sent Lagrone to Burns and the land was rented; that it was

his intention that proceeds of the rent should be applied by Burns on an existing indebtedness, although Burns denied this; that he had never asked Burns for the rent money; that he did not demand of Burns the money received from Bailey and Trimble for oil leases; that he did not undertake to sell leases and pay off the so-called mortgage "because it wasn't worth anything then"; that he intended to use his bonus money to pay the debt; that he offered to pledge his bonus bonds or certificate to Burns, but the latter would not accept them. This occurred after the land became valuable.

The witness admitted that, under his agreement with Burns, there was no obligation to redeem. The question was asked: "If you didn't want to you didn't have to?" And the answer was, "Yes, that is it." Asked if he regarded his obligation to Burns of a nature sufficient to permit suit against him, Fielder replied, "No."

Burns' testimony in many respects was in direct conflict with that of Fielder. Other points of interest in the evidence are:

Both Burns and Wade testified that Burns told Fielder he and his wife could continue to live on the place and have whatever they made on it. Value of the land as of April, 1933, was variously estimated at from $5 to $15 per acre. Wade testified that he had sold some land for $3.10 per acre. R. L. Lane testified that his attention was directed to a sign on the Fielder land which in substance was a notice to trespassers to keep out. The sign had been prepared for Burns at Fielders' suggestion. In consequence of this sign, Lane went to Burns and paid $400 for a lease. It was then ascertained that the Fielder-Burns deed had not been recorded. Lane testified that when he mentioned this to Burns the latter appeared surprised. Together they went to the bank, and the bank sent an agent with them to the court house. The agent indorsed satisfaction of the Fielder mortgage. Burns says that Lane requested that he, too, indorse the record, showing satisfaction, and that he did so. The deed was then recorded. The record did not disclose an assignment of the mortgage to Burns.

The lease sold by Burns to Lane covered 40 acres of the Fielder lands. After Burns recorded the deed, Lane assigned his lease to O. C. Bailey and J. D. Trimble. Thereafter, Burns executed a deed conveying one-half of the mineral rights of the 40 acres covered by the lease, but subject to the lease, and assigning one-half of the royalties payable under the lease. He also executed a lease on two acres of the remaining 20. Fielder, prior to 1933, had conveyed all of the minerals on 18 acres.

March 31, 1937, after an oil field had been proved, Fielder executed an oil and gas lease on 42 acres of the land in favor of Shaw, Hodges, Williams and Westbrook, of Jefferson, Texas. On the same day he executed a power of attorney, coupled with an interest, to Shaw. Acting under this power Shaw undertook to have the Fielder deed to the fee cancelled. June 3, 1937, Fielder and his wife executed a mineral deed to Westbrook, Hodges, and Williams, conveying one-half of the minerals on the 42-acre tract.

Aside from the personal testimony, a circumstance in favor of appellees' contention is that Burns did not have his deed recorded. Fielder testified that it was agreed this should not be done. It is urged by appellees that Burns, in retaining Fielders' note and the mortgage, and later in satisfying the mortgage of record, gave credence to what appellees contend is true, that is, Burns held the mortgage as additional security; or, rather, he looked upon it as an assignment.

By his own admission, however, Fielder construes the transaction as one whereby he, within his own discretion, and at a time convenient to his purpose, could tender repayment to Burns and repossess the property; but Burns, on the other hand, could not sue him. The most that can be said of the agreement, construed most favorably in Fielder's behalf, is that it was a sale coupled with an option to repurchase.

The evidence necessary to impeach the solemn recitations of the deed must be clear and convincing. As was said in *Bevens* v. *Brown*, 196 Ark. 1177, 120 S. W. 2d 574, such evidence "must be so clear that reasonable minds will have no doubt that such an agreement was

executed. It must be so convincing that serious argument cannot be urged against it by reasonable people."

Tested in the light of this rule, we do not believe the purported agreement should have been accorded that high degree of verity which must attach to alleged verbal reservations or conditions in order to overthrow solemn recitals of a deed. Business transactions must have finality. Conveyances must not be exposed to the caprice of parol, nor explained away by less than that quantum of evidence which essentially attains the dignity of clarity, impressing conviction.

In the instant case such evidence is lacking. Therefore, the decree is reversed in part, with directions that title to the land be quieted in Burns under the deed from Fielder, and that those taking interests conveyed by Burns be protected. It is further ordered that all instruments purporting to convey an interest in either the mineral or surface rights, or to the fee, executed by Fielder subsequent to April 13, 1933, as reflected by this record, be cancelled as clouds upon the title of Burns.

CITY OF FORT SMITH *v.* VAN ZANDT.

4-5250 122 S. W. 2d 187

Opinion delivered November 21, 1938.

Fadjo Cravens, for appellant.

R. S. Wilson, for appellee.

McHaney, J. Appellants are the city, the mayor and board of commissioners of Fort Smith. Appellee brought this action to enjoin them from constructing along the center of Midland Boulevard in said city a dividing curb, separating the northbound traffic from the southbound and making of said boulevard a four-lane highway. The city adopted a resolution authorizing said construction which permitted crossings only at street intersections. Appellee owns and operates a tourist and trailer camp on said boulevard, his property fronting thereon about 105 feet and the center of his property is approximately half way between the intersecting streets of Dartmouth and Albert Pike Avenue. The block in which his property is located is 597 feet long. Appellee insisted that an opening in said center curb be left at a point opposite the center of his property so that northbound traffic could turn to the left in the center of the block and enter his property without the necessity of driving to the next street intersection and returning. Appellants refused to do so and this suit followed. The complaint alleged the above facts and that prior to the construction of his said camp he secured permission from the city to construct

and maintain two driveways or openings across the center of said boulevard and proposed to pave the crossings, but was advised not to do so because of the contemplated improvement thereof; that the city had entered into an agreement with the WPA for the widening of said boulevard and the construction of said center curb; that the plans for same provide no opening for his property; and that the construction of said curb will greatly damage and depreciate the value of his property to the extent of $7,000. The answer admitted that the city proposed to make the improvements aforesaid; that prior to the institution of this suit the Fort Smith district of Sebastian county sponsored a Works Progress Administration project for the making of said improvements; that before the U. S. Bureau of Public Roads would approve said project it insisted upon said center curb to divide said roadway into four lanes of traffic as aforesaid, with the provision that no crossing be allowed except at intersecting streets; that appellants found on investigation that the WPA requirement as to crossings was necessary and expedient for the protection of persons and property using said boulevard and adopted the resolution above referred to; that it is a continuation of U. S. and state highways through said city and one of the most used highways entering and passing through the city; that many persons have applied for permission to construct crossways across said boulevard at points other than street intersections, but all have been refused since the adoption of said resolution; that if crossways are permitted between street intersections, operators of vehicles will turn into and cross traffic moving in the opposite direction, thereby increasing traffic hazards and endangering persons and property thereon; that if appellee is permitted to compel the city to grant the right sought, then others operating businesses facing on said boulevard can compel the permission of crossways, thereby multiplying the traffic hazards and in effect destroy the very object of the construction of said center curb.

Trial resulted in a decree for appellee, granting the relief prayed. The court found that the construction of said center curb would materially damage appellee's

property and that said resolution is unreasonable, arbitrary and partly discriminatory. The case is here on appeal.

We think the learned trial court erred in so holding. We cannot agree that the resolution adopted is either arbitrary, unreasonable or discriminatory. It may be true that appellee's property will be adversely affected, but no more so than any other property similarly situated. On the contrary, it appears to be reasonably necessary for the safety of persons and property and for the proper control or handling of traffic. It is undisputed that Midland Boulevard carries very heavy traffic; that it is a continuation through the city of two important U. S. highways and one state highway; and that an unbroken, except at street crossings, middle curb separating the four traffic lanes is proper construction and reasonably necessary under modern conditions of highway travel. It is not contended by appellee that such a construction constitutes a nuisance, but only that it unreasonably interferes with his business. It is true the block in which his property is located is longer than the ordinary city block by about 200 feet, thereby causing northbound persons who wished to enter his place to travel a short distance further than they would if it were only the length of an ordinary city block. Certainly this could not form the basis for declaring the ordinance unreasonable or arbitrary.

There can be no doubt that the city has the power and the duty to make reasonable provision for the safety of persons and property using its streets by the enactment of ordinances, resolutions or by-laws looking to that end, and that the city council or commission, or other municipal authorities have a wide discretion on such matters. The power is conferred by statute. Sections 9543, 9642 and 9702 of Pope's Digest. Our decisions so hold. In *Sander* v. *Blytheville,* 164 Ark. 434, 262 S. W. 23, we held that "under the general welfare clause of Crawford & Moses' Digest, §§ 7493-4, a city council has a broad discretion in determining what is necessary for the public welfare, safety and convenience of the city's inhabitants." Syllabus 2. In the body of the opinion we

said: "Now, there is a presumption in favor of the ordinance, and one who challenges its validity, alleging it to be arbitrary, discriminatory or unreasonable, should make it so appear by clear and satisfactory evidence." Citing *North Little Rock* v. *Rose,* 136 Ark. 298, 206 S. W. 449. In the more recent case of *State ex rel. Latta* v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301, after referring to the statutes above cited, we said: "Such are the varied uses and conflicting interests of city life that, as is said in *Ex Parte Foote,* 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63: 'Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights or clearly transcend the powers granted them.' "

We, therefore, hold that, under the rules stated in the cases above cited, it cannot be said that said resolution is manifestly unreasonable or that it so interferes with appellee's business or property as to be oppressive. He cannot be more harmed than any other property owner who owns property in the middle of the block. To sustain appellee's contention would be virtually to give him the benefits and advantages of a corner lot which he does not own. Also, to sustain him would be either to discriminate against others similarly situated or to give them cross-overs in the middle of the other blocks, which latter would be to destroy the very purpose of the center curb.

We conclude that the court erred in the decree rendered. It is, therefore, reversed and the cause dismissed.

MEHAFFY and DONHAM, JJ., dissent.

DENT, ADM'R. *v.* INDUSTRIAL OIL & GAS CO.

4-5248 122 S. W. 2d 162

Opinion delivered November 21, 1938.

George Patterson, J. K. Mahony, H. S. Yocum, Emon A. Mahony and *Charles E. Wright,* for appellant.

Daily & Woods, for appellee.

MEHAFFY, J. On May 22, 1929, the appellee, Industrial Oil & Gas Company, entered into a contract with G. T. Cazort and his wife, C. M. Cazort, by which the Cazorts agreed to sell gas to the appellee company. The contract consists of 23 paragraphs, most of them long, and in the view we take of it it is unnecessary to set out the entire contract, although, in construing it, it is necessary to consider the whole contract. The parties had had other contracts prior to the time of making this one.

On April 5, 1934, G. T. Cazort and C. M. Cazort filed suit in the Sebastian chancery court, Fort Smith district, against the Industrial Oil & Gas Company, setting out the contract above mentioned, and asked that the appellant company be required to account fully for the gas taken by it from the Crawford fields during the three years last past; that it account for the amount of gas it so contracted and agreed to take, of one million cubic feet per day, less the amounts actually paid for by it, and that plaintiffs have judgment against it for one-fifth of the amount of its said judgment against the Hardin

Gas Company so settled by it without consent of the plaintiffs; that it be required to set up a true copy of the said agreement between plaintiffs and it, and produce the original for inspection and comparison. That it be required to render a complete account of its sales in the Fort Smith area for the past three years, and submit its books and meter readings in verification thereof.

Appellant company filed motion to require the plaintiffs to make their complaint more definite and certain.

G. T. Cazort died in August, 1935. The death was suggested and admitted and the court made an order that the cause be revived as to G. T. Cazort, the revivor being in the name of R. E. Dent, administrator of the estate of G. T. Cazort, deceased.

The appellants filed an amended complaint on September 23, 1936, and there was attached to such amended complaint the contract sued on. There was also a motion filed to require that the City National Bank, agent, and the City National Bank, be made parties. The Twin City Pipe Line Company filed demurrer which was sustained by the court, and ordered that the City National Bank as trustee or agent be made party plaintiff.

The appellants then filed an amendment to the amended complaint. The City National Bank entered its appearance and the Industrial Oil & Gas Company filed answer denying each allegation of the amended complaint and amendment thereto.

Objections and exceptions were filed to deposition of Mrs. Cazort. It is not necessary to discuss these, because in appeals from chancery courts this court considers only competent evidence.

Appellants say in their brief: "Only one issue is involved in this suit and that a simple one—a construction of this single paragraph of the contract of May 22, 1929, between the original plaintiffs, G. T. Cazort and C. M. Cazort, and the original defendant, Industrial Oil & Gas Company." The paragraph referred to by appellants is as follows:

"Second party agrees that it will during the term of this contract take from first parties, provided first parties can furnish same under the terms hereof, a mini-

mum of 1,000,000 cubic feet of gas per day under present conditions and during the period which the smelter located east of Van Buren is operating. Second party agrees that it will take a minimum of 2,000,000 cubic feet of gas per day. The recital of a minimum in this paragraph, however, shall not affect the obligation of second party to take from first parties one-fifth (1/5) of the gas taken from Crawford county, Arkansas, under the terms of this contract, or obligate second party to take at any time an amount in excess of one-fifth (1/5) of the gas taken from Crawford county, Arkansas, under the terms hereof."

The interpretation of a contract is the determination of the meaning attached to the words written or spoken which make the contract. It is the duty of courts to discover the meaning of a specific contract, and to enforce it without leaning in either direction, when the parties stood on an equal footing and were free to do what they chose.

"All mercantile contracts ought to be interpreted according to their plain meaning, to men of sense and understanding, and not according to forced and refined interpretations which are intelligible only to lawyers, and scarcely to them. Contracts should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design nor, on the other hand, be so loosely or inartificially interpreted as to relieve the obligor from a liability fairly within the scope or spirit of their terms." 12 Amer. Jurisprudence, 745.

In construing contracts the court must, if possible, ascertain and give effect to the intention of the parties as far as this can be done consistently with legal principles, and this intention must be ascertained from the whole contract. *Sternberg* v. *Snow King Bak. Pow. Co., Inc.,* 186 Ark. 1161, 57 S. W. 2d 1057; *Coca-Cola Bottling Co. of Ark.* v. *Coca-Cola Bottling Co.,* 183 Ark. 288, 35 S. W. 2d 579; *Sydeman Bros., Inc.* v. *Whitlow,* 186 Ark. 937, 56 S. W. 2d 1020; *Dewey-Portland Cement Co.* v. *Benton County Lbr. Co.,* 187 Ark. 917, 63 S. W. 2d 649.

The lower court found the issues in favor of appellees and against appellants. A majority of this court is

of the opinion that the chancery court's decision is correct and that a proper construction of § 23 quoted above is not that appellees are required to take a minimum of 1,000,000 cubic feet of gas per day, but that they are required only to take one-fifth of the gas taken from Crawford county. A portion of the section reads as follows: "The recital of a minimum in this paragraph, however, shall not affect the obligation of second party to take from first parties one-fifth of the gas taken from Crawford county, Arkansas, under the terms of this contract, or obligate second party to take at any time an amount in excess of one-fifth of the gas taken from Crawford county, Arkansas, under the terms hereof." This court holds, after a consideration of the entire contract, that the clause above referred to in § 23 of the contract manifests the intention of the parties to fix the minimum which appellees must take, not at 1,000,000 cubic feet, but at one-fifth of the gas taken from the Crawford county fields, and that appellees can not, under the contract, be required to take more than that. (Mr. Justice HUMPHREYS and the writer are of opinion that the minimum is 1,000,000 cubic feet.)

It is the opinion of the majority that the decree of the chancery court is correct, and the decree is, therefore, affirmed.

WILSON *v.* DAVISON.

4-5270 122 S. W. 2d 539

Opinion delivered November 28, 1938.

Brewer & Cracraft, for appellant.
W. G. Dinning, for appellee.

DONHAM, J. Appellees were injured November 16, 1937, as the result of a collision between the automobile occupied by them and one occupied and driven by Mrs. J. D. Miller and owned by her husband, J. D. Miller.

J. D. Miller had a verbal agreement with the appellant, Roy Wilson, who operated a cleaning plant in Helena under the trade name of "The Unique Cleaning Service," whereby he agreed to furnish his own car and pay his own expenses in soliciting cleaning and pressing which he brought to appellant's plant. Under his agreement with appellant, Miller would receive 40 per cent. of the price of the cleaning for his services. He went when he pleased and where he pleased and was not in any manner under appellant's control nor was he subject to appellant's direction. The only limitation placed upon Miller in soliciting cleaning and pressing was that he was not permitted by appellant to solicit in Helena or West Helena. Miller extended such credit to his customers as he desired to extend, not as a credit of appellant, but as a personal credit of himself. There was no dealing between the appellant and Miller's customers.

The appellant required Miller to pay for the cleaning when it was delivered to him by appellant at appellant's place of business. It is true that Miller was required to pay appellant only 60 per cent. of the usual and customary price for cleaning and pressing, he retaining the remaining 40 per cent. for his own services.

Miller requested from the appellant pasteboard signs with the words "Unique Cleaning Service" printed thereon, which signs Miller inserted on the side windows of his car. This was done to assist him in letting persons know that he was collecting articles which were to be cleaned or pressed by appellant.

Miller had undergone a surgical operation a few days prior to the date of the alleged collision, and his wife did the soliciting for him while he was in the hospital; and it was while she was driving the car that the collision resulting in injuries to appellees occurred.

It was contended by appellant that Miller was an independent contractor and that, therefore, there was no liability on appellant's part to appellees for the injuries they received. On the other hand, it was contended by appellees that Miller was an employee of appellant and that appellant was liable on the theory of *respondeat superior* for the injuries sustained by them as a result of the alleged negligence of Miller's wife. All questions as to whether Miller's wife was negligent are eliminated from our consideration. It is conceded by appellant that she was negligent and that this negligence resulted in injuries to appellees.

A jury trial of the issues of fact resulted in a verdict for Geraldine Davison in the sum of $250, and for Joe Alice Davison in the sum of $500.

The record presents two questions for our consideration: (1) Was J. D. Miller an independent contractor or an employee? and (2) If Miller was an employee, would appellant be liable for the acts of negligence of Miller's wife?

It was clearly shown in evidence that the car being used by Mrs. Miller was owned by her husband, J. D. Miller, and that neither J. D. Miller nor his wife received any instructions or directions from appellant as to where

to go in the performance of their work and no instructions or directions as to the time during which they should engage in the work and that there were no restrictions of any kind placed upon Miller as he went about in the performance of his work, except that he should not solicit cleaning or pressing in Helena or West Helena. Miller's wife went where and when she pleased in soliciting cleaning and pressing, as did Miller when he drove the car. It was shown, beyond question, that Miller paid his own expenses, that is, he bought his own gasoline, and paid for repairs of his car. Miller was responsible for his own extension of credits and appellant had no contact with Miller's customers.

This court has many times held that it is the right to control and direct that determines whether one is a servant or an independent contractor.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Gillihan,* 77 Ark. 551, 92 S. W. 793, this court quoted with approval from Elliott on Railroads, as follows: "In general, it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work."

This excerpt from Elliott on Railroads has been quoted with approval many times by this court. *Arkansas Natural Gas Co.* v. *Miller,* 105 Ark. 477, 152 S. W. 147; *Arkansas Land & Lumber Co.* v. *Secrist,* 118 Ark. 561, 177 S. W. 37; *Wheeler & Co.* v. *Fitzpatrick,* 135 Ark. 117, 205 S. W. 302, and many other cases. In the case of *Moaten* v. *Columbia Cotton Oil Co.,* 193 Ark. 97, 97 S. W. 2d 629, this court said: "This court held, in the case of *Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S. W. 4, that the vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant, is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. An independent contractor is one who, exercising an independent employment, contracts to do a certain piece of work according to his own methods, and without being subject to the control of the

employer, except as to the result of the work." Other cases to the same effect are: *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6; *Harkins* v. *National Handle Co.,* 159 Ark. 15, 250 S. W. 900; *W. H. Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S. W. 4; *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. 2d 320; *The C. M. Farmer Stave & Heading Co.* v. *Whorton,* 193 Ark. 708, 102 S. W. 2d 79; *Meyer* v. *Moore,* 195 Ark. 1114, 115 S. W. 2d 1087; *Arkansas Power & Light Co.* v. *Richenback,* 196 Ark. 620, 119 S. W. 2d 515; *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* post, p. 131, 120 S. W. 2d 722.

The term, independent contractor, is correctly defined as one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of the employer, except as to the results of the work. In all of the foregoing cases, it is held that it is the right to control and not the actual control that determines whether one is a servant or an independent contractor.

Under the uncontradicted evidence shown by the record before us, we must hold that J. D. Miller was an independent contractor and that appellant, as his employer, would have been in no wise liable for the injuries to appellees, had Miller been driving the car that collided with the car occupied by them at the time of the injury.

Even if Miller had been an employee so as to render the appellant liable for his negligent acts, it, by no means, follows that appellant would be liable for the negligent acts of the wife of Miller. In the case of *Pullen* v. *Faulkner,* 196 Ark. 231, 117 S. W. 2d 28, this court said: "The instant suit is to be distinguished from the class of cases where a servant, without authority of the master, requests the assistance of a third party, and through the negligent act of such third party an injury occurs. It has been held that when the work so delegated by the unauthorized act of the servant is done within the actual or constructive presence of the servant, the negligent act is the act of such servant, and the master will be liable."

There is nothing in the record to show that appellant authorized Miller's wife to do the work she was attempting to do at the time of the alleged accident. And even

though it were conceded that Miller was an employee of the appellant, his wife was not driving the car in his presence at the time of the alleged accident. Therefore, there is nothing in the record to show that appellant would be liable for the negligent act of the wife.

It is evident from what we have said that the judgment of the court must be reversed, and since the case has been fully developed, same will be dismissed. It is so ordered.

SHIPP *v.* MISSOURI PACIFIC TRANSPORTATION CO.

4-5266 122 S. W. 2d 593

Opinion delivered November 28, 1938.

J. B. Dodds and *Wayne W. Owen,* for appellant.

C. E. Yingling, for appellee.

GRIFFIN SMITH, C. J. Appellant, riding on the back seat of an automobile driven by his brother, was injured

when a collision occurred where East Third and Locust streets in North Little Rock intersect. There was substantial evidence to support the jury's verdict in favor of the Transportation Company.

It is insisted by appellant that Instructions numbered 9, and 9½, given at the request of appellee, are erroneous. Appellant also urges that a safety ordinance of the city of North Little Rock, two sections of which were introduced over objections, was inadmissible because it is in conflict with statutory pronouncements on the same subject by the state.

Subdivision "b" of § 64 of act 300, approved March 23, 1937, is: "Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered." Section 71 of the same act reads: "The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this act, may make such left turn, and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicle making the left turn."

Section 2 of the city ordinance directs that "All vehicles approaching an intersection of the public highway with the intention of turning thereat shall, . . . in turning to the left, run beyond the center of such intersection before turning such vehicle to the left." Section 18 is: "When two vehicles approach one another on the same street going in opposite directions, and the driver of one or both of the vehicles desires to turn off said street, the vehicle which continues on the street in the original direction has the right-of-way over the vehicle turning off."

There is no practical difference between quoted sections of the ordinance and the statute. Applying direc-

tions of act 300 to the instant case, we have the following situation: Third street runs east and west. Locust street runs north and south. Shipp, traveling toward the east, entered the street intersection with an intent to turn left (west) on Locust street. He was required to approach the intersection "in that portion of the right half of the roadway nearest the center line thereof"—the north portion of the south half of Third street. Appellee's bus, proceeding west on Third street, likewise approached the intersection, or was within the intersection. Section 71 required Shipp to yield to the bus if the latter was "within the intersection or so close thereto as to constitute an immediate hazard." This meant that Shipp should not have attempted a left turn until the position of the bus ceased to be a hazard.

Section 18 of the ordinance authorized "the vehicle which continues on the street in the original direction" to anticipate a right-of-way, and this merely means that Shipp should not have turned left in the intersection while the bus was within such intersection or so near it as to constitute an immediate hazard. Section 2 of the ordinance directed Shipp to go beyond the intersection before turning left. Difference between the legislative act and the ordinance is that the act required Shipp to delay his turn if the bus was so near as to constitute a hazard. The ordinance gave the bus the right-of-way. The distinction appellant undertakes to draw is more theoretical than real, and goes to the use of terms rather than effect.

Instructions complained of are:

"You are instructed that, under the provisions of the ordinances of the city of North Little Rock where the accident complained of by the plaintiff occurred, it is provided that 'when two vehicles approaching one another on the same street going in opposite directions, and the driver of one of the vehicles desires to turn off said street, the vehicle which continues on the street in the original direction has the right-of-way over the vehicle turning off.' So in this case if you find that the automobile of the plaintiff and the bus of the defendant were approaching each other on the same street, going in op-

posite directions, and that plaintiff desired to turn off of said street while the defendant's bus had the right-of-way over the automobile of the plaintiff; and if the act of plaintiff in turning off of said street contributed to or caused the accident and injury and damage to plaintiff, if you find he sustained any injury and damage, then plaintiff cannot recover and your verdict should be for the defendant."

"You are instructed that under the provisions of the ordinance of the city of North Little Rock which has been introduced in evidence it is provided that 'all vehicles approaching an intersection of the public highway with the intention of turning thereat, shall, . . . in turning to the left, run beyond the center of such intersection before turning such vehicle to the left.' So in this case if you find that the automobile of the plaintiff and the bus of the defendant were approaching each other on the same street or highway, going in opposite directions, and the plaintiff undertook to and did start to turn off of said street into Locust street and to his left and did not run beyond the intersection of said street before turning his automobile to the left, and that such act on the part of the plaintiff contributed to or caused the injuries and damage he sustained, if any, then plaintiff cannot recover and your verdict will be for the defendant."

To each of the instructions appellant objected generally and specifically. As to the first his specific objection was: "The instruction is not based on any proper evidence, and [further] is based upon a void ordinance, . . . and because said instruction is incomplete in that it tells the jury that under any and all circumstances the driver intending to turn off of a street at an intersection shall . . . yield the right-of-way to the other vehicles coming in an opposite direction on such street which do not turn off at such intersection."

Objection to the second instruction was: "It is not based upon any proper evidence, [and, further] is based upon a void ordinance. . . . Said instruction is incomplete in that it tells the jury that under any and all circumstances the driver intending to turn off a street at

an intersection . . . shall . . . in turning to the left run beyond the center of such intersection before turning such vehicle to the left, which is in conflict with the law of the state, and is void as a result thereof."

It is the settled rule in this state that violation of a traffic law, whether promulgated by municipal or state authority, may be shown, but the fact that such law has been violated at a time and in circumstances which give rise to a contention that injury has been occasioned thereby is not to be asserted as creating liability as a matter of law. Such violation is evidence of negligence, but is not conclusive of the issue. *Pollock* v. *Hamm,* 177 Ark. 348, 6 S. W. 2d 541; *Mays* v. *Ritchie Grocer Co.,* 177 Ark. 35, 5 S. W. 2d 728; *Hovley* v. *St. Louis-San Francisco Ry. Co.,* 193 Ark. 580, 102 S. W. 2d 845. An instruction directing the jury to find for or against a plaintiff or defendant on the sole ground that a traffic law has been violated is erroneous. In *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71, in an opinion written by Mr. Justice Wood, the law was declared to be: "Travelers owe to each other the reciprocal duty of observing [the law of the road], and a failure to exercise ordinary care to observe them, resulting in injury to another, will constitute actionable negligence." This case was cited in *Riceland Petroleum Co.* v. *Moore,* 178 Ark. 599, 12 S. W. 2d 415, with the explanation that the court, in the earlier case, recognized that the rule was not an inflexible one, and that emergencies might arise where, in order to escape from danger to one's self or to prevent injury to others, it would not only be excusable, but perfectly proper, to temporarily violate the general rule.

In *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676, in an opinion written by Mr. Justice Butler, we said: "It is further insisted that the instruction is objectionable, because it tells the jury to find for the plaintiff if the violation of the statute [relating to speed] was the proximate cause of the collision and damage, without requiring the jury to find whether the appellant was negligent in failing to comply with the law. We think this objection is well taken, for it was a declaration in effect that violation of a traffic law was *per se* negligence,

whereas violation of the law merely casts upon the appellant the burden of showing that under the circumstances he was acting with ordinary care, notwithstanding the violation of the law."

Did instructions 9, and 9½ declare, as a matter of law, that violation of the ordinance would bar appellant from recovering, and did it take from the jury the question whether appellant was negligent?

Instruction No. 9, after calling attention to the provisions of § 18 of the ordinance, left to the jury's determination (1) whether the automobile and the bus were approaching each other on the same street; (2) whether they were going in opposite directions; (3) whether the plaintiff desired to turn north on Locust street from East Third; (4) whether, if plaintiff did make such turn, defendant's bus had the right-of-way, as distinguished from appellant's right to turn, and in so doing to cut across in front of the bus, and (5) whether plaintiff did, in fact, turn to the left; and, if so, did such act of turning "contribute to or cause the accident."

Instruction No. 9½ referred the same considerations, but did not submit whether the bus had the right-of-way.

It is insisted that *White Company* v. *E. J. Thompson Motor Express Company,* 182 Ark. 71, 29 S. W. 2d 674, is conclusive of appellant's position. In that case, however, the court told the jury that if [the truck] was being driven at a lawful rate of speed, and it was the first [of the two motor vehicles involved] to enter the street intersection where the accident occurred, the truck had the right-of-way, "and it was negligence on the part of plaintiff's driver to drive into the intersection in front of the defendant's truck." It will be observed that the judge told the jury that the particular act constituted negligence.

The instant case is different in that the court did not tell the jury that violation of the ordinance was negligence *per se.* The jury was not told that appellant's act in turning to the left before reaching the intersection was negligence. It was not told that any particular conduct considered separately from other elements did in

fact occur, or that it did not occur; or that, if the jury found such conduct did or did not occur, it would, or would not, constitute negligence. Stripped to its pertinent parts, the instruction told the jury what the terms of the ordinance were, but the court did not say that a violation of those terms would prevent the plaintiff from recovering damages. It mentioned certain acts, as to the commission of which there was substantial testimony, and then said that if such acts were committed, and "if they contributed to or caused the injuries and damage, if any, then plaintiff cannot recover."

In *Hurley* v. *Gus Blass Company,* 191 Ark. 917, 88 S. W. 2d 850, we said: "Appellant urges that the instruction is inherently wrong, because it contains the words, 'any degree [of negligence], however slight.' The words were correctly inserted in the instruction. This court said in the case of *Little Rock & Fort Smith Ry Co.* v. *Miles,* 40 Ark. [at page 322], 48 Am. Rep. 10, that 'The test of contributory negligence is, did the negligence contribute in any degree to produce the injury complained of.' "

We have not overlooked appellant's urged assignment that the instruction did not include such an expression as, "And if you further find that appellant was negligent."

Conformity to the stricter dogmas of technical construction would have been realized if the jury had been expressly directed to find whether plaintiff's act was one of negligence. But that is exactly what the jury did determine. This determination was made in the light of facts and circumstances which acquired evidential value because of the substantial nature of the testimony, and they were considered under instructions not susceptible of misunderstanding.

To reverse this judgment and remand the cause for want of a prescript which could not enlighten the jury by even a shadowy quantum would be placing ritual above substance.

Affirmed.

HUMPHREYS, MEHAFFY and DONHAM, JJ., dissent.

DONHAM, J. (dissenting). The majority has held that the traffic ordinance of the city of North Little Rock introduced in evidence does not differ materially from the state traffic statute. With this holding, I am in accord.

The majority has further held that instructions Nos. 9 and 9½, given at the request of appellee, are correct instructions. To this holding, I cannot agree.

The court in said instruction No. 9½ told the jury: "So in this case if you find that the automobile of the plaintiff and the bus of the defendant were approaching each other on the same street or highway, going in opposite directions, and the plaintiff undertook to and did start to turn off of said street into Locust Street and to his left and did not run beyond the center of the intersection of said streets before turning his automobile to the left, and that such act on the part of the plaintiff contributed to or caused the injuries and damage he sustained, if any, then plaintiff cannot recover and your verdict will be for the defendant."

Instruction No. 9 did not differ materially from instruction No. 9½. Both were to the effect that if appellant violated the city ordinance and this violation contributed to his injury, he could not recover. Hence, the effect of each of the instructions was to make a violation of the city traffic ordinance negligence *per se*. This court has many times held that violations of a city traffic ordinance, as well as violations of the state traffic statute, do not constitute negligence *per se*, but that such violations are only *prima facie* evidence of negligence.

In the case of *White Co.* v. *J. E. Thompson Motor Express Co.*, 182 Ark. 71, 29 S. W. 2d 674, this court said: "It is finally insisted that the court erred in refusing to give its requested instruction No. 5, which would have told the jury that if its truck was being driven at a lawful rate of speed and that it was the first truck to enter the intersection, its truck had the right-of-way 'and it was negligence on the part of plaintiff's driver to drive into the intersection in front of the defendant's truck.' The court correctly refused this instruction. It was inherently wrong in telling the jury that, if appellant's truck reached the intersection first, it was negligence for

the driver of the other truck to attempt to pass in front of him, without taking into consideration the other facts and circumstances in the case, and it was in conflict with instruction No. 1, already discussed." Citing, *Mays* v. *Ritchie Gro. Co.,* 177 Ark. 35, 5 S. W. 2d 728; *Pollock* v. *Hamm,* 177 Ark. 348, 6 S. W. 2d 541; *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676.

In the case of *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676, the court had under consideration an instruction which told the jury that if the defendant was operating his automobile in a residential district at a speed greater than twenty miles per hour and such speed was the proximate cause of the collision and damages, the jury should return a verdict for plaintiff. This court held said instruction erroneous, in that it made the violation of the traffic law negligence *per se,* instead of leaving to the jury the question of whether such violation was negligence.

In the case of *Hammond* v. *Hamby,* 191 Ark. 780, 87 S. W. 2d 1000, this court said: "According to the statement made in Huddy's Enc. on Automobile Law, Vol. 3-4, page 61, the great weight of authority is to the effect that a violation of the statute such as the above is negligence *per se,* but in this state the rule is that it is not negligence *per se,* but is evidence of negligence (*Mays* v. *Ritchie Gro. Co.,* 177 Ark. 35-37, 5 S. W. 2d 728), which casts upon the defendant the burden of proof to establish a compliance with the rule of conduct fixed by the statute, and which would be ordinary care within its meaning." Citing, *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676.

In its brief, appellee, speaking of its alleged negligence and the alleged contributory negligence of appellant, makes the following admission: "The evidence adduced was sharply conflicting on these two issues and tended to show on behalf of the appellant that he was operating his automobile in a prudent manner and was not guilty of negligence, while the bus of the appellee was being driven at an unusual and excessive rate of speed. That appellant had the right of way at the street intersection where the accident occurred and that the collision

resulted from the fact that appellee's driver disregarded the fact that appellant had the right-of-way."

If appellee is correct in this statement, and we believe it is, the case was one for the jury and it was important that the jury be properly instructed by the court in order that it might arrive at a proper conclusion.

Since the two instructions under consideration clearly made a violation of the city traffic ordinance negligence *per se* and not merely *prima facie* evidence of negligence, the instructions were inherently erroneous and, being prejudicial, the judgment of the court should be reversed.

MEHAFFY and HUMPHREYS, JJ., join in this dissent.

THE NATIONAL LIFE & ACCIDENT INS. CO. *v.* BROYLES.

4-5269 122 S. W. 2d 603

Opinion delivered November 28, 1938.

Roy Gean, for appellant.

Rex W. Perkins, for appellee.

BAKER, J. Appellee, Gretchen Broyles, sued the appellant insurance company upon a $2,000 policy issued by the National Life & Accident Company insuring the life of Wayne C. Broyles who died on September 21, 1937. The policy was issued on the 19th day of April, 1934, and premiums were paid in quarterly installments until the maturity date of the premium falling due on April 19, 1937. That premium was not paid, but the policy did not lapse as of that date for the reason that there was a thirty-one day grace period. Before the grace period had expired, but near the time of its expiration, the mother of the insured paid to one of the agents of the company $2 to extend the time for paying the premium. A few days later, perhaps not much more than a week, if that long, she made a second $2 payment. Her statement is to the effect that the agents of the company told or advised her that by making these payments the policy could be kept in force, as she stated, for two months for each payment of $2. Later in answer to a leading question, suggesting the date, the effect of her testimony was that these two payments extended the policy until September 30th, which was a few days after the death of the insured.

There was a jury trial in this case and the jury rendered a verdict for the appellee, less the quarterly premium in controversy. The verdict and consequent judgment are challenged upon this appeal upon several grounds, the principal one of which is insufficiency of the evidence to support the verdict. It takes an analysis of this testimony to disclose its weakness in the matters which we desire to discuss.

One of the insurance agents is spoken of as a superintendent or supervisor. In the brief and argument on the part of appellee it is not seriously insisted that they had the power or authority to do the things which it is alleged they did do, but it is only argued that the insurance company would be bound, if these agents

were acting within the apparent scope of their authority. It was also urged that if the company held them out as having said power in connection with their representation or agency for their company it is now estopped to urge that there was some limitation or restriction upon their activities inconsistent with such representation.

Appellee, also, argues that since the jury has decided these questions their verdict is final and that this court will not interfere. However sound these matters may appear from an abstract statement of them, that is beside the issues involved here. In the first place, no evidence was offered justifying a submission of the limit or extent of the power or authority of the insurance agents to a jury. It has never been the law in this jurisdiction that the authority of an agent may be proven by a third party who merely makes proof of the agents' statements in that respect. It was so held in *Gould & Co.* v. *Tatum,* 21 Ark. 329, 333.

In the case of *Concordia Fire Ins. Co.* v. *Mitchell,* 122 Ark. 357, 183 S. W. 770, it was held that it is "well settled that the existence of an agency cannot be established by proof of the acts and declarations of the agents." To like effect is the case of *Cotton* v. *Ingram,* 114 Ark. 300, 169 S. W. 967. To the same effect is the holding in *Latham* v. *First Nat. Bank of Ft. Smith,* 92 Ark. 315, 122 S. W. 992. It was there announced: "A principal is not bound by the acts and declarations of an agent beyond the scope of his authority. A person dealing with an agent is bound to ascertain the nature and extent of his authority. No one has the right to trust to the mere presumption of authority, nor to the mere assumption of authority by the agent." (Cases there cited.)

It may be said to be improper to permit a third party to put his interpretation upon what he says the agent said or did, as proof of the agent's authority. The only proof in this case about the extension of time for payment upon the policy, after the expiration of the grace period, is to the effect that one of the agents collected $2, that he went back later and advised Mrs. Broyles that

he thought it was a $1,000 policy and that the money had been sent to the company and that he had been sent back to collect $2 additional since the policy was for $2,000. In regard to this statement, even if we concede, as we are inclined to think we should, that Mrs. Broyles' statement was correct, yet we find that it is beyond dispute that the evidence shows that there can be granted an extension of an additional thirty days, after the grace period, and that grant or extension could not be made by the agents who collected the money. They remitted this money to the Fort Smith office where there was power or authority to make the proper extension.

Since there is no other evidence about the right, or power, or authority to extend the payment this evidence is undisputed. From this undisputed proof, then, the only extension that could have been made was that an additional thirty days was given within which to pay this quarterly premium, the amount of which was $9.64. This would have carried this policy to a date not later than July 19th, and had the additional payment of $5.64 been made after the payment of the $4, the premium to carry the policy until July 19th would have been sufficient. There was no such payment. The policy lapsed.

On July 19th another quarterly premium fell due. It is not urged that there was any payment of this quarterly premium due July 19th, nor that it was extended. At the expiration of the grace period, after that date, which was not later than August 19th, had premium due April 19th been paid, the premium not having been paid the policy would have lapsed. Hence, there were two periods at either of which the policy might have lapsed.

We have this inconsistent proposition presented, that by the act of the agents of the company a payment of $4, which first was stated as being $2 for each two months, would have extended the policy for four months and that this four months began after the expiration of the grace period and the grace period is determined as having expired on June 19th. The policy would have expired on September 19th, which was two days before the death of the policyholder, and even under that contention he would have had no insurance. The question,

however, and the answer of the witness was to the effect that these two $2 payments would have carried the policy until September 30th, and the witness, the beneficiary in the policy, answered, "yes." It was not even argued except by inference from such answer that the insurance agents could extend beyond the two two-months periods. This is the only evidence that is argued to support the verdict. Of course, this is not substantial. In fact, it is so inconsistent with the theory upon which plaintiff, herself, was trying the suit as to be self-contradictory.

It is argued that by payment of the $4 the insured escaped the responsibility of paying premiums and the company did not have a right to collect from the insured the balance of that quarterly premium $5.64, nor the next quarterly premium, maturing in July of $9.64. There is no proof in the entire record that these agents that were out soliciting insurance, sometimes collecting premium, had any power or authority to waive the payment of premiums due the insurance company.

We have attempted to avoid detailed discussion of the evidence offered in this case as the most of it would tend only to prolong the matter without profit. It may be proper, however, to call attention to the fact that the policyholder in this case had at one time been an agent for this same company. He knew its method of doing business. His uncle was also an agent for the company and he testified he had seen the policyholder a short time before he left the community to make a trip to California, that he discussed with him the proposition that he should pay his insurance premiums. The policyholder had suggested that he thought before he went away on his trip he would dispose of some property or holdings and pay up his premium. He thoroughly appreciated the fact that it had lapsed.

To sustain this verdict and judgment under the facts and circumstances above stated it seems that we would have to so amend the policy as to make it one that was nonforfeitable on account of the failure to pay premiums and as one containing such provisions and conditions that the insured, himself, could not even voluntarily refuse to pay premiums and cause it to lapse.

The express provisions of the policy are to the effect that all premiums must be paid either at the home office of the company or to an authorized agent and only upon delivery of a receipt signed by the president, vice president, or secretary and countersigned by a representative of the company.

This provision contradicts the theory that soliciting and collecting agents may waive the premiums or that they may so extend the date of the payment of premiums as to amount to waivers. There is no proof that such agents had any authority to issue policies, pass upon applications or waive conditions in policies. *National Life & Accident Ins. Co.* v. *Davison,* 187 Ark. 153, 58 S. W. 2d 691; *Gordon* v. *New York Life Ins. Co.,* 187 Ark. 515, 60 S. W. 2d 907.

Such agents must be treated as special agents or as having limited authority. In such cases, those who deal with such agents must determine at their own risk the extent of the agents' authority.

The court erred in not directing a verdict because there is no evidence of any kind showing the power or authority or that the conduct of agents, even if they attempted to do what is charged, that is, to extend the policy without payment of premiums, was sufficient to prevent a lapse of the policy. The proof is to the effect that the indebtedness against this policy was such under the automatic nonforfeitable provision of the policy at the time of the lapse as to leave only $1.65 of the cash or surrender value. This amount according to the policy was to be used to purchase paid-up insurance. This paid-up insurance amounted to $5 payable to the insured at the age of 85 years or to his beneficiary at his death. The company admits this liability under the provisions of the policy, the conditions of which are not in any manner in dispute and which fixes and determines this method of settlement in case of lapse.

There will, therefore, be a reversal of the judgment rendered and a judgment here for $5 for the beneficiary. This amount was tendered and the insurance company will be permitted to collect costs accruing from and after

the date of the tender, costs, if any, prior to that date will be paid by the insurance company.

MORGAN *v.* RANKIN.

4-5208 122 S. W. 2d 555

Opinion delivered November 28, 1938.

Owens, Ehrman & McHaney and *John M. Lofton, Jr.,* for appellant.

G. B. Colvin, for appellee.

SMITH, J. On June 10, 1935, J. E. Morgan, while driving a truck for the Cudahy Packing Company, collided with a sedan car driven by L. H. Rankin, and as a result of this collision Morgan was injured and Rankin was killed. Annie J. Rankin, the widow of the deceased, qualified as administratrix of her husband's estate, and was sued in that capacity by Morgan to compensate the injury which he had received. He recovered a judgment against the estate, which was affirmed on the appeal to this court. *Rankin* v. *Morgan,* 193 Ark. 751, 102 S. W. 2d 552. The administratrix did not file a cross-complaint, and the cause went to trial on an answer alleging that Morgan was guilty of contributory negligence. The judgment recovered in that case was satisfied by payment. While that appeal was pending, and while Mrs. Rankin was still administratrix of her husband's estate, she filed suit as widow to recover damages occasioned by loss of contributions made to her by her deceased husband against both Morgan and his employer. A demurrer was filed alleging that appellee could not maintain the action in her own right, and, on the day set for hearing the demurrer, she elected to take a nonsuit. On March 31, 1937, the administratrix filed a final report of her administration, and on April 21, 1937, she was discharged as administratrix. On April 27, 1937, she filed this suit upon the same cause of action upon which her first suit was based.

A demurrer was filed to this complaint, upon the grounds (1) that the widow has no right to sue, because there had been administration upon her husband's estate and a personal representative capable of suing under the so-called Lord Campbell's Act; (2) that there was a defect of parties, in that the plaintiff failed to join the next of kin as parties, and (3) that the judgment affirmed by the Supreme Court was *res adjudicata* of the present controversy, since it was the administratrix's duty to have filed a cross-complaint or counterclaim in

that action for the benefit of herself as widow and next of kin.

On November 23, 1937, three days before the date set for the trial, Thelma Lee Teal filed an intervention, in which she alleged that she was the only child of L. H. Rankin; that she was married and did not live with her father, and that at the time of his death he was making no contribution towards her support, and she prayed that judgment be rendered on her mother's complaint for the sole use and benefit of her mother. A motion to dismiss the intervention was filed upon the ground that any cause of action which the intervener may have had was barred by the statute of limitations when the intervention was filed. This motion was overruled and exceptions duly saved. The cause proceeded to trial, and there was a judgment in favor of the widow for her personal benefit, from which is this appeal.

The answer to the question, whether the former judgment, which this court affirmed, bars the present suit, requires a consideration of the application of certain declarations of law announced in numerous cases cited in the briefs of opposing counsel.

When the wrongful act of one party results in the death of another, more than one cause of action may arise. If, as a result of the injury causing death the deceased endured conscious pain and suffering, a recovery may be had on that account, which inures to the benefit of the estate of the deceased. In addition, the heirs and dependents of the deceased may recover damages to compensate their loss.

However, in prosecuting such suits the provisions of the act commonly known as Lord Campbell's Act, which confers the right to sue in death cases, must be pursued. Sections 1277 and 1278, Pope's Digest.

In construing this act in the case of *McBride* v. *Berman,* 79 Ark. 62, 94 S. W. 913, it was said that, while the wife was not technically an "heir at law," that phrase had been used in the statute in the broader sense of one receiving a distributive part of the recovery, and included his wife.

In again construing this statute in the case of *Law* v. *Wynn,* 190 Ark. 1010, 83 S. W. 2d 61, it was held that the term "next of kin" means all the children of decedent, and is not limited to children dependent on the deceased.

This statute (§ 1278, Pope's Digest) provides that "Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, . . . if there be no personal representatives then the same may be brought by the heirs at law of such person." And in the case of *Southwestern Gas & Electric Co.* v. *Godfrey,* 178 Ark. 103, 10 S. W. 2d 894, it was said that "the right of the heirs and next of kin of the decedent to sue for damages for his wrongful death is dependent upon there being no personal representative of such decedent, and, since the complaint of the heirs and next of kin did not allege there was no personal representative of the deceased, and did allege that J. R. Godfrey was the administrator of his estate, it did not state a cause of action as to them, and was subject to the demurrer, which should have been sustained (citing cases). Since the suit was brought by the administrator or personal representative of the decedent, however, who had the right to recover all damages resulting from his wrongful death, no prejudice resulted from the court's failure to sustain the demurrer, and the error was harmless." See, also, *McBride* v. *Berman, supra; Kansas City Southern Ry. Co.* v. *Henrie,* 87 Ark. 443, 112 S. W. 967; *Kansas City Southern Ry. Co.* v. *Frost,* 93 Ark. 183, 124 S. W. 748; *Jenkins* v. *Midland Valley R. R. Co.,* 134 Ark. 1, 203 S. W. 1; *Law* v. *Wynn, supra; Ashcraft* v. *Jerome Hardwood Lbr. Co.,* 173 Ark. 135, 292 S. W. 386. The subject is exhaustively annotated in the note appearing in L. R. A. 1916E, p. 112.

Now, when the suit of Morgan against the estate of Rankin was brought and was tried, there was a personal representative of Rankin's estate. The appellant herself was that person. She then had the right to recover for herself, for the estate and for all others, any and all damage for which Morgan was responsible. She elected not to allege these damages in the suit by Morgan against

the estate of which she was the administratrix, but contented herself with the allegation that Morgan's own negligence had contributed to his injury, and that he could not recover on that account, and this issue was decided adversely to her contention.

It is true Morgan's employer was not a party to that suit, but it could have been made a party, as was done in this case. Morgan was, of course, a party, being the plaintiff in that action, and if there is any liability on the part of the Cudahy Packing Company, Morgan's employer, it is under the doctrine of *respondeat superior,* but Morgan's liability was primary and personal. The Cudahy Packing Company could not be held liable unless Morgan was negligent. It was alleged in the answer of the administratrix that Morgan was negligent, and that his negligence caused or contributed to the collision, resulting in his injury and in Rankin's death, and that was the issue tried in the former case.

It is true the administratrix made this allegation for the purpose of defeating a recovery against the estate of which she was the administratrix, and not for the purpose of recovering damages on account of the death of her intestate. But, under the facts stated, we think she did not have the right to split the action into its several parts. Morgan's employer could have been made a party had the administratrix desired to do so, but without the Cudahy Company being a party, other parties were before the court who had the right to litigate the question of liability for the collision. The widow, as administratrix, had the right to represent, not only herself and the estate of her intestate, but all "heirs-at-law," and to recover any damages accruing.

There were no interests which she did not represent. It was said in the case of *McBride* v. *Berman, supra,* "manifestly, these statutes did not intend this splitting of the cause of action, and contemplate this multiplicity of actions for one act of negligence resulting in death. The statute (§§ 6289 and 6290, Kirby's Digest), commonly called 'Lord Campbell's Act,' intends one action to be brought for the death sued on.

This action must be brought by the personal representative, if there be administration. If there is no administration, then the action must be brought by the heirs at law of such deceased person."

The statute (§ 1416, Pope's Digest) provides that, "in addition to the general denial above provided for, the defendant must set out in his answer as many grounds of defense, counterclaim, or set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished."

The widow, as administratrix of her husband's estate, had the right, and, we think, was under the duty, of litigating, in the suit against her as administratrix, all the questions which she raised in the suit later brought for her personal benefit.

If one participant in an automobile collision may, when sued by the other, waive the right to assert his own damages as a result of the collision and later sue for such damages in a separate suit we may reasonably expect two suits in many of such cases, and a more prolific and profitable field of litigation will be opened up than existed in the case of suits by guests against their hosts, before the passage of our guest statute on that subject.

We think the present cause of action was barred by the former suit, and the judgment here appealed from awarding damages to appellee will be reversed, and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

DONHAM, J., disqualified and not participating.

NORM COMPANY *v.* HARRIS.

4-5274 122 S. W. 2d 532

Opinion delivered November 28, 1938.

J. R. Long, for appellant.

Bessie N. Florence, for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellee in the circuit court of Garland county on the 22d day of March, 1938, alleging in their complaint that on the 25th day of November, 1932, they entered into a written contract with appellee to furnish her certain advertising in reserve territory for the sum of $208 per annum; that appellee breached her contract by failing to perform same on December 29, 1932.

Appellee filed a demurrer to the complaint on the ground that the action was barred by the five-year statute of limitation for failure to bring suit on the breach within five years after said breach.

Thereupon the attorneys of the respective parties signed and filed an agreed statement of facts as follows:

"The contract made the basis of this suit was dated November 25, 1932; the performance of service under the contract as alleged on the part of the plaintiffs occurred on November 29, 1932, and alleged failure of performance by the defendant occurred on December 29, 1932. A suit had been filed on March 6, 1936, by the Norm Company as plaintiff, which failed to set out in the caption of the complaint or in the complaint itself the names of any of the parties who composed the Norm Company, a partnership. However, in an exhibit to the complaint, marked 'A', the names of certain persons appeared as partners. A demurrer to this complaint was filed on March 23, 1936, alleging the defect of parties plaintiff. Said demurrer was heard by the court and

sustained as to defective parties plaintiff on April 19, 1937, and the suit dismissed."

The trial court, after the agreed statement of facts was filed, treated the demurrer as a motion to dismiss the cause of action and sustained the motion and dismissed the complaint, from which order of dismissal is this appeal.

Appellants contend that the court erred in sustaining the motion to dismiss the complaint for the reason that the statute of limitations was tolled by the institution of a suit on March 6, 1936, by them against appellee which was dismissed by the court on account of defect of parties plaintiff, which amounted to a nonsuit and entitled them to bring a suit on the same cause of action within one year from the dismissal thereof and that the instant suit was brought within the one-year period under the provisions of § 8947 of Pope's Digest which is as follows: "If any action shall be commenced within the time respectively prescribed in this act and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same may be reversed upon appeal or writ of error, such plaintiff may commence a new action within one year after such nonsuit suffered or judgment arrested or reversed."

This court decided in the case of *Little Rock, M. R. & T. Railway Co.* v. *Manees*, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45, that: Although an action is brought in a court without jurisdiction, yet its pendency will arrest the statute if a proper action is commenced within a year after the judgment in first suit is vacated; and again decided in the case of *Watkins* v. *Martin*, 69 Ark. 311, 65 S. W. 425, that: Plaintiff must prove bringing of action within one year after dismissal of former action. The agreed statement of facts shows that the suit filed on March 23, 1936, was dismissed on April 19, 1936, on account of a defect of parties plaintiff because the members of the partnership, "Norm Company," did not appear in the caption or body of the complaint, but only appeared in Exhibit "A" to said complaint. The demurrer was sustained and the complaint dismissed under

§ 1485 of Pope's Digest authorizing the court to dismiss an action without prejudice to a future action for want of necessary parties. Appellee argues that the agreed statement of facts does not show that the case was dismissed without prejudice on account of a defect of parties plaintiff and that it must be presumed that it was dismissed upon the merits of the case from which dismissal appellant might have appealed and that for this reason it did not arrest or toll the statute, but the agreed statement of facts does show that it was dismissed on account of a defect of parties, and being dismissed for a defect of the parties, it was dismissed by the court without prejudice under the statute itself. Appellee argues that it amounted to no suit at all, because it was brought by "Norm Company," and that "Norm Company" was not shown to be a corporation or partnership either in the caption or the body of the complaint. The agreed statement of facts shows that an exhibit was attached to the complaint showing that the "Norm Company" was a partnership composed of John H. Ryder, J. Frank Smith, Adolph Doll and Harriett E. Doll. But it is insisted that the exhibit attached was no part of the complaint, and that it was proper for the court in dismissing the case to ignore the exhibit. In this, appellee is in error. The exhibit could have been referred to, and should have been referred to, not to contradict or control, but in explanation of, the allegation. *Lindsey* v. *Bloodworth,* 97 Ark. 541, 134 S. W. 959. Had the court looked to the exhibit it could have readily ascertained that "Norm Company" was a partnership consisting of John H. Ryder, J. Frank Smith, Adolph Doll and Harriett E. Doll, because nothing in the exhibit contradicted that the "Norm Company" had entered into a contract made the basis of this suit, but simply explained who "Norm Company" was. It is apparent that "Norm Company" in the first suit was the "Norm Company" in the instant suit, and that the individuals composing "Norm Company" were the same persons in both cases. The dismissal of the case amounted to a nonsuit without prejudice for defect of parties under the provisions of § 1485 of Pope's Digest, and not a dismissal of the case on its merits.

The judgment is, therefore, reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

GRAYSON *v.* BOWIE.

4-5268 122 S. W. 2d 536

Opinion delivered November 28, 1938.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

Glover & Glover, for appellee.

McHANEY, J. Appellee, Willie Bowie, is a son of Monroe Bowie, deceased, who died testate and said appellee is a beneficiary under his father's will. The other appellees are Willie Bowie's wife and his sister, Lena E. Goodwin, who brought this action for her brother as next friend, alleging that her brother was mentally incompetent. All the appellees are colored.

On February 24, 1934, Willie Bowie and wife conveyed by deed to appellant all his remaining interest in the estate of his father, which came to him as legatee under said will, for a consideration of $750 cash. The complaint alleged that said sum was grossly inadequate and that the reasonable value thereof was greatly in excess thereof; that Willie Bowie is upward of sixty years of age and wholly incapable of transacting business on account of his mental condition; that appellant persuaded him to part with his property, was an ex-

perienced business man, took advantage of him and perpetrated a fraud on him; and that said deed should be declared to be a mortgage. The answer was a general denial. Trial resulted in a decree for appellees, in accordance with the prayer of the complaint, which rendered judgment for appellant for the $750 paid, less the sum received by him in the distribution of the funds of the estate, from which is this appeal.

We think the court erred in so holding. Shortly after the execution and delivery of the deed to appellant, an attempt was made in the Ouachita probate court to have Willie Bowie adjudged insane and incapable of transacting business with the view of forming the basis for the present action, but the probate court, after hearing the testimony of Willie Bowie's neighbors, and upon the court's own personal knowledge, dismissed the petition, holding him to be sane and capable of transacting business. There was no appeal from said decision and appellant insists that appellees are bound thereby and cannot, in this proceeding, insist to the contrary. Whether this be true or not, we do not now decide, as we are of the opinion that the great preponderance of the evidence is contrary to the finding and decree of the court that Willie Bowie is incompetent. Twelve witnesses testified for appellees. Two of them were his sisters, one a sister-in-law, and one a nephew. Four others were colored friends. Three others were physician experts and the other the lawyer representing the estate of Monroe Bowie. The gist of all the testimony of the lay witnesses, relatives and others, was that, in 1924, Willie Bowie had or was supposed to have had an illness of some kind in Memphis, Tennessee, and that since said time, after he came back to Ouachita county, he has not been as active mentally as he was before; that since that time he has a poor memory; that the people around Camden generally regard him as not having a good mind; that his brothers had a power of attorney from and attended to his business for him, the power of attorney being executed during the time of his supposed unsound mind; and that he is not as careful about his personal appearance as he formerly was,

doesn't comb his hair, shave and clean up as he once did. Several of these lay witnesses, including the attorney for Georgie Morris, administratrix of the estate and sister of Willie, testified that in their opinion he was incompetent to transact his own business. This was corroborated by three medical experts. Other testimony was that he would walk off without telling anyone where he was going and wouldn't tell where he had been when he came back.

On the other hand, appellant produced fourteen witnesses including himself and three physician experts, all of whom testified that Willie Bowie is as capable and competent as he had ever been; that they had noticed no change in him and that they regarded him as sane and mentally competent. None of these witnesses were related to appellant and none had any motive to swear falsely unless it might be said that the cashier of the bank of which appellant is the president and his attorney who testified in his behalf might have had such a motive. In addition to the testimony of all these disinterested witnesses, there is the established fact that since said Willie Bowie came back from Memphis in 1924, he was put in the grocery business by his father and brothers which he conducted for some time; that he has been engaged in farming; that he brought a suit against his sister, Georgia Morris, to compel her to handle the affairs of the estate correctly and honestly, and compelled her to do so by a judgment of the probate court; that said sister settled with him a $1,000 liability for about $400, and she offered to buy the same interest from him for which appellant paid $750 for about $400. Evidently at that time she regarded him sane and competent. There are many other facts and circumstances in evidence tending to establish his sanity and competence, but one of the most potent is the judgment of the probate court, rendered subsequent to the conveyance, to the effect that he was sane and competent. When all these facts and circumstances are properly considered, we think the evidence preponderates in favor of appellant.

In *Bryant* v. *Edgmon*, 192 Ark. 20, 90 S. W. 2d 994, we restated the rule in this court in determining where the preponderance of the evidence lies in chancery cases by quoting the language of Judge Wood in *Leach* v. *Smith*, 130 Ark. 465, 197 S. W. 1160, as follows: "But in chancery causes the procedure is entirely different. When chancery causes reach this court on appeal, they are taken up for trial *de novo* on the record made up in the lower court, that is, on the same record, but the law and the facts are examined the same as if there had been no decision at *nisi prius*. In determining the issues of fact by this court in chancery causes, no weight is given to findings of fact by the trial court unless the evidence is so conflicting as to leave the minds of this court in doubt as to where the preponderance lies. Where the evidence is evenly poised, or so nearly so that we are unable to determine in whose favor the preponderance lies, then the findings of fact by the chancellor are persuasive. But the issues of fact, as well as law, are tried by this court anew."

Under this rule we hold that the decree of the court is against the preponderance of the evidence and must be reversed and the cause dismissed. It is so ordered.

MOORE AND CHICAGO MILL & LUMBER COMPANY
v. PHILLIPS.

4-5180 120 S. W. 2d 722

Opinion delivered October 17, 1938.

Austin M. Coates, Coleman & Gantt and *Daggett & Daggett,* for appellants.

E. W. Brockman, Reinberger & Reinberger and *Bridges & Bridges,* for appellees.

GRIFFIN SMITH, C. J. Judgments aggregating $12,125 to compensate personal injuries sustained by Adeline Phillips, Kathleen Williams, and Fitzhugh Brunson, were returned on jury verdicts against Arthur Moore, Allen King, and Chicago Mill & Lumber Company, the latter a corporation.

It is alleged that Moore and King were employees of the corporation; that in April, 1937, the three plaintiffs, mentioned *supra,* were in an automobile driven by Brunson; that a truck belonging to Moore and driven by King, with whom Moore was riding, collided with the Brunson car; that the three plaintiffs were severely and permanently injured, and that at the time the accident occurred Moore and King were engaged in a mission for Chicago Mill & Lumber Company.

There is a great deal of testimony explaining how the accident occurred, much of which is in conflict. There were questions of fact for the jury's consideration, presented under proper instructions as to Moore and King, and the judgments against them are affirmed.

As to the Chicago Mill & Lumber Company, the situation is different. In 1934 Arthur Moore, who had previously lived at Vicksburg, Mississippi, moved to a farm near West Helena, Arkansas. For many years he had been engaged in the timber business, principally as a logging contractor. After going to West Helena, he executed various contracts with Howe Brothers Lumber Company and Shannon Lumber Company, under which he cut and delivered timber from lands owned by the corporations. There is no evidence contradicting his testimony that in the execution of such contracts he owned and furnished the material and equipment and employed the necessary labor. Prior to execution of the contract here involved, he had performed for the Company under only one contract in 1934, later moving some 25,000 feet for the Company, but under verbal agreement. He was also engaged in the business of buying timber and selling logs to various mills.

February 20, 1937, the Company purchased from Mrs. Sallie M. Erwin the standing timber on 340 acres of land in Drew county, the time for removal thereof being restricted to two years. April 3, 1937, the Company and Moore entered into a written contract under which, for a compensation of $10 per thousand feet, Moore agreed to cut, transport and deliver the standing timber to the right-of-way of the Missouri Pacific Rail-

road at Monticello. There is no evidence tending to question execution of the contract, or good faith of the parties. To the contrary, it is shown that from April 3 to April 23, Moore was engaged in executing the work contemplated by the contract. Original ledger sheets, showing the account of Moore with the Company from March 1, 1937, to April 3, 1937, as well as other original records and entries thereon—all of which were made prior to April 23—were introduced in evidence.

These records reflected that on April 9 settlement was had between Moore and the Company, in accord with terms of the contract, for 6,783 feet of logs. April 23 a like settlement, covering 22,035 feet of logs, was had. The record further shows that Moore lived on a farm containing 60 acres, which was "clear," some five miles distant from the plant of the Company in West Helena; that he was the owner of a truck and trailer, and a tractor, although the Company had advanced him some money and had taken a mortgage; that he owned log wagons, mules, and various other camp property, and that he transported this equipment to the lands and established a camp thereon. He took with him laborers then regularly in his employ, and at a later date hired log laborers, some of whom were employed by him to cut timber "by the thousand." He also employed persons owning trucks to transport the timber to Monticello. Settlements were made with his labor at bi-weekly periods, and up to June, 1937, payments were made by Moore from his own funds. Thereafter, laborers were paid by the "woods foreman" of the Company, Cox, but on payrolls made out by Moore, and at his direction, and receipts taken from each employee were introduced in evidence, showing performance of labor on "Arthur Moore's job."

Moore customarily returned to his home near West Helena on Friday preceding alternate Saturdays, to procure settlement with the Company for the amount due him under the contract. The bases for such settlements were "scale sheets" forwarded the Company by Cox.

In the execution of his contract, and in going to and from the land, Moore used a pick-up Ford truck, the

state license to which was in his name. April 23, 1937, he left camp in this truck, accompanied by one of his employees, Allen King, a tractor driver. He started from Monticello for West Helena to effect settlement for logs hauled during the preceding bi-weekly period. While on his way home the accident complained of occurred. Allegations that Moore and King were servants of the Company were met with the answer that Moore was an independent contractor; that neither Moore nor King was, or ever had been, employees of the Company. The contract between Moore and the Company was filed as an exhibit to the answer. There was no substantial proof to show that the contract was colorable, nor were there any allegations or proof that it was not *bona fide*. Plaintiffs contended only that phraseology of the contract, by reason of provisions relating to control and direction of operations, created the relation of master and servant, rather than owner and contractor; and that the Company had by conduct subsequent to the execution of the contract destroyed the relation of owner and contractor, if the contract did in law create such relation, and thereby created the relation of master and servant.

The case may be disposed of by a determination of two principal questions: (1) Does the contract between Moore and the Company, standing alone, create the relationship of owner and contractor? (2) If it be held that the contract did make Moore an independent contractor, is the evidence adduced by plaintiffs sufficient to show that the parties, by subsequent conduct, abandoned this contractual relation and substituted in lieu thereof the relation of master and servant?

If the first question be affirmatively answered, and the second one be answered in the negative, it necessarily follows that the Company would not be under any liability to plaintiffs. Correct determination of the first question necessarily involves consideration of the contract.

Preliminary to the contractual terms, it is first stated that the Company and the "contractor" have "reached an agreement for the cutting, hauling and delivery of the

timber." The land on which it is situate is described; point of delivery is fixed; and the contractor was obligated to "actively begin work . . . within ten days . . . and continuously and diligently prosecute the work so as to complete the delivery of all the timber by the first day of July, 1937."

Section 1 provided that the contractor ". . . has or will provide at his own expense all the teams, logging equipment, labor, etc., necessary to reasonably guarantee the prompt and faithful cutting, hauling and delivery of all or any part of the timber and logs, within the time provided; and keep the timber and logs free from all liens or claims for labor or otherwise; and the corporation may require the contractor to reasonably satisfy it in that behalf before making any payment to him as herein provided."

Section 2 required the contractor to confine operations to such subdivisions as the corporation should direct. It further required him to cut and remove the timber from such subdivision most remote from delivery point. The particular subdivision on which the contractor "shall begin operations" was to be "as directed" by the Company.

Under Section 3 the corporation retained the power to "direct" as to the species to be cut and removed.

Section 4 provided that the timber should be cut in a careful and workmanlike manner, "as may be directed and changed in writing from time to time by the corporation," and that the full product of the tree should be obtained and logs cut to the best advantage in standard lengths.

Section 5 required delivery of the logs in a reasonable time and fixes a penalty on the contractor for default in this respect.

Section 6 required delivery of the logs within fifty feet of the loading equipment on track at Monticello; and the dumping grounds were to be prepared by contractor "at his own expense." If logs were lost or damaged, the contractor is held liable thereof.

Section 7 provided for measurement of logs delivered and bi-weekly statements therefor, on inspection and measurement by an agent of the Company. Contractor was to be furnished with a duplicate tally of logs scaled, which, without objection, was made final basis of settlement.

Section 8 covered the price per thousand feet to be paid contractor "for all logs delivered," but 10 per cent. of the contract price was to be retained until the contract was completely performed, and upon breach by the contractor, the amount retained was to be held by the corporation as liquidated damages. This section further provided: "In addition to the 10 per cent. retention to guarantee the performance of this contract by the contractor, the corporation shall also retain and deduct any amount which the contractor may owe it on any account whatever, including all amounts due it on account of the failure of the contractor, or his employees, to properly cut and log up the timber, or to promptly haul and deliver the same."

Under Section 9 the parties agreed that the Company might either permanently discontinue, or temporarily suspend, cutting and delivery of the timber.

By a long line of decisions this court is committed to the universal rule, that where the contractor is to produce a certain result, according to specific and definite contractual directions, agreed upon and made a part of the contract, and the duty of the contractor is to produce the net result by means and methods of his own choice, and the owner is not concerned with the physical conduct of either the contractor or his employees, then the contract does not create the relation of master and servant. This court has consistently accepted and stated the settled rule that even though control and direction be retained by the owner, the relation of master and servant is not thereby created unless such control and direction relate to the physical conduct of the contractor in the performance of the work with respect to the details thereof. *St. Louis, I. M. & S. Ry.* v. *Gillihan,* 77 Ark. 551, 92 S. W. 793; *Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S. W. 4.

In the Gillihan Case, Mr. Justice HART said: "In general, it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work. But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily, the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relations so as to render the company liable."

In the Starrett Case, Mr. Justice WOOD defined an independent contractor as "One who contracts to do a piece of work according to his own method and without being subject to the control of his employer, except as to the result of the work."

Again, having under consideration a contract strikingly similar to the one here involved, as well as evidence also strikingly similar to that with which we are dealing, it was further said: "Now, under the above definition, according to the plain provisions of the written contract, the relation as between the company and Fleetwood at the time of the injury to appellee, was that of independent contractor rather than that of master and servant."

There is nothing in the contract showing an intent upon the part of the Company to retain control or direction of Moore in the exercise of the means or method by which he should perform the contract. There is no direction relating to the physical conduct of Moore, or his employees, in the execution of such contract. True it is there are certain directions to be observed by the contractor in the cutting of the timber, especially as to place and dimension; but these are specific and definite and are similar to plans and specifications so often found in contracts covering the performance of labor of similar character. Their design is to produce a given result. There are many decisions of this court holding to this effect. The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the

performance, then the relation of master and servant necessarily follows. On the other hand, if control of the means be lacking, and the owner does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists. *St. L., I. M. & S. Ry.* v. *Cooper,* 111 Ark. 91, 163 S. W. 160; *Ark. Land & Lbr. Co.* v. *Secrist,* 118 Ark. 561, 177 S. W. 37; *Harger* v. *Harger,* 144 Ark. 375, 222 S. W. 736; *Harkins* v. *National Handle Co.,* 159 Ark. 15, 250 S. W. 900.

In the Harkins Case it was argued that because the Company reserved the right to control the kind, quality and quantity of the output, according to specifications and prices submitted, and because the right to cancel the lease and take possession of the property was reserved, and because the Company advanced money to meet pay rolls, which were made out on the Company's pay roll forms, the relation of master and servant was established. The opinion says: "None of the reservations by the lessor in the lease, . . . and none of the circumstances proven outside of the contract are inconsistent with the relationship of lessor and lessee. . . . Rodgers (the contractor) employed his own labor, bought his own material and conducted the business according to his own methods. The handle company had no interest save in the output which it had purchased."

Our latest decision involving questions similar to those here presented is *Farmer Stave & Heading Co.* v. *Whorton,* 193 Ark. 708, 102 S. W. 2d 79. The opinion was written in 1937 by Mr. Justice BUTLER. The contract, under which it was alleged that Whorton became an independent contractor, rather than a servant of Farmer, was an oral one. The jury and trial court had found and held the evidence adduced sufficient to show that Whorton was a servant rather than an independent contractor.

The supervision and control proven in the Whorton Case were stated by Mr. Justice BUTLER in the following language: "Farmer furnished Whorton a mill and money to operate and gave him a certain price for the heading

delivered on board cars; that he, or someone else for the company, would go out to the mill occasionally to see how Whorton was getting along and to see that the heading was manufactured properly; that his company did not directly or indirectly exercise any control or supervision over Whorton further than to see that the heading *was sawed according to specifications.*"

No vital distinction can be drawn between the control and supervision in the cited case and that reserved by the Company under the contract involved in the instant case.

There are countless decisions of appellate courts construing stipulations in contracts, such as here involved, relating to the right of the owner "to give directions"—"orders" and "instructions" regarding the work as it progresses; and phrases such as "in accordance with instructions"—"as directed"—"in such manner as shall be directed"—"under supervision of owner's agent, as he may direct"—and "under the direction and supervision." In all of the cases examined, some of which are cited, it is held that such phrases do not relate to the method or manner and do not govern the details or the physical means by which the work is to be performed. The Supreme Court of the United States has so held in two cases directly in point. *Casement* v. *Brown,* 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *U. S.* v. *Driscoll,* 96 U. S. 421, 24 L. Ed. 847.

In the Brown Case the contract provided that the work should be done in the most thorough, substantial and workmanlike manner "under the direction and supervision of the engineer of the company, who will give such directions from time to time during the construction of the work as may appear to him necessary and proper to make the work complete in all respects." Mr. Justice Brewer said: "The will of the company was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the

engineer, the contract provided for daily supervision and approval of both material and work. . . . This constant right of supervision, and this continuing duty of satisfying the judgment of the engineer, do not alter the fact that it was a contract to do particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the company, and do whatever their employers called upon them to do, but they contracted for only a specific work."

In the Driscoll Case the contractor was required "to furnish all labor, tools and machinery necessary to cut, dress and box certain granite, in such manner as should be directed." The contract provided that the United States should keep present at all times a superintendent and clerk—"to see that everything was done according to the contract." It was held that the relation of independent contractor existed.

Gay v. *Roanoke R. & Lbr. Co.,* 148 N. C. 336, 62 S. E. 436, involved a contract for the cutting and transportation of logs, similar to the one in the case at bar. The logs were to be cut and loaded on railroad cars, "in a proper manner, the logs being secured to stand transportation, and the loading to be done according to directions given." There was a further provision that the contractor should "cut the timber in proper and workmanlike manner, and as close as the employer may direct, and to cut all and every suitable tree into logs before leaving any one location." The court held that neither of these provisions negatived the relation of owner and contractor.

In *Stricker* v. *Industrial Commission,* 55 Utah 603, 188 Pac. 849, 19 A. L. R. 1159, the contract required that the "rock should be quarried from such portions of the company's rock quarry as the company might from time to time direct, hauled and delivered to such place or places as the company or its representatives may designate or direct." Regardless of these provisions, the court held that the relation of owner and contractor existed.

In *Goode* v. *Johnson,* 38 Colo. 440, 88 Pac. 439, 8 L. R. A., N. S., 896, the Supreme Court of Colorado had

for construction a contract which provided that the work was to be performed under the direction and supervision of an engineer, who was given authority to discharge any employee of the contractor if the interest of the owner demanded. He was empowered to increase the force to further the progress of the work; and the right was reserved to enter upon, take possession, relet or perform if deemed expedient to do so. The right of temporary suspension or permanent discontinuance was reserved. The engineer had the power to direct application of forces to any portion of the work, as his judgment required; and the right was reserved to directly pay laborers to avoid liens for work done. The court said: "In the light of these considerations, and from the language of these particular clauses, interpreted in the light of the entire contract, including the plans and specifications which are a part thereof, let us proceed to examination of these provisions which plaintiff says give rise to the relation of master and servant. In our judgment, neither of these clauses, nor all combined, have the effect which plaintiff contends for them as the reviewing of some of the leading authorities will disclose."

Numerous decisions are then cited, and the court further said: "The fact that the company pays the employees of the contractor directly in order to protect itself against liens, does not destroy the independent character of such employment. Clauses similar to those in the present contract, and still other provisions relating to supervision which the owner retained over the work, some of which go much further than any reservation herein contained, have been construed by courts, and *almost universally held* not to make the relation thereunder that of master and servant. On the contrary, such employment is ruled to be an independent one exempting the owner from the negligence of the contractor."

The Supreme Court of Mississippi has had, in recent years, numerous occasions to construe contracts similar to the one here involved. In *Hutchinson-Moore Lumber Co.* v. *Pittman,* 154 Miss. 1, 122 So. 191, the

contractor agreed to fell and saw certain standing timber into logs. He agreed to fell the trees, "within 12 inches of the ground, and cut into lots of such lengths, as may be designated from time to time by the company." It further provided that the contractor should be "governed at all times by instructions from the company as to where timber shall be cut and the sequence in which governmental subdivisions shall be entered." The company reserved the right to "authorize and direct the temporary abandonment of any particular part of the timber and direct operations to be conducted at some other point." The court held that the contract did not create the relation of master and servant; that the method and manner of bringing about the results were left with the contractor, and that under the plain provisions thereof the relation of independent contractor existed.

In *Louis Werner Sawmill Co.* v. *Northcutt,* 160 Miss. 441, 134 So. 156, it was expressly held that the employer might reserve the right to require laborers to perform their work according to certain prescribed rules; and, by so doing, the relation of owner and independent contractor would not be affected.

In *McDonald* v. *Hall-Neely Lumber Co.,* 165 Miss. 143, 147 So. 315, Gray contracted with the lumber company to haul logs from a tract of timber to its mill. The court says: "Appellee contracted with Gray for a certain net result, namely, the placing on appellee's mill yard of certain logs, the manner and means, and the expense of doing the work being left entirely to him. The relation of master and servant does not exist, unless the master has some sort of substantial control over the means and methods of carrying out the contract. What logs Gray should haul and where he should place them did not constitute such control by appellee."

The most recent decision by the Mississippi court is *Cook* v. *Wright,* 177 Miss. 644, 171 So. 686. The court said: "This question has, within the last few years, often been before this court. From all the cases and the text, we see that the ultimate question for decision is whether the physical conduct of the contractor in the performance

of his duties is controlled, or is subject to the right of control, by the owner or employer in respect to the details of the work; and we can further say, with a sufficiently approximate accuracy, as to the claims of cases such as the one now before us, that where the subject of the contract is to produce a certain net result, according to plans and specifications, reasonably specific and definite in their end, already agreed upon and made a part of the contract, and the contractor's obligation is to produce that net result by means and methods over which, in the performance, so far as concerns the details of the management of the means and of the physical conduct of himself and his employees thereinabout, has and is obliged to have, his own control, the contract is one for service, not of service, and the relation of master and servant does not exist."

In all of the cases cited from other jurisdictions, the court reviewed at length innumerable cases and then stated and applied the accepted rule. This court, in the *Secrist Case,* 118 Ark. 561, 177 S. W. 37, said: "Reservation or exercise of control does not fix liability unless the owner undertakes to direct the manner in which the employee shall work in the discharge of his duties."

In *Harkins* v. *National Handle Company, supra,* it was contended that because appellee reserved the right to "control the kind, quality and quantity of the output, according to specifications" and "the right to cancel the lease and take possession of the property" and because "it advanced money to meet payrolls," the relation of master and servant was established. It was held that such reservations, and none of the circumstances proven outside of the contract, were inconsistent with the relation of lessor and lessee.

In *Pine Woods Lumber Co.* v. *Cheatham,* 186 Ark. 1060, 57 S. W. 2d 813, there was a verbal contract under which one Deckard agreed to cut and haul timber from certain lands to a named delivery point. Deckard was to furnish teams, equipment and laborers necessary to do the work. The trees were cut and sawed into logs of lengths "as directed by the woods foreman." The own-

er's bookkeeper made out the payrolls, paid the laborers in cash, and charged the contractor's account. Settlements were made on scale sheets and advances for fee bills were deducted. This court said: "The testimony, in all essential parts, reflected, without substantial dispute, that Deckard was an independent contractor."

It is our view that the contract here involved created the relation of owner and contractor, rather than that of master and servant. Under its express terms, Moore was employed to carry on an independent piece of work; to act pursuant to the agreement in the manner outlined, and to remove and transport the timber from a definite area and within a fixed time. He was obligated to perform on specified terms, in a particular manner and for a fixed compensation. The Company was interested only in the result to be obtained, and the method or manner of accomplishment was left solely with Moore. Contractual provisions similar in every respect to those found in this contract have been generally construed as we herein hold.

[2] Is plaintiffs' evidence sufficient to show that the Company, by subsequent conduct, abandoned the relation of owner and contractor and created that of master and servant?

Only three witnesses testified in this respect. Deal, a merchant at Monticello, whose deposition was taken, stated that on May 17—after the accident April 23—Moore and Cox applied to him for a line of credit for Moore. During May, June and July he sold Moore certain merchandise, the invoices therefor being given to Cox, and checks in payment were received from the Company's office in West Helena. The books of the Company reflected that these invoices were regularly charged to Moore's account.

Henry Lee Shelton testified that he began working on the Moore job about the last of June or first of July, cutting timber for Moore by the thousand. Moore showed him the timber and put him to work. Cox, the woods foreman, was not there when witness went to work. On his direct examination, after having stated

that he cut logs, and in answer to the question, "Who directed you where to cut them?", he replied, "Mr. Moore." He then stated that Cox was "on the job" only twice while he was there, and then in answer to the question if at any time he took orders from Mr. Cox, he answered, "Yes, sir." There was this further testimony:

"Q. What orders did Mr. Cox give you? A. Well, he just told us to keep the stumps down pretty low."

On cross-examination the following questions and answers appear in the record:

"Q. On your direct examination you stated that all he ever told you was to cut the stumps low? A. Yes, sir. Q. Is that correct? A. Yes, sir. Q. When you spoke then of him giving you orders, that was the only order he ever gave you? A. Yes, sir. Q. That is the only time he ever attempted to direct you in any manner whatsoever? A. Yes, sir. Q. All he told you was to cut the stumps low? A. Yes, sir. Q. Did Mr. Cox at any time, or during the time you were cutting there, complain as to the manner or method of cutting the logs? A. Not that I remember."

Luke Moore, witness for plaintiffs, testified that he was employed by Arthur Moore; that he first talked to Arthur Moore about a job; that Moore told him he had a contract with Chicago Mill. He then talked to Cox, for the purpose of finding out whether he would be paid, and Cox said, "It will be all right to go ahead and go to work." Cox told him not to worry about it. "He never said he would see that I got the money. He said there was a good company behind it, and not to worry about being paid."

Witness then went to Moore, agreed with him to cut timber for $1.25 per thousand feet, and "that was the way he made the agreement with Moore to cut the timber." Moore showed him the timber and put him to work. In answer to the direct question, "Do you know who had charge of the hauling of that timber," witness stated: "Mr. Moore had the contract to get it out of the woods."

As to orders or directions given by Cox, witness stated that Cox came into the woods once or twice a week, told the cutters what lengths to cut logs—some 10, 12, 14, and 16 feet; that he wanted the timber cut down low, no rough timber cut, and the logs "butted off." In answer to the question, "Did Mr. Moore at any time state to you who he was working under out there, his immediate superior or boss," witness answered, "No, sir, he had a contract to cut the timber."

On cross-examination this witness stated that the instructions referred to in his direct examination on the part of Cox were given to Moore, in the presence of the cutters.

"Q. He was talking to Mr. Moore about it in your presence? A. Yes, sir. Q. Mr. Cox did not complain to you, he was complaining to Mr. Moore about it in your presence? A. Yes, sir. Q. And Mr. Cox told Mr. Moore that the logs would have to be cut different, or else? A. Yes, sir."

Witness further testified that Moore personally made two or three pay rolls. After the accident, the laborers were paid by Cox, on pay rolls made out in Moore's handwriting, in the presence of Moore, and at his direction. Receipts taken from each of the laborers for work done after the accident were introduced in evidence and showed payment for "labor done on A. Moore's job."

The testimony quoted is, in substance, all of the evidence introduced on behalf of plaintiffs tending to show such control or direction on the part of the Company.

All of the evidence introduced by the Company was to the effect that Cox, its woods foreman, was supervising execution of this particular contract, as well as various others in which it was contemporaneously interested in the immediate vicinity; and that Cox did not exercise such degree of control or direction over the means and method by which Moore performed this particular contract as would have the effect of altering the legal status of the parties.

Moore Lumber Co. v. *Starrett,* 170 Ark. 92, 279 S. W. 4, is directly in point. A written contract was involved. The timber was to be cut according to specifications. The contractor was to save the company "harmless against all claims for labor, maintenance, etc." Instructions were given as to "the manner in which the lumber shall be cut." At times the company paid the laborers and charged the account of the contractor. The owner directed the contractor regarding dimensions into which the lumber was to be cut. The testimony showed that on occasions the owner would go through the mill, give orders and directions if he saw anything of which he did not approve, and caution laborers as to the manner in which the work should be done. In the opinion, Mr. Justice Wood said: "In the absence of any proof tending to show that the written contract was a mere camouflage to cover up the real relation between the company and Fleetwood, and that such relation was in fact merely that of employer and employee, or master and servant, the court should not have ignored the plain and unambiguous terms of the written contract, and should have declared as a matter of law that the relation of master and servant did not exist, as requested by appellant."

Decisions of the Supreme Court of Mississippi, cited *supra,* each of which involves contracts essentially similar to the case at bar, and in which the evidence was strikingly similar to that in the instant case, are directly in point, and the holdings are in accord with decisions from courts of other jurisdictions—that is, that such evidence is without probative value.

The Supreme Court of Wisconsin, in *Medford Lumber Co.* v. *Mahner,* 197 Wis. 35, 221 N. W. 390, in a case similar in point of fact to the one at bar, said: "It is further claimed that the lumber company did actually control the details of the work. It is unnecessary to refer to the evidence which it is claimed sustains this conclusion. We have given such evidence our consideration. It consists of admissions of the general manager that he went through the woods occasionally, about once a week, and

talked with Mahner about the job, and the superintendent would go to the job occasionally, look around through the woods, talk to Mahner, and talk about how the work was going. 'They said it was either going all right,—otherwise, if it wasn't, they told him. He walked through the woods, looked around, and seen the logs being cut. If they were cut too short, he would tell them to cut them longer. He said that to the fellows who were sawing.' There is no evidence that the company exercised the right to hire or discharge men, or to exercise any authority over the manner of performing the work. The contract required the logs to be cut in a certain length. This was the ultimate result sought to be accomplished by the contract. Logs cut too short might work a serious loss to the company and it was its privilege and its duty to see that they were cut the proper length. Even though this was spoken of to men in the woods when logs were seen to be cut too short, it was no evidence of an attempt on its part to control the details of the work. We discover no conduct on the part of the company amounting to a practical construction of the contract inconsistent with the natural meaning of the language employed therein.

"Some contention is made that the fact that the lumber company paid the men employed by Mahner upon the presentation of a time order justifies the conclusion that the men working under Mahner were really employees of the company. Advancements are customarily made under such contracts as the work progresses. The company was interested in seeing that the men who worked for Mahner received their pay, this to free its timber of log liens. Advances made in this way protected the company and constituted the proper and businesslike method of handling the situation. The method pursued cannot give rise to an inference in view of the written contract that the employees of Mahner were really the employees of the company."

The following cases from other jurisdictions, cited in the brief of the appellant company, are found to involve contracts in phraseology similar to the contract here questioned. They sustain the view that supervision

for the purpose of determining whether the work is being done in accordance with the contract, and exercise of that right, do not affect independence. *McBride* v. *Madden Shingle Co.,* 173 Mich. 248, 138 N. W. 1077; *Davis* v. *Came-Wyman Lumber Co.,* 126 Tenn. 576, 150 S. W. 545; *Keech* v. *Roper Lumber Co.,* 166 N. C. 503, 82 S. E. 836; *Scales* v. *First State Bank,* 88 Ore. 490, 172 Pac. 499; *Gay* v. *Roanoke R. & Lumber Co.,* 148 N. C. 366, 62 S. E. 436; *Hopper* v. *Ordway & Sons,* 157 N. C. 125, 72 S. E. 839; *Clark* v. *Tall Timber Co.,* 140 La. 380, 73 So. 239; *Chicago, etc., Ry. Co.* v. *Bond,* 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735; *Salmon* v. *Kansas City,* 241 Mo. 14, 145 S. W. 16; *Prest-O-Lite Co.* v. *Skeel,* 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474; *Montain* v. *Fargo,* 38 N. Dak. 432, 166 N. W. 416; L. R. A. 1918C, 600; Ann. Cas. 1918D, 826.

As to the contention by counsel for appellees that the contractual provision reserving to the Company the power to permanently discontinue operations under the contract does, in and of itself, create the relation of master and servant, but little need be said. It is urged that this provision is in reality a "power to discharge," and cases are cited which hold that the unrestricted right of discharge is a very important circumstance tending to disprove the relation of independent contractor. These decisions are not unsound law when applied to facts actually involved, but they are not applicable to the situation here presented. The parties to this contract agreed that work might be temporarily suspended or totally rescinded. They were competent to make such an agreement and, as such, it is distinguishable from an "unrestricted right of discharge," a condition which usually arises where the work to be done is general and indefinite, rather than definite and specific, in character. That such is true is shown by the decision of the Supreme Court of South Dakota in *Cockran* v. *Rice,* 26 S. Dak. 393, 128 N. W. 583, Ann. Cas. 1913 B, 570, relied on by counsel for appellees. Therein, the defendant merely employed Stevens to plow on a 40-acre tract of land at an agreed compensation of $1.25 per acre. The court recognizes

that a contract of independent employment is one which contemplates a definite beginning, continuance and ending. It is said that "the unrestricted right of the employer to end the particular service" is of great bearing on the relation created. But, in the case then under consideration, there was no contract to plow a specified number of acres, and Stevens could have plowed or quit as and when he chose. As said by that court, the contract was merely to pay for such plowing as might be done at a given rate per acre and did not make Stevens an independent contractor. We have carefully examined the remaining decisions cited by counsel for appellee, on this particular phase, and find them without bearing on the facts here presented. Moreover, the great weight of authority is to the effect that the reservation of the right to terminate the contract does not affect the independence. The following cases expressly so hold: *Good* v. *Johnson,* 38 Colo. 440, 88 Pac. 439, 8 L. R. A., N. S. 896; *Odle* v. *Charcoal Iron Co.,* 217 Mich. 469, 187 N. W. 243; *Ellis & Lewis, Inc.,* v. *Trimble,* 177 Okla. 5, 57 Pac. 2d 244; *Moore* v. *Roberts,* (Tex.) 92 S. W. 2d 236; *Gogoff* v. *Industrial Commission,* 77 Utah 355, 296 Pac. 229; *Leech* v. *Sultan Ry.,* 161 Wash. 426, 297 Pac. 203; *Beck* v. *Dubach Lumber Co.,* 171 La. 423, 131 So. 196; *Arthur* v. *Marble Rock School Dist.,* 209 Ia. 280, 228 N. W. 70, 66 A. L. R. 718; *Nelson Bros. & Co.* v. *Industrial Commission,* 330 Ill. 27, 161 N. E. 113; Strong's Case, 277 Mass. 243, 178 N. E. 637.

In *Schroer* v. *Brooks,* 204 Mo. App. 567, 224 S. W. 53, a Missouri case, the Supreme Court of that state held that one who had contracted to cut logs "by the thousand," who determined his own hours of labor, used such appliances as he saw fit, and employed his own laborers, was not a servant, even though the contract under which he worked was terminable at will by the owner. The court said: "Had the defendant sought to terminate the cutting of logs and ties, he would not have discharged Britts from his employ; he would merely have terminated the contract, which was reciprocal, in that Britts could likewise terminate the contract at any time."

There seems, therefore, to be unanimity of opinion that under contracts similar to the one here involved, Moore would be an independent contractor and not a servant of the Company. The evidence is insufficient to show that the Company committed any act which would convert such relation into that of master and servant. Therefore, the Company is not liable to the plaintiffs in this action under the doctrine of *respondeat superior*.

According to statement of counsel for appellees in their brief, all available witnesses have appeared, and the case has been fully developed. The judgments in favor of the several plaintiffs against the Chicago Mill & Lumber Company are reversed, and the several causes of action are hereby dismissed.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY dissent as to that part of the decision which reverses the judgments against Chicago Mill & Lumber Company, but in other respects concur.

THE WESTERN UNION TELEGRAPH CO. *v.* BYRD, ADM'X.

4-4843 122 S. W. 2d 569

Opinion delivered October 31, 1938.

[redacted]

Francis R. Start and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Walter G. Riddick, House, Moses & Holmes and *Sam T. & Tom Poe,* for appellees.

KNOX, Special Justice. Seeking to recover damages for destruction of growing crops by overflow waters which occurred in July, 1932, the fifty-nine appellees each instituted his separate action against appellant in the Pulaski circuit court. These separate actions were by order of the trial court consolidated for trial and appeal.

The gravamen of each of the complaints is, that appellant negligently and without right dug a hole, and placed a telegraph pole therein, in the crown of a certain levee which had been constructed and which was being maintained for the purpose of protecting the property of appellees and others from the high waters of Pennington bayou; and that by reason of the negligence of appellant in digging said hole and installing said pole at such place and in such manner, the levee was so weakened that it could not and did not withstand the pressure of the waters against it, and on account of such weakened condition the levee broke, flooding and destroying the crops of appellees.

Appellant admitted that it did in fact dig the hole and install the pole at the time and place alleged, but it denied that it was guilty of negligence either in so locating the same, or by reason of the method employed in the installation thereof. Appellant concedes that the crops of appellees were inundated by flood waters occurring at the time alleged, but it contends that there was no causal connection between that fact and its act in setting the pole in the levee.

The lands upon which appellees' crops were growing are located at various points within an area located near the south line of Pulaski county, which may be roughly described as a shallow basin approximately four miles long (north and south) and two miles wide (east and west). The rim of this basin is formed: on the west by the roadbed of the Missouri Pacific Railroad; on the north by a strip of higher ground running east and west, and located approximately one mile north of the township line between townships 1 and 2 south, range 11 west; on the east by the Arkansas River levee; and on the south by a public road running along the north line of sections 21 and 22, township 2 south, range 11 west. The rim of this basin at its southwest corner, however, is formed by the north bank of Pennington bayou, a stream which flows in a southeasterly direction traversing both the roadbed of the Missouri Pacific Railroad (the west rim of the basin) and the public road (the south rim of the basin). The natural bank of the bayou between these points is higher than the adjacent lands, and higher than most of the points within the basin. No artificial embankment runs along the top of the natural banks of the bayou between these points, but at points where ditches empty into the bayou, small dams or levees have been built across the mouths thereof and floodgates installed in such dams or levees.

One such ditch flows south along the east side of the roadbed of the railroad and empties into the bayou at the point where the railroad and the bayou intersect.

In 1925, the landowners in the vicinity built a dam across the mouth of this ditch. The top of the dam was approximately level with the natural banks of the bayou to which it was joined. A large iron pipe was placed so as to run through the dam, at or near its base, to the end of which pipe, on the bayou side thereof, there was attached a cap or gate which would automatically open and close depending upon the relative elevation of the water in the boyou and in the ditch, thus permitting the water to flow into the bayou when its waters were lower, and likewise preventing bayou waters from backing up into ditch in high stages. This dam is locally known and

is referred to in the testimony as "Byrd levee." It was in this levee that the pole was set, and it is this levee which, appellees contend, broke and destroyed their crops.

Originally constructed as the private undertaking of interested landowners, Byrd levee was, soon after its completion, taken over and maintained by Woodson Levee District as a part of a general system of levees built and maintained by it for the purpose of protecting lands in that area from the floodwaters of the Arkansas river and its tributaries.

For many years prior to 1932,—and in fact prior to 1925 when Byrd levee was built—the appellant had maintained its telegraph lines along the right-of-way of the Missouri Pacific Railroad, and these lines passed directly over the site of Byrd levee. There is dispute in the evidence as to whether or not there was a telegraph pole in the levee prior to 1932. In April of that year, appellant found it necessary to set new poles along the route of its line, and it set one of these poles in the crown of Byrd levee.

There is some evidence in the record tending to show that the waters which inundated appellees' crops did not come from the bayou, but were produced by a rain of tremendous proportion which fell in that vicinity and throughout the watershed drained by Pennington bayou.

There is ample evidence in the record from which the jury could have found that the waters in Pennington bayou rose considerably higher than, and overflowed, its north bank and the top of Byrd levee, and that the break in the levee, even if it did occur prior to such overflow, was but an incident in an oncoming flood which, with or without such break, would have inundated and destroyed, and did in fact inundate and destroy, appellees' crops.

The trial court submitted the issues to the jury upon instructions which in effect told them that appellees could not recover unless they found from a preponderance of the evidence (1) that appellant was negligent in setting the pole in the place or in the manner it did, (2) that the levee broke as the direct result of such negligence, (3)

that appellee's crops were inundated and destroyed solely by water escaping through such break, and (4) that at no time during the flood did the waters in Pennington bayou rise higher than, or overflow, its north bank and Byrd levee.

Appellant contends that there was no substantial evidence justifying the trial court in submitting these issues to the jury and that therefore the trial court erred in refusing to direct a verdict in its favor. In order that the effect of other evidence hereinafter referred to may be better understood, it doubtless would be best to here state appellant's contention more definitely. It is this: 1. That there is no evidence in the record from which the jury could infer that it was guilty of negligence. 2. That, while certain eye-witnesses swore that at no time during the flood did Pennington bayou overflow its north bank and Byrd levee, this testimony is so in conflict with the physical facts and with natural laws that it should have been wholly rejected by the trial court as constituting no evidence of that fact.

The following facts and testimony, together with others heretofore referred to, are material upon the question of negligence. The top or crown of the levee in which the pole was set was about four feet wide. The hole which was dug to accommodate the pole was eighteen inches in diameter and five feet deep, and it was located at or near the center of the crown. After the pole was placed, the dirt was replaced and tamped. Testimony of engineers was to the effect that the digging of such a hole and the placing of such a pole in a levee of this character would weaken the levee, especially during the period of time required for the dirt to thoroughly adhere to the pole. Major Baxter, an engineer for the United States War Department and engaged in flood control work, testified that if the replaced dirt did not adhere to the pole "it would be almost equivalent to cutting the width of the crown of the levee in two." He and other engineers testified that in their opinion the vibration of the wires at the top of the pole would cause it to sway and loosen its base. Mr. Rhyne, an engineer

called by appellant, testified that if he were charged with the responsibility of maintaining a levee he "would have serious objection" to the placing of a pole therein and would permit it "only in extenuating circumstances." Appellant's assistant foreman testified that a longer pole, which was readily available, could have been set either inside or outside the levee, and that the placing of the pole in such manner would not have been contrary to the rules or practices of the company. Another witness who had formerly been in appellant's employ testified that appellant's instructions to its linemen were "never to set a pole in a levee." Three witnesses testified that on the morning of July 4th, while they were standing in close proximity to Byrd levee observing water in the bayou, which then was about two feet below the top of the levee and the banks, the levee suddenly and violently went out at the point where the pole was situated, and that there was formed in the levee a large hole, near the center of which the telegraph pole was swinging suspended by the wires above.

To discharge the burden of showing that at no time during the flood did the water in Pennington bayou overflow its north bank and Byrd levee, the appellees offered eight witnesses who testified that they, at frequent intervals during the flood, observed the bayou bank and levee and the stage of the water with relation thereto, and that at no time did the water overflow the bank or levee. Mrs. Cora Byrd, one of the appellees, testified that throughout the duration of the flood she remained on her farm which adjoined the levee and the north bank of the bayou, that from her house she could plainly see the levee and the bayou bank, which she observed almost constantly, and that at no time did the water from the bayou flow over the bayou bank or the levee. The testimony of Mrs. Byrd was corroborated by Walter E. Wilson (a commissioner of Woodson Levee District), S. D. Oliphant (then manager of Brown plantation), Arthur Sowers, Wiley Franklin, Robert Jackson, Dave Williams and L. B. Brown.

As further evidence that the north bank of Pennington bayou did not overflow, appellees point to the fact that prior to the flood there was growing on the Byrd land adjoining the bayou a field of alfalfa. Several witnesses testified that during the entire duration of the flood there was plainly visible a green strip of this alfalfa running all along the north bank of the bayou from Byrd levee to the point where the bayou left the Byrd land and entered the land of O. H. Wilson. There also were several witnesses who testified that after the flood this strip of alfalfa continued to live and was cut by the owner that year. There is evidence in the record that if water should run over or stand on alfalfa for as long as two hours during the heat of July it will die.

Robert Jackson was that year cultivating a field of cotton which was located on the north bank of the bayou and adjoined the Byrd alfalfa field. There is evidence that a strip of this cotton about seventy-five feet wide, along the bank of the bayou, was not overflowed, but matured.

Eyewitnesses testifying on behalf of appellant were just as positive that the water did overflow the bank of the bayou and the levee.

The evidence necessary for determination of the question as to whether or not the testimony of appellees' witnesses is so in conflict with physical facts and contrary to natural laws as to constitute no evidence of the facts testified to by them is as follows: During the course of his cross-examination of certain of the appellees and witnesses for appellees, counsel for appellant obtained from them statements as to the depth of the water at various points throughout the flooded area. Appellant then introduced in evidence a contour map of the entire area, showing the elevation of these and all other points in the area, including Byrd levee and the bayou bank. The engineers who made the map testify that it and the various elevations shown thereon are correct and accurate. No engineer testified to the contrary, and in fact Mr. Allen, an engineer for the appellees, testified as to the elevations

of many of these points which in the main corroborated the testimony of the engineers testifying for appellant.

Our attention is directed to the elevations shown by the map at nine points, and the testimony of the witnesses as to the depth of the water at these points. They are: Byrd levee was rebuilt after the flood, and there is evidence that it was built higher than the original levee. Allen, appellees' engineer, placed the low point of the levee proper at 231.29 feet; appellant's engineers placed the low point in the levee proper at 231.4 feet. Allen testified that the elevations of the north bank of the bayou varied from 230.65 to 232.8 feet. Appellant's engineers testified that the elevations along this bank varied from 230 to 231.6 feet. None of Allen's elevations are below 231 feet except the one of 230.65 feet which is at a point several hundred feet down stream. The evidence shows that the natural fall of the water is 6½ feet between Byrd levee and Woodson Flood Gate, a distance of about 1½ miles, and it is argued that this makes this lower elevation unimportant. Counsel for appellant appear to concede this, for in brief and argument they apparently accepted 231 as the low point testified to by Allen.

Little Rock-Pine Bluff Highway. Appellees admit that some water flowed over this road at its low point. The elevation of this point is fixed by Allen at 230.85 feet and by appellant's engineers at 231.4. W. C. Coleman, one of the appellees, estimated the depth, by reason of observing children wading in it, to have been from 4 inches to 1½ feet deep. One of appellee's witnesses daily drove a truck through it and estimated the depth as having been 16 or 18 inches.

Turner House was located on land, the elevation of which, according to the contour map, was 230. Appellee Coleman, who was familiar with the house, estimated that the water rose against this house from two to three feet. Witness Lester testified that it did not exceed ten inches.

The pump at Hugh Brown rainshed was on land, the elevation of which, according to Allen, was 228.25. Witness Lester testified that he drove a wagon through there

and the water came up to the bed of the wagon. He estimated the depth at 5 feet.

Griffin Dennis testified that water got all over his land. He waded through it and estimated the depth at the highest point to be 1½ feet. The highest point on his land, according to the testimony of appellant's engineers, is 231.

Alec Vaughan had corn planted on land, the elevation of which, according to the map, is 228. He testified that he did not know how deep the water was. That it was above the ears of the corn. That corn grew shoulder high on the average.

Clem Murdock was growing corn on land, the elevation of which, according to the map, was 228. He testified that water was up to the ears of his corn and he estimated it to be five feet deep.

The Bassler Milkhouse is located on land, the elevation of which, according to the map, is 232.5. Mr. Bassler testified that the water got in and on this milkhouse —and from watermarks left he estimated the depth at 23 inches.

The highway at Wilson ditch, a point within the flood area less than a half mile south of the point on the highway above mentioned, was, according to the undisputed evidence, never overflowed. The elevation of this point is, according to the map, 231.3.

Many assignments of error are set out in the motion for new trial, but appellant's argument is confined to the assignments covering three points, to-wit: (1) there is no evidence of negligence, (2) the verdicts are contrary to natural law and (3) some of the verdicts are excessive.

Recognizing and observing the restrictions placed upon it by the Constitution, this court has repeatedly declared that, on an appeal from a judgment based upon a verdict of a jury, it can consider the facts only for the purpose of determining whether or not there is in the record any evidence of a substantial character which, when given its highest probative value, together with all inferences reasonably deducible therefrom, is sufficient

to sustain the verdict. *Cleveland-McLeod Lbr. Co.* v. *McLeod,* 96 Ark. 405, 131 S. W. 878; *Prairie County* v. *Harris,* 173 Ark. 1182, 295 S. W. 725; *Texas & Pac. Ry. Co.* v. *Stephens,* 192 Ark. 115, 90 S. W. 2d 978. This court cannot determine the weight and credibility of the evidence, for those are matters which under the Constitution are left to the jury and trial court. *Duff* v. *Ayers,* 156 Ark. 17, 246 S. W. 508; *Moore* v. *Thomas,* 132 Ark. 97, 200 S. W. 790; *Jonesboro Coca-Cola Bottling Co.* v. *Holt,* 194 Ark. 992, 110 S. W. 2d 535. Where there is a conflict in the evidence the determination by the jury of the issues is conclusive. "The fact that this court would have reached a different conclusion . . . or that they (the judges) are of the opinion that the verdict is against the preponderance of the evidence, will not warrant the setting aside of a verdict based upon conflicting evidence." *Missouri Pacific Ry. Co.* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428.

Counsel for appellees argue that in consideration of the question as to the sufficiency of the evidence to sustain the finding of negligence this court is bound, under the doctrine of the law of the case, by the case of *Western Union Telegraph Company* v. *Turner,* 190 Ark. 97, 77 S. W. 2d 633. That case was a companion case to the ones now being considered. Turner recovered judgment against appellant for destruction of crops growing in the same area, and inundated by the same overflow, upon allegations and evidence of negligence substantially the same as those presented by the record here. On appeal this court held that the evidence as to negligence presented a question for the jury.

The doctrine of the law of the case is analogous to the doctrine of *res judicata,* and, like it, has no application in cases between different parties.

Although a decision on a prior appeal in a case between different parties, but involving the same subject matter, does not become the law of the case, yet a decent respect for the stability of judicial decision requires that the former decision be followed on the doctrine of *stare decisis,* and not disturbed unless there was very palpable

error. *Walker Patent Pivoted Bin Co.* v. *Miller & England,* 132 Fed. 823; *City of Cleveland* v. *Cleveland etc. Ry Co.,* 93 Fed. 113, 4 C. J. 1106.

It is our conclusion that the evidence set out in the opinion in the Turner Case, and, also, the evidence disclosed by the record here, required the trial court in each instance to submit the question of negligence to the jury. This evidence and the law applicable thereto was fully discussed in the Turner Case and a repetition thereof would unduly lengthen this opinion and serve no useful purpose.

Under the instructions of the trial court in this case, the jury, in order to find for appellee, was required to find that the water which destroyed their crops came through the break in the levee, and that at no time did the water overflow the bank of the bayou or the levee. Appellant insists that there was no substantial evidence from which the jury could have found this necessary fact, and that for that reason the trial court should have directed a verdict in its favor. Stated more fully, appellant's contention is that the testimony of the eight eye-witnesses, who swore that the water did not overflow the bayou bank and the levee, is in conflict with the physical facts and contrary to natural law, and, therefore, should have been rejected by the trial court as so unworthy of belief as to constitute no evidence of the facts sworn to.

It is the general rule that, on a motion for a directed verdict, the court must take or consider as true all competent evidence or testimony which is in favor of the party against whom the motion is directed. *Burcher* v. *Casey,* 190 Ark. 1055, 83 S. W. 2d 73. This rule is, however, subject to the qualification that testimony which is in conflict with undisputed physical facts, or contrary to the unquestioned laws of nature, of mathematics, of mechanics, or of physics, should be rejected as wholly barren of evidentiary value. *St. Louis S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768; *Magnolia Petroleum Co.* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062. Where there is conflict or dispute in the evidence

as to the existence of a physical fact, the question is for the jury. *Kansas City Sou. Ry. Co.* v. *Henrie,* 87 Ark. 443, 451, 112 S. W. 967. Likewise, it follows that, if testimony is to be held contrary to natural law, only in case certain facts are accepted, and there is conflict or dispute in the evidence as to the existence of such facts, the question is for the jury.

The natural law invoked by appellant is the law of gravity, in its action upon unrestrained and naturally flowing water. In short—that water seeks its level and will not rise higher than its source.

Counsel for appellant point to the testimony of various of the appellees and their witnesses as to the depth reached by the water at seven points within the flood area, and to these depth measurements they add the elevations for these points, as testified to by the engineers, which sum in each instance materially exceeds the elevation of the Byrd levee and the bayou bank, as testified to by the engineers. In fact, according to the testimony of the engineers, one such point is, itself, higher, another is equal to, and a third only slightly lower, than the elevations of the bayou bank and levee. Counsel's argument is this: —that since water will not rise higher than its source, and since the evidence shows that within the overflow area it did reach heights greater than the height of the levee and the bayou bank from which it came, then it must follow that the water reached that height at the bayou and of course overflowed its banks, and, therefore, the evidence of the eye-witnesses that the bayou did not overflow, and the verdict of the jury based thereon, must be rejected as being contrary to natural law.

This conclusion would be correct, provided the jury was bound to accept as true (1) that the relative elevations of these seven points and the bayou bank and levee were as testified to by the engineers and (2) that the water reached these points and covered them to the depth testified to by the witnesses, or at least to a depth which, when added to the elevations, exceeded the elevation of the bayou bank and levee.

It is true that neither the testimony of the parties as to the depth of the water, nor the testimony of the engineers as to the elevations, is directly contradicted, but such testimony need not for that reason be regarded as undisputed, if from other facts and circumstances in the record any reasonable inference can be drawn contrary thereto. *Jolly* v. *Meek,* 185 Ark. 393, 47 S. W. 2d 43; *Paragould & M. R. Co.* v. *Smith,* 93 Ark. 224, 124 S. W. 776; *St. Louis S. W. Ry. Co.* v. *Trotter Minnis,* 89 Ark. 273, 116 S. W. 227.

Since, if this testimony be true, the testimony of the eyewitnesses must be false, then by inverse reasoning it follows that if the testimony of the eye-witnesses be true, then this testimony, or one branch thereof, at least, must be false. It follows then, that not only does this testimony contradict, but is, itself, contradicted by the testimony of the eye-witnesses that the bayou did not overflow its banks.

Here, then, we have testimony supporting three facts, any two, but not all three, of which can stand together in harmony with the natural law that water seeks its level. If the water did not overflow the bayou bank, and the relative elevations are as testified to by the engineers, the testimony that the water did at these seven points reach depths which, when added to the elevation of those points, would exceed the elevation of the bayou bank, must be rejected as being contrary to natural law. If, however, the water did not overflow the bayou bank, but did at the same time reach depths at these seven points as testified to by the witnesses, then the testimony of the engineers as to the relative elevations of these points and the bayou bank must be rejected as being contrary to natural law. Likewise, if the relative elevations are as testified to by the engineers, and the water did in fact reach and cover these seven points to the depths testified to or to any depth which, when added to the elevations of such points, exceeds the elevation of the bayou bank, then the testimony of the eyewitnesses that the water did not overflow the bayou

bank must be rejected as being in conflict with natural law.

It is the general rule, too well established to require the citation of authorities, that when the testimony is in irreconcilable conflict, the question is one in the exclusive province of the jury, it being their duty to reject that part of the testimony which they believe to be false and accept that part which they believe to be true.

This rule must apply here unless, either on account of the manner of its introduction, or on account of the character of the testimony itself, the jury would have been required, under the law, to accept as true both the testimony of the engineers and the testimony of witnesses as to the depth of the water.

Counsel for appellees contend that the record discloses that all of the land upon which the crops were growing is shown by the testimony of the engineers to be materially lower than the bayou bank, and, therefore, it was unnecessary for the jury in arriving at their verdict to give credence to the testimony relative to the depth of the water at these seven points. Counsel point out that when the testimony of these witnesses is compared one with the other an impossible condition is disclosed —that of the same body of still water being at different levels. Counsel, also, contend that the error of this testimony is demonstrated by the undisputed facts that the water did not reach or cover other points in the area which, according to the testimony of the engineers, were much lower than the sum of the depth of the water and the elevation of the land at these points. They particularly direct our attention to the undisputed fact that the highway at Wilson ditch was not covered, a point within the flood area, the elevation of which, according to the engineers, was 231.3 feet, only 3/10ths of a foot higher than the bayou bank. Counsel for appellees argue, therefore, that the jury was not required to accept the testimony as to the depths of the water, that in arriving at their verdict they could have and doubtless did reject it. On the other hand, counsel for appellant point out that nearly all of this testimony came from the lips of

appellees, themselves, and the remainder from their witnesses, and, therefore, they argue that appellees are bound by such testimony.

A determination of the questions, thus presented, would require a careful review and analysis of the evidence, and a consideration and application of the law relating to the questions of when, to what extent, and under what circumstances, is a party bound (1) by his own testimony, (2) by the testimony of parties to other actions consolidated and tried with his, and (3) the testimony of his witnesses. In view of the conclusions hereinafter stated we deem it unnecessary to consider these questions. For the purpose of this opinion we may accept as an established fact that the water did at some or all of the points reach the maximum depth testified to by the witnesses.

This brings us to the question of whether or not the jury was required to accept as true the testimony of the engineers as to the relative elevations. For the moment we will consider the question as if all this testimony had been produced by appellant. The question of whether or not appellees are bound by the testimony of their own engineer will be discussed later.

This court has often declared that testimony of expert witnesses is to be considered by the jury in the same manner as other testimony, and in the light of other testimony and circumstances in the case; that they alone determine its value and weight, and may, under the same rules as apply to other evidence, reject or accept all or any part thereof as they may believe it to be true or false. *Nelon* v. *Nelon,* 171 Ark. 505, 284 S. W. 743; *Missouri P. R. Co.* v. *Hall,* 186 Ark. 270, 53 S. W. 2d 432; *Home Indemnity Co.* v. *Jelks,* 187 Ark. 370, 59 S. W. 2d 1028.

It is suggested that the above rule applies only to "opinion evidence," and that the rule is different where, as here, the expert witness is a civil engineer and is testifying to precise measurements made by him in accordance with approved scientific methods. We are cited to no authority in support of this contention, and we have

found none. This court held directly to the contrary in the case of *Western Union Telegraph Co.* v. *Turner, supra,* where the general rule was applied to testimony identical in character with that now being considered.

The decision in the Turner Case on this point appears to be in accord with the decisions in other jurisdictions. *Holcomb* v. *Alpena Power Co.,* 175 Mich. 500, 141 N. W. 534, was a case for damage caused by overflow. In that case Mr. Justice OSTRANDER, speaking for the Michigan Supreme Court, says:

"A series of levels, made by engineers, as reported and testified to by them, shows that . . . the surface of the land is five feet or more above the level of the lake when the level is the highest. The testimony of the engineers is regarded as conclusive by defendant, opposed as it is by testimony of non-scientific observation . . . In short, it is claimed that the infirmity of plaintiff's theory was demonstrated, and that the jury should not have been permitted to determine whether the water of the lake affected land distant from its banks . . . the level of the land being . . . higher than the level of the water. In making the claim we think counsel lose sight of the fact that the testimony of the engineer may not have been believed by the jury, when contrasted, as it was, with the testimony of other witnesses . . ."

The Supreme Court of Georgia holds that the testimony of eye-witnesses to the fact that land was overflowed may be accepted by the jury as true, in preference to the opinion of an expert, based on measurements made by him, that such overflow could not have occurred. *Southern Ry. Co.* v. *Ward,* 131 Ga. 21, 61 S. E. 913. The Supreme Court of New Mexico holds that evidence that water did flow in a certain direction is not rendered insubstantial by testimony of topographical engineers that it could not have done so. *Sanchez* v. *A. T. & S. Ry. Co.,* 33 N. M. 240, 264 Pac. 960.

We are convinced that the correct rule is, and we, therefore, hold, that where a civil engineer testifies that a topographical survey made by him reveals that land

at one point is higher than at another, and such testimony is in conflict with testimony of eye-witnesses who testify that the same body of water covered the point shown by the survey to be the higher, but did not reach or cover the point shown by that survey to be the lower, such conflict is for the jury.

The next question is this: were appellees bound by the testimony of the engineer who testified in their behalf, and who, in substance, at least, corroborated the testimony of appellant's engineers as to the relative elevations of these seven points and the bayou bank?

In the case of *Midland Valley Ry. Co.* v. *Lemoyne,* 104 Ark. 327, 148 S. W. 654, Mr. Justice Wood, speaking for this court, said: "The testimony of witness Taylor tended to show that there was no negligence whatever, but the testimony of the other witnesses for appellee tended to show that there was negligence. The appellee was not bound by the testimony of witness Taylor, although introduced by her. It was for the jury at last to say what weight they would give to his testimony. 'The primitive notion,' says Mr. Wigmore, 'That a party is morally bound by the statements of his witnesses no longer finds defenders, although its disappearance is by no means very far in the past.' "

We perceive no reason why a different rule should apply to the testimony of expert witnesses. The reason for the rule, it has been stated, is that, if it were otherwise, a party "would be at the mercy of his own witnesses." 28 R. C. L. 643. This would be true whether the witnesses were lay or expert.

We are, therefore, of the opinion that it was the province of the jury to decide the conflict existing between the testimony of the engineer who testified on behalf of appellees, and the eye-witnesses who also testified on their behalf.

The judgments in favor of certain appellees are excessive. To aid them in determining the value of these immature crops, the trial court permitted the jury to consider testimony as to the market value of the products during the period from the date of the destruction

to and through the time in which said crops, but for their destruction, would have been, ordinarily, harvested and marketed. The market value of such products during such period, of course, varied.

There is some evidence tending to show that at some time or times during said period the market price of such products reached, but no evidence to show that they exceeded, the figures shown for the following products: corn, 50 cents per bushel; cotton, 9.14 cents per pound; cotton seed, $20 per ton; alfalfa, $20 per ton.

The lowest cost of harvesting and preparing such products for the market shown by the testimony is: picking the cotton, $7.50 per bale; ginning cotton, $4.50 per bale; bagging and ties, $1 per bale; gathering corn, 2 cents per bushel; cutting and baling alfalfa, $1.80 per ton. The cost of picking cotton on the entire crop, that part which goes to the landlord and that which is retained by the tenant, must, under the evidence, be borne by the tenant. As to the cost of ginning the matter is not clear, and we have in our calculations charged each party the cost of ginning his own part.

There is no dispute in the evidence as to quantity of each product the various appellees lost.

Taking as the basis for calculation the highest market prices for the products, and the lowest cost of harvesting, the loss sustained by the following named appellees could not have been more, and, therefore, the respective judgments in their favor should not have exceeded the following amounts together with interest thereon at the rate of 6 per cent. per annum from August 1st, 1932:

Dave Williams $486.90; Gathan Poe $378; Melvin Lucas $454; Joe Montgomery $393.68; W. M. Toy $388; Clem Murdock $258.27; Gertrude and Will Waters $364.03; Charlie Folks $110; Will Furdge $460.50; Marshall Rosby $602.56; Richard Vaughan $333; W. S. King $248.74; Charlie Dixon $724.80; Savannah Williams $52.80; Sam Miller $65.99; Will Owens $1,684.27; Earl Boyd $686.96; Len Verden $372.80; Fred Scipio $220; Alec Vaughan $284.80; Joe Lumpkin $714.50; Grif-

fin Dennis $546.65; Walter Perkins $728.18; Bob Lipscomb $559.63; Elbert Gray $569.83; Joe Smith $759.15; McKinzie Goines $853.26; Douglas Surratt $936.24; Will Gordon $1,224.87; Harrison Gordon $1,224.87; Albert Jones $210; Percy Withers $964.73; Tammy Fuller $1,032.06; Ed Holmes $729.05; Henderson Withers $1,007.39; James Goines $786.12; Dock Handy $745.99; F. S. McGehee $414.55. Each of the judgments in favor of the appellees mentioned in this paragraph will therefore be modified by reducing the same to the respective amounts shown, to which amounts, however, there shall be computed and added interest at the rate of 6 per cent. per annum from August 1st, 1932; and said judgments as so modified are affirmed.

Appellee, W. M. Bowman, recovered judgment for $1,347.50. He described himself as a renter on the Wilson farm, but failed to say whether his rent was payable in cash or in products, and if in products in what proportion. If his rent is computed on a 50 per cent. basis, then his loss would have been $429.82. If his rent had been one-fourth of the crop, or if he had paid cash rent, and therefore entitled to all of the proceeds, his loss could not have reached the amount awarded him. In his complaint he prayed for judgment for $410.27. Of this sum $20.27 represented alleged loss of alfalfa, and $390 for loss of cotton. There is no proof of loss of alfalfa. The amount stated in his complaint for loss of cotton alone, to-wit $390, measures Bowman's maximum possible recovery. *Hudspeth & Sutton* v. *Gray Durrive & Co.,* 5 Ark. 157; *White* v. *Canada,* 25 Ark. 41; *Williamson* v. *Chicago Mill & Lbr. Co.,* 51 Fed. 2d 551. The judgment in favor of appellee Bowman will, therefore, be modified by reducing the same to the sum of $390, to which sum, however, there shall be computed and added interest at the rate of 6 per cent. per annum from August 1st, 1932. Such judgment as so modified is affirmed.

The respective judgments, in all cases involved in this appeal, which are not herein expressly modified, are affirmed.

Appellant may have 1/59th of its costs on appeal from each appellee whose judgment is modified.

GRIFFIN SMITH, C. J., SMITH and MCHANEY, JJ., dissent.

DONHAM, J., disqualified and not participating.

MCHANEY, J. (dissenting). I cannot agree with the conclusion reached by the majority that a question of fact was made for the jury in these cases, and I, therefore, respectfully dissent therefrom.

It is undisputed in this record, admitted by the engineers representing both sides, that the elevation of the Byrd levee as rebuilt after being dynamited in 1932, was 231.29 to 231.70 feet above sea level; that as rebuilt it was from 1 foot to 1½ feet higher than the former levee; that the elevation of the north bank of Pennington bayou was from 230.65 to 232.8; and that the lowest point on the highway, according to appellant's witness, Lefever, was 231 feet and, according to appellee's witness, Allen, was 230.85, or a difference of .15 of a foot. Now, it cannot be denied, in fact is undisputed, that the water in July, 1932, ran over the low point in that highway for a considerable distance and at a depth of 12 to 18 inches, according to many witnesses. Trucks traveling the highway ran through this water and it was over the running boards. Appellees' witness, Dyson, stated that he drove a model "T" Ford through the water and said it was upon the running board, and was from 15 to 18 inches deep. Children waded through it and appellee, Coleman, who saw them wading estimated its depth at from 4 to 18 inches. Appellees' witness, Mack Jones, drove an ice truck through the water at least twice daily, and said it was from 16 to 18 inches deep. It is said that these are mere estimates, but it seems to me they are something more. While no one actually measured the depth of the water at the low point on the highway with a yard stick, still Dyson knew it went over the running boards of his Ford which he said were 16 inches high, and Coleman used the legs of wading children for his measuring stick. If the water went over the highway at all and came from the bayou as appellees contend, then it is bound to have gone over the levee and the north bank of the bayou,

even though the levee had not gone out. For the purpose of this opinion I assume that the levee broke and that the pole in it caused it to break, but if the water went over the levee or north bank of the bayou, or would have done so if it had not broken, then the breaking of the levee was not the proximate cause of the overflow and consequent damage to appellees, and appellant is not liable. The lowest point on the levee as rebuilt was 231.29. The lowest point on the highway was 231. It would require only a very few inches of water on the highway to put it over the low point on the levee and over the north bank of the bayou. Now if the levee were a foot lower at the time of this overflow as the undisputed proof shows, and the water on the highway was a foot deep, then it was bound to have gone over all the levee and over all the north bank of the bayou. There can be no speculation or conjecture about it, as the fact that water seeks its level and will not rise beyond its source, unless under pressure, is as true as truth itself.

Another undisputed fact which appears to the writer as an act of God to demonstrate the futility of the claims of appellees is the overflow occurring in January, 1937, a fact not mentioned in the majority opinion. Appellees' engineer, witness, Allen, testified that in that overflow all the Byrd levee, except a very short strip west of the telegraph pole placed in the levee as rebuilt at about the same place and which is still there, and both the north and south banks of the bayou, overflowed to a considerable depth. This witness said the water in January, 1937, reached to a maximum height of 232.5, and at that time was only 4.8 inches deep on the highway. But at the same time it was way over nearly all the Byrd levee and both banks of the bayou. So, with this undisputed physical fact established beyond a shadow of doubt, what must of necessity have been the situation in the July, 1932, flood, when the water was 12 to 18 inches deep over the same spot on the highway and the Byrd levee 12 to 18 inches lower? The answer necessarily must be that the water must have been over the levee and over the banks of the bayou, eye-witnesses to the contrary notwithstanding.

In *Magnolia Petroleum Company* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062, we held that where "Testimony is at variance with physical facts and such repugnance is material and self-evident, improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not, on appeal, be looked upon as inviolate, if in conflict with recognized elements of time, mathematics, and the accepted laws of physics," quoting syllabus No. 2. In other words, where human testimony contradicts undisputed physical facts, the latter must control. If the water in January, 1937, rose to an elevation of 232.5 feet it is bound to have overflowed the Byrd levee at a height of 231.29, and no number of witnesses who said it didn't could be believed. Also, when it is established that water at a height of 232.5 flowed over the levee, and over the highway to a depth of 4.8 inches, then it necessarily follows that, when water from the same source overflows the highway to a greater depth, as it did in July, 1932, by the undisputed evidence, it must have been higher at the source in 1932 than in 1937, and no number of witnesses who said it was not can be believed; and for this reason alone, if for no other, the trial court should have directed a verdict for appellant, and this court should reverse and dismiss the judgments in favor of appellees because he did not do so.

But this is not the only reason this cause should be reversed and dismissed. There are a number of others, all related to this cause, however. The elevation, undisputed, of the Turner house, being on a portion of the overflowed land, is 230 feet. The water rose on the Turner house, according to appellee, Coleman, son-in-law of the late Mr. Turner, on Tuesday to from 6 to 12 inches, and on Wednesday it had risen 2½ or 3 feet higher. If the water on this house ever rose to such heights it must have been over the levee and the banks of the bayou. The Hugh Brown pump's elevation is 228.25 according to appellees' witness, Allen. Proof showed the water 5 feet deep. The Griffin Dennis land at its highest point is 233 feet and it all overflowed. Alec Vaughn's land has elevation of 228 and it was covered by 5 feet of water and the same is true as to the Clem Murdock land. The Bas-

ler milk house, located about 3 miles north of the Byrd levee, has an elevation of 232.5 and the water was 23 inches deep on the milk house.

But the majority say the witnesses, Lefever for appellant and Allen for appellee, did not have to be believed by the jury, and that their testimony as to elevations is not binding. Well, they agreed without essential difference on elevations and appellee's witness, Allen, agrees that appellant's witness Lefever's elevations are correct. Both parties relied upon them and why should they not be bound by their testimony? Moreover, it occurs to the writer that establishing these elevations above sea level is a pure question of mathematical measurements based on given or accepted data, and that the result would be the same whether the data was given or accepted. The problem must have been correctly solved, else the two engineers would not have agreed and the jury had no right to disregard their testimony. Let it be remembered that each witness made his own survey, independent of the other, and that neither was a mere checking of the correctness of the other, and yet they agreed upon all points of elevation without substantial difference.

For these reasons, I respectfully dissent and am authorized to say that the Chief Justice and Mr. Justice FRANK G. SMITH concur in this dissent.

GOODIN, ADM'X. *v.* BOYD-SICARD COAL COMPANY.

4-5277 122 S. W. 2d 548

Opinion delivered November 28, 1938.

Roy Gean, for appellant.

Thomas Harper, for appellee.

DONHAM, J. The appellant, as administratrix of the estate of William David Goodin, deceased, brought suit against the appellee, Boyd-Sicard Coal Company, for the use and benefit of the estate and the widow and minor children of the deceased for the alleged wrongful

death of the deceased caused from a large rock's falling upon him in the west entry of appellee's coal mine at Excelsior, Arkansas. Deceased received his injuries October 1, 1937, and died from the effects thereof the following day. The deceased was foreman in the mine and it is alleged that he received his injuries because the appellee failed to exercise ordinary care to furnish him a reasonably safe place in which to work.

The deceased had general charge of the production of coal, but there were two "wall bosses" who had charge of the entries of the mine and there is substantial proof in the record to the effect that it was the duty of the wall boss working the west entry where deceased was injured to make the place where the rock fell upon deceased reasonably safe. There is substantial evidence to the effect that it was his duty either to have timbered the entry so that the rock would not have fallen, or to have taken the rock down. The appellee sought to avoid liability on the ground that the deceased, being foreman, was chargeable with making the place where the rock fell safe. It was contended that the deceased knew that there was danger that the rock might fall and that, therefore, he was guilty of contributory negligence in going under it and that he assumed the risk, both contributory negligence and assumed risk being pleaded as full and complete defenses.

The deceased in the discharge of his duties as foreman was required to be all through the mine. But it is shown by the evidence that he had not been near the place where the rock fell upon him for several days until a few moments before the rock fell and injured him. The wall boss, Harry Simon, walked under the rock immediately in advance of the deceased and he testified that he did not know that there was any immediate danger of the rock's falling and stated that if he had known it, he would not have walked under it. As stated, there is substantial evidence in the record to the effect that it was the duty of the wall boss to know whether or not there was danger that the rock might fall in the entry at the place where deceased was injured, and that it was his further duty to exercise care to keep the place rea-

sonably safe, either by removing the rock or by timbering the entry so that the rock would not fall.

The case was submitted to the jury upon conflicting evidence as to the issues of fact and a verdict was returned for appellee. Judgment was rendered thereon and the appellant prayed and was granted an appeal to this court.

Appellant contends that the judgment of the trial court should be reversed because of erroneous instructions given by the court. The court modified instructions "A" and "2-A" requested by appellant and gave said instructions as modified, over the objection of the appellant, proper exception in each case being saved. The modification by the court was to the effect that if the jury found that the deceased was guilty of contributory negligence, as defined in the instructions of the court, appellant could not recover. Instructions Nos. 19, 20 and 24 given at the request of appellee also required the jury to find for appellee, if it was found that deceased was guilty of contributory negligence.

The appellee was a corporation. The cause of action of an employee working for a corporation who receives injury while engaged in the course of his employment is based on § 9130 of Pope's Digest, which reads as follows:

"Every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such corporation, or, in case of death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin of such employee, for such injury or death resulting in whole or in part from negligence (of such corporation or from the negligence) of any of the officers, agents or employees of such corporation."

In such cases, contributory negligence does not bar recovery. It only reduces the damages in proportion to the amount of negligence attributable to the injured employee. Section 9131 of Pope's Digest is as follows:

"In all actions hereafter brought against any such corporation under or by virtue of any of the provisions of this act to recover damages for personal injuries (to an employee, or where such injuries) have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury (and not by the court) in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such corporation of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In construing the last-above section of the statute, this court has many times held that contributory negligence as a complete defense has been eliminated from all actions for injury or death while one is employed by a corporation not engaged in interstate commerce. *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330, 205 S. W. 695; *Central Coal & Coke Co.* v. *Barnes,* 149 Ark. 533, 223 S. W. 683; *Ward Furniture Mfg. Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002; *Ward Furniture Mfg. Co.* v. *Pickle,* 174 Ark. 463, 295 S. W. 727; *Seaman-Dunning Corp.* v. *Haralson,* 182 Ark. 93, 29 S. W. 2d 1085; *Standard Oil Co. of La.* v. *Milner,* 191 Ark. 972, 88 S. W. 2d 824.

In the last-above case cited, this court said: "By the sections of the statutes heretofore referred to (9130 and 9131, Pope's Digest) and in all actions arising thereunder, contributory negligence is not a complete defense thereto." Citing *Ward Furn. Mfg. Co.* v. *Pickle,* 174 Ark. 463, 295 S. W. 727; *Bradley Lbr. Co.* v. *Tarvin,* 181 Ark. 1145, 27 S. W. 2d 520; *Miss. River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255; *Dierks Lbr. & Coal Co.* v. *Tollerson,* 186 Ark. 429, 54 S. W. 2d 61; *American Co. of Ark.* v. *Baker,* 187 Ark. 492, 60 S. W. 2d 572; *W. P. Brown & Sons Lbr. Co.* v. *Oaties,* 189 Ark. 338, 72 S. W. 2d 213; *Hartman-Clark Bros. Co.* v. *Melton,* 190 Ark. 1001, 82 S. W. 2d 257.

In *Standard Oil Co. of La.* v. *Milner, supra,* the court further said: "Since contributory negligence is not a complete bar to appellee's cause of action, it necessarily follows that the court did not err in refusing to modify appellee's finding instruction to negative contributory negligence. It is only in cases where the defense or defenses interposed are complete and not partial that finding instructions must be conditioned upon such defenses, and the corollary of this proposition is that partial defenses only should not be stated as conditions to recovery." Citing, *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. 2d 676; *Coca-Cola Bottling Co. of Blytheville* v. *Doud,* 189 Ark. 986, 76 S. W. 2d 87; *National Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, 294 S. W. 395; *Garrison Company* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396.

It is contended by appellee that appellant assumed the risk of injury as a matter of law by the rock's falling upon him. The trial court did not take this view of the case and refused to direct a verdict for appellee on this or any other ground. In this holding, the trial court was correct. Several witnesses testified that there were two wall bosses and that it was their duty to make safe the entry where deceased was injured. One of these wall bosses walked under the rock that fell upon deceased just a few seconds before the rock fell. If the wall boss, whose duty it was to make the place safe and who had been working constantly under and near this rock and who had sounded it as he testified and who had been constantly observing it, thought it not too dangerous to walk under it, it cannot be said, as a matter of law, that the deceased assumed the risk when he, immediately following the wall boss, walked under the rock also.

In the case of *Seaman-Dunning Corp.* v. *Haralson,* 182 Ark. 93, 29 S. W. 2d 1085, this court quoted with approval from 39 C. J., p. 689, as follows: "Although the defense of assumption of risk is established as a part of the law and will be applied in all cases fairly within the rule, it is nevertheless, not a favored doctrine, but at best is artificial and harsh and should not be extended beyond its reasonable limits."

The court further quoted with approval from 39 C. J., p. 1188, as follows: "Whether the servant knew and appreciated the danger or, in the exercise of ordinary care, ought to have known of it so as to be chargeable with the assumption of the risk thereof, is a question for the jury, unless the evidence warrants but a single reasonable inference to such fact. Thus on conflicting evidence it is for the jury to determine whether the danger was obvious or latent, and whether the servant had sufficient opportunity to discover it."

In the case of *Mercury Mining Co.* v. *Chambers,* 193 Ark. 771, 102 S. W. 2d 543, this court quoted with approval from 18 R. C. L., p. 649, as follows: "Although an employee may have had knowledge, as of a physical fact, of the defective condition of a tool, appliance or place, by reason of which he has sustained an injury, it by no means follows that he must have appreciated the danger to which he was exposed. His general knowledge may not have been such as to give him any conception of the peril. The condition may have appeared perfectly harmless. If this is shown to have been the case, his right of recovery is not defeated, for it is an appreciation of the danger, not mere knowledge of the defect by which the danger is threatened, that bars his action."

It seems clear under the rules above announced by this court that the question of whether the deceased assumed the risk was one for the jury.

The court gave a large number of instructions, which, because of repetition, unduly stressed the alleged defenses of appellee and which might have misled the jury. It is unnecessary to call attention specifically to each of these repetitions, but, in view of a new trial, we think it necessary to call attention generally to them. Where the subject-matter is fully covered by one instruction, it is unnecessary to repeat it, as constant repetition serves to place undue stress on the repeated matter and this tends to mislead and confuse the jury. Lengthy charges, numerous separate instructions with much repetition is bad practice and frequently tends to

mislead the jury. This court has condemned such practice.

In the case of *Furlow* v. *United Oil Mills,* 104 Ark. 489, 149 S. W. 69, 45 L. R. A., N. S. 372, this court said: "The court gave a very lengthy charge to the jury, in which are numerous separate instructions relative to the various issues involved in the case. Some of these instructions are repeated, and while this repetition might seemingly lay undue stress upon the matters therein embraced, and for that reason was bad practice and improper, yet in this case we cannot say that prejudice has resulted sufficient to call for a reversal on that ground."

Appellant contends that the court erred in giving a number of instructions, other than those to which specific reference has already been made, dealing with the alleged defenses of contributory negligence and assumed risk. With reference to these instructions, we may say that any instruction to the effect that the deceased was guilty of contributory negligence, as a matter of law, or to the effect that he assumed the risk, as a matter of law, was erroneous. Furthermore, any instruction which barred appellant from recovery, if the deceased was found by the jury to have been guilty of contributory negligence, was erroneous. Of course, if deceased was guilty of negligence and such negligence was the sole proximate cause of his injuries and death, there could be no recovery. But contributory negligence does not have such effect. It only serves to reduce the damages in proportion to the amount of negligence attributable to the injured party. As already stated, the questions of contributory negligence and assumed risk were for the jury.

In view of a new trial, there is another matter to which we must call attention. There is evidence in the record to the effect that it was the duty of the deceased to make his own place of work safe. On the other hand, there was evidence in the record to the effect that it was the duty of the wall boss to make inspections of the wall and to use ordinary care to keep same in a reasonably safe condition. Therefore, no instruction should be given which assumes that it was the duty of the ap-

pellee to make the place of work of the deceased safe. Ordinarily, of course, it is the duty of an employer to use ordinary care to make the place of work reasonably safe for his employee. However, when an employee is required as a part of his employment to make his own place of work safe, he cannot recover for his injury due to a negligent failure on his part to perform his duty in this respect. If it was the duty of the appellee, through one of its wall bosses, to use ordinary care to make the place where the rock fell reasonably safe, then, of course, no such duty rested upon deceased as would bar appellant from recovery for his injuries and death. As stated, the record before us makes it a jury question as to whose duty it was to make the place where the injury occurred, safe.

It follows from what we have said that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

C. M. Ferguson & Son *v.* White.

4-5276 121 S. W. 2d 894

Opinion delivered November 28, 1938.

Rowell, Rowell & Dickey, for appellant.

A. J. Johnson and *T. S. Lovett, Jr.,* for appellee.

BAKER, J. The appeal in this case is from a judgment rendered in the Lincoln circuit court of February 14, 1938. The appellee had sued the appellant for $203 for damages alleged to have been sustained in the following manner.

The appellee owned a team of mules. During the month of May, 1937, they were hitched to a wagon and were driven by two negro employees of the appellee along state highway No. 13 near Yorktown in Lincoln county. A servant or employee of the appellant was driving a truck along the said highway behind or to the rear of the wagon to which the mules were hitched going in the same direction. As he approached the wagon and team of mules he began sounding his horn which caused the mules to take fright. One of the negro employees in the wagon signaled to the truck driver attempting to have him desist from sounding the horn, but it is charged that this servant trailed or followed the mule team and continued to sound the horn until the team ran away. Some damage was done to the wagon. The team broke loose from the wagon, ran off the highway and down an embankment and into a tree. One of the mules was apparently uninjured, but the other is said to have had slight cuts on his legs, but was thought to have suffered only minor injuries. An attempt was made to use the team for several days thereafter. The mule that had been slightly injured, as it was thought, would stop to rest. One of the negro witnesses in describing the condition of the mules after the injury, said that the mule that later died was faster than the other, that it took two or three to catch him, that after the injury anyone could go to him and catch him, that he was "kinda stove up," that he worked him straight along during the following week, but he acted like he didn't want to eat anything. While he was ploughing him about a week later the mule fell dead.

The proof developed that the wagon did not belong to the plaintiff, Mr. White. It was one that he had borrowed, but after the accident he had it repaired at the

expense of $13, which he paid. Proof also showed the mule that died or was killed to be of the value of $190. There were two matters presented upon this appeal. One is that the evidence is insufficient to support the verdict for the value of the mule and the second is that the plaintiff had no right to recover for the damages done to the wagon that he did not own.

The manner in which this runaway was caused is presented upon conflicting testimony. Appellant's servants deny that there was any negligence or improper conduct and present this case to the effect that the driver of the truck was merely following a wagon and team and gave the signal of his intention to pass. The proof, however, presented on the part of the appellee and by witnesses other than those connected with the incident is to the effect that the truck driver, as he approached the wagon and team of mules, began sounding his horn and notwithstanding the fact that the mules were frightened and began to run, continued to follow or trail the wagon and team until the team had broken loose from the wagon and ran away. This certainly was a disputed question of fact and the jury has decided that question against appellant's contention and that matter is now settled that there was negligence and the evidence is certainly substantial to support the verdict.

In the absence of any controlling statute or other authority we would be impelled to hold that the conduct of the driver of the truck, as described by the witnesses, was negligent and that the master would be liable for any damages caused thereby. Section 6640 of Pope's Digest prescribes the duties of one driving an automobile when he meets a frightened team and the opinion in the case of *Hardy* v. *Cloe,* 165 Ark. 253, 263 S. W. 968, is to the same practical effect. Only an effort to fill space would justify further discussion of that matter.

It is argued that the injuries to the mule were not sufficient to cause his death. It is true that the appellee and his servants did not think the mule was injured very seriously at first, but the proof is not disputed that from and after the day of this runaway, when the two mules ran down the hill and were brought to a stop, one

on one side of a tree and one on the other, one was injured. The injured mule, though he was worked afterwards did not recover. Though he had been hard to catch or bridle prior to that time, and it had sometimes taken as many as three to catch him, he gave no further trouble in that respect; although he was "high strung," quick and energetic, they had to stop and rest him frequently as he worked, and although they thought he would get better as he had time to get over the soreness caused by the runaway, he died within a week without real improvement. He fell and died while they were working him. We are asked to reverse this case because this evidence is unsatisfactory, at least, to appellant to show that the death of the mule was caused by injuries received in the runaway.

We cannot arrogate to ourselves any superior knowledge of the cause of the mule's death and loss to the owner over and above what was had by the trial court and jury. The matter was properly submitted to a jury for its determination and the verdict of the jury is final. The evidence is substantial.

The other matter which we are asked to consider and reverse is the judgment for damages to the wagon and it is suggested that if this judgment is permitted to stand the owner can now sue and recover a judgment for a like amount and the appellant would then have to pay twice. The appellee was in possession of the wagon, perhaps under obligation to take care of it, felt responsible for its condition, as a result of the accident. At any rate the proof is that he had the wagon repaired, that it cost $13 to restore it to its former condition; that Mr. White, the plaintiff, had paid that bill and the owner was not thereby damaged or injured. The only party suffering loss was Mr. White. The amount of his loss is not questioned nor is the method of proof. It is perhaps unnecessary to attempt a further discussion as the law of bailor and bailee is well known and established. In 3 R. C. L. 128, § 50, we find a statement substantially to the effect that it is a well settled rule that, as against a stranger or wrongdoer, a gratuitous bailee who is in the actual or exclusive possession of a

chattel, may recover possession in his own name against such stranger or wrongdoer who attempts to retain said property. It is also said in 6 C. J., pp. 1149, 1150, § 111, that a bailee in possession of property had special interest in it such as to entitle him to sue third persons for losses and injuries to the property or for disturbance of his possession, etc. This probably results from the fact that bailee is responsible for minor repairs. 8 C. J. S., p. 257, § 24.

Surely under this case the owner of the wagon who has suffered no loss or damage could not recover any.

There is no prejudicial error. Affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* THE FIDELITY & CASUALTY COMPANY OF N. Y.

4-5275 121 S. W. 2d 890

Opinion delivered November 28, 1938.

House, Moses & Holmes and *Eugene R. Warren,* for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

MEHAFFY, J. The appellee, an insurance company engaged in writing insurance and surety bonds, instituted this suit in the Pulaski circuit court against the appellant, alleging that in 1933 the appellee became surety upon the official bond of Austin Murphy, who was the duly qualified and elected treasurer of Jackson county, Arkansas; the bond was for a period of two years; during Murphy's term in office, he issued certain warrants that were void under Amendment No. 10 to the Constitution; said warrants constituted no legal obligations, and the claim for which said warrants were issued were unenforceable against the county; in 1936, the state of Arkansas instituted suit against the appellee for the use and benefit of Jackson county and Murphy, the treasurer, was made defendant in said suit. In June, 1936, judgment was rendered in favor of the state against Austin Murphy and the appellee for the amount of said warrants and assessed $5 prosecuting attorney's fee on each warrant; there were two warrants; the appellee was required to pay said judgment and alleges that it was subrogated to any and all rights which Jackson county and Austin Murphy had against appellant. Judgment was asked for $401.79 with interest.

Appellant filed a demurrer on the ground that the complaint did not state facts sufficient to constitute a valid cause of action.

The appellant filed motion to transfer the cause to equity, and the cause was transferred. The following is an agreed statement of facts: "It is herein stipulated and agreed by and between the parties herein that the following constitute the material facts of this controversy:

"1. The plaintiff is a corporation engaged in the writing of fidelity and surety bonds and is authorized to do business in the state of Arkansas.

"2. The defendant is a corporation organized under the laws of the state of Arkansas and has been properly served with process in this action.

"3. On or about January 1, 1933, the plaintiff became surety on the bond of Austin Murphy, who was the duly qualified and elected treasurer of Jackson county, Arkansas. The term of said bond was for a period of two years. Plaintiff was duly compensated for the execution of said bond.

"4. On January 6, 1933, Jackson county general revenue warrant No. 21, in the sum of $204.79, was issued by the clerk of Jackson county to the defendant for services duly rendered by the defendant to Jackson county, Arkansas. On February 9, 1933, Jackson county general revenue warrant No. 632, in the sum of $362.44 was issued to the defendant by the clerk of Jackson county in payment of services duly rendered Jackson county by the defendant. Order of allowance of warrant No. 21, is found in book C, p. 338, and of warrant No. 632 is found in book C, p. 362.

"5. On May 6, 1933, the defendant delivered to A. G. Albright, sheriff and collector of Jackson county, Arkansas, the said warrants Nos. 21 and 632 in part payment of taxes owed by the defendant. Albright issued his official receipt on May 8, 1933, and delivered same to the defendant. The said Albright in his monthly settlement with the treasurer of Jackson county duly delivered the two said warrants to the treasurer which were accepted by the said treasurer, and credit given the collector on July 3, 1933.

"6. Warrant No. 21 was void for the reason that it was issued in contravention of Amendment No. 10 to the Constitution of the state of Arkansas, in that the indebtedness upon which the order of allowance was made was contracted after all the revenues for the fiscal period involved had been exhausted. Warrant No. 632, in the amount of $362.44, was valid in the sum of $175.44, and held void in the sum of $188, for the reason that it was

issued in contravention of Amendment No. 10 to the Constitution of the state of Arkansas, in that the orders of allowance upon which said warrant was issued, and the indebtedness upon which the orders were made had been contracted after all the revenues for the fiscal period involved had been exhausted.

"7. The defendant had duly tendered the services for which the warrants were issued in payment, and accepted said warrants in good faith and with no actual knowledge of the condition of the treasury of Jackson county. Austin Murphy acted in good faith in said transaction, with no knowledge of the invalidity of the warrants.

"8. During the year, 1936, the state of Arkansas instituted separate causes of action in the Jackson county circuit court upon each of the foregoing warrants and named the said Austin Murphy and the plaintiff herein, for the total amount of $391.79, and in addition, assessed as costs $5 prosecuting attorney's fees for each warrant. Said judgment was duly paid by plaintiff herein."

The appellant answered admitting the facts set forth in the agreement; states that it had duly rendered the services, and that it accepted the warrants in good faith with no knowledge of the condition of the treasury of Jackson county. It denied that plaintiff was entitled to recover, and stated that the contract was for a purpose which was valid and binding on said county, and that having issued the warrants which were paid by the treasurer, it or any person claiming under or through subrogation, assignment, or otherwise, is now estopped from recovering said sums from appellant.

The chancellor entered a decree in favor of the appellee against the appellant for the amount sued for, and the case is here on appeal

This court has held that the doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties, with regard to form, and its purpose, and object is the prevention of injustice.

Amendment No. 10 of the Constitution prohibits the county court, levying board, or agent of any county

from making or authorizing any contract or making any allowance for any purpose whatsoever, in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made. It also prohibits the county judge, county clerk or any other county officer to sign or issue any script, warrants, or make any allowance in excess of the revenue from all sources for the current fiscal year.

Appellant says in its answer that the contract was for a purpose which was valid and binding on said county, and that said county, having issued said warrants which were paid by the treasurer, it or any person claiming under it through subrogation, assignment or otherwise, is estopped from recovering said sums.

In the first place, there was no contract, because the constitution prohibits the making of a contract; moreover, it could not make a contract for any purpose or sign a warrant or pay money if said contract or warrant was in excess of the revenues for that year.

The appellant refers to a number of authorities, and it may be said that the authorities are not in harmony. Some courts hold that there is no liability if the person sought to be charged did not have actual knowledge of the invalidity of the claim. It is generally held, however, that if the party sought to be charged has either actual or constructive notice, this is sufficient. This is not like a case where a contract has been made which was authorized by law, but not valid because of some defect; but in the instant case there not only was no contract, but the making of a contract, the making of an allowance, or the issuing of a warrant, was absolutely prohibited, so that when the appellant received these warrants, it received absolutely void warrants.

One authority to which attention is called by the appellant is 60 C. J. 764. That provides that when the surety had made good the default of the principal the surety will be subrogated to the rights of the beneficiary or obligee against a third person who has received the trust property with notice or without value, or who with knowledge, had participated in the breach of trust, etc.

In the same volume referred to, on page 760, it is said: "The generally accepted rule seems to be that, where, because of the character of the debt, or the character or status of the creditor, the law accords a right of priority to the debt, or some particular remedy or privilege in connection with its enforcement, a surety for the debt, who has paid the same, will be subrogated to such right of priority, special privilege, or remedy, even as against a co-surety or his estate. Thus a surety for a debt owing to a state, the United States, or the crown, will usually be subrogated to the sovereign right to have prior payment from the estate of the principal."

No distinction is made between compensated and gratuitous sureties.

"Thus, where the sureties of a public officer have made good a loss occasioned by their principal's default or misconduct in the collection of a debt, it has been generally held that they are entitled to be subrogated to the rights of the obligee against those persons who were originally liable for such debt." 25 R. C. L. 1332.

The warrants received by appellant were worthless papers, and if it sold electricity or any commodity to a county at a time when the county's revenues for that year had been exhausted, it did so at its peril and could not collect from the county. When it received the warrants from the county which had been issued in excess of the revenue, the county had a right to recover from it the amount so received, and if the surety was compelled to pay this, it is subrogated to the rights of the county.

It was said in the case of *Clark* v. *School Dist. 16*, 84 Ark. 516, 106 S. W. 677: "Although the treasurer illegally pays the warrant for such services, he may, when his mistake is discovered, recover the same back into the treasury."

If one could enforce the collection of warrants issued after the funds were exhausted, this would nullify Amendment No. 10.

The appellee had a right to recover, and the judgment is affirmed.

GARRETT *v.* PYRAMID LIFE INS. COMPANY.

4-5267 121 S. W. 2d 898

Opinion delivered November 28, 1938.

Talley & Talley and *Wayne W. Owen,* for appellant.

Verne McMillen, for appellee.

SMITH, J. Mrs. Lizzie Garrett, hereinafter referred to as appellant, brought suit on May 5, 1937, against the Pyramid Life Insurance Company, hereinafter referred to as appellee, to collect a policy of insurance issued by appellee, under date of September 30, 1935, on the life of Tome J. Garrett, her son, in which she was named as beneficiary. The insured was killed September 12, 1936.

In response to a motion to make the complaint more definite and certain, the court, on September 24, 1937, sustained a motion to require appellant to state the date of premium payments, to whom paid, and to set out the receipts for the payments made. On April 15, 1938, appellant stated, in answer to this order of the court, that a premium payment, amounting to $22.82, was made by the insured, Tome J. Garrett, on the ..... day of October, 1935, and that the payment was made to appellee's general agent, Kenneth S. L. Cooke, and a receipt given therefor. Appellee filed an answer, alleging that only one premium payment had been made, that being a payment for a quarter of the year, and that the policy had lapsed on account of nonpayment of other required premiums.

Practically no attempt was made to prove a premium payment in the amount and manner alleged except

by the testimony of Ben Cockerill. This witness testified that the insured met Cooke, the agent, in Hot Springs, and paid Cooke the premium and took a receipt therefor. When asked, "Did the receipt say it was for balance on premium, for annual, semi-annual or quarterly?", he answered, "Annual," and that Cooke said "it was the annual premium for the year."

This testimony was in conflict with all the other testimony previously offered by appellee upon the question of the payment of premium, the other testimony being to the effect that the payments made were all quarterly premiums. This contradiction was qualified by Cockerill's answer "Yes" to the following question: "I believe you said this receipt stated 'the remaining part of the annual premium'?".

When the first testimony was offered conflicting with the allegations of the response to the motion to make definite and certain, the following colloquy occurred between the court and counsel for appellant: "Court: I know. We had this matter up in my office sometime ago. Mr. Talley, in your original complaint, there was no allegation as to the payment of this premium, and the court was of the opinion that the defendant should have some notice of what your contention was in that respect and granted defendant's motion to make the complaint more definite and certain, by setting up when these payments were made. Now, you did that by way of an amendment and response to the motion. Now, let me see your response. You allege in here that the premium was paid by the insured, Tom Garrett, in the amount of $22.80, and that the premium was paid sometime in October. Now, your proof would be confined to that allegation. Mr. Talley: At this time I want to amend the complaint to include that the premiums were paid in the month of October, 1935, as set out in the amended complaint, as well as of July 30, or in July or August, 1936. It is a universal rule that you can amend. Court: It might be if it was the first time the matter was called to the attention of the attorneys, but we spent considerable time in trying to get the issues in this case in such condition that both parties could be ready for trial today.

Now, when you come up and allege a different method of payment, then the defendant is not put upon notice. What is he expected to meet by way of proof?"

However, the court permitted testimony to be offered that the premiums had been paid quarterly, and upon that issue the following testimony was heard.

Edward W. Garrett, a brother of the insured and a son of the beneficiary, testified that he knew that his mother paid two premiums. He did not recollect whether they were quarterly premiums, but it "seemed to me like the first one was two dollars and something," and he did not recollect the amount of the second payment, but he had seen four different receipts. He identified a receipt offered in evidence dated October 10, 1935, for $3. Another receipt was offered in evidence dated February 11, 1936, for $2. And, when asked, "Did she (Mrs. Garrett) make any payments other than these, or was that the extent of her payments?" answered, "I don't think she did." He was further interrogated as follows: "Q. Did you state that later, other payments were made to Mr. Cook? A. Yes. Q. Where was that? A. I don't exactly know, but I think it was made in the CCC camp. Q. How do you know? Were you there at the time? A. No. Q. Then you couldn't testify to that? A. He came home with a receipt in his pocket. Q. Do you remember the dates on the receipts that you saw after these two—the dates of them? A. No. My mother took care of all that and I never paid much attention to it. Q. What was the amount of the receipts? A. Those two? Q. No, the other one you saw; what was the amount of it? A. I think it was $6. Q. You stated one of these subsequent receipts was for $6. What were the others for? You stated you saw two other receipts, didn't you? A. No, I just only saw one. Q. About when was the date you saw this last receipt that was paid; and for what period was that? A. The best I recollect, it was in July, but I am not sure about it. Q. Of what year? A. 1935. Q. You said 1935. This policy was issued in 1935. A. 1936, it was. Q. But you do know this: you know that premium was paid in July, 1936—that $6 premium, do you not? A. Yes, I saw that;

he had it in his pocket." When asked if he saw the date when the receipt was issued which he saw in July, the witness answered: "I don't recollect just exactly."

The witness Cockerill, above referred to, identified the time when he saw the receipt which he mentioned as being during the time he and the deceased were working in the CCC camp in July, 1935. In answer to repeated questions he was very definite that the time was in July, 1935, in fact, July 30, 1935. In a final attempt to have the witness place the date a year later, he was asked, on his redirect examination: "Q. Was it 1935 or 1936? Refresh your memory by something and give the date. A. It was 1935 when we were in camp. Q. You went into the CCC camp in 1935? A. Yes." The inquiry was not pursued further, and the witness was excused.

The widow of deceased testified that her husband paid as much as $5, and she didn't know how much more. Her husband went to the courthouse to make the payment to the agent, and she went with him, but did not go in the courthouse and did not see the payment made, but her husband had a receipt for $5, which he placed in his pocketbook, and after his death she kept it with her things, and it was still in the pocketbook the last time she saw it, but does not know where it now is, and she did not know who had signed the receipt and was not sure as to the amount receipted for.

The guardian of the insured's children testified that he took charge of deceased's effects and his papers, which were in a box, and "there was one receipt, I guess you would call it, for the money he had paid in, was all I know anything about." He testified that the receipt he saw in the box "was something similar to the receipt here."

The beneficiary testified that when the application for the policy was made she paid "a couple of dollars," and that, altogether, she made "two or three payments." When the policy was delivered she made the payment evidenced by the receipt dated October 10, 1935, above referred to, and that a receipt was given her for each payment made, and that when she made the last payment to Cooke she was told by him that this was the last pay-

ment she would have to make and the policy was in full force. The answer to this leading question was the word "Yes," but it does not state for what period of time the policy would be in full force. She was then interrogated as follows: "Q. Did he tell you that you would have to pay any more premiums on that policy-year? A. A year? Q. On that policy for a year? A. No, sir. Q. He said you wouldn't have to pay any more premium? A. Yes. Q. For the policy-year? A. I don't remember. You see, I didn't make any more payments, and it stopped at that. Q. Did he tell you it wouldn't be necessary to make any more payments? A. I don't know. Q. In other words, did he say the policy was paid up? A. Yes, he said that."

This witness testified that the first payment was made by note for the premium, and after a number of questions by her counsel, all more or less leading, in regard to this note, which elicited no definite information, the court said: "Q. Mrs. Garrett, if you remember the amount of the note, state it; but if you don't, just state you don't remember it. A. I don't remember the amount of the note." (Appellant's counsel): "Q. You don't know whether it amounted to $22.82 or $6.05, or what it was? A. No."

Upon the cross-examination of this witness she admitted that Cooke, appellee's agent, accompanied by R. W. Hendricks, came to her house to collect a premium, and she was asked if she told Cooke that her son, the insured, would not permit her to pay any more on the premium, and that she was not going to pay any additional premium, and that he (Cooke) need not come back any more. She answered: "I just told him I didn't want to pay it any more, but I didn't tell him any reasons."

Hendricks, who was called as a witness for appellant, testifying in regard to this visit, stated: "Mr. Cooke went up there and talked with her there and tried to get her to keep this policy on; and she wouldn't do it," and that appellant told Cooke that "her son objected to it, and she couldn't carry the policy any longer, that he wanted to build a new house."

Cooke was called as a witness for appellant, and he stated that he had severed his connection with appellee more than a year before, and that he wrote the policy, which carried an annual premium of $22.82, or $6.05 quarterly, that he made four visits to collect this premium, and that on one visit he was paid $3, which completed the payment of the premium for the first quarter, and that he was never able to collect more, and only $6.05 was ever paid by anyone on the premium.

Appellant was not recalled to deny the testimony of Hendricks.

We have stated the substance of the material testimony tending to show that premiums were paid which would have continued the policy in force until the date of the insured's death, and we think the trial court was fully justified in concluding that there was no substantial testimony to sustain that contention.

It is insisted, however, that appellee waived nonpayment by sending appellant a "Notice of Payment Due" reading as follows:

"Notice of Payment Due
"Pyramid Life Insurance Company
of Little Rock, Arkansas
"Home Office Statistical Information

"KS: Cooke Ark.-S. A.

"No. 20306 Amt. 1,200 20 Pay Due on 30 Day of Sept. 1936.

"Notice of the Annual Premium—22.82 Life on the life of Mr. Tome J. Garrett % Mrs. Lizzie Garrett, Mt. Valley Route, Hot Springs, Arkansas. 22.80 Total.

"Please return this notice with your remittance. Notify the company of any change of address.

"Please remit direct to home office or branch office.

"Make all remittances payable to the company."

This contention may be disposed of by saying that the notice was received September 17, and the insured had died on the 12th, five days prior to its receipt. The complaint did not allege there had been a waiver, and the motion for a new trial is silent upon this question; indeed, the notice copied above does not appear to have been introduced to prove a waiver of the payment of

premium but, rather, to show that the premium had in fact been paid.

In the case of *Patterson* v. *Equitable Life Assurance Society,* 112 Ark. 171, 165 S. W. 454, it was said: "Furthermore, the death of Patterson fixed the rights of the parties to the insurance contract as they existed at that time, and any letter written by the appellee after Patterson's death, and without knowledge thereof, and addressed to him as though he were living, could not be considered as a waiver of appellee's rights under the insurance contract as they existed at the time of Patterson's death. At the time of the death of the insured, by reason of the nonpayment of the premium, the policy had lapsed, and he had been advised thereof, and only certain rights which involved affirmative action on his part remained to him, and of which he had not availed himself, and his death left only the right, by the very terms of the contract, to a paid-up policy of insurance for $900. The appellee, at the time of writing the letters, being ignorant of the death of Patterson, could not waive its rights fixed by his death, even if the letters would have otherwise constituted a waiver. There can be no such thing as a waiver of rights without knowledge of the facts upon which such rights are based." The case of *American Life Ass'n* v. *Vaden,* 164 Ark. 75, 261 S. W. 320, is to the same effect.

We conclude, therefore, that the trial court committed no error in directing the jury to return a verdict for appellee, and the judgment is affirmed.

MISSOURI PACIFIC RD. COMPANY *v.* BARNES.

4-5222 121 S. W. 2d 896

Opinion delivered November 28, 1938.

R. E. Wiley and *E. W. Moorhead,* for appellant.
Y. W. Etheridge, for appellee.

HUMPHREYS, J. Appellee brought suit against appellants in the circuit court of Ashley county to recover damages for the destruction by fire of a warehouse and the contents thereof owned by her, which was located within a few feet of appellants' railroad tracks and on its right-of-way about 200 yards south of its depot, it being alleged that the fire was started by one of its engines when passing said warehouse.

The action was bottomed upon § 11147 of Pope's Digest making corporations operating railroads in this state liable for the destruction of, or injury to, any property, real or personal, which may be caused by fire through the operation of such railroad regardless of whether the fire causing such damage was the result of the negligence of the railroad company, its employees, agents or servants, and providing that: "All corporations, companies or persons, engaged in operating railroad wholly or partly in this state shall be liable for the destruction of, or injury to, any property, real or personal, which may be caused by fire, or result from any locomotive, engine, machinery, train, car, or other thing used upon said railroad, or in the operation thereof, or which may result from, or be caused by, any employee, agent or servant of such corporation, company or person upon or in the operation of such railroad, and the owner of any such property, real or personal, which may be destroyed or injured, may recover all such damage to said property by suit in any court, in the county where the damage occurred, having jurisdiction of the amount of such damages, and upon the trial of any such action or suit for damage it shall not be lawful for the defendant in such suit or action to plead or prove as a defense thereto that the fire which caused such injury was not the result of negligence or carelessness upon the part of

such defendant, its employees, agents or servants; but in all such actions it shall only be necessary for the owner of such property so injured to prove that the fire which caused or resulted in the injury originated or was caused by the operation of such railroad, or resulted from the acts of the employees, agents or servants of such railroad company, . . ." Appellee recovered a judgment of $800, her costs and an attorney's fee of $150, from which is this appeal.

It was developed in the progress of the trial that the land upon which the warehouse was located had been leased from appellant by J. K. Barnes, who was the son of appellee, and in charge and control of all her business, on the sixth day of June, 1930, and that the written lease exempted the lessor from liability as follows:

"(e) to assume all risks of loss, injury or damage of any kind or nature to any building or other structure or appurtenance thereto, belonging to lessee, or to others, which may be now or hereafter placed on premises, and all risks of loss, injuries or damage of any kind or nature to the contents of such buildings or structures or to any goods, merchandise, chattels, or any other property now or that may hereafter be upon premises, whether belonging to lessee or to others, and whether such loss, injury or damage results from fire, flood or other agency, or whether the same be caused by the negligence of carrier, its agents, servants or employees, or otherwise, and to protect, indemnify and save harmless the carrier from all claims or demands or suits or actions growing out of any such loss, injury or damage."

The lease contained the provision relative to the term thereof as follows: "Term hereof shall be deemed concluded by (a) expiration of thirty days following serving by carrier of written notice of such being carrier's intention. (b) Lessee failing for ten days to cure any default after written notice thereof, (c) expiration of thirty days following serving by lessee, subsequent to aforesaid fixed term, of written notice of such being lessee's intention or (d) lessee's non-user of premises for any six consecutive months.' "

J. K. Barnes testified that the agent of appellants at Parkdale told him that he had received a letter from the railroad officials to cancel the lease on that part of its right-of-way on which the warehouse was located, and notified him to move the warehouse and its contents off the right-of-way; that he did not do so, because the lease provided for the railroad officials to do that; that after receiving the verbal notice from the agent he quit using the warehouse, but left the warehouse and the contents consisting of four 802 gin heads, with cleaners, feeders, belts and pulleys being a complete battery of four gin heads worth $2,500 or more, and three thousand pounds of sacked sulphur in the warehouse, which belonged to his mother; that he continued to pay the annual rental of $36 per year to appellants, because the lease contained other buildings on the right-of-way which he had leased for his mother, and which he had continued to use; that after he received notice that the lease was canceled as to the warehouse he left the same gin heads, etc., in the house which had been in it before receiving the notice; that after receiving the notice the railroad company fenced its right-of-way, including the land occupied by the warehouse, with a barbed wire fence.

Appellants contend that, under the provisions of the lease and testimony of J. K. Barnes, there was no cancellation of the lease, and, that under the provisions of the lease, they were exempted from liability on account of destruction of the warehouse and contents thereof by fire.

A majority of the court are of the opinion that this contention should have been sustained, and that the trial court erred in not directing a verdict for the appellants.

The writer and Justices Mehaffy and Donham are of opinion that the cancellation of the lease was a question for determination by the jury under the evidence in the case.

The majority opinion makes it unnecessary to consider and determine the issue of liability relative to setting out the fire that destroyed the warehouse and the contents thereof, and the correctness of the instructions responsive to that issue; and also unnecessary to con-

sider and determine the liability of J. K. Barnes on the cross-complaint of appellants against him.

On account of the error indicated the judgment is reversed, and the cause is dismissed.

HUDSON & DUGGER COMPANY *v.* ISON.

4-5255 121 S. W. 2d 901

Opinion delivered November 28, 1938.

House, Moses & Holmes, James Smith and *Richard C. Butler,* for appellant.

Poe & Wood, for appellee.

MEHAFFY, J. This suit was filed by appellant, plaintiff below, to set aside certain tax sales, the property having forfeited for assessments alleged to have been

made in 1930. The lands were bid in by the state and certified to the State Land Commissioner in 1936. Following such certification the appellees herein procured donation certificates, and some of the donees made improvements. The nature and value of these improvements are set out in an agreed statement of facts. In the view we take of the case it is not necessary to consider the facts so agreed to.

The chancellor dismissed the complaint, and held that errors complained of were cured by act 142 of 1935. The effect of the decree is to say that the matters placed in issue were irregularities, and were not jurisdictional.

Numerous errors were assigned in the original complaint. However, in an amended complaint appellant seems to rely upon six assignments: (1) The county board of equalization failed to meet in 1930, and "failed to adopt a resolution as required by law." (2) The county clerk failed to enter upon his records the adjusted or equalized assessed value of the lands described in the original complaint for the year 1930, "as adopted by the equalization board as required by law." (3) The county clerk failed to send the names of the members of the equalization board to the State Equalization Board, as required by law. (4) The quorum court failed to appoint the members of the county equalization board in the year 1929 for the year 1930, as required by law. (5) The county clerk wholly failed to comply with §§ 10019 and 10092 of Crawford & Moses' Digest. (6) The school tax assessed against lands of plaintiff for the year 1930 was void.

The cause was argued orally, and appellant, while not abandoning any of its several assignments of errors, particularly emphasized the allegation that there was no assessment of taxes in Desha county for 1930. In the alternative it argued that, if it should be found that assessments had been made, such so-called assessments were invalid for the reason that the county board of equalization did not meet during 1930.

It is first contended by the appellant that there was no assessment of appellant's property in Desha county in 1930.

N. D. Newton, county clerk of Desha county, testified that the records in his office showed the assessment on real estate in Desha county for the year 1930; that the assessment book was filed in the county clerk's office by the assessor on August 18, 1930. The witness then read the record, or rather the certificate of the assessor, which was in usual form. We, therefore, think it conclusively appears that there was an assessment of real estate in Desha county in 1930. It is true that there was a date at the head of the list showing 1929, but the county clerk testified very positively that the assessment was made in 1930, and the certificate of the assessor, which was sworn to before the clerk on August 18, 1930, shows that it was the assessment for 1930 and not for 1929.

But it is contended by the appellant that there is no valid assessment because of the failure of the equalization board to meet and equalize the assessment, and that this makes the tax sale void. This court, on November 14, 1938, decided the questions against the appellant's contention here, *Stout Lumber Co.* v. *Parker, ante* p. 65, 122 S. W. 2d 180. In that case we said: "Appellant assumes that, because the equalization board had finally adjourned when the assessments were made, its right of redress was gone. This is not correct. There was the right, by certiorari from the circuit court directed to the county clerk, to have the record brought up for review and correction. Section 2865, Pope's Digest."

Appellant next contends that the failure of the county clerk to comply with § 10019 of C. & M. Digest (§ 13766, Pope's Digest) invalidates the sale. It is our opinion that there was a substantial compliance with this statute, although whether there was or not would not effect the result in this case. This is, also, true of appellant's fourth contention, about complying with § 10092 of C. & M. Digest (§ 13855, Pope's Digest). This question was considered by this court in the case of *Benham* v. *Davis,* 196 Ark. 740, 119 S. W. 2d 743. The court there said:

" 'The requirement of Kirby's Digest, § 7092, that the county clerk shall keep a record of lands sold for taxes to individuals separate from the record of lands

sold to the state is directory merely, and a sale of lands to the state for nonpayment of taxes is not rendered invalid by noncompliance with such requirement.' What the clerk did, according to his testimony, was that he took the record in which was recorded the delinquent list, and as the sales were made, he wrote in the margin of that record to whom it was sold, on a line provided for that purpose. If it was sold to an individual, his name was inserted. If it was sold to the state, the record so showed. We think this is a substantial compliance with the statute as the record made in the manner stated by the clerk affords all of the information that would be obtainable from a separate list, and the taxpayer could not be misled by the absence of or the failure to keep such separate list. As said in *Leigh* v. *Trippe, supra*: 'It is the declared policy of our revenue laws to disregard technical irregularities in tax sales which are not prejudicial to the rights of the owner, and to require all proceedings to set aside sales on account of such irregularities to be instituted during the period allowed for redemption'."

It is urged that the county clerk failed in other duties, and that this makes the tax sale void, and also that the tax sale was void, because there was no valid levy of the school district tax. The exhibits introduced by Mr. N. D. Newton, clerk, shows that the school tax in this particular district was levied according to law. All these irregularities were cured by act 142 of 1935, this suit, having been brought before act 142 was repealed. Under act 142, when the taxes on real estate have not been paid within the time provided by law, the property shall be sold. It is, also, provided in said act that the sale shall not be set aside by any proceedings at law or in equity because of any irregularity, informality, or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, and the recording of the lists and notice of sale, or the certificate as to publication of said notice of sale. Under said act it is required that there be a proper description of the property for which

said property is sold for delinquent taxes. There is no dispute about there being a proper description in the instant case. The taxes had not been paid, and the sale cannot now be set aside for the irregularities complained of. Act 142 prevents this.

The acts complained of that are claimed to be jurisdictional are shown by the evidence in the record to have been performed as required by law.

We find no error, and the decree is affirmed.

OMOHUNDRO *v.* FLY.

4-5290 122 S. W. 2d 541

Opinion delivered December 5, 1938.

Griffin & Griffin, for appellant.

Brickhouse & Brickhouse, for appellee.

HOLT, J. Appellees brought suit against the appellant Mrs. Lethe S. Omohundro in the Pulaski circuit court on a brokerage account and recovered judgment against her in the sum of $796.42.

The material allegations of the complaint are as follows: That plaintiffs, D. W. Fly and O. A. McFall, are engaged in general brokerage business in Little Rock, Ar-

kansas; that from March 19, 1937, through April 15, 1937, they purchased for defendant's account 500 shares of Missouri Pacific Preferred and 100 shares of common; and that in September, 1937, the market declined and they requested defendant to put up additional margin for her account and when she failed to do so they liquidated the securities in the account at a loss to themselves of $796.42, for which judgment was prayed.

The answer of appellant is as follows: "Comes the defendant, Mrs. Lethe S. Omohundro and denies each and every material allegation.

"Wherefore, having fully answered, this defendant prays that she be discharged and for her costs herein expended."

Appellant alleges one assignment of error for our consideration, that the verdict is contrary to the law and evidence. In this assignment she contends that the court below erred in failing to submit to the jury her contention that she placed a stop order with appellees.

We dispose of her contention as to the stop order by saying that she neither set this up in her answer as a defense nor did she ask the court for a proper instruction thereon. We pass now to appellant's contention that the verdict is contrary to the law and the evidence.

The facts stated in the most favorable light to appellees are substantially as follows: Appellant instructed appellees to purchase for her on the New York Stock Exchange at various dates beginning March 19, 1937, and ending April 15, 1937, 500 shares of certain stocks, which appellees proceeded to do. She, also, placed in their hands cash in the sum of $3,097.47, out of which to make these purchases. From the date of the last purchase until September, 1937, the stocks fluctuated on the market and on September 24, 1937, after the market had gone down, defendant's equity was entirely wiped out. On this date she owed plaintiffs a balance of $796.42.

It is conceded by the parties hereto that a contract existed between them under which these operations were being carried on, the substantial provisions of which are: Any transaction shall be subject to the constitution,

rules, regulations, customs and usages of the exchange or market (and the clearing house, if any) where executed. Appellees might pledge and repledge any securities in defendant's account whenever they saw fit to do so; that they could liquidate the account whenever in their discretion they considered it necessary for them to do so for their own protection, such as in the event of bankruptcy, the death, or the appointment of a receiver for the defendant; that they can liquidate the account without any notice or call for margin whatsoever.

Also, the contract provides that defendant shall at all times be liable for the payment of any debit balance owing in any of her accounts with appellees upon demand, and that she shall be liable for any deficiency remaining in any of such accounts in the event of the liquidation thereof in whole or in part by either appellant or appellees.

After a careful consideration of the evidence as disclosed by the record, it is our conclusion that it is of a very substantial nature and that the verdict of the jury should not be disturbed. We are also of the view that the instructions given by the court were correct declarations of the law applicable to the facts in this case and it would serve no useful purpose to set them out here.

It, of course, is not necessary to cite authorities from a long line of our cases which hold that where there is substantial evidence to support a verdict, it is our duty to affirm it. We, therefore, hold that the judgment of the court below should be affirmed, and it is so ordered.

HOLLOWAY *v.* PARKER.

4-5287 122 S. W. 2d 563

Opinion delivered December 5, 1938.

W. P. Beard, for appellant.

Joe P. Melton and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

SMITH, J. This appeal presents the question whether the signature of Mrs. Emma M. Thompson to her alleged last will and testament is a forgery. Upon this issue many witnesses gave testimony more or less relevant, and we have before us a vast mass of testimony which cannot be reconciled. Without attempting to review the testimony in this opinion we announce our conclusion to be that there was sufficient testimony to support the finding that the will was genuine; but there is

also sufficient testimony to support the contrary finding made in the verdict signed by eleven of the twelve jurors who tried the case. The chief insistence for the reversal of the judgment pronounced upon the verdict is that it was based, in part at least, upon incompetent testimony admitted over proponent's objections and exceptions, and this, we think, is the only serious question presented for our decision.

Two preliminary questions may be briefly disposed of. The first is that the contestants should have been required to file pleadings setting up the grounds upon which their resistance to the probate of the will was based. The will was probated in common form, and letters testamentary were issued thereon. The heirs-at-law of the deceased prayed in proper form an appeal from the order of the probate court admitting the will to probate. We are cited to no statute requiring other pleadings, although it may have been well enough, and the better practice, to require contestants to state the ground of their contest, and thus define and restrict the issues to be tried.

In the chapter on Wills in 68 C. J., p. 1175, it is pointed out that some states have statutes requiring contests to include a statement of the grounds of contest, but it is there said that "In the absence of positive statutory requirements, where there is an appeal to an intermediate appellate tribunal in which a trial is had on issues of fact, the practice seems to be to require no statement of the reasons of appeal if the appellate court is bound to send the main issue of will or no will directly to the jury."

The opinion in the case of *Hamilton* v. *Hamilton*, 178 Ark. 241, 10 S. W. 2d 377, recites the fact that there were no pleadings filed either in the probate court or in the circuit court on appeal in that case, which was a contest over a will alleged to have been forged. However, it is clear that no prejudice could have resulted from the failure of the court to require pleadings to be filed, for the reason that there had been a former trial of this case resulting in a hung jury, and it is not claimed that any

issues were involved in the second trial which had not been raised in the first one.

The second point is that the court did not withdraw the case from the jury and render a decision. The basis of this contention is that, upon the conclusion of proponent's testimony, the attorney for contestants asked the court to direct the jury to return a verdict finding against the will, and proponent's attorney asked the court to direct a verdict finding for the will. The court declined both requests, and contestants proceeded to put on their testimony.

The practice of withdrawing a case from the jury upon request for a directed verdict was announced in the case of *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339, and was amplified in the case of *Webber* v. *Rodgers,* 128 Ark. 25, 193 S. W. 87, both of which cases have since been frequently cited and followed.

The effect of these cases is that where both parties have offered their testimony, and each requests the court for a directed verdict and requests no other instruction, the trial court may treat the case as having been withdrawn from the jury and submitted to the court sitting as a jury, and the judgment of the court, pronounced under the circumstances, has the same effect as if the jury itself had decided the case. The practice is quite common, as is reflected in numerous opinions of this court, for the defendant, at the conclusion of the plaintiff's testimony, to request the court to render judgment for the defendant; but it has never been held that making this request forestalls the introduction of testimony by the defendant if the request is denied. However, we think that while in cases where both parties have offered all their testimony and each has asked the court for a directed verdict, and neither has asked any other instruction, the trial judge may then withdraw the case from the jury; but he is not required to do so. It is even then within his discretion to submit the case to the jury, rather than to take the case from the jury and decide it himself.

But the real question in the case, as has been stated, is whether incompetent testimony was admitted which

may have influenced the verdict of the jury. It will appear from a general statement of this testimony that it was prejudicial if it was incompetent. Its general purport was to the effect that Mrs. Thompson and her sisters and their children were not only very fond of each other, but were clannish in their relations to each other, and that Mrs. Thompson had always said that she wished her niece, Mrs. Meric Elcan Fulton, to have her home, and had made a will devising it to her, whereas, under the will offered for probate, this valuable estate was devised to proponent except certain small sums of money. These were $100 to each of her sisters, $50 to each of her nieces and nephews, $25 to each of her grandnieces and grandnephews, $40 per month to a cousin, and $1,000 to the church of which she was a member. These items constitute a very small part of the estate. Mrs. Thompson never had any children.

The question of law presented by this and other similar testimony showing the state of Mrs. Thompson's feelings toward her relatives and toward proponent is whether the testimony was erroneously admitted. Most —but not all—of the testimony as to Mrs. Thompson's declarations showing the state of her feelings toward the parties to this litigation were made prior to the date of the alleged will.

We think this testimony was not incompetent for two reasons. The first is that if it was error to admit the testimony, the error was invited.

In support of the will proponent offered his own and other testimony showing the intimate relation between himself and Mrs. Thompson, in whose home he had lived at one time as a member of her family, and the state of her feeling toward him. For instance, in response to the question asked by proponent's attorney, "Did she (Mrs. Thompson) have any conversation with you after you prepared the will?", the witness, who was an attesting witness, answered: "She made the remark that she wanted Mr. Holloway (proponent) to have the bulk of her estate, because he was the only one who had done anything for her." The necessary implication of this and other testimony to the same effect is that Mrs.

Thompson felt kindly to proponent and unkindly to her relatives. Having put this relationship and state of feeling in issue, proponent had no right to object to testimony offered in its refutation. We have many cases to the effect that a party may not complain because the court admitted incompetent evidence on behalf of the other party if he was the first to introduce evidence of a similar character. In such cases the error is said to have been invited, and not prejudicial for that reason.

While the admission of this testimony might be held not to be prejudicial for the reason stated, we prefer not to place our decision upon this ground alone. Our cases are not harmonious on the subject, and we take this occasion to announce the rule to be hereafter followed. This much may be said in extenuation of the discord in our cases. This court, like a number of others, first followed the rule announced by the Supreme Court of the United States in the case of *Throckmorton* v. *Holt,* 180 U. S. 552, 21 S. Ct. 474, 45 L. Ed. 663, and this court, as well as a number of others, as will presently be made to appear, has attempted to ameliorate the rule announced in the case last cited and avert the injustice which its application had previously encompassed without disapproving that case.

Of this Throckmorton Case, it may first be said that the opinion was rendered by a badly divided court, as three of the justices dissented upon the point under discussion, while a fourth justice concurred only in the result, so that the opinion was made by the barest possible majority of the court.

In the case of *Leslie* v. *McMurtry*, 60 Ark. 301, 30 S. W. 33, the trial court excluded testimony to prove the declarations of the testator made about a year after the date of the instrument claimed to be a will, to the effect that he had made no will. The reason given for affirming the action of the trial court in excluding this testimony was that "He (the testator) may, to secure his own peace and comfort during life, to relieve himself from unpleasant importunities of expectant heirs, conceal the nature of his testamentary dispositions, and make state-

ments calculated and intended to deceive those with whom he is conversing." This reason does not apply here, because no testimony was offered that Mrs. Thompson had stated that she would die intestate.

This case was cited and approved in the case of *Flowers* v. *Flowers*, 74 Ark. 212, 85 S. W. 242, where it was said: "That decision seems in line with the decided weight of authority, as shown by the collation of authorities in the note to the recent case of *Throckmorton* v. *Holt,* 180 U. S. 552, 571, 21 S. Ct. 474, 45 L. Ed. 663."

In the later case of *Connor* v. *Bowers,* 184 Ark. 102, 41 S. W. 2d 977, it was said: "The general rule announced by this court in the cases of *Leslie* v. *McMurtry,* 60 Ark. 301, 30 S. W. 33, and *Flowers* v. *Flowers*, 74 Ark. 212, 85 S. W. 242, is that declarations of a decedent either before or after the execution of a will, unless a part of the *res gestae,* are inadmissible where the issue is one of forgery."

If we had no other cases on the subject, these would indicate that we were definitely committed to the proposition that the declarations of an alleged testator, unless a part of the *res gestae,* were inadmissible where a will was being contested upon the ground that it was forged. But we have other cases, and their holding is to the contrary. However, before reviewing them, it may be said, as a practical matter, that the admission only of statements, which are a part of the *res gestae,* in the execution of a will, operates to render admissible the evidence of the parties who may have participated in its forgery, and of excluding other testimony, which would make it highly probable, if not entirely certain, that the will had been forged. This rule permits the forgers to testify, and excludes the testimony of others, as it is highly improbable that anyone except the conspirators would be present when the will was forged.

The case of *Longer* v. *Beakley,* 106 Ark. 213, 153 S. W. 811, is one of these cases announcing the contrary rule. If there were any doubt as to what this opinion holds—and we think there is none—the dissenting opinion of the late Chief Justice McCulloch, of honored and rev-

ered memory, removes the doubt. In his dissenting opinion, Judge McCulloch, who had written the Flowers Case, *supra,* cites the Leslie Case, *supra,* in support of his dissenting view, but his opinion was a dissenting opinion, and not the opinion of the court. It is said this Longer Case was not a will contest, and, as a matter of fact, involved the question whether an assignment of an insurance policy had been forged. But both the majority and the dissenting opinions recognized that the rule relating to the admission of testimony in will cases was applicable to and governed in that case. It was said in the majority opinion that "For all practical purposes the execution of this request for change of beneficiary was Frankring's will, because it disposed of practically all he owned," and upon the issue whether the change of beneficiary was a forgery, we held competent evidence showing the mental attitude of the insured to his relatives who would have been the beneficiaries in the insurance policy if no change had been made, and also his attitude towards the substituted beneficiary.

In the case of *Hamilton* v. *Hamilton,* above referred to, in a contest over the probate of a will alleged to have been forged, the court refused to give an instruction numbered 5 to the effect that the intention of the alleged testatrix in regard to the distribution which she wished made of her estate was entitled to no consideration in determining whether or not the purported will was properly executed. In holding that it was not error to refuse this instruction, it was there said: "We think a will executed in accordance with the declared intention of a testator would be a very strong circumstance tending to show the genuineness of a will assailed on the ground that the signatures thereto were forgeries. We cannot think of a stronger circumstance tending to establish the genuineness of a will under such circumstances. The case of *Johnson* v. *Hinton,* 130 Ark. 394, 197 S. W. 706, cited by appellants in support of their contention on this point, is not applicable. In that case the issue was whether the will had been properly executed in accordance with the statutory requirements. Of course, the intention of

a testator under such circumstances could have no effect. The testator, in order to give validity to his will, must execute his will in accordance with statutory requirements, irrespective of what his declared intention might or might not have been. The court did not err in refusing to give appellants' requested instruction No. 5."

We shall not attempt to reconcile these cases, as that task would be impossible to perform. We shall content ourselves with the announcement of the correct rule to follow. The conclusion we shall announce has been reached after the fullest consideration of many cases on this subject, but we shall attempt no review of them, as their number is almost without limit. If one wishes to review the cases on the subject, many of them may be found cited in the cases of *Rea* v. *Pursley,* 170 Ga. 788, 154 S. E. 325; In re *Morrison's Estate,* 198 Cal. 1, 242 Pac. 939; *State* v. *Ready,* 78 N. J. L. 599, 75 Atl. 564, 28 L. R. A., N. S., 240, and *In re Estate of M. Creger,* 135 Okla. 77, 274 Pac. 30, 62 A. L. R. 690, and especially those in the note to the last-cited case. See, also, chapter on Wills, 68 C. J., p. 1004, and cases there cited.

In the body of the opinion in the case of *In re Creger's Estate, supra,* it was said: "Perhaps a majority of the earlier cases are in harmony with the Throckmorton Case. Perhaps, on account of the prestige of the Supreme Court of the United States, the case of *Throckmorton* v. *Holt* doubtless overshadowed for a time the decisions of the state courts, which took the oposite view. Recently, however, the case has not been followed to any great extent, and we believe now that it is against the great numerical weight of the authorities, as well as it is against reason and the natural rule of relevancy." A vast number of cases are there cited in support of the statement quoted.

In the case of *Rea* v. *Pursley, supra,* it was said: "Probably the majority of the earlier cases are in harmony with *Throckmorton* v. *Holt, supra,* but it has been suggested that this is due to the fact of the prestige of the Supreme Court of the United States, which rendered the decision in that case. In the later cases the correct-

ness of the rule laid down in that case has been questioned and repudiated. Now the weight and trend of the authorities are in favor of the admissibility of declarations of an alleged testator, both those made before and those made after the date of the purported will, on the issue of forgery of the will, where the issue is raised by other substantial evidence, and proof of the declarations is corroborative of other testimony."

In this opinion the Supreme Court of Georgia, after citing a great many cases, proceeded to say: "It will be noted that the early cases in California, New Jersey, New York, Ohio, Texas, and West Virginia, which supported the doctrine that these declarations are inadmissible, have not been followed in later cases from the Supreme Courts of these states. We feel safe in holding that such declarations, though they may not be admissible, when standing alone, to prove or disprove the genuineness of a will offered for probate, on which point we do not express any opinion, are admissible in all cases where the genuineness of the instrument has been assailed by other proper evidence either to strengthen or weaken the assault. This is the settled rule in England, and, as we have shown, is well supported by the authorities in this country."

The case of In re *Morrison's Estate, supra,* was a California case. California was one of the states which for a long period of time adhered to the doctrine of the Throckmorton Case, but later, in a series of well-considered opinions, at last committed itself definitely to the opposite view. In this Morrison Case the Supreme Court of California, in commenting upon restrictive rules of evidence which limited the inquiry as to the proof of the handwriting of an alleged testator and that of the subscribing witnesses in the inquiry as to whether the will was genuine or had been forged, had this to say: "But in this state of case was no other evidence admissible? Were the jury bound to decide the issue and make up their verdict upon such testimony alone, and do the rules of evidence inexorably exclude from their consideration every other fact or circumstance that would tend to throw light upon the subject, so as to render it prob-

able or improbable that such a paper was ever written by the deceased, or in corroboration of the direct testimony as to handwriting given on either side? We think not. It must be admitted that testimony as to handwriting, in any case of alleged forgery, though the best the nature of the case admits of, is usually the most unsatisfactory species of evidence courts of justice have to deal with."

In holding that the inquiry should not be thus restricted the court had this further to say: "It seems to us that in such a case every collateral fact and circumstance which is not clearly immaterial and irrelevant ought to be admitted, to aid the jury in reaching the truth, which after all is the object of every jury trial."

After quoting extensively from the case of *Hoppe* v. *Byers*, 60 Md. 381, the Supreme Court of California, in this Morrison Case, proceeded to say: "The foregoing decision and the reasons which are given to support it has been cited with approval by a number of other states in decisions made since its rendition, and the doctrine therein declared, with notes embracing these decisions, has been embodied in the text of the following authors in the editions of their works on evidence issued or revised since the decision of the Maryland Case: See 1 Greenleaf on Evidence, (16th Ed.) pp. 57, 81, 261; 4 Chamberlayne on Evidence, § 2649; Chase's Stephens Digest of Law of Evidence, (2d Ed.) p. 100; 1 Elliott on Evidence, § 533; 1 Wigmore on Evidence, (2d Ed.) § 112, 3 Id. §§ 1735, 1736. In the author's note to Wigmore on Evidence, § 112, *supra,* the case of *Hoppe* v. *Byers, supra,* and the later decisions of other states adopting its doctrine are cited at length, and the case of *Throckmorton* v. *Holt, supra,* which indicates a different rule, is criticized as against the weight of authority and as a 'lonesome decision.' "

The note to the Creger Case, *supra,* annotates extensively the question of "admissibility of testator's declarations upon the issue of the genuineness or due execution of purported will." The annotator says: "The apparent weight and trend of authority, notwithstanding the contrary result was reached in a decision in the Fed-

eral Supreme Court (Throckmorton Case), is in favor of the admissibility of declarations of the alleged testator (both those made before and those made after the date of the purported will), on the issue of forgery of the will, where the issue is raised by other substantial evidence, and proof of the declarations is therefore corroborative of other testimony." Numerous cases from eighteen different states are cited to support this declaration of the law.

The annotator sums up his exhaustive review of the authorities with a statement which appears to us to be the proper rule, and which we now adopt, as follows: "It seems that if an instrument purporting to be a will is produced, and a *prima facie* case is made out of its due execution and genuineness by testimony of the subscribing witnesses, proof of their handwriting, or otherwise, those contesting the will should not be allowed to overthrow it merely by proving declarations of the testator inconsistent with the purported will, and, therefore, unless they offer some other proof that the instrument is not genuine, but is a forgery, or was not duly executed, it will be proper to exclude evidence of the testator's declarations. Probably some of the decisions excluding the declarations can be explained on this ground, even though not expressly so stated. They may have been offered without sufficient corroborative evidence." In the instant case testimony was offered as to numerous facts and circumstances tending to show that the will was not genuine, and we conclude, therefore, that the testimony as to the declarations of Mrs. Thompson were properly admitted.

Upon the question as to "Time of declarations with respect to date of will as affecting question; *res gestae,*" the annotator, in the note to the Creger Case, *supra,* at page 710, makes this very pertinent and practical observation: "It is evident, however, that if the courts were to permit the date of the will to determine the admissibility or inadmissibility of such declarations on the issue of forgery, they would be assuming the very point in issue, viz., the genuineness of the will; otherwise

they would be giving importance to a purely fictitious date inserted by the forger."

This statement is so convincing that we cannot withhold our approval from it.

Upon the whole case we are of the opinion that the testimony complained of was admissible, and as the testimony fully supports the verdict and the judgment pronounced thereon it must be affirmed, and it is so ordered.

UNITED FIDELITY LIFE INS. COMPANY *v.* DEMPSEY.

4-5279 122 S. W. 2d 170

Opinion delivered December 5, 1938.

W. P. Strait, for appellant.

Opie Rogers, for appellee.

SMITH, J. Appellee, holding a disability insurance policy in appellant company, sued appellant, the insurer, for a breach of that contract, upon the theory that the company had repudiated it by failure to perform its conditions, by paying disability benefits. The judgment recovered by appellee in that case was reversed. *United Fidelity Life Ins. Co.* v. *Dempsey,* 193 Ark. 204, 98 S. W. 2d 943. We there held that appellee was entitled to recover disability benefits, but that the assertion, in good faith made by the insurer, that appellee was not in fact totally disabled, did not constitute a breach of the contract and a repudiation thereof. In other words, if the insurer had concluded, upon investigation and in good faith, that the insured was not in fact totally and permanently disabled, it had the right to assert that fact, without being held to have repudiated the contract. The same question is presented on this appeal as was involved in and decided upon the former appeal, and the rule there announced is decisive of the present appeal, it being from a judgment based upon the jury's finding that appellant had breached and repudiated the contract.

Without reciting the testimony in detail, it may be said here, as was said in the former opinion, that the testimony is sufficient to support the finding that appellee is disabled within the meaning of the provisions of his insurance policy, and is, therefore, entitled to recover the monthly benefits provided for in the policy; but it does not follow, on that account, that he is entitled to the present value of such payments as would accrue during the remainder of his expectancy, as was decided by the verdict and judgment from which is this appeal. If he recovers from his disability, his right to receive benefits would cease. On the other hand, if the insurer arbitrarily or fraudulently took the position that appellee was no longer disabled, this would be a breach of the contract of insurance. In such case the insurer would have no right to require the insured to expend his benefits in repeated suits to collect them, so that the question presented here, as was the case on the former appeal, is whether the insurer had acted arbitrarily or fraudulently in refusing to continue disability payments after the

fact had been established that he was disabled within the meaning of the policy. In this connection, it may be said that total disability having been established, there was a presumption that this condition continued; but this is a presumption of fact, and not of law, and may be rebutted and be shown not to be true. *Equitable Life Assurance Society* v. *Bagley,* 192 Ark. 749, 94 S. W. 2d 722.

Here, the undisputed testimony is to the effect that the insurer had received information, from sources apparently reliable, to the effect that appellee was no longer totally disabled, and an investigation of these reports appeared to confirm their truth.

These circumstances were to the following effect: Appellee is the son-in-law of W. E. Jumper, a traveling shoe salesman who owns a large shoe store in the city of Conway. There appeared in the December 31, 1936, issue of a local newspaper the following news item:

"Conway Shoe Store
"Sold by M'Alister

"J. P. McAlister announced today that W. E. Jumper has completed negotiations for the purchase of the Conway Shoe Store, owned by Mr. McAlister, and that he plans to remove with his family to Harrison, his former home, where he will be associated in the shoe business with Dave Heuer, his brother-in-law.

"The Conway Shoe Store which has enjoyed a fine business under Mr. McAlister's management, will be operated by Mr. Jumper's son-in-law, Jesse Dempsey, and his daughter, Miss Ruth Jumper, it was announced.

"The consideration was said to have been $12,500.

"George Carter will remain with the store as salesman and George Schrekenhoeffer has returned to manage the repair department."

Subsequent to this notice and after January 1, 1937, appellee became connected with the shoe store and spent much time there. It was shown that he played golf, and attended a Christmas dance, and participated in the dancing. After coming into possession of this information the insurer called upon appellee for a statement as to his then existing condition, which was not furnished.

The testimony tending most strongly to show that the refusal to continue payments of disability benefits was arbitrary and fraudulent was the attitude of the appellant in regard to payment of benefits which accrued between the date of the first trial and the affirmance of that judgment by this court. The opinion on the former appeal was delivered November 23, 1936, and the judgment in that case for $50 was paid on December 1, 1936, and appellant's attorney wrote appellee's attorney stating that $100 in addition would be due, including the January, 1937, payment. But, instead of paying the $100 in addition to the $50 judgment, a check was sent for only $50. Thereafter payments accumulated at the rate of $10 per month, amounting to $150, and that liability was compromised and settled for $130, appellee then being entitled to $150, if entitled to anything at all. But while payments were accruing to the extent stated a controversy had arisen as to whether any additional payments should be made.

Appellee explained to the satisfaction of the jury the circumstances above detailed which had led the insurer to conclude that his disability had ended. It was shown that the newspaper notice to the effect that appellee had taken over the management of the shoe store was published without authority, and was not true, that appellee stayed in the store when he pleased and did what he was able to do, for which he was paid no salary, and that he was supported by his father and his father-in-law. Appellee had previously submitted to an examination by a physician selected by the insurance company, and had been advised by the doctor to take as much exercise as he was able to, and that he had played a few games of golf, but that it required him four hours to make the rounds, which other players made in from one to an hour-and-a-half. Appellee admitted that he had danced on the Christmas occasion, and his own doctor stated that appellee was able to do this if he danced gently and for a short time. But appellee testified that any kind of work or exercise occasioned him much pain, and could be sustained for only short periods of time, and that he was able to render only slight and occasional services at

the shoe store, and that frequently he was unable to go there for several days together.

Appellee's testimony was to the effect that as the result of a gasoline explosion which had severely burned him, his legs had been reduced from twenty to thirty per cent. of their normal size, and that he had four skin grafts and had been ordered to return to the hospital for another, and his physicians testified that there was danger of blood clots in the legs, if appellee stood up too much and caused the circulation "to flow to his legs too much," and that this would cause ulcers, and that his legs were as well as they would ever be.

While the facts and circumstances detailed above are sufficient to support the finding of the jury that appellee is totally and permanently disabled and rendered unable to follow a gainful occupation, we think it insufficient to support the finding that the insurer had acted arbitrarily or fraudulently in raising that question, and the same judgment must now be entered as was rendered upon the former appeal.

The judgment for the present value of future installments of benefits, which was found and is admitted to be $2,000, if a recovery could be sustained on that account, will be reversed, and judgment will be entered here for $100, which appellant admits to be the amount of installments due at the time of the trial, with interest at 6 per cent. on each delinquency from the date it was due to the date of trial, and thereafter on the whole amount until paid.

ST. LOUIS-SAN FRANCISCO RY. COMPANY *v.* CALL.

4-5281 122 S. W. 2d 178

Opinion delivered December 5, 1938.

J. W. Jamison, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

E. G. Ward, for appellee.

HUMPHREYS, J. Appellee brought suit against appellants in the circuit court of Clay county to recover damages in the sum of $740, for killing one of her mules, injuring another and tearing up her wagon and harness at "Bare Crossing" east of Piggott through the alleged negligence of their servants in operating one of their trains. The alleged negligence consisted in a failure to give warning of the approach of the train, to stop after discovering the peril of the property and in running the train at a reckless speed.

Appellant, St. Louis-San Francisco Railroad Company, filed a motion stating it was an improper party to the action because at the time of the accrual thereof it was neither in the possession of or operating its property, but that the same was in the possession and being operated by trustees appointed by the U. S. District Court, Eastern Division, of the Eastern District of Missouri and entered its appearance in the cause for the sole purpose of presenting the motion. The court overruled the motion and then appellants, reserving its exceptions to the action of the court in denying a motion to dismiss, answered, denying all allegations of the complaint, and interposing the further defense, that if the property was damaged it was because of the contributory negligence of the party in charge thereof negligently driving same on appellant's tracks.

The cause was submitted to a jury upon the evidence introduced and instructions of the court resulting in a

verdict and judgment against appellants for $325, from which is this appeal.

If any error was committed by the court in refusing to dismiss the suit against the St. Louis-San Francisco Railway Company, the exceptions thereto were not preserved in the motion for a new trial and same is not before us for determination.

The record reflects, without dispute, that the view of the servants operating the train was obstructed so they could not see travelers on the highway, except through a narrow opening, by a levee which appellants permitted an improvement district to construct across its right-of-way up to its ties on both sides of the track and on top of which weeds have been permitted to grow up; that no post was erected to warn persons in charge of the train that a crossing was there and that the train was traveling at the rate of 35 miles an hour at the time of the collision.

The testimony is conflicting as to whether the statutory signals by the trainmen were given for the time and in the manner required by § 11135 of Pope's Digest.

The trainmen testified that they gave the signals, but Marvin Hinkle, who was 400 feet from the crossing, testified that the first signal given was within 360 feet of the crossing and Nick Moody, who was driving the team, testified that the train was within 60 or 75 feet from the crossing when it first whistled and that he was within 16 or 17 feet of the track and that although he tried to stop the team he could not do so before the train struck the team and wagon.

Mr. Story, the engineer, testified that had he been running the train at 15 or 20 miles an hour when he approached the crossing instead of 35 miles an hour he could have stopped the train before he ran over the team.

This court said in the case of *Davis* v. *Scott,* 151 Ark. 34, 235 S. W. 407, that: "Deceased knew the train was approaching, and, if he looked toward it after it came in sight, he may have been misled by the excessive speed, and on that account failed to properly judge his chance of getting across before the engine reached him. But, whether the deceased actually looked at the approaching

train or not it is fairly inferable that if the train had been under control at a lower rate of speed, the engineer, by throwing on the emergency, might have slowed down the train so that deceased could have gotten across in safety."

We think in view of the levee that obstructed the vision of the trainmen as well as travelers on the highway the rate of speed at which the train was *traveling* was a question which the jury might consider in determining whether appellants were negligent in operating same; and also that the jury might take into account in arriving at whether appellants were negligent the circumstance that it permitted a levee to be constructed across its right-of-way so as to prevent the trainmen from observing travelers on the highway and so as to prevent travelers from seeing trains approaching the crossing.

In addition to the physical conditions at and near the crossing for which appellants were responsible, the jury were, of course, warranted in taking into consideration whether signals were given in determining whether appellants were negligently operating the train when it ran over the team.

The killing of and injury to the property being admitted the law presumes appellants were negligent and the burden rested upon them to show they were not negligent and to show that the driver was guilty of contributory negligence. They have not met the burden by the undisputed evidence, and we cannot say as a matter of law that the court erred in refusing to instruct a verdict for them.

The instruction on the lookout statute, Pope's Digest, § 11144, was not abstract and erroneous for the reason that the engineer testified that he could have avoided the injury had he been running at a speed of 15 or 20 miles an hour, and the jury may have found or would have been warranted in finding that he was running at an excessive rate of speed in view of the physical conditions at and near the crossing.

Appellant contends that the verdict is excessive, but according to the evidence the actual value of the mule

killed, the damage to the one injured and the damage to the wagon and harness amounted to as much or more than $325, for which a verdict was returned.

No error appearing, the judgment is affirmed.

EDWARDS *v.* JONES.

4-5286 123 S. W. 2d 286

Opinion delivered December 5, 1938.

Isaac McClellan and *W. H. McClellan,* for appellant.

Sid J. Reid, for appellee.

SMITH, J. E. R. Edwards owned two adjacent forty-acre tracts of land, which, together, constituted his homestead, where he resided with his wife. He executed a timber deed to Fred Jones, conveying "All the merchantable pine and gum timber" on the lands constituting his homestead, for the consideration of $120. The wife did

not execute or acknowledge this deed. After the timber had been cut and removed, Edwards and his wife joined in a suit against Jones for the treble value of the timber, upon the theory that the deed was void, inasmuch as Mrs. Edwards had not joined in its execution and acknowledgment.

Certain questions were raised in the pleadings and in the introduction of the testimony as to whether timber not merchantable had been cut, and also as to damages occasioned by setting out a fire on the lands. There was a verdict and judgment in favor of Jones, from which is this appeal, and appellants state the question submitted for our decision as follows: "Therefore, we are going to discuss this evidence as to the legality of the deed, as we think the case should either be affirmed or reversed on this question alone."

The concession is made by appellee as it may well be —that the deed was void under the provisions of § 7181, Pope's Digest. See *Autrey* v. *Lake,* 195 Ark. 243, 112 S. W. 2d 434, and cases there cited. But the court was of the opinion that, under the testimony, the wife had estopped herself to raise that question, and no testimony is abstracted to show that the court was in error in so holding, indeed, the testimony is not incorporated in the transcript. For the sake of brevity apparently, the parties entered into "Stipulations as to evidence in the above-entitled cause agreed to by attorneys for plaintiff and defendant." From these stipulations we copy as follows: "The court then held over the objections of plaintiffs that the deed was a good written contract and bound the wife as such when she had knowledge of the cutting of the timber, her husband being employed in the cutting of same by the defendant, and by her silence to object to the cutting and receiving the benefits of the consideration for said timber through her husband, she would now be estopped to maintain this action. The court further holding that she had the right to enjoin the cutting by the defendant, but refused to avail herself of that remedy and cannot now claim damages in this action. To which ruling of the court the plaintiffs at the time ob-

jected and asked that their exceptions be noted of record."

Appellee vouchsafes the information that the testimony showed that Edwards was employed in cutting and removing the timber, and that a part of the consideration for the timber deed was paid Edwards and his wife by furnishing them with groceries for their housekeeping purposes as well as other necessities for their use. We cannot consider this as testimony, for the reason that it does not appear in the record, but inasmuch as no testimony upon this question appears in the record we must indulge the presumption that testimony was offered which sustained the declaration made by the court, if competent testimony to that effect could have been offered. *St. Francis County* v. *Lee County*, 46 Ark. 67; *Kansas City, F. S. & M. R. R. Co.* v. *Joslin*, 74 Ark. 551, 86 S. W. 435; *London* v. *McGehee*, 126 Ark. 469, 191 S. W. 10.

We perceive no reason why Mrs. Edwards may not have estopped herself to question the validity of the sale of the timber, and if she stood by and saw her husband assist in cutting it and received for her own use and benefit portions of the proceeds of the sale of the timber (and as such testimony may have been offered—and we must assume that it was) she is estopped to deny the validity of a sale against which she made no protest until the consideration had been paid, appropriated and enjoyed by herself and her husband.

It was said in the case of *Fox* v. *Drewry*, 62 Ark. 316, 35 S. W. 533, that a married woman may be estopped to claim real estate, or an interest therein, but that mere silence or inertness will not suffice to work an estoppel "Unless in some way the party relying upon an estoppel is put at disadvantage by the action of the party sought to be estopped, it will not be available." But, as has already been shown, Jones was put to disadvantage. Mrs. Edwards had the opportunity to speak, but remained silent. She saw Jones employ her husband and pay him wages, and she received the benefits of payments on the purchase price. These payments of wages and of purchase price were the natural results of Mrs. Edwards' silence, and she must have known that Jones relied upon

her silence to his detriment if she may now be heard to speak. *Pettit-Galloway Co.* v. *Womack,* 167 Ark. 356, 268 S. W. 353.

The view that Mrs. Edwards has estopped herself to question the validity of the timber deed renders unimportant the fact that the deed was void when executed.

The judgment will, therefore, be affirmed, and it is so ordered.

THE SCOTT-BURR STORES CORPORATION *v.* FOSTER.

4-5263 122 S. W. 2d 165

Opinion delivered December 5, 1938.

Steve Carrigan, for appellant.

W. S. Atkins, for appellee.

BAKER, J. The Scott-Burr Stores Corporation was sued by Mrs. Ida Foster for personal injuries alleged to have been sustained on the 10th day of December, 1937. She was employed in the store or business house of the appellant in the city of Hope, Hempstead county, Arkansas. It was alleged that prior to the time of her injury she was strong and able-bodied, in good health, with steady nerves and that the injury she suffered had resulted in permanent physical disability to such an extent that she was then wholly incapacitated. She had worked as a saleslady in the mercantile business operated by the appellant as extra help for a period of approximately a year. She, no doubt, was possessed with that degree of familiarity with the store and fixtures, and surroundings as might have been expected of one so employed for the time. The business house of the appellant is described as a one-story building, facing south, in the rear or north end of which is an upper floor or decking, called a balcony, upon which is located an office department and storage places for goods, fixtures and furniture, or appliances not in actual use. This second floor or balcony is reached by a stairway, one side of which rests against the north wall of the building, perhaps about four or five feet wide. At the top of the stairway and to the side, away from the wall, there is a bannister, supported by uprights about four feet high. Boards are placed on top this bannister, reaching across or over the stairway so

that the end of the boards next to the wall rested upon a cleat or piece of timber fastened to the wall as a support for the boards, which when so placed constituted or made a shelf upon which numerous articles had been placed or stored. Among these articles there were chalk or plaster of paris statuettes, supports for goods placed in or under counters called shams. These shams were made of wood and cardboard and were employed when in use as temporary or false shelves under counters or on counters, or at such places as it was desired to make use of them, for the purpose of stacking or placing goods thereon.

At the time Mrs. Foster was hurt, she had been sent to this balcony floor to get some paper clips for use in tagging merchandise. Descending the stairway some objects that had been placed or piled upon this shelf over the stairway fell from it, struck her on the right side of the head, just above the ear, glanced off striking her shoulder and falling to the floor. It is probably not positively known whether the object which struck her was one of the shams, a loose board or one of the statuettes. Someone picked up from the floor shortly thereafter one or more of the shams. It is said that some of the statuettes also fell. The blow from which she suffered was not sufficient to knock her down, but she was so badly hurt that she stopped for a few minutes on the stairway to recover from the shock and then returned to the place where she had been working. She was sent out with another lady to a doctor's office for treatment of the rather severe wound on the side of her head. The doctor described the wound as being cut to the bone or periosteum. He treated the wound by sterilizing and by applying clips so as to draw the edges of the cut together. No treatment was given to the shoulder or arm at the time, but there was administered to her a shot in order to avoid the development of tetanus. She returned to her work and remained there until late in the afternoon when she was called away on account of the illness of her father, who died a day or two thereafter. On account of his illness and death she did not return to the store for about a week. At the time she returned her arm and

shoulder were very sore and somewhat swollen. She had with her some liniment or lotion which she applied or had rubbed on by one of her fellow employees. It is alleged that she grew worse, returned to her home where she was confined for several weks. Upon trial of this case she was awarded a verdict for $3,000. The appeal comes from the verdict and consequent judgment.

For her cause of action she alleges that the defendant did not use ordinary care to furnish her a reasonably safe place within which to work. In addition to a general denial the defendant pleaded assumption of risk.

Defendant insisted that the court should have directed a verdict in its favor for the reason that the evidence was not sufficient to show negligence. The defendant, also, urged that there was error in giving instructions Nos. 1, 2 and 5. It was also urged that the verdict was excessive.

Only because of the most earnest insistence on the part of the appellant that the evidence is not sufficient to show actionable negligence do we mention this matter at all. The appellant, however, argues that if there were objects so placed upon the shelving above the stairway that they fell therefrom, that fact in itself is not evidence of negligence without some showing that such objects had been so placed or located for a sufficient length of time that they must have been observed by the management of the store or that, in the exercise of ordinary care, a presumption arises that they could or should have been seen. We do not agree with this theory of the appellant. The evidence shows that this shelf is above the stairway, the only passageway by which one might go from one floor to the other, that if any object should fall from this shelf almost of necessity it must fall upon the stairway. There is no evidence of the insecurity of the stairway or bannister, or shelfing above it. So far as the evidence is concerned in that respect we must and do presume that the stairway was steady and that in the normal use of it there was nothing to loosen, disturb or shake objects placed upon the shelf so as to cause them to fall. This was a place, so far as the evidence shows, not open to public use, but resorted to only

by the employees of the company. When objects were placed upon this shelf over the stairway, if they were not so placed or stacked thereon that they would not fall from that particular location, then the servant or employee handling such articles must be deemed to have been negligent and if there was no rack, and the evidence does not show any, to prevent the falling of such articles carelessly or negligently placed at or near the edge of this shelf, then there should have been such constant inspection as ordinary prudence would require to maintain at least reasonable safety. We think the jury might well have found that if those who used the stairway, or those who placed or stored or stacked articles upon this overhead shelving had exercised ordinary care in so doing there would have been a practical impossibility for objects to fall therefrom. It is not necessary to point out, or even to know or suspect what particular servant or agent may have been negligent. It was within reasonable requirements of the defendant company that it exercise ordinary care to keep this place reasonable safe for those who must in the performance of their duties use the stairway. The insistence, on the part of the appellant, that there is no evidence from which it could be assumed or inferred that the particular shams that fell from the open shelf above the stairway had been in the dangerous position or ready to fall for any length of time before they actually fell upon the appellee is not tenable as a defense. If we assume that the articles that fell had been so placed, that they were in danger of falling, by some employees of the company only a moment before they did fall, then that act of so placing them was an act of negligence and the length of time within which they may have been in a dangerous position is immaterial. We think this is particularly true when it is considered that the objects that did fall may have been one of the statuettes or some of the shams placed upon or over the shelf.

We are not unaware that the plaintiff in her description of the board or object that fell upon her as appearing to be a board about a foot wide and four and a half or five feet long, that is to say, of the same shape, size or length as the shelving boards over the stairway, but

we think the evidence is conclusive and not in dispute that these boards were securely nailed down and constituted a part of the building and that any inspection that might have been made to determine deterioration would have disclosed no defect in that regard, so it must be observed that there is a distinction or difference as to a lack of safety arising out of a defective condition that might have been discovered by inspection or in a dangerous condition brought about by the negligence of agents or employees of the defendant by piling or placing upon said shelf up over the stairway articles that might at any time slide or fall therefrom. It is argued, however, that the appellee was mistaken about the objects that fell and hit her. That is probably true. She returned to the place where she had been struck a little later and, of course, most probably saw or observed then the overhead boards which she described in attempting to describe what actually had fallen. It is not disputed even by the appellant that some of the shams fell nor is it disputed that the appellee received a cut upon her head requiring surgical attention and treatment. So it must appear that many of the cases cited by appellant upon this point in regard to defective appliances or defects in stairways, bannisters or shelves, are not applicable under the proof when given a favorable consideration on behalf of the plaintiff. True, plaintiff's complaint alleged "the falling of the said plank from which plaintiff was injured was caused by the negligence and carelessness of the defendant." The sham shaped like a plank, though somewhat lighter, weighing less than two pounds, proven and admitted to have been one of the falling objects at the time of the injury, was substantial proof of the allegation of the complaint.

The second error alleged by the appellant is that the court erred in giving instruction No. 1. That instruction as given is as follows: "You are instructed that the burden is on the plaintiff to show by a preponderance of the evidence her right to recover on her complaint; and by a preponderance of the evidence is meant not necessarily the greater number of witnesses, but the greater weight of the testimony, giving to the testimony of each witness

such weight and credit as you think it is entitled to, and you are the sole judges of the credibility of the witness and the weight of the evidence."

The objection made to this particular instruction is that it did not give to the jury a rule to follow in determining the weight of the testimony and credibility of the witnesses. The objection was made in due time to the instruction as given and a proper suggestion was made to the court by a specific objection announcing a time-honored, perhaps stereotyped rule approved many times over by this court, as follows: "Giving to the testimony of each witness such weight and credit as you may find it is entitled to when you have considered and determined the witness' interest in the case, his or her relationship to the parties, bias or prejudice, means of information and manner of the testifying, and after weighing the same by these rules, give to the testimony of each witness such weight and credit as you think it is entitled to, as the same does, or does not, comport with the truth."

We think it would have been better had the court followed this somewhat ancient formula. To a certain degree it is dangerous to depart from long established uses and practices approved by the court on every occasion when it has been proper to consider such propositions. Yet we cannot say that there was prejudicial error in a failure on the part of the court to amend the instruction as suggested by appellant's counsel. Without attempting to analyze or make detailed comment on the additional elements proper to have been added to the instruction as given we suggest that the omitted part calls the attention of the jury to the fact that the jury has in its presence the witnesses whose conduct they may have observed and that they may consider any interest the witness may have or any bias or prejudice. It would perhaps be somewhat hard indeed to find a jury that would not sharply appreciate these particular conditions, and would not consider them in arriving at a verdict even without such instruction. The members of this court who have spent the greatest number of years in the actual practice know that juries are quick to observe interest, or bias whether such interest arises out of the

relationship to the parties or out of bias or favor on account of parties or conditions. But it may be possible at times to have a jury inexperienced and no member of which had served upon any former jury. On such an occasion it would be proper indeed to give such precautionary instructions as were omitted in this case. The instruction as given is substantially the effect of what was requested, the requested portion being only an elaboration or enlargement of the statements contained in the instruction as given.

The third matter alleged as error arises out of the giving of instruction No. 2 given, at the request of the appellee. Instruction No. 2 is as follows: "You are instructed that it was the duty of the defendant to exercise reasonable care to furnish the plaintiff a reasonably safe place in which to work, and if the defendant failed to do so and the plaintiff was injured thereby, then you are told that such failure on the part of the defendant, if any, to furnish the plaintiff a safe place in which to work was negligence."

The only error alleged in this instruction arises out of the last part of it where it says "to furnish the plaintiff a safe place in which to work was negligence." We agree with appellant that it perhaps would have been better had the court said "exercise ordinary care to furnish the plaintiff a safe place within which to work." That was said in the foregoing and first part of the instruction. The language used, however, was "reasonable care" instead of "ordinary care." "Reasonable care" has been determined as being not essentially different from "ordinary care" and we think that announcement of the law was correct. *Natural Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, 294 S. W. 395.

But again we suggest that it is still better to follow those long-proven and correct announcements of the law, so easily understood and so hard to misinterpret, but from the foregoing cited case it must be said that the use of the word "reasonable" instead of "ordinary" was not prejudicial error.

We think it was made plain not only in instruction No. 2 that the defendant was required not to furnish a

reasonably safe place, but to exercise ordinary care to do so. It is hardly probable the instruction was misunderstood, as in the instruction the jury was told, and the last expression must have been regarded more as a repetition than as a contradiction. The court made this point perfectly clear in giving instruction No. 7 requested by the appellant as amended at the time it was given wherein the court stated "that the defendant was not under any absolute duty as an employer of the plaintiff to furnish her with any particular kind of steps or shelves above the same, or to stack the shams or pasteboard shelves or other objects in a manner so that they would not jar loose or fall, but that the defendant's duty was only to exercise ordinary care to provide the shelves above the stairs to stack the shams or pasteboard shelves or other objects in a manner as to be reasonably safe, etc.,".

The two instructions, that is to say No. 2 and No. 7, when read together certainly make clear the duty of the master to the servant to the jury and meet the objection made by appellant in regard to the clumsy expression in instruction No. 2.

It is also urged that in giving instruction No. 2 the court omitted to instruct the jury as to the defense of assumed risk. Instruction No. 2 was not what is generally called a binding instruction. That is to say, it was not one in which the jury was told if they found certain conditions to be true to find for the plaintiff or defendant, as the case might be, and being such omitted from consideration, as suggested in this case, a substantial defense urged by the defendant corporation.

The effect of this instruction was to aid the jury in a determination of whether or not the defendant might be charged with negligence and so far as this instruction was concerned, even though the jury might find that the defendant was guilty of negligence, the jury was not directed to determine on that account the issues in favor of the plaintiff. That defense of assumed risk was reserved for another instruction and it was not necessary to mention the defense of assumed risk in giving to the jury an instruction whereby they might determine the sole

issue of negligence. In this case the jury might find there was negligence and still find for the defendant on the ground of assumed risk. The two instructions Nos. 2 and 7 are not in conflict and do not place upon any employer an undue burden as in *Ft. Smith-Spadra Mining Co.* v. *Shirley,* 178 Ark. 1007, 13 S. W. 2d 14, or *Spadra Coal Co.* v. *White,* 188 Ark. 568, 66 S. W. 2d 1072. In that respect this instruction differs from the authorities cited by appellant in regard to the defense as suggested. The case is differentiated from such cases as *Postal Telegraph Cable Co.* v. *White,* 188 Ark. 361, 66 S. W. 2d 642. In that case we discussed the effect of a so-called binding instruction given without suitable statement as to the defenses presented. In this case the defense of assumed risk was properly given to the jury under another instruction. The verdict makes further discussion on that matter superfluous.

The next objection urged is in giving instruction No. 5 by the court to aid in a determination of the amount of recovery in the event the jury should find for the plaintiff. This is the usual or ordinary instruction given in such cases and we do not think we are justified in extending unnecessarily a discussion of the instruction, although there were specific objections made, because it is urged as the chief objection that there is no evidence to show that she suffered by reason of the negligence of the defendant. This objection is a mere rehash of the first objection made and the second specific objection is that there is no evidence to sustain a recovery against defendant for damages resulting to plaintiff and that there is no evidence of pain and suffering, no evidence of impairment of plaintiff's earning capacity, no evidence of the probable consequences of the alleged injuries that may be reasonably anticipated. These objections are more nearly technical than meritorious. It takes little proof to show that a deep cut on the side of the head is painful; that a badly swollen arm and shoulder are painful, or that such pain would tend to the impairment of plaintiff's proficiency in the performance of her work as a saleslady, nor did it require very much evidence to show that when this plaintiff had been put to bed and

kept there several weeks under the care of a physician, with her arm and shoulder bound securely in a fixed condition, when witnesses testify to her nervousness, to her complaints, to her lack of sleep, except under the influence of drugs that she suffered from the painful and distressing experiences. These matters were all before the jury, submitted to it under instructions for their determination of the facts. We might suggest in this regard that many of the questions sometimes asked witnesses and answers given in regard to serious accidents, lacerations, cuts, bruises, or loss of limbs, as to pain and suffering, are unnecessary attempts at proof of facts known by every one who understands the extent of injuries.

There remains but one other matter that appellant suggests as erroneous. Appellant urges that the verdict of the jury was excessive. It is true in this case that the plaintiff has not shown a great amount of earning capacity. She has shown a rather serious physical condition arising out of the injury. She has shown great suffering, long confinement to her bed, seen and treated constantly by a physician, so tortured with pain and nervousness so great that she could not sleep or rest. She lost considerable weight, a condition perhaps somewhat of what might have been expected at the time of the injury. But no one might reasonably have anticipated consequences so serious and so long endured. The cut on the side of her head was perhaps the least important of her physical ailments and disturbances. It apparently healed within due and proper time and without serious consequences, unless the nervous condition may have arisen out of that injury.

We have given to this evidence in regard to her suffering full consideration and we cannot say that the verdict of the jury in regard to the extent of her injuries and the amount she should recover was not supported by substantial evidence.

The judgment should be affirmed. It is so ordered.

STATE *v.* MIDLAND VALLEY RD. COMPANY.

4-5282 122 S. W. 2d 173

Opinion delivered December 5, 1938.

Jack Holt, Attorney General, and *George Vaughan,* for appellant.

Thos. B. Pryor, Miles, Armstrong & Young and *O. E. Swain,* for appellee.

MEHAFFY, J. This is a suit by the State of Arkansas to collect back taxes alleged to be due from the appellee, Midland Valley Railroad Company.

Complaint was filed in the chancery court of Sebastian county on July 29, 1935. On August 17, 1935, the appellee filed a demurrer to the complaint which was by the court overruled on May 8, 1936. On June 10, 1936, answer was filed and on June 20, 1936, the appellant filed amendment to complaint, and also filed a supplemental complaint with interrogatories. The corporation commission had authorized the bringing of the suit and the appellee filed petition before the corporation commission requesting that it recall the order to sue, which the commission declined to do.

The appellant took the deposition of Mr. C. J. Ingersoll. Mr. Ingersoll testified that he is chairman of the board of directors of the Midland Valley Railroad Company, with which he has been connected since 1920, first as assistant to the president for 12 years, and since that time as chairman of the board. The deposition of Mr. Ingersoll was taken at Philadelphia by agreement on interrogatories. He testified in substance that the Midland Valley Railroad Company was incorporated June 4, 1903, in the state of Arkansas, and attached to his deposition a copy of the charter and articles of incorporation. He gave the names and addresses of the officers and directors of the railroad company during each year from 1930 to 1936, inclusive, with the number of shares and classes of stock controlled by each; that the corporate and financial records and books of account are kept in the custody of officers of appellee at its offices in Muskogee, Oklahoma, and Philadelphia, Pennsylvania; that the president and vice-president have free access to the financial files, records and books of account. The company's seal is kept by the secretary in his office in Philadelphia. The chief accounting officer is Mr. E. B. Harper. Witness has full directing control, management and supervision of the transportation operations and financial affairs of the appellee. Witness then gives a statement of prop-

erty, assets, in the form of moneys and credits consisting of $1,124,901 cash in bank subject to check; that this money was held and used by the railroad company in the operation of its lines as a common carrier and this sum constituted the working fund growing out of the operation of the company as a common carrier; that on January 1, 1931, there existed at various places outside the state of Arkansas what is classified by the Interstate Commerce Commission as cash and loans and deposits in the sum of $671,183; that all this constituted working funds growing out of and held and used by the company in the operation of its lines as a common carrier and meeting its obligations growing out of its utility operations. The testimony as to the other years was substantially the same as he said that the sole business of the appellee was common carrier by rail, and that this business was in full activity then and now absorbing all the resources of the company. The appellee makes annual written reports to the Interstate Commerce Commission and to the Arkansas Corporation Commission; the reports in question do not purport to give value and do not do so; the reports are true and correct to the best of witness' knowledge and belief. The reports to the Interstate Commerce Commission and to the Arkansas Corporation Commission do not purport and do not differentiate between what is alleged in the question as being earned from transportation operations, on the one hand, and derived from non-carrier properties or activities on the other. All of the income of the company is applicable to and used in its sole activity, that of operating a public utility. Witness then gives a list of stocks of other corporations held by it and also the number of bonds, and their value. The returns from the bonds have been commingled with the company's revenue and used by it in paying expenses of its utility operations, and but for such returns in the last few years the railroad would not have been able to pay its fixed charges; witness testifies at length about its relationship with the Muskogee company, in what capacity it has been connected with said company, and what amount of the total, common and preferred stock of the company is owned by the Musko-

gee company in the years 1930 to 1936, inclusive; that these matters are reported to the Arkansas Corporation Commission each year and the figures here are the same as in the report made to the commission. Witness testified that the report to the Arkansas Corporation Commission showed the items with reference to its current, as distinguished from its deferred liability, and gave the figures; also showed its capital and surplus. Witness also testified at length and in detail about the outstanding preferred stock, the preferences to which the holders of said stock are entitled, a tabular statement of the amount and rate of dividends declared and paid on its preferred stock each year from 1930 to 1936, inclusive, and also the same with reference to the common stock; that the first mortgage of the Midland Valley Railroad Company to Girard Trust Company, trustee, is $15,000,000, and mortgaged to the Fidelity Company in the sum of $5,512,500.

This is the only evidence introduced by the state, and it shows that the indebtedness is in excess of the value of the property it owns.

There were other pleadings filed later, but on March 7, 1938, the cause was submitted to the chancellor and time given both parties to file briefs. After the submission and after the briefs had been filed the appellant, on June 14, 1938, filed motion for an order authorizing resumption of the taking of testimony, examination of defendant's officials, and for the production of books and papers, and the appellee filed motion to strike and to dismiss; whereupon the court entered the following decree:

"On this day the above cause coming on to be heard comes the plaintiff by George W. Vaughan, attorney, and also comes the defendant by its attorneys, and the cause being submitted to the court upon the complaint and exhibits thereto; the answer of the defendant; the deposition of C. Jared Ingersoll and the exhibits attached thereto; and on the motion of the defendant to strike from the files plaintiff's reply to the second amended answer the supplemental complaint, and the motion for an order authorizing resumption of taking of testimony, examination of witnesses and for the production of books

and papers, and the court being well and sufficiently advised in the premises, and this cause having been submitted to the court on March 7, 1938, and the court having taken the same under advisement, after allowing time to both parties in which to file briefs, and after said briefs were filed, the plaintiff then filed its reply to the second amended answer, the supplemental complaint and the motion for an order authorizing resumption of taking of testimony, examination of witnesses and for the production of books and papers; and said pleadings on behalf of the plaintiff were not filed until June 14, 1938, which was after all briefs were filed, and defendant then filed its motion to strike said pleadings from the file, and the court is of the opinion that said motion to strike filed on behalf of the defendant should be sustained, and is of the further opinion that the plaintiff's complaint should be dismissed for want of equity.

"It is, therefore, considered, ordered, and decreed by the court that said motion to strike be and the same is hereby sustained, and thereupon the court, having considered the deposition of C. Jared Ingersoll, which was all the evidence introduced in the cause, and after hearing the arguments of counsel and having considered the briefs on file, it is ordered, adjudged and decreed that the complaint of the plaintiff be, and the same is hereby dismissed for want of equity, and it is further ordered that the defendant have and recover of and from the plaintiff all of its costs herein expended, to all of which the plaintiff excepted."

The case is here on appeal.

The complaint stated a cause of action and the dedemurrer was, therefore, properly overruled by the court. The pleadings of the appellee were not verified, but this was a mere formal matter and if motion had been made the court would doubtless have required a verification of the pleadings.

This court said in the case of *Coleman* v. *Bercher*, 94 Ark. 345, 126 S. W. 1070: "The omission of the plaintiff or her attorney to sign the complaint, and the omission of Hiner in the affidavit attached thereto to state that he was plaintiff's attorney, were mere formal

defects or clerical mistakes which could not affect the rights of the parties in a trial on the merits of the case; and the motion to correct the same, having been seasonably made, should have been allowed by the court as a correction of mistake, under § 6245 of Kirby's Digest, and thus have cured the defect.

"To illustrate, our Civil Code provides that a complaint must contain the style of the court, but the court has held that the omission to do so is a mere formal error. *McLeran* v. *Morgan,* 27 Ark. 148."

This court said in another case: "The answer upon which the motion was based does not appear to have been verified. That would not have been regarded as sufficient to have justified striking it from the files, or to have prevented a consideration of its contents, unless there had been a refusal to verify after order made to do so." *Jackson* v. *Reeve,* 44 Ark. 496.

Appellant complains because it says the appellee failed to answer interrogatories, but this matter does not seem to have been called to the attention of the court, and the parties themselves were endeavoring to reach an agreement as to the facts.

The appellant filed a motion to require the attendance of witnesses and the production of books. If this motion had been made in time, the state would have been entitled to an order of the court to produce books alleged to contain evidence pertinent to the matter in controversy. Section 5152, Pope's Digest. But this motion was not made in time. The decree recites that it was after the case had been submitted and briefs had been filed by both sides.

The appellant asked in its motion not only for the production of books and the examination of appellee's officials, but for an order authorizing the resumption of the taking of testimony. This motion was made on June 14, 1938, nearly three years after the complaint was filed and after the case had been submitted and both parties had filed briefs. The granting or refusing to grant this motion was within the discretion of the trial judge. Of course his discretion must not be abused, and when abused is subject to review by the appellate court.

"The judge is not to be restricted to the function of a mere umpire or referee in a contest between opposing parties or counsel, but is charged by law and conscience with the fundamental duty of seeing that truth is established and justice done, under the statutes and rules of law designed to bring about such result, and his control of the situation should be manifest and complete at all times." 64 C. J. 66.

"The trial judge must always have a very large discretion in controlling and managing the routine proceedings at the trial, and it is not necessary to specify the matters to which such discretion extends. It applies beyond doubt to the addresses of counsel as well as to other incidents. But it must be a reasonable, a legal, discretion, and whether it be so or not must depend upon the nature of the proceeding on which it is exercised, the way it is exercised, and the special circumstances under which it is exercised. It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and, unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been." *Coca-Cola Bottling Company of Ark.* v. *Jordan,* 186 Ark. 1006, 54 S. W. 2d 403.

At the trial the appellant introduced the deposition of Mr. Ingersoll and rested. The case was submitted to the court, and three months after that time the motion was filed. The court did not abuse its discretion in refusing to re-open the case and permit the taking of more testimony.

The evidence of Ingersoll is not disputed and it shows that all of the property mentioned by the state as subject to taxation is used in the utility operation of the company. Section 2051 of Pope's Digest provides that all property, real and personal, not used in the utility operation of the company as such, shall be listed and assessed by the assessor. Whether any of the prop-

erty mentioned by the state was not used in the utility operation of the company was a question to be determined from the evidence, and the only evidence in the case shows that the property mentioned was used in the utility operation of the company.

The decree of the chancery court is not against the preponderance of the evidence, and it is, therefore, affirmed.

MISSOURI PACIFIC TRANSPORTATION CO. *v.* BELL.

4-5262 122 S. W. 2d 958

Opinion delivered December 5, 1938.

House, Moses & Holmes, T. J. Gentry, Jr., and *Eugene R. Warren,* for appellant.

F. D. Goza and *J. H. Lookadoo,* for appellee.

McHANEY, J. Appellee, a passenger on one of the Missouri Pacific buses on October 20, 1937, from Little

Rock to Gifford, Arkansas, brought this action against appellants to recover damages for personal injuries she alleges she sustained when she fell in the bus while alighting therefrom. The negligence alleged in the complaint was that the driver stopped the bus for her to alight at her destination and that he "carelessly and negligently permitted said bus to start again and roll down the highway several feet without being under control by him, after having stopped said bus, and while plaintiff was walking down the aisle in said bus for the purpose of alighting. That after said bus had rolled down the highway for several feet and while plaintiff was walking in the aisle of said bus as aforesaid, the defendant, J. N. Wright, carelessly and negligently stopped the bus very suddenly by means of the brake," causing her to fall and receive severe and painful injuries. Appellants answered, denying generally and specifically all the material allegations of negligence and injuries alleged. Trial resulted in a verdict and judgment for appellee in the sum of $15,000. The case is here on appeal.

We think the court erred in refusing to direct a verdict for appellants at their request. The complaint alleged a cause of action, but the proof failed to sustain it, in that it failed to establish that, after the bus first came to a stop to permit the appellee, her husband and little girl to alight, it was started again and was stopped with a sudden, unnecessary and violent jerk causing her to fall and receive all the terrible injuries described in the evidence.

Her testimony on the question of negligence is, when asked how she received her injuries, she answered: "Well, when we got to the top of the intersection where we were supposed to get off, there is a hill there. My husband told him when we got there we wanted to get off, that when he got there he went about middleways and stopped the bus, opened the door and throwed on the lights and we proceeded to get up and get out. He and the girl were ahead of me on the bus and they got three or four steps ahead of me on the bus, and when I got up and started up the aisle, the bus jammed, I guess, the

brakes, and threw me across the bus and down between the seats." Again she was asked by her counsel:

"Q. Mrs. Bell, what really caused you to fall?

"A. The stopping of the bus.

"Q. The sudden stopping of the bus?

"A. The sudden stopping of the bus."

This was all the testimony she gave as to the negligence of the driver. Her husband, a witness in her behalf, testified as follows: "Q. She claims to have fallen by reason of a jerk or sudden stopping of the bus—what do you know about that? A. The bus made a second stop. Q. Tell just what happened? A. Well, when I pulled the cord and told the driver that we wanted off at the intersection, he pulled up and stopped about where he ordinarily stopped and let us off north of the intersection. I don't know why he never did pull down in front —I guess on account of the traffic—and the little girl was on the seat with me, and if the court will permit it, I could start back at Little Rock and tell something— Q. Go ahead and tell about getting off there? A. The little girl was in the seat with me and when he opened the door, I immediately got up and out of my seat and proceeded to the front of the bus, and just before I got to the front of the bus I noticed the bus was slowly moving again and just at that instant he applied the brake again and I caught to the baggage carrier and got off the bus, and when I got off I looked back and my wife wasn't in sight and I stepped on the step and she had come on, holding to the corner of the last seat." Another witness, who claims to have driven his car up to the intersection of a side road with highway 67 on which the bus was traveling, stated that the bus came to a stop, rolled a few feet and stopped again, but he did not testify as to any sudden, unnecessary or violent jerk of the bus in either stop. This was all the evidence on the subject for appellee. Seven other passengers on the bus and the driver, appellant Wright, testified that the bus came to a full stop in the ordinary way without any jerk, that the driver turned on the lights, opened the door and got on the outside to assist appellee, her husband and little girl to alight, and that the bus did not move and was not stopped

again while they were alighting. But assuming the testimony of these seven disinterested passengers, constituting as it undoubtedly does the great preponderance of the evidence, testified falsely, and that appellee and her husband, both vitally interested in the result of the action, testified truthfully, still it is insufficient to show that appellee was thrown by reason of a second stop which was unusual, unnecessary or a violent jerk. They do not contend that the motor was put in gear to start the bus a second time, but only that it was stopped on a slight decline of about ¾ inch in two feet and was permitted to roll down this decline about 4 or 5 feet when it was again stopped by the application of the brakes. Now, if the bus moved from a dead stop down such a slight decline for only 4 or 5 feet, it would seem to be a physical impossibility for the bus to have gained enough momentum or speed to have caused a sudden, unnecessary or violent jerk, sufficient to upset a normal person standing in the aisle and cause the terribly disabling injuries to appellee, about which she and her witnesses have testified.

When asked by her counsel as to what "really" caused her to fall, she answered: "The stopping of the bus;" and when prompted further by counsel, she said "The sudden stopping of the bus." She says nothing about the second stopping of the bus. It is undoubtedly true that appellee fell in the bus, and it may be true that she was injured in the fall, but the proof fails to show that it was the result of the second stopping of the bus, or that the second stopping, if any, was sudden, unnecessary or violent, and these were the grounds of negligence relied on in the complaint and without proof of which no recovery can be sustained.

At one place in her testimony appellee, in answer to a question as to the statement she made at the time she got off the bus that her foot slipped, testified: "I don't know. I said my feet slipped—it was like ice. I know my feet went out from under something. Q. You said your feet went out from under you and caused you to fall? A. I don't know what I said. Q. You said it was like ice. A. I said my feet went out from under me like I was standing on ice. Q. Didn't you state that your foot

slipped on something? A. I don't know whether I did or not." That was what she said right at the time of the accident. Whether her injuries were the result of her feet slipping out from under her or whether she fell when the bus stopped is not material to the inquiry here. Before there can be a recovery the negligence alleged must be established by proof, and as we have shown, it is not sufficient. Juries are not permitted to base their verdicts on speculation and conjecture, and as to whether there is any substantial evidence to support the verdict is a question of law and not of fact. *Murphy* v. *Murphy,* 144 Ark. 429, 222 S. W. 721; *Fair Store No. 32* v. *Hadley Milling Company,* 148 Ark. 209, 229 S. W. 727.

For the error of the court in refusing to direct a verdict for appellant, the judgment is reversed, and, as the cause appears to have been fully developed, it is dismissed.

HUMPHREYS, MEHAFFY and BAKER, JJ., dissent.

MEHAFFY, J. (dissenting). I cannot agree with the majority in reversing and dismissing this case. The majority opinion says:

"Whether her injuries were the result of her feet slipping out from under her, or whether she fell when the bus stopped, is not material to the injury here."

It is, also, said in the opinion: "But assuming the testimony of these seven distinterested passengers, constituting as it undoubtedly does the great preponderance of the evidence, testified falsely, and that appellee and her husband, both vitally interested in the result of the action, testified truthfully, still it is insufficient to show that appellee was thrown by reason of a second stop which was unusual, unnecessary, or a violent jerk."

It is not a question of whether it was an unusual, violent jerk, nor is there any question here as to who told the truth. That question is settled by the jury's verdict. This court and practically all of the other appellate courts in the country, have held that carriers of passengers must exercise the highest degree of care for the protection of their passengers, and if guilty of slight negligence, which causes the injury of a passenger, the carrier is liable.

"A common carrier of passengers by street car is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons employed in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended.

When the cars of the street railway companies stop for passengers to alight, it is the duty of their servants to stop long enough for the passengers to alight, and to see that the car does not start again while any one is attempting to alight or exposed to danger. Stopping a reasonable time is not sufficient, but it is the duty of the conductor or those in charge to see and know that no passenger is in the act of alighting or in a dangerous position before putting the car in motion again." *Oliver v. Ft. Smith Light & Traction Co.*, 89 Ark. 222, 116 S. W. 204, 131 Am. St. Rep. 86.

It is admitted that appellee was a passenger, and the evidence showed that the bus stopped at its usual place for passengers to alight; that when appellee left her seat, started to the door of the bus for the purpose of getting off, the bus, without warning, started up again, causing her to fall, resulting in her injuries. It is wholly immaterial whether there was a sudden or violent jerk, because if appellants negligently permitted the bus to start after it had stopped, and while appellee was in the act of going to the door to alight, and this starting of the bus caused her to fall, resulting in her injuries, the carrier is liable. The authorities are practically unanimous in holding this to be the rule.

This court recently said, in commenting on the instruction given by the lower court: " 'Our interpretation of the instruction is that it told the jury that it was appellant's duty to exercise that degree of care which may reasonably be expected of intelligent people to see that its car was kept in repair and in a safe condition consistent with the practical operation thereof.' The court held that the instruction was more favorable than the appellant was entitled to; that the law imposes the highest degree of skill and care upon common carriers consistent with the practical operation of their cars to

furnish their passengers a safe place to get on and off." *Mo. Pac. Trans. Co.* v. *Robinson,* 191 Ark. 428, 86 S. W. 2d 913; *Ark. P. & L. Co.* v. *Hughes,* 189 Ark. 1015, 76 S. W. 2d 53; *Prescott & N. W. Rd. Co.* v. *Thomas,* 114 Ark. 56, 167 S. W. 486; *Beech* v. *Eureka Traction Co.,* 135 Ark. 542, 203 S. W. 834.

The rule is stated in C. J. as follows: "In view of the limitation which will be stated hereafter, the rule is probably more accurately stated as the highest degree of care, prudence, and foresight that a prudent man engaged in the business, as usually conducted, would employ, that is, such care as is reasonably practicable; or in other words, such care, prudence, and foresight as can reasonably be exercised consistent with the practical operation of the road or mode of conveyance used, and the exercise of its business as a carrier, taking into consideration the circumstances and conditions existing at the time and place in question, and in some cases this degree of care has been expressed as the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances." 10 C. J. 858 *et seq.*

Whether the starting of the bus after it had stopped for passengers to alight, and then stopping it again while passengers were attempting to alight, was the exercise of the highest degree of care by the carrier was not a question of law, but was a question of fact under the circumstances, and was for the jury and not this court to decide.

The evidence shows that the appellee, when she started to get off, was caused to fall by the starting of the bus and stopping it a second time. Her husband testified that he caught to the baggage carrier and did not fall. Mr. Belote, a citizen of Malvern, testified that he drove up and knows that the bus stopped a second time. This testimony must be taken as true. It is the established rule of this court that in testing the sufficiency of evidence to sustain the verdict, the evidence of the appellee must be viewed in the light most favorable to him, and if there is any substantial evidence, the jury's verdict is permitted to stand, notwithstanding the evidence of appellant's witnesses to the contrary.

The "disinterested" passengers that the majority talk about testified that the bus did not make but one stop; but they testified that the woman fell; something caused her to fall, and the jury found that it was the movement of the bus after it had stopped for passengers to alight.

The rule is thoroughly established in this jurisdiction that the jury, and not this court, is the judge of the credibility of witnesses and the strength and weight of their testimony.

In the case of *Humphries, et al.,* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492, this court said: " 'It is earnestly insisted by appellants that the court should have directed a verdict in their favor. As we have many times held in determining this question, we must view the evidence in the light most favorable to appellee, and if there is any substantial evidence to support the verdict, it will be sustained.' " *Missouri State Life Ins. Co.* v. *Holt,* 186 Ark. 672, 55 S. W. 2d 788; *Mo. Pac. Rd. Co.* v. *Harville,* 185 Ark. 47, 46 S. W. 2d 17; *Baltimore & O. Rd. Co.* v. *McGill Bros. Rice Mill,* 185 Ark. 108, 46 S. W. 2d 651; *Altman-Rogers Co.* v. *Rogers,* 185 Ark. 561, 48 S. W. 2d 239; *Halbrook* v. *Williams,* 185 Ark. 885, 50 S. W. 2d 243; *Ark. P. & L. Co.* v. *Connelly,* 185 Ark. 693, 49 S. W. 2d 387; *Chicago, R. I. & P. Ry. Co.* v. *Matthews,* 185 Ark. 724, 49 S. W. 2d 392.

The judges of this court have no opportunity to see the witness, observe his demeanor on the stand or his manner of testifying, and, therefore, could not judge of the credibility of the witness or the weight to be given his testimony as well as the trial judge and jurors, and for that reason we have uniformly held that if there is any substantial evidence to support the verdict of the jury, this court cannot set it aside. Even if we are of opinion that the verdict is against the preponderance of the evidence, and believe that if we had been on the jury we would have reached a different conclusion, still if there is any substantial evidence to support the jury's verdict, it must be upheld.

" 'The fact that the appellate court would have reached a different conclusion had the judges thereof sat

on the jury, or that they are of the opinion that the verdict is against the preponderance of the evidence, will not warrant the setting aside of a verdict based on conflicting evidence.' 4 C. J. 850, 960."

This court several times quoted with approval this doctrine as stated by the Wisconsin court as follows: "We must also keep in significant view the rule that, the verdict of a jury cannot, properly, be disturbed on appeal, merely because of its appearing to be against the clear weight of the evidence, or because if we were to pass upon the matter as seen in the printed record, we might find differently than the jury did.

"If the verdict has any credible evidence to support it—any which the jury could in reason have believed, leaving all mere conflicting evidence, evidence short of matter of common knowledge, conceded or unquestionably established facts and physical situations—it is proof against attack on appeal, and that must be applied so strictly, on account of the superior advantages of the court and jury before weighing the evidence, that the judgment of the latter approved by the former is due to prevail, unless it appears so radically wrong as to have no reasonable probabilities in its favor after giving legitimate effect to the presumption in its favor and the make weights reasonably presumed to have been rightly afforded below which do not appear, and could not be made to appear, of record." *Barlow* v. *Foster,* 149 Wis. 613, 136 N. W. 822.

The Utah Supreme Court said: "Where, however, the evidence introduced has a legal tendency to make out a proper case, in all its parts, then, although it may, in the opinion of the trial court, or the appellate court, be slightly inconclusive, and far from satisfactory, yet it should be submitted to the jury whose proper province it is to consider and determine its tendency and weight." *Cunningham* v. *Union Pac. Ry. Co.,* 4 Utah 206, 7 Pac. 795.

One reason why the jury's verdict is conclusive here, is that the trial court and members of the jury see the witnesses on the stand, hear them testify, have an opportunity to observe their demeanor on the witness stand,

and to determine from all these things not only the credibility of the witnesses, but the weight to be given to their testimony. The judges of this court have no such opportunity; we simply have the printed record, and it is our province to decide the questions of law, and the province of the jury to decide questions of fact.

But the majority opinion says that juries are not permitted to base their verdicts on speculation and conjecture. That is true, and this court should not base its opinion on speculation and conjecture. I think that when the evidence shows that the bus started up, after passengers had been invited to alight at the usual place for passengers to alight, and then stopped again, causing a passenger to fall and injuring her, that these are questions of fact for the jury to decide, and that there is no speculation or conjecture about it.

It is also said in the majority opinion that whether there is substantial evidence to sustain the verdict is a question of law and not of fact, and the majority has therefore held that when the carrier committed the acts above stated, it was in the exercise of the highest degree of care. I think that these questions were for the jury and not for this court, and I think the judgment should be affirmed.

Mr. Justice HUMPHREYS and Mr. Justice BAKER agree with me.

FLOYD PLANT FOOD CO. *v.* MOORE.

4-5288 122 S. W. 2d 463

Opinion delivered December 5, 1938.

A. R. Cooper, Viola Castleberry Stewart, for appellant.

Isaac McClellan and *W. H. McClellan,* for appellee.

BAKER, J. The Floyd Plant Food Company was a corporation organized under the laws of Illinois, was engaged in the manufacture and sale of fertilizer and in the course of its business R. L. Moore, the appellee, became indebted to it for which he executed two notes, one in the sum of $176.85 and the other for $1,516.30. The smaller one of these notes was already barred at the time the first suit was filed and does not enter into the controversy. The larger note was dated April 16, 1930, and it matured on November 1, 1930. It was indorsed with the credit of $160.67. This indorsement, however, was a correction made in the settlement and not a payment made after the maturity date.

The complaint was filed in the name of the Floyd Plant Food Company on October 29, 1935, three or four days before the date upon which the note would have been barred by the statute of limitations of five years.

On August 17, 1936, a little more than nine months after the filing of the original complaint, the Federal Chemical Company filed what it designated as an amendment to the original complaint of the Floyd Plant Food

Company, alleging that it came into the possession of the notes sued on by the first plaintiff by an outright purchase and that the said Federal Chemical Company is now the owner and holder of the promissory note executed by the defendant, and it prayed that it be made a party plaintiff and have judgment against the defendant. To this pleading defendant Moore filed a demurrer, a motion to dismiss and pleaded the statute of limitations. As a response to the defendant's motion to dismiss the Federal Chemical Company pleaded further that in 1934 the Floyd Plant Food Company was dissolved and the Federal Chemical Company took over all its assets, including all cash, accounts and notes, of which the notes sued on were a part. Later an additional amendment was filed and upon the filing of this amendment proof was taken by deposition of Mr. W. Q. Harned, treasurer of the Federal Chemical Company. Mr. Harned, in response to a question asked in the taking of his deposition, in describing the nature of the transaction whereby the Federal Chemical Company became the owner and possessor of the notes, said: "The notes are now owned by the Federal Chemical Company, due to the fact that in 1934 the Floyd Plant Food Company, which was owned by the Federal Chemical Company, was dissolved, and the Federal Chemical Company took over all of its assets, including all cash, accounts and notes, of which these two notes were a part."

The trial court, upon hearing the issues involved in this case, held that the amendment to the complaint, wherein Federal Chemical Company asked that it be made a party plaintiff, was an effort to substitute one plaintiff for another and that such substitution did not become effective and that inasmuch as the two corporations are not identical, the filing of the suit by the one that had no cause of action did not serve to toll the statute of limitations in favor of the one that owned the note and had the right to sue and collect the same, and that the action filed by the Federal Chemical Company was barred by the statute of limitations. The resulting judgment was for defendant.

There is but one matter to be determined upon this appeal; was the action sued upon by the Federal Chemical Company barred by the statute of limitations?

If the Floyd Plant Food Company had such an interest in this note, the subject of the litigation, that entitled it to file and maintain a suit for the use and benefit of the Federal Chemical Company, then certainly the filing of its complaint would serve to toll the statute of limitations and any pleadings filed thereafter by way of amendment to the original complaint and which were not in effect a substitution of parties plaintiff would relate back to the date of the institution of the original action; but, on the other hand, if the Floyd Plant Food Company did not in fact have a cause of action at the time it instituted this suit, which it had the right to prosecute, then the Federal Chemical Company was possessed of this cause of action and it alone had the right to prosecute the same, then certainly the amendment filed to the pleadings amounted only to an effort to substitute the actual party in interest for one who had no cause of action, and such substitution cannot be permitted.

Upon the presentation of these numerous pleadings mentioned and the deposition taken on behalf of the appellant, counsel for appellant presented an array of requests for findings of fact and for declarations of law to be made thereon. The court declined to make these findings of fact or the declarations of law as requested, but held that plaintiff's cause of action was barred by the statute and "all of the facts and the law in favor of the defendant." The rule recognized so long as to be almost proverbial is that we shall consider whatever facts there are in this record in the light most favorable to sustain the judgment rendered. Proceeding upon this theory we take the pleadings first as evidencing the appellant's theory. A material part of such matters has already been stated. It remains to give effect to what the pleader himself has alleged.

The first allegation that we notice is to the effect that "the Federal Chemical Company came in possession of the note sued on from its co-plaintiff, the Floyd Plant Food Company, by outright purchase. Said Federal

Chemical Company is now the owner and holder of said note." This was the first pleading filed by the Federal Chemical Company on August 17, 1936, more than five years after the maturity date of the notes sued on, which were barred at that time unless the statute had been tolled by the institution of the prior suit by the Floyd Plant Company. If we take this pleading for what it says, then there were two corporations, the Federal Chemical Company and the Floyd Plant Food Company, and the Floyd Plant Food Company had disposed of all the interest it had in said note two years prior to that date by a sale or "outright purchase," by its co-plaintiff. By that purchase, Federal Chemical Company "came into possession of the notes two years before the Floyd Company sued on them." If that allegation is true then there are two corporations. They were not the same because they dealt with each other, one sold the notes and the other purchased them. When the Floyd Plant Food Company disposed of these notes it had no kind of interest remaining in them. The pleading could not have any other meaning.

Again this plaintiff pleads that "in 1934 Floyd Plant Food Company, which was a corporation owned by Federal Chemical Company, was dissolved and the Federal Chemical Co. took over all its assets, including cash, accounts and notes, of which these two notes were a part." Now certainly the Federal Chemical Company may not be heard to insist that the Floyd Plant Food Company and the Federal Chemical Company were identical when one was dissolved and the other continued to exist. The one that dissolved had no property left. All its assets went into the hands of the other corporation, the Federal Chemical Company, which, according to the pleadings, was a Kentucky corporation, as distinguished from the Floyd Plant Food Company, an Illinois Corporation, but counsel for appellant adroitly argue that under the Illinois statute a corporation even after such act or resolution as may have operated to dissolve it had a period of two years thereafter within which its business affairs might be closed and the estate of the corporation be fully administered. Such is the law in this state, the difference

being that in this state there is a period of three years. Pope's Digest, § 2203. We are conversant with such legislation, but fail to see how it may be pertinent here.

Under the pleadings of the Federal Chemical Company the reason for the continued existence of this Illinois corporation did not exist. It had undergone dissolution. It had disposed of all its assets of every kind and these were taken over by the Federal Chemical Company. It had no assets to dispose of, no estate to administer. There was no reason for its continued existence, and under the pleadings, could properly be held not to have been in existence at the time the suit was instituted in its name. The appellant argues, however, that the pleadings and proof show that the Federal Chemical Company owned a majority of the stock of the Illinois corporation and that it may be regarded as the owner of that corporation. Let it be so regarded. The idea or concept that one possessed or owned the other necessarily implies that there were two separate entities, one the owner and the other owned. They were not identical because one was dissolved, the other continued to function.

With this state of the record before us the effect of the court's declaration that they were not identical is fully supported by evidence of a substantial nature. Numerous cases have been cited and few of them may be said to have any application to any of the questions presented upon this appeal, and to take up all these authorities and make any analysis of them would prolong this discussion without merit in so doing. A typical illustration among authorities cited is the case of *Evans* v. *List,* 193 Ark. 13, 97 S. W. 2d 73. In that case a suit was filed against George W. List, trading as List Laundry. This suit was brought within the three year statute of limitations. It was discovered shortly afterward, but after the three-year statute had run, that the corporate name of the laundry company was American Excelsior Laundry Company. The pleading was amended to show the proper name of the laundry company and it was held, and we think very properly so, that the institution of the suit

against List Laundry, by which it was commonly known, was the institution of a suit and served to toll the statute.

It is a matter of extreme doubt that the St. Louis S. W. R. Co. could maintain a suit in the name of the Cotton Belt Railroad Company, though the two names designate only one person. It would not be a matter of mistake if it filed a suit under such name or style, because it must recognize its own corporate existence and corporate name. There is a difference in being made a defendant under one or two or more names by which a person or corporation might be known and in suing and attempting to maintain litigation under such an appellation which it, itself, knew was not correct.

We think it must follow as a natural result and conclusion of the arguments advanced to the effect that a suit by one corporation may be taken over by another which was a holder of some or all the capital stock of the first corporation and by substitution be made the beneficiary of litigation as well as the sole and only plaintiff in the old suit filed by the corporation that did not at the time exist is too far-fetched to be sound.

We suggest, without further discussion, a proposition as being conclusive of the controversy here presented. If this case had gone to trial in the name of the Floyd Plant Food Company prior to the date that the notes were barred by the statute of limitations and the defendant had offered and proved just what the Federal Chemical Company now alleges, that is that the Floyd Plant Food Company did not own the note, had no interest therein and that it had been taken over two years before by the Federal Chemical Company, which is now the owner and in possession of the note, the court necessarily would have dismissed plaintiff's suit, and not to have done so would have been in effect to permit two recoveries, one for a corporation out of existence and later a recovery for the Federal Chemical Company at such time as it might have sued prior to the bar of the statute.

It can serve no real purpose to argue such cases as *Foster Holcomb Inv. Co.* v. *Little Rock Publishing Co.*, 151 Ark. 449, 236 S. W. 597. In that case there was an attempt to sue the Arkansas Democrat. Of course an

amendment permitted a suit to be maintained against Little Rock Publishing Company, the owner of the Arkansas Democrat and the corporation under and by which the Democrat was published. The Arkansas Democrat, however, and the publishing company sued was a single entity, one artificial person though known under two names.

Certainly no such conditions prevail here and there is not the least particle of similarity; and vigorous declarations supported by an array of adjectives cannot supply proof of identity of the two different corporations, the names of which appear in this case as parties plaintiff. The first did not exist at the time the suit was instituted and the second did exist and was not even operating under the same name. The one that had been dissolved was an Illinois corporation and the other that continued in existence was a Kentucky corporation, so the effect and legal consequences of the attempted act to name a new corporation as a party plaintiff, after this action had been barred, was an effort to substitute one plaintiff for another that did not exist. That could not be done, and it was so announced in *Fencing Dist. No. 6* v. *Missouri Pac. R. R. Co.,* 180 Ark. 488, 21 S. W. 2d 959. There it was said a statute permitting amendments as to form will not permit an amendment making new parties plaintiff in order to sustain an action that was originally brought without authority. It is also said that "leave to amend by striking out the sole plaintiff and substituting another could not have been granted. The right of amendment is broad; but it does not warrant the substitution of a stranger for the sole plaintiff in the cause. *Coleman* v. *Floyd,* 105 Ark. 300, 150 S. W. 703."

To substantially the same effect, our court has decided numerous cases. *State* v. *Rottaken,* 34 Ark. 144; *Winters* v. *Crum,* 193 Ark. 1068, 105 S. W. 2d 77; *Davis* v. *Chrisp,* 159 Ark. 335, 252 S. W. 606.

In the last two cited cases a very similar proposition to the one presented here arose. In one the plaintiff who brought the suit alleged himself to be the real owner of the instrument sued on. When the deposition of the plaintiff, however, revealed that the true owner was an-

other, the defendant filed a motion to dismiss on the ground that the plaintiff was not the owner and had no authority to institute the action. The motion was sustained and upheld by this court on appeal.

In a much older case, *Schiele* v. *Dillard*, 94 Ark. 277, 126 S. W. 835, an effort was made to substitute new plaintiffs for old. The court refused to permit this to be done, saying that such action would be tantamount to a new suit between entirely different parties.

So in this case, if the attempted substitution of the new plaintiff, the only one who could maintain the suit, has any effect it was in the nature of a new action began at the time of the filing of the amendment which was after the statute bar had attached.

A further discussion cannot be of any benefit. The judgment is affirmed.

THE PLANTERS NATIONAL BANK OF MENA *v.* TOWNSEND.

4-5273 123 S. W. 2d 527

Opinion delivered December 5, 1938.

Minor Pipkin and *Howard Hasting,* for appellant.

Hal L. Norwood, for appellee.

HUMPHREYS, J. Florence Taylor and Maggie Townsend brought suit against James Keyes, administrator of the estate of Harrison Thompson, deceased, and the Planters National Bank of Mena in the chancery court of Polk county, on the 26th day of January, 1938. The complaint filed by them is as follows:

"The plaintiffs, Florence Taylor and Maggie Townsend, for their cause of action state that on the 26th day of September, 1917, B. F. Thompson, now deceased, executed to his son, Harrison Thompson, a deed to the following lands in Polk county containing 240 acres (particularly describing same); that the consideration expressed in the deed was as follows: 'One thousand dollars, cash in hand (receipt of which is hereby acknowledged), and one thousand to be paid to each of the following persons to-wit: Maggie Bales $1,000, Scottie Taylor $1,000, Rose Mantooth $1,000, Florence Taylor $1,000 and Maude Mims $1,000; the above heirs one thousand dollars each in 1918 with the further provision that the grantee would take care of the grantor during the balance of the life of the grantor'; a lien was retained upon said lands to secure the payment of the residue of the purchase money. A copy of said deed is hereto attached and made a part of this complaint; that at the time of the execution of the deed, Maggie Townsend, one of the plaintiffs herein, was named Maggie Bales and she is the

person referred to in said deed as Maggie Bales; that B. F. Thompson had two children in addition to the children mentioned in the deed, to-wit: Dora Keyes and Frank Thompson, and had, prior to the execution of the deed as aforesaid, conveyed to each of said two children 80 acres of land; that the execution of the deed to Dora Keyes and Frank Thompson and the provisions of the deed to Harrison Thompson were intended by the said B. F. Thompson to be a distribution of his estate among his children; that Harrison Thompson made settlement with all of the children named in the deed except these plaintiffs, Florence Taylor and Maggie Townsend; that said defendants have received no part of the amount which the deed directed should be paid to them; that on the 29th day of September, 1933, for the purpose of securing the payment of a note for $2,200 and interest, Harrison Thompson executed to the Planters National Bank of Mena a mortgage on the same land described in the deed from B. F. Thompson to Harrison Thompson; that the mortgage recites that the mortgagor warranted the title against all lawful claims '*except a prior lien for $2,000, an undivided one-third interest in and to said lands to which this mortgage is inferior.*' A copy of said mortgage is filed herewith and made a part of this complaint; that Harrison Thompson died on November 14, 1937, and James Keyes was by the probate court of Polk county appointed administrator and is qualified as such administrator; that the estate of Harrison Thompson owes debts in addition to the amounts specifically mentioned as being due these plaintiffs and the National Bank of Mena, which said debts amount to as much or more than the assets in the hands of the administrator.

"The plaintiffs allege that the claims of $2,000 mentioned in the mortgage as being a prior lien referred to the amounts due the plaintiffs herein and that the one-third interest in and to said lands referred to the one-third of the amount of the consideration mentioned in the deed from Ben Thompson to Harrison Thompson; that the defendant, Planters National Bank of Mena, accepted the mortgage with the understanding and full

knowledge as expressed in the mortgage that the claims of the plaintiffs were superior to the claim of the bank and that the plaintiffs had a lien superior to that of the bank; the plaintiffs pray for judgment for the sum of $1,000 each with interest thereon at the rate of 6 per cent. per annum from the 26th day of September, 1917, and that the court by proper order direct a commissioner, to be appointed by the court to sell the lands described herein at such time and under such terms as the court may adjudge to be proper, and that from the proceeds of such sale the commissioner pay to these plaintiffs the amounts that may be adjudged to be due them, the costs and expenses of this suit and the sale, and whatever balance may remain, if any, pay to the Planters National Bank on the obligation mentioned herein, and if any amount should then remain, that it be paid to James Keyes as administrator of the estate of Harrison Thompson; and the plaintiffs pray such other and proper general relief as may be just and equitable."

Subsequent to filing this complaint Florence Taylor died and the cause was revived upon proper showing in the name of the beneficiaries of her will.

An amended and substituted answer was then filed by the Planters National Bank of Mena as follows:

1.

"Defendant denies each and every material allegation of the complaint of the plaintiffs herein.

2.

"And this further: that on the 1st day of August, 1934, the deceased, Harrison Thompson, being then and there in full life and vigor and being indebted to this defendant in the sum of $150, executed his certain promissory note, of that date, in said amount, bearing interest at the rate of 8 per cent. per annum from date until paid, payable on the first day of July, 1935; that there is now due on said note the principal sum, together with interest thereon at the rate of 8 per cent. per annum from August 1, 1934, less a credit of $18.75; a copy of said note is attached hereto, marked 'Exhibit A,' and made a part

hereof; the original being held subject to the inspection of all parties in interest.

"Also, on the 22nd day of May, 1937, the deceased, Harrison Thompson, being then and there in full life and vigor and being further indebted to this defendant in the sum of $998.77, executed his certain other and different promissory note, of that date, in said amount, bearing interest at the rate of 8 per cent. per annum from May 22, 1937; that a copy of said note is attached hereto, marked 'Exhibit B,' and made a part hereof; the original being held subject to the inspection of all parties in interest.

"Also: on the 13th day of September, 1937, the deceased, Harrison Thompson, being then and there in full life and vigor and being further indebted to this defendant in the sum of $100, executed his certain other and different promissory note, of that date, in said amount, bearing interest at the rate of 8 per cent. per annum from date until paid, payable 90 days after date; that there is now due on said note the principal sum, together with interest thereon at the rate of 8 per cent. per annum from September 13, 1937; that a copy of said note is attached hereto, marked 'Exhibit C,' and made a part hereof, the original being held subject to the inspection of all parties in interest.

"This defendant is now the holder of each of the foregoing notes as original payee therein, and as such claims to be a general creditor of the estate of the deceased with the right to interpose any defense to the claims of the plaintiffs herein which either it or the estate may have. Wherefore, this defendant hereby specifically pleads that the cause of action of the plaintiffs as set out in their complaint is barred by the statute of limitations, for the reason that no action was commenced to enforce the rights of said plaintiffs within five years after their cause of action accrued.

3.

"And this further: that on the 29th day of September, 1933, the deceased, Harrison Thompson, then and there being in full life and vigor, a single, unmarried person, and being indebted unto this defendant in the sum

of $2,200, made and executed to this defendant, as payee, his certain other and different promissory note, of that date, in said amount, bearing interest at the rate of 8 per cent. per annum from date until paid, due and payable 90 days after date; said note was renewed from time to time, upon payment of the accrued interest, the last of said renewal notes having been made and executed by deceased in his lifetime to this defendant on the 12th day of December, 1936, for the principal sum of $2,200 aforesaid, bearing interest at the rate of 8 per cent. from date until paid, due and payable one year after date.

"To secure the prompt payment of the aforesaid debt at the maturity thereof, the deceased, Harrison Thompson, did on the date aforesaid, that is to say, on the 29th day of September, 1933, execute his certain mortgage whereby he conveyed to this defendant the following described lands, lying and being situated in Polk county, Arkansas, to-wit: (particularly describing the 240-acre tract in the deed from B. F. Thompson to Harrison Thompson) which said mortgage was duly acknowledged and filed for record in the office of the recorder of Polk county, Arkansas, on the 3rd day of October, 1933, and now appears of record there, in 'Record Book A-3,' at p. 479 thereof.

"A copy of the aforesaid note and mortgage is attached hereto, marked 'Exhibit D' and 'Exhibit E' respectively, and made a part hereof, the originals being held subject to the inspection of all parties in interest.

"This defendant says: that by virtue of the aforesaid debt in the principal sum of $2,200, evidenced by promissory note and secured by mortgage, as heretofore set out, it is a special, or secured, creditor,—as well as a general creditor—of the estate of the deceased, Harrison Thompson, and entitled further to the right of interposing any defense to the cause of action of the plaintiffs herein which either it or the estate may have. Wherefore, this defendant hereby specifically pleads that the cause of action of the plaintiffs as set out in their complaint is barred by the statute of limitations, for the reason that no action was commenced to enforce the rights

of said plaintiffs within five years after their cause of action accrued.

"Also, at the time of the execution of this defendant's mortgage described above, the bar of the statute of limitations had fallen against, and was barring the enforcement of, the alleged and purported debt and vendor's lien sued upon by the plaintiffs herein; and there was no memorandum showing any extension or renewal of said debt and lien, such as would operate to revive or extend said debt and lien and take the same out of the statute, indorsed on the margin of the record where the instrument, relied upon in this case as evidence of the said debt and lien, was recorded; and therefore, this defendant says, that as to it, the debt and alleged and purported vendor's lien of the plaintiffs herein are barred by the statute of limitations, and as to it, constitutes no lien upon the property described in this defendant's mortgage above set out.

"The aforesaid debt is now past due and unpaid, and there is now due thereon the principal sum of $2,200, together with interest thereon from the 12th day of December, 1936, at the rate of 8 per cent. per annum to date.

"The said Harrison Thompson has departed this life, and his estate is in process of administration with Jim Keyes as administrator thereof. The deceased never married and, therefore, has never had any children; his father and mother preceded him in death; he had at one time the following brothers and sisters, namely: Maggie Thompson (Bales Townsend), Scottie Thompson Taylor, Dora Thompson Keyes, Rose Thompson Mantooth, Maude Thompson Mims, Florence Thompson Taylor, and Frank Thompson; but Florence Thompson Taylor is now deceased, leaving her husband, J. D. Taylor, surviving her, and no children; Frank Thompson is also deceased with his widow, Minnie Martin Thompson, and four minor children, namely: Frank, Jr., John, Ben, and Ann, surviving him.

"This defendant says that its rights to have a foreclosure of said mortgage had become absolute; but that in order to have a complete foreclosure, it is necessary

that the aforesaid persons, namely: Maggie Townsend, Scottie Taylor, Dora Keyes, Rose Mantooth, Maude Mims, J. D. Taylor, Minnie Thompson, Frank Thompson, Jr., John Thompson, Ben Thompson, and Ann Thompson, all being parties interested in the property in question, should be made parties to this action. Therefore, defendant prays: that the said persons be made parties to this action; that a guardian *ad litem* be appointed to represent the said minors, and that process issue to all, to the end that whatever interest they may have in the premises may be adjudicated in this action.

4.

"Wherefore this defendant prays: that the complaint of the plaintiffs herein be dismissed for want of equity and that they take nothing by this action; that this defendant, The Planters National Bank of Mena, Mena, Arkansas, have judgment against the estate of Harrison, Thompson, deceased, for said sum of $2,200, together with interest from December 12, 1936, to date of said judgment, at the rate of 8 per cent. per annum; that this defendant have judgment against the plaintiffs and the estate of Harrison Thompson, deceased, for its costs herein laid out and expended; that the same be declared a lien upon the lands above mentioned; and that if the same be not paid within a time to be fixed by the court, said property be sold to satisfy the same; that the equity of redemption of all parties to this action in said lands be forever barred; that a commissioner be appointed to make said sale and execute said decree; and that this defendant have all other just and equitable relief to which this court considers it entitled."

Maggie Townsend and Minnie L. Thompson, guardian, filed a reply to the amended and substituted answer of the Planters National Bank of Mena as follows:

"Come the plaintiffs, Maggie Townsend and Minnie L. Thompson, as the natural guardian and next friend of Frank, John, Ben, and Ann Thompson, and for their reply to the amended and substituted answer of the Planters National Bank of Mena,

"First: Deny each and every material allegation of the said amended and substituted answer.

"Second: Further replying plaintiffs allege that under the provisions of its mortgage the bank is estopped to plead the statute of limitations against the claims of the plaintiffs.

"Third: That the deed from B. F. Thompson to Harrison Thompson, in effect, created a trust relation and the statute of limitations could not begin to run against the claims of the plaintiffs as long as that relation existed.

"Wherefore, the premises considered, the plaintiffs pray that their claims be decreed to be a first lien on the land and that the land be sold in satisfaction thereof, and for all proper, general and equitable relief."

The plaintiffs then filed a motion to dismiss the cause of action against the administrator as follows:

"Come the plaintiffs and dismiss their complaint herein as to the administrator, Jim Keyes, because:

"First: Neither the plaintiffs nor the defendant, Planters National Bank of Mena, pray for judgment against the estate of Harrison Thompson and neither is entitled to judgment in this cause against said estate, and the administrator is not a necessary party.

"Second: Because the defendant, Planters National Bank of Mena, in its answer set out all of the heirs who have or could have any interest in the estate of Harrison Thompson and asked that all of said parties be made parties to this suit, and the said parties have been, at the instance of the Planters National Bank of Mena, made parties and have been duly summoned."

On the 11th day of April, 1938, the trial court denied the motion and entered the following order:

"On this 11th day of April, 1938, the first day of the regular April term of this court, came on for hearing the motion of the plaintiffs herein to dismiss as to the administrator of the estate of Harrison Thompson, deceased: all parties appeared by their attorneys; and the motion was submitted to the court upon the pleadings and argument of counsel; whereupon the court after being well and sufficiently advised in the premises and after due

consideration and deliberation did find that the said administrator was a necessary party to the action and that this motion came too late, being after issue joined.

"Therefore, it is, by the court, considered, ordered and adjudged: That the motion be denied and overruled; that the administrator, Jim Keyes, be given ten days to answer; and that the plaintiffs pay the costs of this motion."

Thereafter, James Keyes filed a separate answer as follows:

"Comes now the defendant, James Keyes, administrator of the estate of Harrison Thompson, deceased, and for his answer to the complaint of the plaintiff herein states:

"Denies that on September 26, 1917, B. F. Thompson executed to his son, Harrison Thompson, a deed to the lands mentioned and described in the complaint of plaintiff; denies that the consideration expressed in said deed was $1,000 paid and $1,000 to be paid to each of the other parties named in the complaint; denies that a lien was retained in said deed to secure payment of the alleged residue of the purchase money; defendant denies that the said B. F. Thompson had conveyed to his two children, Dora Keyes and Frank Thompson, 80 acres of land as alleged in the complaint; denies that the execution of said deeds to Dora Keyes and Frank Thompson and the provisions in the deed to Harrison Thompson were by the said B. F. Thompson intended to be a distribution of his estate among his said children; denies that Harrison Thompson made settlement with all the children named except the plaintiffs; denies that plaintiffs have received no part of the amount which was directed to be paid to them in said deed.

"Defendant further answering denies each and every allegation set forth in the complaint of the plaintiff, except that this defendant admits that the said Harrison Thompson died as alleged in plaintiff's complaint and admits that this defendant is the duly appointed, qualified and acting administrator of the estate of said decedent.

"Defendant denies that estate owes debts in addition to the claims of the plaintiffs which amount to as much or more than the assets in his hands belonging to said estate.

"Further answering defendant says that neither the plaintiffs nor his co-defendant have ever presented any claim for probate against the estate of the said Harrison Thompson, deceased, and no claim in favor of either of them has ever been probated or allowed and that the assets of the estate in his hands are ample to pay all probated claims without the lands described in plaintiffs' complaint and that, therefore, this defendant is not a necessary or proper party to this action.

"Wherefore, defendant prays judgment on this his answer and that the plaintiffs take nothing as against him and that he recover all his costs in this suit expended and for all further legal, equitable and proper relief."

The cause was submitted to the trial court on the 18th day of May, 1938, upon the pleadings, exhibits thereto and the oral testimony of Mrs. Maggie Townsend and Mrs. Minnie L. Eddleman, Tom Rials and J. V. Townsend on behalf of the plaintiffs and Fred Embry on behalf of the Planters National Bank, resulting in the following finding by the court:

"That the court has jurisdiction of the parties and subject-matter of this cause and finds: 'That since this suit was instituted one of the plaintiffs, Florence Taylor, departed this life; that she made a will bequeathing to Minnie L. Thompson for the use of Frank, Jr., John, Ben, and Ann Thompson, the children of Minnie L. Thompson and of Frank Thompson, deceased, all amounts due her by the estate of H. Thompson; that said will has been duly probated; that upon the death of Florence Taylor her cause of action was revived in the name of Minnie L. Thompson as the guardian and next friend of the said minor children; that since said revival of said cause Minnie L. Thompson has married Ira Eddleman; that Maggie Townsend was Maggie Bales.

"The court further finds that Harrison Thompson died on November 14, 1937; that he had never been married; that James Keyes is the administrator of his estate;

and that there are no persons interested by inheritance in the estate of Harrison Thompson except Dora Keyes, Maggie Townsend, Rose Mantooth, Scottie Taylor, Maude Mims, and the minor children of Frank Thompson, deceased; that J. D. Taylor, named as one of the defendants, is the husband of Florence Taylor, deceased, but has no interest in the estate of Harrison Thompson, his wife having by will bequeathed her interest to the children of Frank Thompson.

"The court further finds that B. F. Thompson had eight children; that desiring to divide his property among his children he gave Dora Keyes and Frank Thompson each eighty acres of land and executed a deed to Harrison Thompson to the following lands: (Particularly describing the 240-acre tract in question.)

That the deed acknowledged the receipt of $1,000 and the balance of the consideration was that Harrison Thompson would pay Maggie Bales, Scottie Taylor, Rose Mantooth, Florence Taylor, and Maude Mims, children of the grantor, the sum of $1,000 each, and it was expressly provided that a lien was retained upon said land to secure payment of the amounts as stated.

"That Harrison Thompson paid Dora Keyes, Maude Mims, Rose Mantooth, and Scottie Taylor the amounts mentioned, but did not pay Maggie (Bales) Townsend and Florence Taylor; that there is now due each of them the sum of one thousand dollars with interest at the rate of 6 per cent. per annum from the 29th day of September, 1933, making a total due each of them of one thousand, two hundred seventy-eight and 16/100 dollars ($1,278.16); that there is a valid lien against the land aforesaid for said amounts.

"The court further finds that on the 29th day of September, 1933, Harrison Thompson, to secure the payment of a note for twenty-two hundred dollars ($2,200) bearing interest at 8 per cent. per annum, executed a mortgage to the Planters National Bank of Mena, on the lands herein described; that nothing has been paid on the principal and there is now due on the interest $256.91, making a total of $2,456.91; that said mortgage was executed subject to a prior lien on said lands for the payment

of two thousand dollars, being the debt found herein to be due Maggie Townsend and Minnie L. Eddleman as guardian.

"It is, therefore, by the court considered, adjudged and decreed that the plaintiffs, Maggie Townsend and Minnie L. Eddleman, as guardian and next friend, each have and recover $1,278.16, with interest from the date until paid at the rate of 6 per cent. per annum; that the Planters National Bank of Mena have judgment against said lands and the administrator of the estate of Harrison Thompson in the sum of $2,456.91, with interest from this date until paid at the rate of 8 per cent. per annum; to secure the payment of the judgments the parties have liens on the land described herein, which are prior and paramount to any right, title, claim, interest, equity or estate of any parties defendants herein, or any one claiming through, by or under them, except that the lien of Maggie Townsend and Minnie L. Eddleman is superior to the lien of the Planters National Bank of Mena. It is further considered, ordered, adjudged and decreed that if the sums herein mentioned are not immediately paid with the costs of this action, the commissioner of this court, after he shall have advertised the time, terms, and place of the sale for 30 days publication in some newspaper in Polk county, Arkansas, having a *bona fide* circulation therein by at least two insertions, sell at the west door of the courthouse, in the city of Mena, at public outcry to the highest bidder, on a credit of three months, the lands herein described. The purchaser at such sale shall be required to give bond with approved security for the payment of the purchase price and a lien shall be retained on said land to further secure such purchase price; provided that if Maggie Townsend shall become the purchaser at such sale for an amount in excess of the judgment in her favor, in lieu of giving bond she may credit the amount of her bid, less the commissioner's fee, upon the judgment herein rendered at the time of the confirmation of such sale, which credit shall be an extinguishment of this judgment to the extent of such credit; and, provided further, that if her bid shall exceed the amount of the judgment, she shall be required to give

bond only for the overplus. The same provisions shall apply to Minnie L. Eddleman in the event she should become the purchaser. If the Planters National Bank becomes the purchaser at such sale, it shall only be required to give security for the payment of the amounts adjudged to be due Maggie Townsend and Minnie L. Eddleman, guardian, and whatever amount its bid is in excess of the amounts due said parties combined with the judgment of the Planters National Bank.

"It is further considered, ordered, adjudged and decreed that, upon a sale of said lands and property as aforesaid, and confirmation thereof by this court, all of the right, title, claim, interest, equity, or estate of the parties connected with this suit either plaintiffs or defendants in and to said property, and every part thereof, shall be and same is hereby decreed to be forever barred and foreclosed, including all rights or possibility of dower and homestead of any of said parties.

"It is further considered, ordered, adjudged and decreed that M. M. Martin, chancery clerk, be and he is hereby appointed commissioner of this court to execute this decree, to make the sale aforesaid, and report his actions hereunder to this court. The plaintiffs shall pay all costs that they have caused to accrue and the Planters National Bank shall pay all costs that it has caused to accrue; the commissioners (and costs of sale) shall be divided equally between the plaintiffs and the Planters National Bank.

"From the proceeds of the sale the commissioner shall first pay the cost of sale, the amounts adjudged to be due Maggie Townsend and Minnie L. Eddleman, guardian and next friend, then the Planters National Bank of Mena, and if there should remain any balance pay the same to James Keyes, administrator.

"And the court doth retain control of this cause for such further orders as may be necessary to enforce and protect the rights of the parties hereto, as well as any who may subsequently become parties hereto by proper proceedings."

Appellants have duly prosecuted an appeal to this court from the findings and decree of the trial court.

The record reflects that Florence Taylor and Maggie Townsend were the daughters of B. F. Thompson and that he had six other children; that prior to the execution of the deed by him to Harrison Thompson on September 26, 1917, he had conveyed to two of them, Dora Keyes and Frank Thompson, each, 80 acres of land; that the deed he made to Harrison Thompson did not mention Dora Keyes and Frank Thompson, to whom he had theretofore conveyed lands; that the deed contained the names of the other six children; that in addition to the consideration mentioned in the deed to Harrison Thompson it was provided among other things and as a part of the consideration therefor that Harrison Thompson should support the grantor, B. F. Thompson, for and during his life; that the deed also referred to the five persons to whom Harrison Thompson should pay $1,000 each in the year 1918 as his heirs. These circumstances indicate that in selling the land to Harrison Thompson his father was parting with all of his property else he would not have required Harrison Thompson to support him during his life. We think it reasonably inferable that in making the deed his purpose was to equalize his children in the disposition of his property by requiring his grantee to pay each of the heirs who had received nothing up to that time $1,000 each, and, therefore, we cannot agree with the learned attorneys for appellant that the sale of the land by B. F. Thompson to Harrison Thompson, his oldest son, was a common bargain and sale proposition and created the relationship of debtor and creditor, with security, between B. F. Thompson and Harrison Thompson. We do not think it can be said that the five heirs to whom Harrison Thompson was required to pay $1,000 each were constituted agents under the deed to collect the money for B. F. Thompson, the grantor. We think it very clear that B. F. Thompson expected each of the heirs mentioned in the deed to receive $1,000 each for their several benefits as a part of the consideration for the conveyance of the 240-acre tract. It is true that B. F. Thompson retained a vendor's lien to enforce the payment of the balance of the purchase money, but it was for the security of the five heirs he

mentioned in the deed and not a security for himself. The testimony reflects that the plaintiffs in this action, who were two of the heirs mentioned in the deed, were never paid the $1,000 each by Harrison Thompson and that when he executed the mortgage to the Planters National Bank he placed a provision in it recognizing his indebtedness to the plaintiffs and his obligation to pay same. He specifically states in the mortgage executed by him to the Planters National Bank that the mortgage he was giving it was inferior to the vendor's lien securing his indebtedness of $2,000 and interest to the plaintiffs. It is true that the plaintiffs' right of action accrued in 1918 and that more than five years had elapsed before the mortgage was executed to appellant and before the institution of this suit, but one may toll the statute of limitations by a written recognition of the debt either before or after the statutory bar.

We think the provision in the mortgage executed by Harrison Thompson to the Planters National Bank of Mena was a written recognition or acknowledgment that he owed the plaintiffs $2,000 which was secured by a vendor's lien on the property he was mortgaging to it and that a consideration for giving it the mortgage was that the mortgage should be inferior to the vendor's lien on said tract of land securing the indebtedness he owed to appellees as a part of the purchase money to the very land he was mortgaging to it. This suit was instituted within five years after the written acknowledgment of the indebtedness. The language used by Harrison Thompson was that he warranted the title to it as "against all lawful claims except a prior lien for $2,000 in an undivided one-third interest in and to this land to which this mortgage (meaning the bank's mortgage) is inferior."

This court said in the case of *Haney* v. *Holt,* 179 Ark. 402, 16 S. W. 2d 569, that: "He (referring to a second mortgagee) purchases only the surplus or residuum after satisfying the other incumbrances; if a mortgage expressly provides that it shall be subject to a prior mortgage, it is subject to it independently of the fact that the prior mortgage is not of record. The plain-

tiffs, by accepting their subsequent mortgage under the circumstances aforesaid, ceased to be strangers to the defendant's prior mortgage, and were thereby brought into contractual relations with said mortgagee." And, also, said in the case of *Clapp Bros. & Co.* v. *Halliday Bros.*, 48 Ark. 258, 2 S. W. 853, that: "A mortgagee who accepts a mortgage which recites a prior mortgage of the same property, and provides for its payment, is estopped to deny the existence of the prior mortgage, or the validity of its lien, though it be not acknowledged and recorded as required by the statutes; but he does not, by his acceptance, assume the payment of the first mortgage above the value of the mortgaged property which he receives." And, also, said in the case of *Gunnels* v. *Farmers' Bank of Emerson,* 184 Ark. 149, 40 S. W. 2d 989, that: "One who takes a mortgage reciting that it is a second mortgage is not entitled to assert that the prior mortgage is barred by reason of failure to indorse a memorandum on the record of a renewal note secured by the prior mortgage as the second mortgagee contracted with reference to the first mortgage."

The mortgage the bank took from Harrison Thompson was ample notice to the bank that a vendor's lien had been retained on the whole property to secure the balance of the purchase money and by making any kind of investigation it could have ascertained that the unpaid purchase money amounting to $2,000 was due the plaintiffs in the case and not to anyone of the others mentioned in the deed. We think the debt was sufficiently identified by the writing itself, but certainly so by the oral evidence which in no way contradicted the written instrument. The clause in the mortgage was a written acknowledgment on the part of Harrison Thompson that he owed the debt and it was a written contract and agreement on the part of the bank that the $2,000 and interest should be paid before the bank was paid the amount expressed in its mortgage. Our conclusion based upon the written statement in the bank's mortgage that its mortgage was inferior to the vendor's lien of appellees and that appellees' vendor's lien was prior to that of the

bank clearly estopped the bank from pleading the statute of limitations even as a general creditor of the estate of Harrison Thompson, deceased, or under the theory that it, the bank, was a third party or a stranger to the contract.

It is true that there is some uncertainty in the provision as to whether the bank's mortgage was subject to a lien on a one-third interest to the property or to a lien upon the whole property, and in view of the fact that the bank itself wrote the mortgage and the language used must be given the strongest construction possible against the party drafting the mortgage, and in view of the fact that it was talked over by the cashier, attorney of the bank, and Harrison Thompson and the deed itself reflected that the vendor's lien covered the entire property, we think the construction should be given the clause that the bank's mortgage was subject to the vendor's lien upon the whole property for the balance of the purchase money. In arriving at our conclusion we have only considered the evidence to which objections were not made, hence it becomes unnecessary to determine whether the administrator, James Keyes, was a necessary party or whether the testimony objected to was admissible.

No error appearing, the judgment is affirmed.

SWEET *v.* NIX.

4-5293 122 S. W. 2d 538

Opinion delivered December 12, 1938.

A. D. Pope, for appellant.

R. T. Boulware, for appellee.

McHaney, J. Appellants are the widow and heirs at law of W. M. Sweet, deceased. In his lifetime, on November 26, 1927, Mr. Sweet and his wife, the appellant, Carrie Sweet, executed and delivered their deed of trust on a certain 72-acre tract of land in Lafayette county to Pike Roe, trustee for R. O. Taylor, to secure an indebtedness of $182.80, due by Sweet to said Taylor, which deed of trust was duly recorded, and a short time later assigned of record by Taylor to J. T. Stephens and Ezra Garner. In 1930, subsequent to the death of Mr. Sweet, Stephens and Garner foreclosed said deed of trust at a time when all the heirs at law were minors, and at the foreclosure sale, A. F. Nix became the purchaser, and he and his wife are the appellees here.

This action was brought by appellants in December, 1937, to cancel and set aside said foreclosure sale and to permit them to redeem from said sale. Appellees demurred to the complaint both generally and specially. The court treated the demurrer as a motion to make more definite and certain and required appellants to attach as exhibits all the pleadings, orders, depositions and other papers on file in connection with the foreclosure proceedings had in 1930, and then sustained the demurrer. Appellants stood on the complaint as amended with said exhibits and same was dismissed for want of equity. The case is here on appeal.

We think the court was correct in sustaining the demurrer and in dismissing the complaint for want of equity. The term of court at which the foreclosure de-

cree was rendered had lapsed more than seven years prior to the bringing of this action. We have many times held that, after the close of the term at which the decree was rendered, the court may set it aside or modify it only in the manner and for the causes specified in § 8246, Pope's Digest. See *Ingram* v. *Raiford,* 174 Ark. 1127, 298 S. W. 507. Section 8248 provides the procedure to vacate or modify under the fourth, fifth, sixth, seventh and eighth grounds of § 8246, which shall be by complaint, verified by affidavit, and setting forth, among other requirements, the defense to the action, if the party applying was defendant. Section 8249 provides: "A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment is rendered, . . ." Not only is there no valid defense shown to the foreclosure action, but none is attempted to be alleged or stated in the complaint herein. Numerous cases might be cited to the effect that failure to allege a meritorious defense to the action in which the judgment or decree sought to be set aside was rendered is fatal to the action. Some of the later cases are *H. G. Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308; *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *Adams* v. *Mitchell,* 189 Ark. 696, 74 S. W. 2d 969. In the last-cited case it was held that, before a defendant may question the service upon which a judgment was rendered, he must show the existence of a defense to the suit which terminated in the judgment.

One of the grounds urged here to set aside the judgment is that service was bad because summons was delivered by a deputy sheriff who was the trustee in the deed of trust. But, as we have just shown, appellants cannot question the service in the absence of a defense to the original action.

A number of other grounds to set aside are argued by counsel for appellants, none of which are more meritorious than the question of service just mentioned. The reason for the statute and the rule of this court is that courts should not be required to do vain and useless

things, and it would be a vain and useless thing to set aside a judgment to which there was no defense, and the same result would necessarily follow on a new trial.

The decree is correct, and it is affirmed.

PICTORIAL PAPER PACKAGE CORPORATION *v.* SWAMP & DIXIE LABORATORIES, INC.

4-5300 122 S. W. 2d 529

Opinion delivered December 12, 1938.

I. J. Friedman and *Geo. W. Dodd,* for appellant.

Warner & Warner, for appellee.

HOLT, J. This appeal comes from a decision of the Sebastian circuit court, sitting as a jury, in which there was a finding and judgment for defendant, appellee here.

The sole question for our consideration, and one on which this case turns, is the construction of a contract, which is in writing, evidenced by letters and a telegram.

The facts out of which the contract grew are substantially as follows:

On June 15, 1934, appellee wrote appellant in part as follows: "Please quote us prices on 50 M and 100 M lots, on the 100 M with the agreement that we take this out in two shipments. The first shipment at once and the second in six months. We must have the first shipment of merchandise in here not later than July 20th, so please give us these prices as soon as possible." On June 25, 1934, appellee answered in part as follows: "Just in receipt of letter of 22nd, in which you quoted us prices on Swamp Chill and Fever Tonic Cartons. We note that you only gave your price on 50 M. We asked you to give your price on 50 M and 100 M lots, with the understanding that we can take 50 M out at once and 50 M in six months. We also asked you what delivery you could make on these cartons. We would like part of the cartons not later than the middle of July." Again on June 28, 1934, appellant wrote defendant in part as follows: "We can execute delivery on an order of this nature within about two weeks after receipt of your order. If you desire these cartons by the middle of July we can easily have them for you by that time if you will send us your order along the latter part of this month. In these lots you will be permitted to contract, all to be taken out within six months' time." On July 2, following, appellee wired appellant as follows: "Enter order One Hundred Thousand Chill Tonic cartons, Fifty Thousand to be shipped at once." Following receipt of this telegram on July 2nd, appellant prepared the "contract order" covering the merchandise as follows: "Charge to Swamp & Dixie Laboratories, Inc., 301-11 Rogers Ave., Fort Smith, Arkansas. Contract Order: Ship 50 M by July 15, balance as ordered within six months. 100 M PTL 'Swamp Chill and Fever Tonic' cartons @ $3.35 M, $335." Appellant writes appellee again on July 5, 1934, in part as follows: "We are inclosing our acknowledgment of your valued order recently favored us for 100 M printed 'Swamp Chill and Fever Tonic' cartons, the cost of which will be in the neighborhood of $335. When the manufacture of this order has been completed, the mer-

chandise is to be placed in storage—50 M to be shipped by July 15th, and the balance to be consummated within six months from date of first shipment. Immediately let us hear from you if the order as written up and acknowledged has not been done in accordance with your instructions."

The first shipment of 50 M cartons made within the time specified, July 15, 1934, amounted to $168.84, which was paid by appellee. The balance of the cartons were never shipped and nothing said or done by either party about them until January 20, 1936, more than 18 months after the sale was made, when appellant wrote appellee as follows: "In checking our contract and split shipment orders, we find that we still have on hand 52,650 'Swamp Chill and Fever Tonic' cartons on your old contract order dated July 2, 1934. This order was accepted on the basis of making complete delivery within six months after date of first shipment, which was made on July 17, 1934; since that date we had received no release orders from you. In as much as this contract should have been completed a long time ago, we are wondering if you will not be good enough to allow us to make shipment of the above mentioned cartons at this time. . . ."

On January 22, 1936, appellee replied to the above letter in part as follows: "We did not know that we had any of these cartons on hand. We placed this order with you on July 2, 1934, and asked you to make shipment of 50 M cartons at once, and that we must have the cartons not later than July 16th. The balance of the order was to be taken out in six months' time. As the cartons were not shipped to us on the specified date, we thought that we had received all of our cartons. . . . We gave you specific shipping instructions when we sent you our order on July 2, 1934, so we do not think it is any fault of ours that you still have the cartons on hand. The balance of the cartons should have been shipped the first part of 1935."

Again on January 25, 1936, appellant wrote appellee in part as follows: "We are replying to your letter of January 22nd with reference to the 'Swamp Chill and Fever Tonic' cartons we have on hand on your

contract dated July 2, 1934. This order was entered and accepted on the basis of shipping 50 M cartons by July 15, 1934, and the balance as ordered out, all within six months from the date of the first shipment." Additional subsequent correspondence passed between the parties which is not necessary to repeat here.

The court below made the following findings of fact and declarations of law: "1. The court finds that under the contract between the parties the plaintiff agreed to sell and deliver to defendant at Fort Smith, Arkansas, 100 M cartons, at $3.35 per M. That 50 M were to be shipped by plaintiff by July 15, 1934, and the balance within six months. 2. That the first shipment was made by plaintiff to the defendant at Fort Smith, Arkansas, as specified in said contract, but that the plaintiff failed to ship the balance of the cartons within the time specified and made no tender or offer to ship said cartons until January 20, 1936, on which date plaintiff wrote defendant asking it to consent to shipment being made at that time, and that defendant refused to do so. Under the facts the court declares that the plaintiff is not entitled to recover herein and that the complaint should be dismissed with costs in favor of the defendant." Since the contract is evidenced by writings, it was the duty of the trial court to construe it, declare its terms and the obligations of the parties under it. *United States Fidelity & Guaranty Co.* v. *Sellars,* 160 Ark. 599, 255 S. W. 26.

It is undisputed that 100 M cartons were ordered by appellee, that 50 M were shipped according to contract, that appellee never at any time gave shipping instructions for the delivery of the remaining 50 M cartons, nor was any demand made by appellant upon appellee to take them out until in January, 1936. Was it the duty of appellee, under the terms of the contract, to give appellant instructions for the shipment of the remaining 50 M cartons? We hold that it was not necessary for appellee to do so and that in the absence of directions from appellee to appellant to ship out the remaining cartons within the six months' period, it was the duty of appellant to ship the goods within that period, if appellee is to be bound by the contract.

Appellant in its letter of January 25, 1936, placed the following interpretation upon the contract: "This order was entered and accepted on the basis of shipping 50 M cartons by July 15, 1934, and the balance as ordered out, all within six months from the date of the first shipment." In the case of *Sydeman Bros., Inc.*, v. *Whitlow*, 186 Ark. 937, 56 S. W. 2d 1020, the court said: "It is a well established principle of law that, in the interpretation or construction of contracts, the construction the parties themselves have placed on the contract is entitled to great weight, and will generally be adopted by the courts in giving effect to its provisions. It is to be assumed that the parties to the contract knew best what was meant by its terms, and are the least liable to be mistaken about its intentions."

The rule is well settled that where the contract provides that the goods are to be shipped within a certain period, the time of shipment is material and it is not a compliance with the contract if the goods are shipped before or after the time specified. The general rule seems to be as stated in 55 C. J., p. 341, as follows: "Where the contract provides that the goods are to be shipped within a certain period, the time of shipment is usually regarded as material, and it is not a compliance with the contract if the goods are shipped before or after the time specified, unless the terms of the contract and the surrounding circumstances known to the parties show a different intention."

Since the contract provides that appellant must ship 50 M by July 15th and the balance as ordered out within six months, appellant was required to ship the balance of the cartons, 50 M, within six months after July 15th, but gave appellee the option to order the cartons shipped at any time within said period of six months if desired. The rule applicable is stated in 55 C. J., p. 349, as follows: "If delivery is to be made on or before a certain date at the option of the buyer, the seller has until such last date to make delivery, in the absence of any demand by the buyer, and the failure of the buyer to exercise his option is equivalent to demand for delivery on the last date."

Again the rule is stated in 23 R. C. L., p. 1364, as follows: "But where the contract provided for delivery at the buyer's option by giving a certain notice, at any time during a certain month, it has been held that the giving of notice by the buyer was not a condition precedent to the attachment of a duty on the seller's part to deliver, and that, if no notice was given in the exercise of the option for an earlier delivery, it was the duty of the seller to make delivery on the last day of the month."

In *Rogers-Pyatt Co.* v. *Starr Piano Co.,* 212 App. Div. 792, 209 N. Y. S. 733, in reversing the case on appeal and rendering judgment for the buyer, the court said: "The learned trial court gave judgment for the plaintiff upon the theory that 'the defendant breached by not furnishing shipping instructions.' But this is erroneous, as no shipping instructions were required to be given by defendant. The contract itself provided that the goods were to be shipped to 'Starr Piano Co. at Richmond, Indiana,' and all that plaintiff had to do was to put the shellac f.o.b. on cars at New York, before the expiration date of the contract, consigned to defendant at Richmond, Indiana, and it would have complied with the terms of the contract. *British Aluminum Company, Ltd.* v. *Trefts,* 163 App. Div. 184, 148 N. Y. S. 144."

We think that the case of *British Aluminum Co., Ltd.* v. *Trefts, supra,* is also in point, in which, among other things, the court said: "It is contended on the part of the respondent that the plaintiff was under no obligation to deliver or to tender delivery until the defendant specified a time for delivery of the remaining 13 tons of aluminum, which concededly he never did. The parties did not undertake that the vendor need not ship the goods until it received shipping directions from the vendee. The provisions with respect to shipments earlier than the final date were for the benefit of the vendee, and he was required, not to give shipping instructions essential to enable the vendor to make a delivery, but to specify dates for delivery in so far as he might desire a delivery before the 31st day of December, 1911. The vendor had the

right, and I think that it was its duty, if it intended to hold defendant, to deliver or tender delivery of the remaining 13 tons of aluminum on the 31st day of December, 1911, for the legal effect of the contract was to call for delivery thereof on that day. The vendor needed no shipping instructions to enable it to deliver the aluminum, which was to be consigned to the defendant at Buffalo, and to be delivered f.o.b. at the city of New York; and if it did, it should have asked for them if it desired to perform and to put the vendee in default. The contract merely gave the vendee the right to require delivery of part or all the aluminum prior to the final date of delivery. In so far as delivery was not required to be made before that date, the vendor, if it desired the benefits of its contract, was at liberty, without awaiting a request from the vendee, to deliver the aluminum f.o.b. at New York City, consigned to the vendee at Buffalo, and the failure of the vendee to demand delivery did not, in my opinion, excuse the vendor from so delivering or tendering delivery of the remaining 13 tons." We feel that it is unnecessary to cite additional authority.

We hold that the contract provided that shipment should be made to appellee within six months from July 15, 1934, and that it gave it the option to order the balance of the cartons prior to the expiration of the six months' period and that under its terms it was not necessary for appellee to give shipping instructions to appellant to enable appellant to make the shipment, but that appellee did have the option to specify dates if it desired delivery before the expiration of the six months' period. Under the contract appellant did not need shipping instructions to enable it to deliver the cartons.

On the whole case, we conclude that the findings and judgment of the trial court should not be disturbed, and we accordingly affirm.

JEWEL TEA COMPANY, INC., *v.* MCCRARY.

4-5295 122 S. W. 2d 534

Opinion delivered December 12, 1938.

[redacted]

Mann, Mann & McCulloch, for appellant.

Marvin B. Norfleet, for appellee.

GRIFFIN SMITH, C. J. This appeal is from a judgment for $1,500 on a jury's verdict finding that H. W. Jonakin was negligent in driving a Jewel Tea Company automobile, as a consequence of which appellee sustained personal injuries.

The gravel highway on which appellee was driving his Chevrolet car south from Forrest City is about thirty feet wide. Appellee testified that he slowed to 25 or 30 miles an hour to pass a cattle truck, a part of which was parked on the highway, occupying three or four feet of the west portion thereof; that he had cleared the truck and was four or five car lengths beyond when the Tea Company car struck his left fender and "stripped me down." The accident occurred between 7 and 7:30 o'clock in the evening. In explanation of the shock he

sustained, appellee said: "I was 'out' until between 9:30 and 10:30, and don't remember being brought back to town."

Jonakin's testimony was that he was on the east [his] side of the road; that he saw the truck parked across the road, and that appellee's car "came out from behind the trailer at about 25 or 30 miles an hour. I was going very slowly and kept to my right and applied my brakes. Had my right wheels 18 inches off the gravel in the grass on the east side of the road when the other car came around. . . ."

Each side introduced other testimony. There was substantial evidence upon which the jury could have found for either the plaintiff or the defendants. The questions of negligence and contributory negligence were properly referable to the jury.

Errors complained of are: (1) That the court should not have permitted Pugh Hodges to express an opinion. (2) That the court erred in permitting E. A. Rolfe to testify concerning car tracks at the scene of the accident, and to draw conclusions therefrom. (3) That photographs were improperly admitted in evidence as exhibits to the testimony of James L. Alley. (4) That the verdict is contrary to the evidence.

In response to the question, "What was Mr. McCrary's condition as you saw it?" the witness Hodges replied: "He looked to me like he was in a kind of semi-conscious condition; he talked, but he didn't know what he was talking about." Objection was not made until the answer had been given. The court's ruling was: "He can tell [what McCrary's actions were] and let the jury determine that."

It was proper to permit the witness to describe the conditions he observed. Where one testifying is not called upon for an opinion, but simply for a statement of facts, the rule that competency of such witness depends upon actual experience with respect to the subject under investigation, or previous study and scientific research, has

no application. A non-expert may explain what he saw, and state what his impressions or reactions were.[1]

E. A. Rolfe testified that he went to the accident locale during the early morning following the collision. Asked if he saw any tracks indicating where the cars came together, he replied: "I noticed tracks that looked like the car going south had gone by the truck, and the car coming from the south looked like just before it got to where it hit the car it turned to the west."

Objection was made that the witness viewed the scene at least twelve hours after the accident occurred, and "the testimony is not competent to show how the accident happened."

The court's ruling was: "He can tell what he saw there." Exceptions were saved to the ruling and to competency of the testimony.

The witness then stated: "There were no other tracks there, and it showed where the car had run to the west and then turned back to the east."

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[1] *Pfeifer Stone Company* v. *Shirley*, 125 Ark. 186, 187 S. W. 930; *Kansas City Southern Railway Company* v. *Cobb*, 118 Ark. 569, 178 S. W. 383; *Mutual Aid Union* v. *Blacknall*, 129 Ark. 450, 196 S. W. 792; *Modern Woodmen of America* v. *Whitaker*, 173 Ark. 921, 293 S. W. 1045.

In the Cobb Case, after quoting from Judge ELLIOTT'S treatise on evidence, it was stated in the opinion: "Where one person is acquainted with another and they come in contact with each other frequently, it is not a matter of expert knowledge for one to tell whether the other appears to be sick or well. These are matters of common experience and observation. And a non-expert witness, after stating the facts upon which his opinion is based, may even give his opinion in such matters. Jones on Evidence, vol. 2, §§ 360 *et seq.* 366."

The rule laid down in Corpus Juris [vol. 22, p. 618, § 711] is: "When the circumstances are such that all the facts cannot be placed before the jury with such clearness as to enable them to draw a correct inference, and the province of the jury is not invaded, and the inference is not one for the drawing of which special skill, knowledge, and experience are required, an ordinary person who has suitable opportunity for observation may state the apparent physical condition of another person. . . . Such an observer may also state the obvious condition and visible effect of particular injuries, or state inferences from transient physical appearances, as that a person was hurt or injured, . . . paralyzed, conscious or unconscious."

There was no error in permitting the photographs to be introduced. Appellee testified that when the pictures were taken the truck was in the tracks it made prior to the collision. The driver gave similar testimony. The jury understood the truck had been moved and replaced in order that the photographs might be taken. Verity of the photographs depended upon testimony of the two witnesses. The jury had a right to believe or disbelieve such evidence.

The writer of this opinion thinks the Rolfe testimony was incompetent and prejudicial; but the majority holds otherwise.

The judgment is affirmed.

LUMBERMEN'S MUTUAL INSURANCE CO. *v.* MITCHELL.

4-5271 122 S. W. 2d 543

Opinion delivered December 12, 1938.

O. A. Featherston, for appellant.

Boyd Tackett, for appellee.

HOLT, J. Appellant brings this appeal from a decision of the Pike circuit court, sitting as a jury, awarding judgment in favor of appellee.

The only error pressed upon us here by appellant is that there was no substantial evidence upon which the lower court's judgment could be based.

We cannot agree with this contention. The facts, as disclosed by the record and which are practically undis-

puted, are substantially as follows: On May 6, 1937, the appellee, C. C. Mitchell, bought a 1933 model V-8 Ford sedan automobile from the Burch Motor Company at Hot Springs, Arkansas, and on the same day purchased from appellant, Lumbermen's Mutual Insurance Company, through its agent, H. W. Conde, a liability insurance contract covering the automobile. The policy contained the following provisions:

"The Lumbermen's Mutual Insurance Company, Mansfield, Ohio (a mutual company, hereinafter called the company). "Does hereby agree with the insured, named in the declaration made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

"Coverage E — Collision or upset — Actual Cash Value—Less $50 deductible—Premium—$7.

"To pay for loss consisting of damage to the automobile caused by accidental collision with another object or by accidental upset, but only for the amount of each separate loss, when determined, in excess of the deductible sum."

On August 29, 1937, Alton Mitchell in company with his brother, Jessie Mitchell, with the permission of appellee, their father, were driving the car in question and were involved in a collision near Okolona, Arkansas, which tore off the fan belt and the radiator, burst off the lines to the manifold heads which cover the valves and tore off two pieces of bolts from the manifold and otherwise seriously damaged the motor. Immediately after the collision appellee notified appellant and upon instructions from it, the car was towed to the Burch Motor Company's garage at Hot Springs, Arkansas, to be repaired. Two weeks later appellee was notified that the car was completely repaired, and after paying the Burch Motor Company $50, his part of the repair bill, he attempted to drive the car to his home in Glenwood, 32 miles away. When he had driven the car less than a mile, it began to "pop, jump and fail to function correctly." He finally managed to drive the car home, but the next morning,

after driving it three or four miles, the motor completely failed to function and appellee towed the car back to the Burch Motor Company. Mr. Burch, manager of the Burch Motor Company, and Mr. Conde, agent of appellant insurance company, promised appellee that they would see that the car was completely repaired and fixed. The car remained with the Burch Motor Company for several weeks, but appellant refused to authorize the Burch Motor Company to make further repairs on the car. On several occasions, Mr. Conde promised appellee and appellee's attorney that he would authorize the Burch Motor Company to fix the damaged car, but failed to keep his promise. After several weeks delay, appellant finally refused to make the additional repairs and appellee authorized the Burch Motor Company to make the repairs at an additional expense of $69.20. These repairs called for a new motor. It would cost considerably more money to repair the old engine than to put in a new motor. The motor was in good condition prior to the collision.

The judgment of the court below was as follows: "The only question for determination of the issues involved in this case is whether or not the defective condition of the motor of plaintiff's car, after the repair of the car by the Burch Motor Company, was caused by the collision which occurred August 29, 1937.

"Plaintiff testified that the motor was in excellent condition prior to this collision and that as the result of the collision the top of the manifold of the motor was bursted and that the motor completely failed to function after a drive of some thirty miles following the repairs. He notified defendant's agent and the motor company and demanded that the repairs of the motor be made, and defendant declined to make such further repairs, although there is some testimony that they promised to do so. The plaintiff is corroborated in his testimony as to the cause of the motor trouble by one of the parties who was in the car at the time of the collision, the mechanic who repaired the motor prior to the collision, and other testimony of expert character.

"The preponderance of the evidence justifies the conclusion that the defendant failed to fully repair plaintiff's car following the collision under their contract, and since plaintiff has been damaged in the sum of $69.20 for their failure to do so after due notice and demand." Then follows the judgment of the court in favor of appellee.

Since, in accordance with a long established rule of this court, we must give the judgment of the trial court, when sitting as a jury, the same weight and effect that we give to the verdict of a jury, it is our duty to affirm where there is substantial testimony to support his finding.

Giving to the facts, as we find them in this record, their strongest probative force in favor of appellee, it is our view that the evidence is of a substantial nature and the judgment will accordingly be affirmed.

CLEMMONS *v.* BYARS.

4-5291 122 S. W. 2d 652

Opinion delivered December 12, 1938.

H. G. Wade, for appellant.

G. R. Haynie, for appellee.

HUMPHREYS, J. This is an appeal by H. G. Wade from a decree of the chancery court of Ouachita county in which judgment was rendered in favor of B. J. Byars for $295.21 against him, G. S. Clemmons and Monroe Clemmons for the value of four bales of cotton and 85 bushels of corn which they sold and appropriated to their own use while under attachment in a proceeding in the court of D. O. Atterberry, justice of the peace in Calhoun county, to enforce a landlord's lien of B. J. Byars for rent and advances made by him to his tenants, G. S. Clemmons and Monroe Clemmons, on land which they had rented from him in Calhoun county for the year 1935.

The sheriff of Calhoun county and his bondsmen were made parties defendant and judgment was prayed against them on account of the sheriff's negligence in permitting the tenants to retain possession of the property and convert it with the aid of H. G. Wade to their

own use after the writ of attachment was levied on said cotton and corn.

On motion, the service was quashed as to the sheriff and his bondsmen and the suit was not prosecuted as to them any further.

G. S. Clemmons and Monroe Clemmons filed a motion to quash the service upon them which was overruled over their objection and exception, but they have not appealed from the decree rendered against them, hence, it is unnecessary to pass upon the action of the trial court in overruling the motion or in rendering judgment against them.

H. G. Wade filed a demurrer to the complaint of Byars which was overruled over his objection and exception. The case was then transferred to the chancery court, to which transfer H. G. Wade objected and excepted.

After the case was transferred to the chancery court H. G. Wade made a motion to remand it to the circuit court, which motion was overruled over his objection and exception.

H. G. Wade then renewed his demurrer to the complaint, which was overruled over his objection and exception and then filed a separate answer denying any liability on account of converting the property to his own use while same was in *costodia legis,* specifically pleading that he did not wrongfully assist the Clemmonses in the conversion of the property, but that he received and sold one bale thereof under an order of Henry Means, conciliation commissioner in Ouachita county in the United States District Court for the Western Division of Arkansas. He also pleaded the six months' statute of limitations contained in the landlord's lien act as a bar to the prosecution of this action. Pope's Dig., § 8845.

G. S. Clemmons and Monroe Clemmons filed a separate answer, the contents of which is unnecessary to set out as they have not appealed from the judgment rendered by the court against them.

The cause then proceeded to a hearing which resulted in a joint and several judgment being rendered

against the Clemmonses and H. G. Wade for the total amount sued for, from which H. G. Wade has appealed.

We have read the evidence carefully and according to our interpretation thereof it is, in substance, as follows:

The land upon which the crop was raised by the Clemmonses as tenants of B. J. Byars in 1935 had been conveyed by G. S. Clemmons and his wife to F. F. Neeley in satisfaction of a mortgage thereon and, in 1933, F. F. Neeley conveyed same to B. J. Byars, who rented it to the Clemmonses in 1935 for a rental of one-third of the corn and one-fourth of the cotton and advanced to them, as landlord, supplies to make the crop. They raised 85 bushels of corn and four bales of cotton and were indebted to Byars when the judgment was rendered in the instant suit in the sum of $295.21 on account of rent due him and supplies furnished by him. The Clemmonses having failed to pay him the rent or the amount due for supplies, he proceeded within six months, or in the fall of 1935, to enforce his landlord's lien for the rents and supplies, and the property was levied upon by the sheriff who left it in the care of the Clemmonses.

G. S. Clemmons, with the aid of H. G. Wade, then filed a petition in bankruptcy before Henry Means under the Frazier-Lemke Act seeking to have the deed to Byars declared a mortgage and invoking the aid of the conciliation commissioner in adjusting same so that he might liquidate it in the course of time. A schedule of his property was filed with the bankruptcy petition, including the property on which Byars held a landlord's lien and which he was attempting to enforce before a justice of the peace in Calhoun county. The conciliation commissioner seems to have made an order authorizing the Clemmonses to sell the cotton and corn which was under attachment, and this order was made at a time when Henry Means was not in condition to hold court. He set this order aside and released the cotton and corn, but immediately G. S. Clemmons filed another schedule of property before the conciliation commissioner and, without notice to Byars, he issued another order authorizing the Clemmonses to sell the property. This order was afterwards set aside by the federal judge on the ground that the proceeding before the conciliation commissioner was not a good faith

proceeding and was not filed in order to get aid in the settlement of the mortgage, but was filed for the purpose of destroying the landlord's lien upon the property.

In a suit in the chancery court that followed, the deed from Neeley to Byars was declared an absolute deed and not a mortgage and that Byars was the owner in fee of the land after he received his deed in 1933. The record also reflects that as soon as the Clemmonses got an order from the conciliation commissioner to sell the cotton they telephoned to H. G. Wade, who had been assisting them, perhaps in the first petition before the conciliation commissioner, and certainly in the second petition filed before the conciliation commissioner, that such an order had been issued and Wade directed them to bring the cotton in, and with their consent took one bale of cotton for his services and assisted the Clemmonses through the service of the stenographer of a Mr. Bowers who was acting for Wade to sell the other three bales and when the order was issued by the conciliation commissioner allowing the Clemmonses and their attorney to dispose of the cotton the Clemmonses proceeded to use the corn. Byars prosecuted his attachment suit to enforce his landlord's lien, but it was an empty victory because while the suit was pending and the property was in *custodia legis* it had been appropriated by the Clemmonses and Wade and his landlord's lien was destroyed in that way. They sold the property and used the proceeds. The purpose of the Frazier-Lemke bankruptcy act was to aid and protect home owners against the loss of their homes and its purpose was not to protect tenants in their effort to cheat their landlords in the collection of their rent and supply bills. In fact, the act does not give the conciliation commissioner any authority to adjudicate or determine the existence or non-existence of landlord's liens and the legal rights of parties connected with the litigation. Its only purpose was to grant power to the federal courts to postpone the foreclosure of mortgages in order to give debtors reasonable time to protect themselves against the loss of their home. The order issued by the conciliation commissioner allowing the Clemmonses and Wade to sell the cotton was beyond the

jurisdiction of the conciliation commissioner and was void. He had no right to issue such an order and the petition itself was afterwards dismissed by the federal judge. The petition was just a subterfuge, as we read the record, to destroy Byars' landlord's lien and the enforcement thereof by attachment proceedings.

In order to escape liability, Wade testified that he had nothing to do with the first petition and that he participated in the second petition to the extent of representing the Clemmonses as an attorney and he also testified that he knew nothing of the pendency of Byars' suit by attachment to enforce his landlord's lien, but the evidence as a whole convinces us that he assisted the Clemmonses in selling three bales of cotton and in appropriating one bale to his own use, and under the void proceedings he assisted them in making it possible for them to use the corn.

It would extend this opinion to great length to set out the whole testimony, so on this trial *de novo* we have contented ourselves, after a very careful reading thereof, with setting out our interpretation thereof.

Appellant contends that the trial court erred in not remanding the cause to the circuit court, arguing that the circuit court, and not the chancery court, had jurisdiction of the cause of action. This court said in the case of *Reavis* v. *Barnes,* 36 Ark. 575, that (quoting syllabus): "A landlord cannot maintain an action for money had and received to his use, against one who has purchased and sold his tenant's crop with knowledge that his rent was due and unpaid. His remedy, if any, is by specific attachment while the crop is in the purchaser's hands, or by bill in equity after the sale, to have the proceeds appropriated to payment of his rents."

This doctrine was approved in the case of *Manilla Supply Co.* v. *Tiger Bros.*, 126 Ark. 105, 189 S. W. 675. The circuit court did not err in transferring the cause to equity nor did the chancery court err in refusing to remand the cause to the circuit court.

Appellant contends that his demurrer to the complaint should have been sustained because the allegations thereof were insufficient to state a cause of action.

We think the court correctly overruled the demurrer because the complaint states that during the pendency of the landlord's attachment suit to enforce his landlord's lien for rent and supplies the tenants by and with the aid of H. G. Wade took the property out of the custody of the court and unlawfully converted same to their own use. Such a cause of action is cognizable in a court of equity according to the cases cited above.

Appellant contends that an action of this character is barred under the landlord's statute unless the landlord has proceeded within six months to enforce his lien. The landlord did proceed within six months to enforce his lien and was prevented from getting the property under his attachment because while his suit was pending appellant and his tenants unlawfully took charge of the property or took it out of the custody of the court and converted same to their own use. Under those circumstances we ruled in the case of *Bank of Gillett* v. *Botts,* 157 Ark. 478, 248 S. W. 573, that the six months' statute of limitations was inapplicable and did not apply where a mortgagee wrongfully took the property and converted same to his own use. This case was alluded to and cited in the case of *Bottrell* v. *Farmer's Bank & Trust Co.,* 172 Ark. 1165, 291 S. W. 832, but this court in the Bottrell Case differentiated it from the case of *Bank of Gillett* v. *Botts* in the following language: "Appellant calls attention to the case of the *Bank of Gillett* v. *Botts,* 157 Ark. 479, 248 S. W. 573, but in that case it will be observed that the suit was brought by the landlord against the tenant and some laborers who were claiming laborer's liens on the rice crops. The purpose of this suit which was brought within six months, was to establish a lien for rent and supplies. After the suit was begun to enforce the lien, a receiver was appointed by the chancery court. The bank in that case took charge of the property and sold it, after the suit was begun to enforce the lien, and the court simply held that in that case the six months' statute had no application. It had no application because the suit to enforce the landlord's lien for rent and supplies was properly begun within six months, and the bank, after

the expiration of six months, took possession of the property and sold it while the suit was pending.''

The instant case is ruled by the case of *Bank of Gillett* v. *Botts,* and under the facts in this case the six months' statute of limitations is not applicable. In the Bottrell Case, *supra,* relied upon by appellant, no action had been brought during the six months' period to enforce the landlord's lien, whereas, in the instant case, such a suit had been brought, and the landlord's lien was in effect destroyed by the action of appellants and the Clemmonses.

No error appearing, the judgment is affirmed.

ORVIS BROS. & CO. *v.* OLIVER.

4-5301 123 S. W. 2d 1065

Opinion delivered December 12, 1938.

Dene H. Coleman, for appellant.

J. L. Taylor, DeWitt M. Hines and *Bryan J. McCallen,* for appellee.

SMITH, J. Appellants, who are brokers, have their principal office in the city of New York, with branch offices in a number of other cities. The transactions out of which this litigation arose were had with appellee through the Memphis branch. Appellants sued P. L. Oliver, of Corning, Arkansas, who operates a cotton gin and deals in cotton as P. L. Oliver & Company, to recover certain sums of money which they advanced for the account of Oliver in three futures transactions.

The transactions, which were evidenced by numerous telegrams, were as follows:

On March 8, 1937, Oliver, hereinafter referred to as appellee, placed with appellants a contract for July cotton at 13.35. This cotton was later sold, on instructions from appellee, at 13.96, which resulted in a profit to appellee, less commissions and taxes, of $272.91.

On April 2, 1937, appellee bought another contract for 100 bales of cotton at 14.25, and on April 19th sold the contract at 13.51, involving a loss, including commissions and taxes, of $397.04.

These transactions are admitted, and appellee concedes his liability for the difference between his profits on one transaction and the loss on the other if the contracts may be enforced. He says the contracts were gambling transactions and unenforceable for that reason in the courts of this state. There was a verdict and judgment in his favor, from which is this appeal.

There was a third transaction involving a similar purchase of cotton seed oil, which appellee testified was made without his authority, and the question whether this last-mentioned contract was unauthorized was not submitted to the jury as a separate issue of fact. The jury found that the admitted contracts were unenforceable, as being gambling contracts. It was, therefore, unnecessary for the jury to determine whether the oil contract had been made, as it would not have been enforced by the jury had it been admitted. It cannot, therefore, be said that the jury has found that the contract relating to the cotton seed oil was unauthorized. In view of what we shall hereinafter say, the validity of the cotton seed oil contract must be submitted to and be determined by the jury upon the remand of the cause for that purpose.

Testimony was offered by the brokers, hereinafter referred to as appellants, to the following effect. They are members of the New York Cotton Exchange, the New York Produce Exchange, and many other exchanges. They act as brokers for people who are not members of these exchanges, but do not buy anything for themselves. They solicit and receive business from ginners, cotton shippers, operators on the spot market who use cotton futures in their business, and from others. Appellee opened an account with appellants, and was extended a line of credit amounting to $1,000. No one can transact business in these exchanges who is not a member thereof.

The transactions in regard to the cotton above-mentioned were had and conducted in accordance with the rules and regulations of the Cotton Exchange, and when appellee was called upon to make good the net loss he had sustained he declined to do so, hence this suit.

Witness N. P. Boulet, the manager of appellants' Memphis branch, who conducted the transactions, testi-

fied that he was familiar with the rules and regulations of the Exchange, as well as with those of the United States Cotton Futures Act, and he knew that the contracts had been executed in accordance with the provisions of these rules and regulations and of that act. They could not otherwise have been executed in the Exchange. The writings offered as exhibits by the witnesses for appellants evidencing the transactions show that they were regularly executed. The testimony of Harry A. Levine is to the effect that he was a partner of appellants, in charge of the Commodities Department, and that appellants were members in good standing of the Exchange through which the transactions were had. He was personally familiar with the transactions, and knew that they were executed in accordance with the rules and regulations of the New York Cotton Exchange, and subject to the provisions of the United States Cotton Futures Act of August 11, 1916, and the transactions were actually executed on the floor of the New York Cotton Exchange.

Signed contracts, executed by appellants as agent for appellee, were offered in evidence, and these recite that the purchases of the cotton were "subject to the United States Cotton Futures Act." The correspondence between appellants and the parties with whom they dealt as agent for appellee makes certain the fact that the transactions were conducted in accordance with the rules of the New York Cotton Exchange, and all the writings evidencing the transactions stated, as above quoted, that they were subject to the United States Cotton Futures Act. The testimony is convincing and undisputed that the transactions were entered and cleared through the New York Cotton Exchange. A certificate issued under the seal of the Cotton Exchange details the transactions and leaves no doubt upon the subject.

It is insisted, however, that the purchase of the cotton and the sale thereof for the account of appellee was a gambling transaction, in that, appellee did not expect to receive and his vendor did not expect to deliver the cotton contracted for, and that this fact is conclusively evidenced by the sale of the contract before its July ma-

turity, at a profit in one instance and at a loss in the other, and that the transactions were a mere wager as to whether the price of cotton would go up or go down.

It may be true, as appellee contends, that he did not expect the actual delivery of the cotton which he purchased; but it is also true that he had a contract which entitled him to its delivery. He had the option to sell or "close out" his contract before the date on which delivery of the cotton was due, and he exercised that option. But the United States Cotton Futures Act, referred to in act 208 of the Acts of 1929 (Vol. II, Acts of 1929 of the General Assembly of the State of Arkansas, p. 1024), to which further reference will later be made, provides that he might demand actual delivery. This act appears in full in United States Statutes at Large, Vol. 39, Part I, beginning at page 476. This act is annotated in Vol. 6-A Federal Code, Annotated, pages 86 *et seq.*, and in United States Code, Annotated, Title 26, pages 584 *et seq.*

This act provides that actual delivery may be demanded, and that middling shall be deemed the grade of cotton contracted for if no other grade is specified. However, the writings evidencing the purchase of the cotton here in question specified that it was "for middling." This act provides that the grades which may be sold shall be within the grades for which standards are established by the Secretary of Agriculture. Certain inferior grades are declared not to be tenderable in satisfaction of the contract. Provision is made for variations in weight of the bales so that the total weight of a number of bales may aggregate the quantity or total weight contracted for. Delivery allowance is made for the difference above or below the contract price which the receiver of the cotton shall pay for cotton above or below the grade contracted for. There are other provisions which make certain that the appellee might have demanded delivery of the cotton, had he elected to do so, when his contract matured. The act provides that the relevant portions here involved "shall be deemed fully incorporated into any such contract if there be written or printed thereon, or on the document or memorandum evidencing the same,

at or prior to the time the same is entered into, the words, 'subject to the United States Cotton Futures Act, § 1094'." The writings evidencing the contracts here involved contained this indorsement.

It is no doubt true that in most cases arising under this act, as in the instant case, actual delivery was not intended, although no testimony was offered to that effect in the trial of this case, the contract required delivery, if demanded. In other words, the transaction is one generally called dealing on margins. But such contracts were held not to be gambling contracts in the case of *Johnston* v. *Miller,* 67 Ark. 172, 53 S. W. 1052, that opinion having been delivered November 18, 1899.

Subsequent to the rendition of that opinion the General Assembly of this state, at its 1907 session (act 162, Acts 1907, p. 388), passed "An act to prohibit contracts and agreements for the sale and future delivery of cotton, grain, provisions, and other commodities, stocks, bonds, and other securities upon margins, commonly known as dealing in futures; to declare such transaction unlawful and to constitute a misdemeanor on the part of any person, association of persons, or corporation participating therein, whether directly or indirectly; to prohibit the establishment, maintenance, or operation of any office or other place where such contracts are made or offered," and for other purposes. This act appears as §§ 2652 *et seq.,* C. & M. Digest.

It may be said, in passing, that, while this act was in full force and effect the case of *Mullinix* v. *Hubbard* arose in this state and was decided by the Circuit Court of Appeals of this circuit on May 27, 1925. 6 Fed. 2d 109. In that case the 6th headnote reads as follows: "That no deliveries were made under contract calling for future deliveries, but contracts were closed out by lawful and customary methods permitted by rules of New York Cotton Exchange and United States Cotton Futures Act (Comp. St., §§ 6309a-6309v), and that customer intended to close them out in such manner when he made contracts, did not make contracts illegal as wagering contracts."

The case of *Browne* v. *Thorn,* 260 U. S. 137, 43 S. Ct. 36, 67 L. Ed. 171, also arose in this state, and was decided

by the Supreme Court of the United States while the act of 1907 was in effect. Justice HOLMES, speaking for the Supreme Court of the United States, in an opinion to which there was no dissent, said: "It is objected that the judge instructed the jury that hedging was lawful, hedging being explained as a means by which manufactures and others who have to make contracts of purchase or sale in advance secure themselves against the fluctuations of the market by counter contracts. *Prima facie* such contracts are lawful. *Chicago Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 25 S. Ct. 637, 49 L. Ed. 1031." The "hedging" contract there involved was enforced.

We prefer, however, to put our decision upon the provisions of act 208 of the Acts of 1929, hereinabove referred to, which act appears as §§ 3342, *et seq.*, Pope's Digest.

Section 10 of this act, appearing as § 3351, Pope's Digest, provides that "All laws and parts of laws regulating or prohibiting dealings in future contracts (or) in conflict or inconsistent herewith, be and the same are hereby repealed."

This act of 1929 appears to be an exact copy of chapter 97 of the session laws of Oklahoma for the year 1917, except a few unimportant verbal changes, and except also that our act contains a section, numbered 12, which declares that an emergency exists, which requires that the act shall take effect and be in force from and after its passage.

When our act was passed the Supreme Court of Oklahoma had delivered its opinion in the case of *Avery* v. *Goodrich* (October 7, 1924), 229 Pac. 577. This case must be given great weight, because the Oklahoma statute had been construed by the Supreme Court of that State in the case cited when we adopted the Oklahoma act, and the rule in regard to adopted statutes applies. It was there held by the Supreme Court of Oklahoma (to quote the headnote in that case) that "Where a petition states that a contract of sale for future delivery of cotton was made in accordance with the rules of any board of trade or exchange, where such contracts of sale are executed,

and was actually executed on the floor of such board of trade or exchange and performed or discharged according to the rules thereof and was placed by, with, or through a regular member, in good standing, of the cotton exchange or board of trade, organized under the laws of the state of Oklahoma or any other state, it alleges a valid and enforceable contract in the courts of this state, if such contract is further shown to conform with requirements of clauses 1 and 2 of the Session Laws of Oklahoma of 1917, c. 97, and that such contract was made subject to the provisions of the United States Cotton Futures Act, approved August 11, 1916 (U. S. Comp. St., §§ 6309a-6309v)."

In the case of *T. S. Faulk & Co.* v. *Fenner & Beane,* 221 Ala. 96, 127 So. 673, a headnote to a decision by the Supreme Court of Alabama reads as follows: "Though proof that nothing was actually delivered at time of executing future marginal contract makes out a *prima facie* case of illegality of all forbidden transactions under Code 1923, § 6819, *prima facie* case, though made out under first part of the section, may be met and overcome by proof that contract was made under the United States Cotton Futures Act (26 USCA, §§ 731-752)."

Other decisions to the same effect by the same court are *Fenner & Beane* v. *Phillips,* 222 Ala. 106, 130 So. 892, and *Fenner & Beane* v. *Olive,* 226 Ala. 359, 147 So. 147.

The Supreme Court of Georgia, in the case of *Layton* v. *State,* 165 Ga. 265, 140 S. E. 847, construed a statute of that state making it unlawful to maintain a place of business in that state for the purpose of engaging in the business commonly called "Dealing in futures on margins," and making a violation of the act a misdemeanor. A headnote in that case reads as follows: "6. The act does not prohibit such transactions as are regulated by and fall within the terms of the act of Congress known by the short title of 'United States Cotton Futures Act', Fed. Stat. Ann. Supp. 1918, p. 359 (26 USCA, §§ 731 *et seq.;* U. S. Comp. St., §§ 6309a, *et seq.*)." See, also, the opinion by the same court in the case of *Arthur* v. *State,* 146 Ga. 827, 92 S. E. 637.

Kentucky appears to have had a statute similar to our act of 1907, *supra,* but not to have had a statute similar to our act of 1929, *supra.* Notwithstanding that fact, it was held by the Court of Appeals of Kentucky, in the case of *Johnson* v. *Clark & Co.,* 224 Ky. 598, 6 S. W. 2d 1048, (to quote the headnote in that case) that "Where, on each order of principal to broker to purchase cotton for future delivery, broker mailed written confirmation which provided orders were received with understanding that actual delivery was contemplated, and that brokers had no agents; principal, for whom brokers closed deals at loss, could not avoid liability or recover margin advanced by showing person claimed to be broker's agent had notice that future delivery was not, in fact, contemplated, and that transactions were unlawful as gambling transactions, under Ky. St., § 1955, orders having been made in strict accordance with United States Cotton Futures Act (26 USCA, c. 13)." See, also, *Fenner* v. *Boykin,* 271 U. S. 240, 46 S. Ct. 492, 70 L. Ed. 927; *Thorn* v. *Browne,* 257 Fed. 519; *Getts* v. *Newburger,* 272 Fed. 209; *Jacobs* v. *Hyman,* 286 Fed. 346.

If it be said that any moral turpitude attached to gambling may not be removed by legislation, it may be answered that it is within the province of the General Assembly to declare what acts are and what acts are not gambling within the meaning of the laws of this state. That declaration has been made, so far as this case is concerned, by act 208 of the Acts of 1929, *supra.* Section 2 of this act reads as follows: "That all contracts of sale for future delivery of cotton, grain, stocks, or other commodities (1) made in accordance with the rules of any board of trade, exchange or similar institution where such contracts of sale are executed and (2) actually executed on the floor of such board of trade, exchange or similar institution and performed or discharged according to the rules thereof; and (3) when such contracts of sale are made with or through a regular member in good standing of a cotton exchange, grain exchange, board of trade, or similar institution organized under the laws of the state of Arkansas or any other state shall be, and they are hereby declared to be valid and enforceable in

the courts of this state according to their terms, provided, that contracts of sale for future delivery of cotton in order to be valid and enforceable as provided herein must not only conform to the requirements of clauses (1), (2), and (3), of this section, but must also be made subject to the provisions of the United States Cotton Futures Act, approved August 11, 1916; provided, further, that if this clause should for any reason be held inoperative then contracts for the future delivery of cotton shall be valid and enforceable if they conform to the requirement of clauses one, two, and three of this section."

Three conditions are imposed to make valid contracts for the future delivery of any commodity except cotton. As to cotton it is provided "that contracts of sale for future delivery of cotton" must be made "subject to the provisions of the United States Cotton Futures Act, approved August 11, 1916," with the further proviso that if the last-mentioned clause "shall be for any reason held inoperative, then contracts for the future delivery of cotton shall be valid and enforceable if they conform to the requirements of clauses one, two, and three of this section." This last-mentioned proviso has no application here, as the United States Cotton Futures Act remains in force.

The contracts here sued on conformed to the requirements of the section quoted, and we must hold that they are valid and enforceable, because the General Assembly has so enacted.

The judgment of the court below must, therefore, be reversed, and it is so ordered, and judgment will be rendered here for the plaintiff for $124.13, this being the difference between the profits on one transaction and the loss on the other, as stated above; and the cause will be remanded for the determination of the question whether the contract for the purchase of the cotton seed oil had been authorized, the verdict of the jury in the trial below not being decisive of that question.

HUMPHREYS and MEHAFFY, JJ., dissent.

SMITH, J. (on rehearing). In the petition for rehearing it is earnestly insisted that the cause should not have been remanded for a new trial upon the question of the authorization of the purchase of the cottonseed oil, for the reasons that appellant made no objection to the verdict of the jury on that account in the motion for a new trial, and that inasmuch as this issue was submitted to the jury under conflicting testimony, sufficient to support a finding either way—that is, that the contract was authorized or that it was unauthorized—the verdict of the jury is conclusive of that issue, and for the further reason that a reversal was not asked on account of the failure to render judgment in the cottonseed oil transaction in the briefs on the appeal to this court.

We do not agree with these contentions. It must be remembered that there were three separate transactions. Two of them were admitted; as to the third—the purchase of the cottonseed oil—it was denied that the purchase by the broker for the customer's account had been authorized. But it must also be remembered that no instruction was given asking the jury to specifically find whether the oil transaction had been authorized. It was contended that all these transactions were gambling transactions, and void for that reason. The jury found the fact so to be, and did not find for the plaintiff upon the admitted transactions. It was, under this finding, unimportant to determine whether the oil transaction was authorized or not, as no verdict would have been returned for the plaintiff had it been found that the oil transaction was authorized.

Appellant did not, in his motion for a new trial, assign as error the failure of the jury to find whether the oil transaction was authorized. But the law does not require any one to do a vain and useless thing. Why find whether the oil transaction was authorized or not, if a verdict would not be rendered on that account even though the finding was made that the transaction had been authorized.

Either party had the right to ask a specific finding on this question; but neither party made that request. Appellee was evidently content to have the case decided

upon the question whether the transactions, all three of them, were gambling transactions or not, and no other issue was submitted to the jury. Upon this state of the record we do not think it can be said that the jury made a finding that the oil transaction was unauthorized. That question was not specifically submitted to the jury, and it was unimportant, under the verdict of the jury, as to the gambling character of all the transactions, to determine whether one of them was unauthorized. No useful purpose would have been served by objecting to the form of the verdict, as appellee now insists should have been done. The verdict was in proper form, and was a proper verdict to render, under the instructions of the court, if the transactions were found to constitute gambling. If one was, all were.

Appellant did not waive this question in the brief on the appeal. Upon this issue it was said in the brief on the original submission of the case: "As to the additional debt occasioned by the purchase and sale of the 60,000 pounds of cottonseed oil, there is a dispute in the testimony, by reason of which the trial jury might have found a scintilla of evidence upon which to base a verdict for appellee in so far as that *lone transaction* was concerned, notwithstanding the facts that telegrams were sent direct to the appellee confirming each purchase and sale involved in this case, and that statements were mailed to him from time to time, personal demands made for payment of the entire account, and letters written from May, 1937, to January, 1938, requesting payment; and it was not until April 4, 1937, the trial day in court, that appellee ever denied any item of the account. However, we assume that it can serve no useful purpose at this time to discuss the merits of the cottonseed oil transaction."

The effect of this argument is to insist that the oil transaction was authorized by letters and telegrams, and were shown to have been authorized by various statements of the transaction mailed appellee from time to time, as well as personal demands, although there was conceded to be a scintilla of evidence to the contrary. But it was properly conceded that there was no use to

discuss the merits of the oil transaction, which was disputed, if there was no liability on the similar transactions which were admitted.

We do not think, therefore, that it can be said that the question of liability on the oil transaction was waived either in the court below or upon the appeal to this court, and the petition for rehearing is, therefore, overruled.

SINCLAIR REFINING COMPANY *v.* HENDERSON.

4-5305 122 S. W. 2d 580

Opinion delivered December 12, 1938.

V. R. Tomlinson, Ingram & Moher and *John E. Coates, Jr.*, for appellant.

A. G. Meehan and *John W. Moncrief*, for appellee.

GRIFFIN SMITH, C. J. Judgments aggregating $25,000 based on jury verdicts, were entered against Sinclair Oil Refining Company and Harry E. Brown in consequence of injuries resulting in the death of Mrs. Mamie Henderson.

A five-gallon can of liquid thought to be kerosene was delivered by appellants to the Henderson home. It is alleged that through negligence a more inflammable liquid—one containing from fifteen to twenty per cent. gasoline—was supplied. Mrs. Henderson undertook to light a fire by using the supposed kerosene. There was a violent explosion, as a result of which Mrs. Henderson sustained burns causing her death the following day.

The fifty-three assignments of errors brought forward in appellants' motion for a new trial are treated under six headings: (1) The trial court erred in refusing to direct verdicts for appellants. (2) Appellants, being distributors, would not be liable unless they knew, or by reasonable care should have known, that the car of kerosene had been adulterated, since there had been official inspection at point of shipment. (3) The four separate judgments do not conform to the verdicts. (4) The judgments are excessive. (5) The court erred in refusing to declare a mistrial when appellees' counsel read to the jury appellants offer to confess judgment for a nominal sum. (6) The court erred in refusing to dismiss as to Orin M. Henderson as next friend.

Orin M. Henderson is a farmer, residing in Arkansas county, near Stuttgart. Mrs. Henderson was injured about five o'clock the morning of April 24, 1937—Saturday. She had arisen without disturbing her husband or either of the three children. Her only explanation of the accident was: "I struck a match and the thing blew up."

It is admitted by appellants that deliveries of distillate and kerosene were made to the Henderson home the afternoon of April 20—Wednesday.

Brown testified the delivery truck contained three compartments. The middle and back compartments were filled with distillate. The front compartment contained kerosene. Carl Garrich and R. G. Cruger accompanied witness to the Henderson farm. Brown told Garrich to unload the distillate. This was done through use of a hose several feet long. Garrich filled Henderson's "skid tank" and put an additional quantity in barrels. Brown says he saw Garrich "finish the remainder of the tractor fuel in the first compartment and drain it into a bucket and pour it into the barrel." Mrs. Henderson then came and wanted kerosene, pointing to a can. She asked that it be put on the back porch of the residence. Garrich emptied the Henderson can of some liquid he thought was water. Brown insists he cautioned Garrich to "be sure about it." After emptying the can Garrich hung it to the rear knob on the faucet and filled it directly from the tank. When the kerosene was drawn the hose was still attached to the other spigot, running distillate. Brown also stated that in filling the five-gallon can, Garrich had to shut off the faucet several times "because kerosene will foam."

Garrich testified he fastened the hose to the middle faucet to drain the rear tank, then changed to the left faucet, which was attached to the middle tank. "A little distillate was in the back tank that would not run out by gravity and we had to bucket that out. . . . We carry a five-gallon can or bucket for that purpose. Then I fastened the hose to the faucet on the left side and started running the distillate into the barrels." Garrich told of Mrs. Henderson's request for kerosene; of procuring the five-gallon can, and of emptying from it what he supposed was water. He was positive the hose was connected to the left distillate faucet when the five-gallon can was filled. In speaking of the can, Garrich said: "It was sort of a white, clear galvanized can, and not the red can in the courtroom. . . . After I filled the five-gallon can with kerosene I set it on the rack of the truck and went on emptying the rest of the distillate. We put the five-gallon can on the truck and drove out of the barn. I picked up the can and set it on the porch. I did not notice any other can on the porch."

A witness for plaintiffs testified that he had formerly worked for Brown; that all three tanks on the truck were sometimes used for tractor fuel (distillate), and "one time all three were used for gasoline. . . . I have seen tractor fuel come out [of the tanks] with the coal oil in flushing the compartments."

On behalf of appellees, Ozell Roe, a neighbor, testified she remembered the occasion when Mrs. Henderson procured five gallons of kerosene from the Sinclair Company, and that it was Wednesday; also, Mrs. Henderson bought a gallon of kerosene in Stuttgart on Tuesday. The witness borrowed a baking can full of kerosene from Mrs. Henderson on Thursday. The supply was taken from the one-gallon can. Witness had observed a half gallon fruit jar on the Henderson ice box. It contained gasoline. The jar lacked 1½ or 2 inches of being full. Witness "believed" she had seen the five-gallon can exhibited at the trial—"it is the one Mrs. Henderson used for coal oil."

After accompanying Mrs. Henderson to the hospital on Saturday, witness returned home Sunday. "There was a coal oil can in the Henderson home when I got there Sunday. I put it on the inside of the kitchen. I had the key to the house, locked the door, and nailed up the screen window on the back porch. I was at home from that time on until the can was removed from the house, except on Tuesday. . . . There was nothing to indicate that anybody had entered the house after I locked it. . . . A can of oil was taken away from the Henderson home about three and a half weeks after the death of Mrs. Henderson. Some strangers took it away and Mr. Orin Henderson was with them. I opened the door for them."

On cross-examination Mrs. Roe reiterated that the gallon of kerosene procured in Stuttgart by Mrs. Henderson was purchased on Tuesday before the Saturday accident. Witness was present when Mrs. Henderson brought it home: "She poured some in that can I was telling you about—that baking powder can for me—some in her lamp, and some in her oil stove. She had three stoves in the house, a wood stove, a cook stove, and

an oil stove. The heating stove was in the living room where the accident occurred. There was a pump engine run by gas. It was pretty close to the tool kitchen door. Mrs. Henderson and I were going to wash some quilts on Saturday morning. We were going to use the washing machine. It was driven by gasoline and was on the back porch. The gasoline was kept in the regular gasoline barrel in the tool shed about 150 yards from the house. The gasoline we were going to use in the washing machine was sitting on the ice box on the back porch. It was brought to the house Friday afternoon. . . . Some people representing the Sinclair Refining Company came out to the Henderson place before Mr. Henderson got out of the hospital. They wanted some coal oil. . . . That was after Mr. Brown had been out there on the previous Saturday. . . . I put the five-gallon can of kerosene in the kitchen and locked the house. Nobody put anything else in that can before it was taken away."

Jim Cubit, a neighbor, arrived at the Henderson home soon after the explosion. He testified: "I noticed the heater. The front door was swinging open. . . . If there had been a fire in the stove I couldn't tell it. Five or six small sticks like kindling wood were in the stove, but they were not burnt. The wood in the stove was kind of smoked black. It was scorched. I don't think there were any coals in the fire. . . . I found a gallon can with the bottom blown out."

Allen Henderson testified that the day the accident occurred he took a fruit jar lid "and poured out a couple of spoonfuls of the contents of the [five-gallon] can, and walked out into the yard, set the lid on the ground and lit a match. The wind blew it out. I only had two matches and the wind blew them both out, and I didn't do anything with it."

Orin Henderson testified that after remaining in the hospital fifteen days he went to his father's home. With two friends he got the five-gallon can and took it to Dr. Manglesdorf, state chemist. He had not seen the can from the date of the accident until it was procured when the trip was made to Little Rock. From the weight of the can, he judged a gallon or a gallon and a half of the

contents had been taken out. Dr. Manglesdorf said he was not allowed to make tests for private individuals, but suggested that a chemist be procured.

Orin Henderson further testified: "On the Saturday morning of the accident the contents of the one-gallon can had come out of the five-gallon can. I generally always build the fire, and on Friday morning the little can was sitting by the cook stove or wood range. It had a very small amount of kerosene in it. . . . I drained what there was in the little can and then built the fire. The one-gallon can was empty and I poured what I thought was between one-half and three-quarters of a gallon from the five-gallon can sitting on the porch. . . . There was not any other kerosene on the place except that purchased from the Sinclair Refining Co. . . . My best judgment is that we had not had any fire in the heater for about a week."

The Memphis chemist who made tests said: "I feel perfectly safe in saying that between 15 and 20 per cent. of the material in that mixture would have passed a gasoline distillation test. In a mixture of gasoline and kerosene there would be a vapor from the gasoline. . . . If that liquid contained from 15 to 20 per cent. gasoline the contents could not be detected by smelling it. . . . The stream of gasoline coming out of the spout [of a can] gives off a vapor where the temperature is considerably hot—such as over a stove where you are starting a fire. It takes a considerable length of time to warm up the fluid in the can in order to make a vapor or formula that will ignite."

Appellants' testimony included Brown's statement that he went to the Henderson home the afternoon of the day of the accident and in the presence of a member of the Henderson family took a gallon sample from the five-gallon can. The can was still on the porch. The sample smelled and foamed like kerosene, and "everybody there agreed that it was kerosene." The specimen was brought to the Stuttgart bulk plant in the presence of witnesses, then taken to the city clerk's office with instructions that it be put in a vault. A representative of the Sinclair Company got the sample about five days

later and delivered it to Mr. Lyons. Lyons testified that in April, 1937, he delivered three samples to Dr. Manglesdorf. They were in gallon bottle jars and were given him by Harry Brown. Manglesdorf testified the samples were coal oil and conformed to state laws.

Appellants rely upon *Pierce Oil Corporation v. Taylor*, 147 Ark. 100, 227 S. W. 420, where, with facts somewhat similar to those in the instant case, it was held there was no presumption of negligence.[1] In the Taylor Case, however, recovery was permitted by reason of evidence tending to show that the so-called kerosene sold by defendant "would light more quickly and burn brighter" than ordinary kerosene.

If appellees relied entirely upon the negligence of Brown in failing to inspect the car of kerosene which appellants' evidence shows was sold to the Sinclair Company by the Root Petroleum Company, and by the latter shipped to Brown, for the account of the Sinclair Company, their insistence that no presumption of negligence attached would be sound, for there is nothing in the evidence to show that the odor or color or consistency of the kerosene was such as to put the dealer on notice. It was shown that other customers in and around Stuttgart whose orders were filled from the same supply received genuine kerosene.

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[1] In the Taylor Case the court said: "The testimony adduced by defendant tended to show that the oil was tested in the tanks before shipment to Ozark and also after it was received at Ozark and found to be kerosene up to the standard required by law, and that the barrels of fluid sold to Plugge Bros. were taken from the tanks of oil thus tested and found to be in accordance with the requirements of the statute. The testimony in addition to that introduced in the trial in the Federal court was concerning the test made of the tanks of oil before shipment to Ozark. That testimony merely added to the volume of evidence in favor of the defendant, but did not eliminate the conflict in the testimony as to the fact that defendant, through its agents, furnished oil as kerosene which proved to be either gasoline or some other oil more inflammable than kerosene. We are of the opinion that the evidence was sufficient to show that defendant's agents were guilty of negligence in furnishing oil dangerous and unfit for use and which was not in fact kerosene of the standard required by law."

Appellees, however, have offered substantial evidence that the one-gallon can was filled from the five-gallon supply; that Mrs. Henderson was injured when the smaller can exploded; that there was no fire in the stove, or hot ashes, or coals, nor sufficient heat to have ignited kerosene within the one-gallon can; that distillate and kerosene were being drawn from the same tank truck in circumstances from which the jury could infer that a mistake was made in filling the five-gallon can, and that distillate or a diluted kerosene was in fact supplied. It is true Garrich testified a mistake was not made; but he also testified that "a little distillate was in the back tank that would not run out by gravity, and we had to 'bucket' that out." Just what the witness meant by this statement is not quite clear. In appellants' abstract of Garrich's testimony there is this quotation: "A little distillate was in the back tank that would not run out by gravity and we had to take it out with a five-gallon can." If the bucket to which reference was made by Garrich was, in fact, a five-gallon can, it would have been an easy matter for this container to be substituted for the five-gallon can of kerosene for delivery to the Henderson porch.

The transactions and attending circumstances do not present a situation where, as a matter of law, it can be said that it was impossible for an error to have been made in attempting to draw the kerosene.

Cases cited by appellants[2] are applicable to the facts to which the decisions were applied, but are not conclusive here.

The four separate verdicts rendered were: (1) For Allen Henderson as administrator, $2,500. (2) For Allen Henderson, administrator, and Orin M. Henderson, $6,000. (3) For Orin M. Henderson individually, $1,500. (4) For Allen Henderson, administrator, and Orin M.

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[2] *Kroger Grocery & Baking Co.* v. *Melton*, 193 Ark. 494, 102 S. W. 2d 859; *Walloch* v. *Heiden*, 180 Ark. 844, 22 S. W. 2d 1020; *Goode* v. *Pierce Oil Corp.*, 171 Ark. 863, 286 S. W. 1009; *Magnolia Petroleum Co.* v. *Bell*, 186 Ark. 723, 55 S. W. 2d 782; *Biddle* v. *Jacobs*, 116 Ark. 82, 172 S. W. 258; *Fort Smith Light & Traction Co.* v. *Cooper*, 170 Ark. 286, 280 S. W. 990; *Mo. Pac. Rd. Co.* v. *Baum*, 117 S. W. 2d 31, 196 Ark. 239, 117 S. W. 2d 31.

Henderson as next friend for the benefit of the children, $15,000.

The administrator is the father of Orin M. Henderson, and grandfather of the minor children. Verdict No. 1 awarded him as such administrator $2,500. This recovery compensated damages for the benefit of Mrs. Henderson's estate for physical pain and mental anguish. That this was the jury's intention is affirmed by the special verdict forms submitted, and the judgment for $2,500 is responsive.

Verdict No. 3 is for the benefit of Orin M. Henderson, to compensate physical injuries he personally received.

Verdict No. 4 is in response to the special form: "If you find for plaintiffs for the use and benefit of Loretta Gay Henderson, Bobbie Joe Henderson, and Paul James Henderson, the form of your verdict shall be [as set out]." The jury's intention, by this verdict, was that the recovery should be for the children, all of whom were included. These minors sued by their father as natural guardian and next friend, but the administrator also sued in the same action. The court did not err in entering judgment on this verdict.[3] The administrator was the proper party to sue, and the verdict was in his favor.

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[3] *St. Louis I. M. & S. Ry. Co.* v. *Prince*, 101 Ark. 315, 142 S. W. 499. This appeal involved two causes, one brought by John A. Prince as administrator of his wife's estate, and the other by Prince in his individual capacity to recover damages for injuries to his person and property, and also for the loss of the services and companionship of his wife. The suits were consolidated. The administrator recovered $10,000 for the benefit of the estate and next of kin of the wife. At page 325 of the opinion it is said: "The elements of damages embraced in the verdict in that case consisted of the physical and mental pain and suffering of the wife and also of the pecuniary loss of the next of kin, sustained by her death. The next of kin were four little girls, aged, respectively, 10, 8 and 6 years, and 8 months. The mother was 31 years of age, strong in body and vigorous in mind. She was devoted to her children, and provided in a large measure for their wants and comforts. She was of industrious habits, good character and a dutiful parent. It has been held that the loss to minor children of the instruction and the physical, moral and intellectual training by a parent is a proper element to be considered in estimating the damage to the children by reason of such parent's wrongful death." (See cases cited.)

The special form was submitted to the jury without objection from appellants. The court's judgment was for the administrator, to the exclusion of the father.

Verdict No. 2 is inconsistent and the judgment is inherently wrong. It awarded Allen Henderson, administrator, and Orin M. Henderson, $6,000. It is true the special form to which the jury responded with Verdict No. 1 limited the award to the administrator to elements arising from physical pain and mental anguish suffered by Mrs. Henderson. The husband's damages for loss of companionship, and also expenses of the estate for medical care, funeral costs, etc., were not enumerated. The special form submitted was: "If you find for plaintiffs, Allen Henderson as administrator of the estate of Mrs. Mamie Henderson, deceased, and Orin M. Henderson, because of the damage, if any, proximately suffered by Orin M. Henderson, if any, because of the injuries and death of his wife, the form of your verdict shall be . . ."

After the verdicts had been returned the court held that the administrator had joined the husband in the suit in the capacity of a trustee,[4] as shown by footnote.

It is our view that the interests of husband and administrator did not create the relationship of trustee and beneficiary, and this judgment must be reversed. The

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[4] The order of the court was: "Allen Henderson, administrator of estate of Mrs. Mamie Henderson, deceased, joined with plaintiff Orin M. Henderson in his action for damages for wrongful death of his wife, Mamie Henderson, resulting in loss of services and companionship or help of the wife, Mamie Henderson; and this was done by said Allen Henderson, as administrator, in capacity of and as trustee for Orin M. Henderson and for the benefit of Orin M. Henderson but the court finds and declares that the aid and presence of Allen Henderson, administrator of the estate of the wife of Orin M. Henderson, is unnecessary and the presence or aid of said Allen Henderson in capacity as such trustee for Orin M. Henderson is not essential to Orin M. Henderson, nor to the prosecution by Orin M. Henderson of his action for damages for the wrongful death of his said wife. And the said Allen Henderson, administrator, is excluded and removed from the cause and action and proceedings of and by and for Orin M. Henderson against defendants because of the wrongful death of his wife and the consequent loss of her services, companionship and help."

administrator, as such, could sue for the estate. The husband could be joined in the action in order that he might recover whatever damage he had sustained through loss of his wife's companionship, etc., but interest of the administrator and interests of the husband were different. It was not the duty of the administrator to sue for damages sustained by Orin M. Henderson. Inclusion of the administrator in the special form was misleading and the error could not be cured by the court's judgment finding that in fact the administrator was trustee.

The judgments are not excessive. Mrs. Henderson was horribly burned and suffered excruciating agonies. Relief through death did not occur for thirty hours. Cases cited by appellants[5] showing recoveries of smaller sums in suits where facts are somewhat analogous are not authority for the proposition that if larger recoveries had resulted the appellate court would have reduced them.

In addressing the jury, one of counsel for appellees said: "I believe, in this opening statement, I could do no better than to begin by reading to you the pleadings—complaint and answer in full, so you may understand the questions in issue." The complaint and amendments were then read, and counsel remarked: "And now, gentlemen of the jury, so you may understand exactly the points in issue, the defendant makes and files this answer."

No objection was made by appellants when it was stated that the pleadings were to be read. The answer contained an offer in the nature of a compromise by payment of $50.[6]

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[5] *Singer Mfg. Co.* v. *Rogers*, 70 Ark. 385, 67 S. W. 75, 68 S. W. 153; *Houston Oil Co.* v. *McGuire*, 187 Ark. 293, 59 S. W. 2d 593; *St. Louis, etc., Ry. Co.* v. *Prince*, 101 Ark. 315, 142 S. W. 499; *St. Louis, etc., Ry. Co.* v. *Adams*, 74 Ark. 326, 85 S. W. 768, 86 S. W. 287, 109 Am. St. Rep. 85.

[6] That part of the answer pertinent here is: "Defendants deny that they are liable to the plaintiffs in any sum whatsoever. But, in order to stop this litigation the defendants here and now offer to confess judgment by way of compromise, in favor of plaintiffs in the sum of $50, plus all costs accrued to date, on condition that said offer be accepted before further costs accrue; otherwise, the defendants will insist that they are under no liability herein."

Appellants moved for a mistrial. There was no error in overruling the motion. Although that part of the answer making the compromise offer ought not to have been read to the jury, yet appellants knew what their answer contained; knew that if it should be read the compromise offer would be brought to the jury's attention. Objection should have been made when it was stated the answer would be read. This might properly be termed a negatively invited error, and is not controlled by the cases cited.[7]

We have discussed, *supra,* the right of the father as natural guardian and next friend of the minor to sue in their behalf. It is not inappropriate in this opinion to say that the practice of submitting special interrogatories and requiring special verdicts—particularly in cases similar to the instant one—should be encouraged.

Judgment No. 2 is reversed. As to other recoveries aggregating $19,000, the judgments are affirmed.

TRUITT *v.* BAKER.

4-5298 122 S. W. 2d 467

Opinion delivered December 12, 1938.

W. F. Reeves, for appellant.

S. W. Woods, for appellee.

BAKER, J. On September 2, 1933, a suit was filed in the justice of peace court of St. Joe township, Searcy

[7] Cases cited by appellants in support of their contention that it was error for the defendant to read the answer are: *Bates* v. *Blocker,* 175 Ark. 891, 1 S. W. 2d 11; *Geyer* v. *Western Union Tel. Co.,* 192 Ark. 578, 93 S. W. 2d 660; *Tri-State Transit Co.* v. *Miller,* 188 Ark. 149, 65 S. W. 2d 9, 90 A. L. R. 1389.

county, Arkansas, against R. F. Truitt. He was sued upon a note dated June 24, 1933, due ninety days after date, in the sum of $109, payable to Hulda Baker, the appellee. At the time this suit was instituted F. F. Baker, son of Hulda Baker, took the note to a justice of the peace for the institution of the suit. A writ of attachment issued and was served by seizing or attaching household goods belonging to the defendant, Truitt. Truitt executed a delivery bond which was signed by W. P. Campbell and W. D. Smith as sureties. After the bond was made, the property was released and moved out of the state. Before the case was tried defendant appeared and by motion asked a dismissal of the action for the reason that the case had been docketed in the justice of the peace court in the name of F. F. Baker against Truitt, instead of the real plaintiff, Hulda Baker, who was the owner of the note and for the reason that the affidavit for the attachment did not appear to be sworn to, that is, a signed jurat was not attached thereto. The bond was executed by F. F. Baker, as the sole maker, or surety, in which he obligated himself to pay all costs that might accrue in the case and pay all damages done the defendant in the cause of action. F. F. Baker stated under oath that his mother was due the $109 for rent and that the said Hulda Baker authorized him to act as agent.

It appeared upon the trial that F. F. Baker had no interest in the case and this is a ground relied upon by appellants for dismissal and numerous authorities are cited as showing that the judgment rendered in favor of Hulda Baker was after the substitution of Hulda Baker as the new plaintiff, in whose favor judgment was announced.

We have given due consideration to all the authorities cited. In fact we have just considered within the last few days practically the sole question involved here, that is the substitution of one plaintiff for another. *Floyd Plant Food Company* v. *Moore, ante,* p. 259, 122 S. W. 2d 463.

The difference in this case and the one just mentioned is the fact that in this matter now under consideration there has not been really a substitution of one party

for another as plaintiff. We have already called attention to the fact that this suit was one begun in the justice of the peace court. Statutes do not require that any pleadings should be filed for the institution of such an action. We presume the note was filed. The record seems to indicate that fact. If it were, this served as a pleading and showed upon its face that Hulda Baker was the true plaintiff. The bond made for the attachment showing that F. F. Baker was acting as agent and this was notice that the real party in interest was Hulda Baker. When analyzed, the only fault found with the judgment rendered in this case is that the proceedings do not follow an approved pattern. There is no objection that exact justice was not done. It would be surprising, indeed, if we were not able to find any authorities to fit this case. We call attention to one: *Gunter* v. *Earnest,* 68 Ark. 180, 56 S. W. 876. That was a replevin suit instituted in a justice court by a husband and it was tried on the theory that he was suing on behalf of his wife. The court held there that the affidavit was amendable upon appeal, the one in which the husband had sworn that the property was his own, to show that the property belonged to his wife and that he was acting as her agent. So in this case if this suit were instituted, as in fact it was, on behalf of Hulda Baker, that matter could be made to appear by an amendment, although it had been erroneously docketed by the justice of the peace. Pope's Digest, § 1463.

The other questions in this case become practically unimportant upon a decision that Hulda Baker was the real party in interest and that the suit was not improperly brought or maintained. Section 579 of Pope's Digest provides that "if the plaintiff shall recover against the defendant, and the attachment shall have been discharged upon the execution of a bond, as provided by § 562, then the court shall render judgment against the defendant and his sureties in said bond for the amount recovered and the cost of the suit."

So we hold that the objections made are almost purely technical without substantial merit.

Judgment is affirmed.

STANDARD MUTUAL BENEFIT CORPORATION *v.* STATE.

4-5296 122 S. W. 2d 459

Opinion delivered December 12, 1938.

Carmichael & Hendricks, for appellant.

Byron Goodson and *J. F. Quillin,* for appellee.

MEHAFFY, J. This action was instituted by the state against the Standard Mutual Benefit Corporation. The complaint alleged that the appellant had, through one Francis A'Hearn, sold a policy of insurance to Mrs. Mary Townsend of Mena, Arkansas, and collected the advance premium; that this constituted the doing of business within the state of Arkansas without having appointed an agent and established an office, and that this subjected the appellant to a fine of $1,000; that appellant is a corporation organized under the laws of Florida, having its principal office in the city of Jacksonville; that it had not complied with the laws of the state of Arkansas relative and prerequisite to the lawful transaction of business in this state; had appointed no agent for service in the state, and has no agent for service; that A'Hearn solicited Mrs. Townsend to take out insurance with said corporation, and that she did take out a policy and that said transaction was contrary to and in violation of § 2247 of Pope's Digest. It asked for judgment in a sum not less than $1,000.

The appellant, without entering its appearance for any other purpose, filed motion to quash service, stating

that it had never attempted to qualify to do business in Arkansas; had no agent within the state, nor had it an office in Polk county, Arkansas; that it has not sold any insurance nor issued any policy in reference to the laws of Arkansas, nor was it depending upon the state of Arkansas for any benefit therefrom; that it has not made any contract or agreement with the state of Arkansas for any service rendered or to be rendered, nor for any other purpose, and has not been doing any business whatever in the state of Arkansas; that the court had no jurisdiction, and asked that the service be quashed and the suit dismissed.

The affidavit of H. W. Piper, president of the corporation, was attached to the motion to quash. The appellant, also, filed answer preserving its objections mentioned in the motion to quash.

Mrs. Mary Townsend, a witness for the state, testified in substance that she lives in Mena, Arkansas; has lived there nine years; is seventy years of age; that she knew a man named Francis A'Hearn and he was the insurance agent who came to her house and sold her a policy of insurance in November, 1936, and the name of the insurance company was Standard Mutual Benefit Corporation of Jacksonville, Florida, and that she signed the application; she paid him three dollars; the policy was delivered to her in Mena; she paid one dollar a month for more than a year; she sent the money in their self-addressed envelopes, and they sent her receipts; she does not have the receipts; when she could not pay the premiums she borrowed the money from her children, and when she found out it was a fraud she gathered up the receipts and the policy and burned them all. When asked how long she had known Francis A'Hearn she said he was just coming through the country, came to her house and sold her a policy; paid the premium by sending one-dollar bills in the insurance company's self-addressed envelopes; she sent a one-dollar bill every time.

Here the attorney for the state read in evidence questions 28, 29 and 30 of the deposition of H. W. Piper, as follows:

"28. State whether the Standard Mutual Benefit Corporation has any property in the state of Arkansas. A. No.

"29. State whether it has any place of business in the state of Arkansas. A. No.

"30. State whether it ever designated an agent in the state of Arkansas upon whom service might be had. A. No."

This evidence was offered by the state to show that the company had not obtained the right to do business in the state of Arkansas and had no agent upon whom service might be had.

The state rested, and the appellant moved the court to direct a verdict for it, which was overruled, and exceptions saved.

The appellant then introduced the deposition of H. W. Piper, who testified that he was 31 years of age, lives in Jacksonville, Florida, and is president of the Standard Mutual Benefit Corporation; has been president since May 16, 1936; he never knew Francis A'Hearn or any person by the name of A'Hearn; that he does not know Mrs. S. B. Reed of Mena, Arkansas.

Here the state asked the court to direct the jury not to consider any testimony with reference to the S. B. Reed policy except for throwing light on whether the defendant company engaged in doing business in the state of Arkansas. The attorney for appellant agreed to this, and thereupon the court stated to the jury. "You will only consider testimony with reference to Mrs. Townsend."

The appellant continued then to read the deposition of Mr. Piper, who testified that he did not know Mrs. Townsend of Mena. Mrs. Reed's policy was No. A 50,560 for $1,000, dated September 18, 1936. The witness testified all policies in Series A, 50,000, were issued from a mailing list secured by the corporation on July 1, 1936; that these policies were in force and paid for one month in advance, and the only requirement to keep these policies in force was the payment of the next monthly premium of one dollar when it came due; no applications were received; the policy was issued and mailed to Mrs.

Reed from a mailing list mentioned above; there was a policy issued to Mr. Reed also, and the two policies were mailed together; witness did the mailing. No premiums were ever paid on these policies. Francis A'Hearn was never the agent of the Standard Mutual Benefit Corporation of Florida and had nothing whatever to do, directly or indirectly, with the transaction with reference to these policies; he has never been directly or indirectly in the employ or service of the insurance corporation. The appellant was licensed to do business on June 10, 1936. In order to create a large membership with the most possible speed the corporation purchased a mailing list containing 20,000 names of people that had mutual insurance or were definitely interested in mutual insurance; the company issued policies to these people and no charge was made to them for the first month's premium, and the policies were mailed, together with a circular letter, which read as follows:

"Would you like to add a maximum of $1,000 to your estate for the protection of your loved ones?

"We thought you would, so we have taken the liberty of issuing in your name one of our wonderful life protection policies that is so modestly priced as to meet the demands of everyone's pocket book.

"The Standard Mutual Benefit Corporation is licensed under the strict supervision of the Department of Insurance of the state of Florida, and its guaranty reserve fund on deposit with the state treasurer, thus assuring policyholders that policy provisions and benefits will be fulfilled at all times.

"This policy comes to you at no cost. As a special favor to a select few, we have omitted the customary application fee. The policy is now in force, subject to policy provisions, and your monthly assessment of one dollar ($1) will not be due until..... Prior to this date you will receive a payment notice card with a self-addressed envelope. Don't let your family suffer from your carelessness in time of need when protection can be procured so cheaply.

"Knowing you will take advantage of this wonderful offer and retain this liberal protection, we take this opportunity of welcoming you among our many members."

A copy of the policy mailed to Mrs. Reed was introduced in evidence, also copy of charter and original by-laws. Mr. Piper's deposition then continued:

Interstate business, then, was carried on by direct mail by appellant's authority; appellant has no agents or branch offices in any state outside of the state of its incorporation, and it has no property nor place of business nor designated agent in the state of Arkansas; has never received any communication by mail or otherwise from Mrs. Reed, S. B. Reed or Mary Townsend; appellant is licensed under the Insurance Department of the state of Florida, and all policies are issued and contracts consummated in Florida.

There was, also, introduced a permit by the insurance department of the state of Florida.

Mrs. Townsend, being recalled, testified, when asked about the policy being delivered to her in Mena, that it was put in her mail box on her porch; that she received it through the mail; it came from Jacksonville, Florida; she could not be positive whether it was mailed at Jacksonville or whether somebody put it in her mail box; there was no letter with it; she found it in her mail box after A'Hearn was at her house, and she paid him three dollars. The circular letter introduced in evidence was not with her policy. She told A'Hearn that her age was 68.

This was all the evidence, and the court denied appellant's motion for a directed verdict, and read to the jury §§ 2247, 2250 and 2252 of Pope's Digest, and gave other instructions; but the view we take of the case makes it unnecessary to discuss the instructions.

The appellee, in its brief, states clearly the issues involved in the case. It says: "There was, of course, only one issue in the case; did the defendant company do business of an intrastate character in Arkansas? This was the only question raised by the pleading and the only issue developed by evidence."

Appellee relies solely on the transaction with Mrs. Townsend to show that appellant did intrastate business. Appellee concedes that the service in this case would not be sufficient to give the trial court jurisdiction of the

person of the defendant if the acts complained of were interstate, and states: "If the state's evidence is believed, the transaction was intrastate; if the defendant's evidence is believed the transaction was interstate."

If there were any evidence of a substantial character that A'Hearn was the agent of appellant, the state would be correct; but there is no evidence that A'Hearn had any authority to act as agent for appellant at any time. The record does not disclose who A'Hearn is, where he is, nor anything about him except Mrs. Townsend's testimony that he claimed to be the agent of the appellant, had forms of the appellant, sold her a policy, and collected three dollars. She destroyed the policy and the receipts. Her testimony is insufficient to establish the agency of A'Hearn.

There is no principle of law better established than the principle that you can neither prove agency nor the extent of an agent's authority by his declarations or actions. Mechem on Agency, Vol. 1, § 285.

The rule is stated in the above citation as follows:

"The authority of an agent, and its nature and extent, where these questions are directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself or make himself agent merely by saying that he is one. Evidence of his own statements, declarations or admissions, made out of courts, therefore (as distinguished from his testimony as a witness), is not admissible against his principal for the purpose of establishing, enlarging or renewing his authority, nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise. His written statement and admissions are as objectionable as his oral ones, and his letters, telegrams, advertisements and other writings cannot be used as evidence of his agency. The fact that the agent has since died does not change the rule. Where his authority is in writing he cannot extend its scope by his own declarations. His acts and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence."

American So. Trust Co. v. *McKee,* 173 Ark. 147, 293 S. W. 50.

The appellee concedes that if the act of the company for which judgment was sought and obtained had constituted interstate business, the trial court could not have acquired jurisdiction under service upon the State Auditor. But it is contended by appellee that not only did A'Hearn represent that he was the agent of the company, but that he had appellant's application forms, and this, together with the other circumstances testified to by Mrs. Townsend, was sufficient to establish A'Hearn's agency. Appellee relies on the case of *Massachusetts Mutual Life Ins. Co.* v. *Brun,* 187 Ark. 790, 62 S. W. 2d 961, but in that case the court said:

"The insurance company had given power of attorney to release the former deed of trust, and had also given Bailey power of attorney to satisfy or release other deeds of trust. Bailey had been connected with the insurance company for 7 or 8 years. When this suit was filed, Bailey made the affidavit attached to the complaint, as local agent of the insurance company. He testified that he made a mistake in signing the affidavit that way; that he was only their rental agent.

"The insurance company furnished Bailey with forms for application of loans. The insurance company had no other representative in Fort Smith except Bailey. It called on him to make appraisement of property. Whenever a loan was made by the insurance company, the papers were sent to Bailey in order that he might have them executed and recorded. In fact, everything Bailey did in connection with this loan is shown by the evidence to have been done as a representative of the insurance company, and not as a representative of the borrower."

In the instant case, however, there is no evidence that A'Hearn had ever been connected with appellant. There is no evidence that the company furnished A'Hearn any forms. There is no evidence that the company ever had any communication of any sort with A'Hearn or that the company or any of its officers had ever heard of him.

The appellee calls attention to the case of *Jerome Hardwood Lbr. Co.* v. *Davis Bros. Lbr. Co.,* 161 Ark. 197,

255 S. W. 906. The question there was whether J. M. Wells was the agent of the appellant and the court said: "The only proof of such agency and authority is the letters and telegrams in the record, signed with the appellant's name by J. M. Wells. It was admitted by the parties that the appellant succeeded to all of the assets of the Bliss-Cook Oak Company at Jerome, Arkansas. A witness testified that he worked for the appellant at Jerome in 1918 or 1919, and that, while he was at work there, appellant was operating under the name of Bliss-Cook Oak Company, and witness knew J. M. Wells, who was employed by the appellant as sales manager. The testimony of the witness further showed that he left Jerome about July 1, 1919." There is no such testimony in the instant case. Mrs. Townsend testified that A'Hearn was "just coming through the country" when he came to her house and sold her the policy. There is no evidence that Mrs. Townsend ever saw A'Hearn at any other time. She had never seen him before that time and has never seen him since. She testified that she sent the money to the company, a one-dollar bill each month in the company's self-addressed envelopes. She does not testify that she got these envelopes from A'Hearn; she does not testify where she got them. The evidence is that the policy was delivered to her by being deposited in her mail box on her porch. She does not know whether it was mailed from Jacksonville, Florida, or whether somebody put it in her mail box. She says it was in her mail box after A'Hearn was at her house, but she does not state how long afterwards.

The undisputed evidence shows that the company mailed out many policies and that Mr. and Mrs. Reed of Mena received policies in the mail. Mrs. Townsend also probably received her policy in the mail in the same manner and without connection between it and the transaction with Mr. A'Hearn. When she received the policy she took it to her attorney, who advised her not to have anything to do with it. If she had dealt with the agent and received the policy and paid for it, she, of course, might have taken it to the attorney; but it is much more probable that if she found the policy in the mail box and

knew nothing about it, she would have taken it to her attorney as she said she did. However, all questions of fact are settled by the jury's verdict if there was any substantial evidence to support the verdict.

Our conclusion is that there is a total lack of evidence either to show that A'Hearn was the agent of the company, or that the appellant ever did any intrastate business in Arkansas.

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

PEKIN COOPERAGE CO. *v.* STATE, USE PIKE COUNTY.

4-5289 122 S. W. 2d 468

Opinion delivered December 12, 1938.

Jerry Witt, for appellant.

Byron Goodson and *P. L. Smith,* for appellee.

SMITH, J. The prosecuting attorney of the ninth judicial circuit, of which Pike county is a part, filed an information in the Pike county circuit court, in which it was alleged that the Pekin Cooperage Company, a foreign corporation, had been doing business in Pike county

without complying with the statutes of this state authorizing foreign corporations to transact business within the state. An answer was filed denying all the material allegations of the information.

A jury was waived, and the court found that the defendant had operated a business in this state, and the sufficiency of the testimony to support that finding is conceded, but it is contended that competent and sufficient testimony was not offered that the defendant had failed to comply with the laws of this state authorizing it so to do. The correctness of this contention is the question presented by this appeal.

Upon this issue the following certificate was offered in evidence over the objection and exception of the defendant:

"Certificate
"State of Arkansas
"Department of State
"Little Rock

"C. G. Hall,
"Secretary of State.

"I, C. G. Hall, Secretary of State, of the state of Arkansas, and as such, keeper of the corporation records, do hereby certify that the records of this office show the Pekin Cooperage Company was not authorized to do business in this state during the years of 1936 and 1937. This company qualified December 28, 1898, and withdrew February 25, 1935.

"C. G. Hall,
"Secretary of State."

"Given under my hand and seal of office on this the 22nd day of March, 1938."

The contention was made at the trial below, and is renewed here, that this certificate was unauthorized by law, and was not competent and sufficient to establish the fact that defendant was not authorized to do business in this state.

To sustain the judgment of the trial court that this certificate was sufficient to support the finding that defendant had not complied with the law we are cited to § 5143, Pope's Digest, and to the case of *Austell* v. *Union*

Central Life Ins. Co., 175 Ark. 1143, 2 S. W. 2d 22. Section 5143, Pope's Digest, reads as follows: "Copies of any record, book, report, paper or other document on file with, or of record in, the office of any public officer or commission of the state, or of any county officer, or any excerpts from such record, book, report, paper or other document, when duly certified by the officer or the secretary of the commission in whose custody such record, book, paper or other document is found, shall be received in evidence in any court of this state with like effect as the originals thereof."

This section of the statutes does not render the certificate copied above competent as evidence, as it does not profess to be a copy of any record, book, report, paper, or other document on file with, or of record in, the office of the Secretary of State. On the contrary, it recites a negative fact, as to the truth and accuracy of which the defendant was afforded no opportunity to examine or cross-examine the person making the certificate.

Nor, in our opinion, does the Austell case, *supra,* support the ruling of the trial court. In that case the Union Central Life Insurance Company had brought suit to foreclose a deed of trust executed in its favor. The right of the insurance company to prosecute the suit was challenged upon the ground that it had not qualified under the provisions of § 1826, C. & M. Digest (§ 2247, Pope's Digest), to do a loan business in this state before entering into the contract in question. But the insurance company did offer in evidence a "Certificate of Compliance," executed pursuant to the provisions of §§ 6059 to 6065, inclusive, C. & M. Digest, (§§ 7779 *et seq.,* Pope's Digest), authorizing it to do business in this state as an insurance company, which sections required, among other things, that a copy of the charter and by-laws of the foreign insurance company be filed in the Insurance Department, and an inspection thereof disclosed that the corporation was authorized, "under the direction of its board of directors to invest the funds of the corporation, make all loans, and do such other business as the Board may direct." The very purpose of the certificate of compliance, there offered in evidence, was to show that the

insurance company had complied with the laws of this state authorizing it to do business within the state. It was issued to evidence that fact.

It is argued that we should take judicial notice of the fact that the defendant did not comply with the law authorizing it to do business in this state. We are cited to no case, nor to any statute, imposing this duty or conferring that authority. In the case cited and in other cases this court has taken judicial notice of certain public records which were in existence, but we must decline to enlarge our judicial knowledge to the point of knowing whether there are records in a public office. The theory upon which judicial notice or knowledge dispenses with proof of particular facts is based upon the maxim, "What is known need not be proved," but finite man cannot be expected to know what foreign corporations have not complied with the laws of this state authorizing them to do business within the state.

Whether defendant had complied with the law authorizing it to do business in this state was a question of fact, which might have been shown by the testimony of the Secretary of State, or a deputy having custody of his records. He might have been called as a witness or his deposition could have been taken, but he had no authority to make a mere certificate of a negative fact, the same not being a certified copy of any record in his office.

At § 980, chapter Evidence, 22 C. J., p. 838, it is said: "To prove a fact of record without the production of the record itself, a duly authenticated copy of the record or so much thereof as relates to the fact in question is required. A certificate by a public officer having the lawful custody of public records as to any fact appearing on the records of his office or as to any conclusion he may draw from an inspection of the records is not competent evidence, unless made so by statute. *A fortiori* the authority to make certified copies will not authorize a certification as to facts not appearing of record, or improperly inserted therein, or as to the purport of papers that are missing from the record. So, in the absence of a statute, a negative certificate by an officer will not be evidence

of the non-appearance of a fact on the records or of the absence of any entry, paper, or document from the records of his office, it being said that such negative proof requires oral testimony under oath of a search made and of its results."

In the case of *Driver* v. *Evans,* 47 Ark. 297, 1 S. W. 518, the question arose whether a tract of land there in controversy had been selected by the state of Arkansas as swamp land and conveyed by the state as such. In holding that the certificate of the State Land Commissioner stating this to be a fact was incompetent and insufficient proof that it was, the court held, to quote a headnote in that case, that "The purchase of swamp land from the state can be proved only by the certificate or deed of purchase, or, in their absence, by certified transcript of the records and official documents of the proper land office. The certificate of the State Land Commissioner of what the records in his office show is not admissible."

The case of *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553, involved the validity of a tax sale dependent upon the question whether the school tax had been voted and certified. The opinion points out how a negative fact may be proved, and it was done in that case by the deputy of the custodian of the records in question, who testified that he had made a thorough examination of the records in his office, and that the result of his search disclosed that there had been no certificate showing that the school tax had been voted in the school district in which the land was situated. This testimony could, of course, have been taken by deposition, and it was held sufficient, but that officer could not have issued a mere certificate to that effect, as no statute or rule of evidence permitted him to do so.

It was held in the case of *Railway Co.* v. *Fire Ass'n,* 55 Ark. 163, 18 S. W. 43, that until the contrary appears the law will presume that a foreign corporation doing business in the state has complied with the law authorizing it to do so, and as the contrary has not been made to appear in the instant case by any competent evidence

the judgment must be reversed, and the cause remanded. It is so ordered.

MOTOR TRUCK TRANSFER, INC., *v.* SOUTHWESTERN TRANSPORTATION CO.

4-5294 122 S. W. 2d 471

Opinion delivered December 12, 1938.

William W. Shepherd and *Charles W. Mehaffy,* for appellant.

Walter L. Brown, B. F. Batts and *Gaughan, Sifford, Godwin* and *Gaughan,* for appellee.

BAKER, J. There is an elaborate record made in this case wherein the appellant is referred to as the Motor Truck Transfer, Inc., and also is sometimes mentioned under the name of the manager, Mr. Garms. This appellant had been operating motor truck lines for a period of about seven years under a special permit during the whole time. The special permit was one under which the appellant was authorized to handle or move heavy machinery and building materials. There is much in the record that shows that this appellant was perhaps better fitted or equipped to handle extremely large tanks, heavy

road machinery and heavy or extraordinary bulky farm machinery. Without attempting to quote from the proof, it may be said that the service of the appellant company to its particular customers was generally satisfactory and the appellant, perhaps, did a considerable volume of business. During the last part of the period that it was operating, it handled all kinds of commodities found ready for transport throughout the territory in which it operated. Mr. Garms himself says that he was serving other motor companies or carriers by taking off of them the hauling of heavy articles. He was asked if the reason he did not engage in the transportation of other articles was because he had only a special permit and he stated that that was the reason for the injunction and why he had applied to the commission, asking for a permit and saying that "I want to abide by the law and meet the law and I want to be so they can't injunction me on some other terms, and if I don't haul general commodities it will be impossible to haul special commodities, and so far as I can see if I am to haul everything it would be general commodities. I didn't haul just one thing for one man. They were busy—hundreds of them—and couldn't get here—that wants my service. I could get lots of letters to that effect."

There may have been, and perhaps was, a demand for the kind of service rendered by Mr. Garms' corporation.

Our attention is called to the order made by the corporation commission which was sustained upon appeal to the circuit court. The provisions of law under which these appeals may be prosecuted are such that upon trial of the matters in issue upon the appeal from the corporation commission the circuit court is in no manner bound by the order of the commission and upon appeal from the circuit court, the matter is presented here upon the record made before the corporation commission, according to §§ 2019 and 2020, Pope's Digest, for trial of the same issues *de novo* and the proceeding is not essentially different from the rules of law in regard to appeals from chancery court decrees. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160; *Bryant* v. *Edgmon,* 192 Ark. 20, 90 S.

W. 2d 994. The legal effect of these provisions in regard to appeals is that as to the substantial rights of the parties we shall not be influenced or governed by the orders of the commission or judgment of the circuit court to reverse which appeals are presented. There can be no fair understanding, however, of the issues presented here unless it is recognized that the matter before us is not a mere petition for a license to operate. The court may not issue or grant licenses. It is a presentation of the issues to determine whether the commission making the order denying the license to the Motor Truck Transfer, Inc., should be sustained or overruled. That is a matter that has been argued here. Appellant argues that the commission was arbitrary; that its action was an unwarranted abuse of its discretion and that we should so declare and direct, by proper order, that proper license be issued to the appellant.

The appellees in this case are made up of different parties who have intervened, asked to be made parties to the proceeding, and who have offered substantial testimony to the effect that the territory that the Motor Truck Transfer proposes to serve is already amply provided for by the numerous truck organizations operating therein. The proof shows that they are operating only about 40 per cent. to 60 per cent. capacity and could take care of a considerably larger volume of business, if it were offered. Without any attempt at an analysis of all this volume of testimony we think our conclusion may be stated in a very short form.

The only substantial evidence that it is a matter of convenience and necessity that license should be granted to the appellant company is the fact that Mr. Garms, as the manager, through experienced and trained employees, is most likely better fitted than anyone else to handle heavy machinery and like products than any of the other motor transport organizations. It was licensed to handle and transport such commodities under the special license under which it operated before this litigation was started.

It does not follow, however, as a necessary conclusion that license should be granted to appellant. Others might easily prepare themselves to handle this particular

class of freight or commodities. It is shown by substantial evidence and not denied that the appellant company, prior to the time of this litigation, was not confining itself to the class of commodities which it was licensed to move or haul, but was seizing upon and soliciting every class of freight usually transported in the community in which it operated. This it did not have a right to do under the special permit. To that extent it did not obey the rules and regulations of the commission, but refused to be bound by them. Moreover, for some reason it operated for a time without the bond or insurance contract required to be carried by it. Though repeatedly notified by the commission to furnish or supply such bond or insurance, it refused, or, at least, failed to do so. This was the public liability insurance that every motor truck operator is required to provide, when it begins operation, or, at least, within a reasonable time thereafter. The Motor Truck Transfer refused to be bound by fixed tariffs and would not, or, at least, did not file with the corporation commission, as required by its rules any tariff for freights, to be charged, and it was the arbitrary action or refusal to observe these salutary rules or regulations that caused the appellant company to be cited for a hearing. The fact that the appellant company did all these things is not excused by any explanation made.

No emergency is shown, nor does the appellant company offer any other excuse.

There is no contention by it that such regulations are arbitrary, illegal or unenforceable. Hence, there is no necessity of a consideration of such rules and regulations except to say that such rules and regulations are generally made and enforced in the interest of the public as a primary matter and for the protection of other carriers of like kind whose business is subject to the same form and character of regulation. It should take no argument to determine that those engaged in this class of business were entitled to a substantial return upon the investment made, for the labor employed, and as compensation for ability to create and properly operate a public service organization. Regulation is necessary when public roads are used by these transportation agencies. They

were not built as arteries for the moving of freight alone, nor may they be used freely on all occasions and everywhere by those who refuse to observe the rights of others, on the same public highways.

Without attempting to be too critical of the conduct of others, it appears to us that the only arbitrary action that has been taken in this whole controversy arises out of the conduct of Mr. Garms and his corporation in their refusal to be bound by the regulatory provisions of the commission. The right to make rules and regulations necessarily implies a power that may be exercised for their enforcement.

It is argued here that the appellant company has made rather heavy investments to perform the particular service which it has heretofore been licensed to do; that the action of the commission in refusing to issue a new, and what we presume is desired, general license is not only arbitrary, but it is the taking of property, or what amounts to the same thing, a destruction of appellant's property, to refuse to permit it to go on. We do not think so. Most probably had the appellant company been obedient to the rules and regulations made for the benefit of the public and for its own protection, it might yet have been operating. If its property has been sacrificed it has been the victim of its own conduct.

We do not have to go as far in deciding this case as the court did in supporting the commission's rules and regulations in the case of *St. L., I. M. & S. Ry.* v. *State,* 99 Ark. 1, 136 S. W. 938. There the court merely determined that, though it might differ with the commission, it would support the commission's order unless it was clearly arbitrary and unreasonable.

We recently had occasion to consider a matter similar to the one here presented. *Jernigan, Bank Commissioner,* v. *Loid Rainwater,* 196 Ark. 251, 117 S. W. 2d 18. While this matter covers an entirely different economic activity, it involved the regulatory power and provisions of the Securities Division of the Banking Department and in that respect is similar to the matter under consideration. The petition for the granting of license called for the exercise of discretion reposed in the bank commis-

sioner. We there said: ". . . He, in the first instance, and we, upon appeal, may review this action to determine whether there has been an arbitrary decision, or an abuse of discretion, but we should regard and uphold the decision of the Securities Division of the State Banking Department unless it be made to appear that there was an abuse of discretion or an arbitrary decision."

The authorities there cited, we think, support the conclusion we announced.

The announcement just quoted is a proper criterion for our action here. The judgment of the court is sustained and affirmed.

ARKANSAS GENERAL UTILITIES COMPANY *v.* WILSON, ADMR.

4-5307 122 S. W. 2d 956

Opinion delivered December 19, 1938.

Isgrig & Robinson, for appellant.

Will J. Irvin and *Russell J. Baxter,* for appellee.

SMITH, J. Late in the afternoon of May 8, 1937, James Dodd, a man forty-five years of age, was walking towards the business section of Wilmar, Arkansas, upon a dirt sidewalk in what is known as the negro quarter in that town, when he came in contact with one of appellant's electric wires, and was killed by the electricity with which the wire was charged. The wire was broken between the two poles to which it had been attached, and was charged with 2,300 volts of electricity. It is not denied that deceased was killed by coming in contact with one of appellant's live electric wires, but the suit brought by his administrator was defended upon the ground that, during a violent thunderstorm which occurred that afternoon, the wire had been struck by a flash of lightning which caused it to fall to the ground, leaving a part attached to each of the poles upon which it had been suspended. There was testimony to the effect that a cross-arm on a pole to which the wire was attached presented the appearance of having recently been struck by lightning, the wire being broken between the cross-arm and the next pole. There was opposing testimony to the effect that a sliver in the cross-arm "was out at the end, like where you run an auger through a piece of wood and the splinters stick out."

The theory upon which the case was tried and submitted to the jury is reflected in instruction numbered 1, which reads as follows: "You are instructed if you find from a preponderance of the evidence in this case that on May 8, 1937, the defendant, Arkansas General Utilities Company, owned, maintained, and operated in the town of Wilmar, Drew county, Arkansas, a distribution system of electric lights, and that it negligently and carelessly permitted a certain of its wires charged with electricity in the McKinstry quarters of said town to become slack, sagging and uninsulated, and if you further find from a preponderance of the testimony in this case that solely on account of such sagging and uninsulated condition, if any, of said wires, two came in contact, causing one to break and fall to the ground or the

sidewalk where the public was accustomed to travel, and that the plaintiff's intestate, without any fault or carelessness on his part, came in contact with said fallen wire and was killed by the current with which said wire was charged proximately from the result, if any, of the sagging, slack and uninsulated condition of said wire, then you will find for the plaintiff."

This and other instructions to the same effect submit to the jury the questions whether the wires were slack or sagging and were uninsulated, and their necessary purport is that the wire should have been kept taut and should have been insulated, and that the failure so to do was negligence. This theory of the case is shown by the following question and answer asked W. T. Alexander, an electrician, who testified in appellant's behalf as an expert witness: "Q. Now, Mr. Alexander, even though such electric wires are allowed to become loose and sag to such an extent that a wind were to blow them together, even under those circumstances would it be possible for the wires to short and burn in two if they were properly insulated? A. It would not."

Appellee's testimony was to the effect that the insulation on the wires had become ragged, so that parts of the wire were not insulated, and that they had sagged or slackened to the extent that the wind might blow them together so that they would touch. The testimony was, also, to the effect that the wires were suspended on poles 22 feet above the ground.

The instructions apparently tell the jury that the failure to insulate was an act of negligence, and they were specifically objected to on that ground. But this is not an absolute duty, to be performed under all circumstances. In the recent case of *Arkansas Power & Light Co* v. *Cates,* 180 Ark. 1003, 24 S. W. 2d 846, it was said that "This court has recently held: 'There is involved here no question about the duty of the electric company to insulate all its wires. The authorities appear to be unanimous in holding that there is no such duty, but the cases do hold, as we understand them, that this duty must be performed, or other sufficient safety methods employed to prevent contact with wires conveying the

current at such places as danger of contact may reasonably be anticipated.' *Hines* v. *Consumers' Ice & Light Co.*, 168 Ark. 914, 272 S. W. 59; *Morgan* v. *Cockrell*, 173 Ark. 910, 294 S. W. 44; 9 R. C. L. 1213, § 21."

In the case of *Arkansas Power & Light Co.* v. *Hoover*, 182 Ark. 1065, 34 S. W. 2d 464, it was said: "We have repeatedly held that it was the duty of the company to keep its appliances in safe condition, and that either the wires must be kept insulated, or must be so located as to be, comparatively speaking, harmless. If the company does not choose to properly insulate a deadly wire of its maintenance, it must place the same under ground, at a high altitude, or at some inaccessible place." Stringing the wire twenty-two feet above the path would appear to be placing it at an inaccessible place, where insulation would not be required, as no one would likely come in contact with it in that position. We think, therefore, that it was error to predicate negligence upon the failure to insulate.

However, if the wires were not insulated, it became and was the duty of the appellant to use the commensurate care to see that these uninsulated wires did not come in contact with each other, and, if it negligently failed to discharge that duty, it would be responsible for the consequences of its negligence.

The testimony is sufficient to present the issue for the consideration and determination of the jury whether the wires had been properly installed, and, if so, whether there had been negligence in failing to maintain them in that condition; and, in the determination of that question, it would not be improper for the jury to take into account the fact that the wires were not insulated.

For the error indicated the judgment must be reversed, and the cause will be remanded for a new trial.

HUMPHREYS and MEHAFFY, JJ., dissent.

HUMPHREYS, J. (dissenting). The judgment in this case was reversed because a majority of the court interpreted instruction No. 1 and other like instructions as telling the jury that unless the wires were insulated and kept taut the failure to do so constituted negligence on the part of appellant, the Arkansas General Utilities

Company. In other words, that a duty rested upon appellant to do both these things in order to escape liability. I do not think such was the purport of instruction No. 1 or any other instruction given by the court. The purport of the instructions was to tell the jury that if the sagging and uninsulated condition of the wires was the sole cause of the injury then appellant would be guilty of negligence and responsible for the death of deceased. There is no question that the wires came in contact, burned in two and fell to the ground where appellee, without fault on his part, came in contact with them and was killed on account of the current they carried. The undisputed evidence shows that the wires were properly insulated when installed and, not only so, but that they were taut and hung 22 feet above the ground. There is much evidence in the record to the effect that appellant not only permitted the insulation on the wires to become worn and ragged, but that it permitted them to sag so that they might be blown together, burn in two and drop to the ground and endanger the life of any one who came in contact with them. This court laid down the rule in the case of *Arkansas Power & Light Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. 2d 846, and re-announced the rule in the case of *Arkansas Power & Light Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464, to the effect, in substance, that a company maintaining high-power lines must either insulate them or it must place them under ground, or at a high altitude, or at some inaccessible place and that a failure to do so constituted negligence and, also, that such duty rested upon an electric company to maintain its wires in a safe condition. Under the rule announced in the cases cited it was appellant's duty either to maintain the insulation in good repair or else to maintain them in a taut condition and in such position that they would not contact each other and burn and fall on the ground. If the electric company had properly maintained the insulation or had properly maintained taut wires 22 feet above the ground it would not have been negligent in the installation or maintenance thereof. Proper maintenance was just as important as proper installation in order to prevent injury to persons who might come in contact with

them without fault on their part. It must either maintain the insulation or else maintain the wires in such position and condition as to prevent them from contacting each other and burning and falling to the ground so as to endanger passers-by. Under the situation in the instant case, appellant would have been liable for a failure to perform its duty in either respect and the instructions complained of met the requirements of the rule as applied to the facts herein.

I think the majority have misconstrued the meaning of the instructions or, at least, have interpreted their meaning differently from what I do or from the meaning the jury had a right to give them. In my view of the meaning of the instructions as applied to the facts, the judgment herein should have been affirmed instead of being reversed and remanded for a new trial without taking into account the worn and ragged condition of the insulation on the wires.

Mr. Justice MEHAFFY authorizes me to state that he concurs in this dissenting opinion.

MISSOURI PACIFIC RD. CO., THOMPSON, TRUSTEE, *v.* HAYES.

4-5313 122 S. W. 2d 945

Opinion delivered December 19, 1938.

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

Rains & Rains, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered against appellants in favor of appellee in the circuit court of Crawford county for injuries received to two head of his stock while attempting to cross a bridge designated as No. 14 on appellants' main line of railroad at and in Greenwood Junction in Sequoyah county, Oklahoma. It was alleged in the complaint that appellants constructed fences at the junction so as to create a pocket into which stock might wander without any opening for them to get out except to cross bridge No. 14 which had no floor upon which animals might walk except boards on one side for the use of its employees or other persons who might cross same. It was particularly alleged that no stock guards were erected at the entrance of the pocket to keep stock from walking into it, and that shortly after the mare and mule belonging to appellee entered this pocket a northbound train of appellants pulled into Greenwood Junction, and frightened the stock and caused them to run into the north end of the pocket and that in attempting to cross the bridge, they fell into it, and the mare broke her left hind leg, and the mule skinned and sprained its legs.

The main defenses interposed were that the location of the bridge involved and referred to in the complaint was within the yard limits and station grounds at Greenwood Junction, Oklahoma, and for that reason the right-

of-way fencing statutes of the state of Oklahoma did not apply to the case, since, under said law appellants were not required to fence said grounds and yards; and the denial that after the stock were discovered in the alleged pocket, a northbound train of appellants frightened the stock and caused them to run to the north end of said pocket and attempt to cross the bridge.

After the evidence was introduced appellants requested a directed verdict in their favor which was refused by the court, appellants' theory being that under the undisputed evidence no liability was shown, and that the judgment should be reversed, and the cause dismissed.

The accident happened on the night of the 16th of October, 1937, after the animals had entered upon the right-of-way of appellants through an opening in the fence complained of. They had gotten out of a pasture owned by appellee, and had wandered about a mile and a half from his home along a public road running across appellants' main line, and just before they were injured were trespassing upon appellants' right-of-way. The injury occurred in the state of Oklahoma, and the Oklahoma law governs as to any liability on the part of appellants.

Section 11966 of the Oklahoma Statutes of 1931 provides: "It shall be the duty of every person or corporation owning or operating any railroad in the state of Oklahoma to fence its road except at public highways and station grounds with a good lawful fence."

It will be observed that in the state of Oklahoma a corporation owning or operating a railroad therein is required to fence its road except at public highways and station grounds. In construing the statute it was said in the case of *A. T. & S. F. Ry. Co.* v. *Huston,* 111 Okla. 274, 239 Pac. 472, that: "When animals come upon a railway track at a place not required by law to be fenced, such as station grounds, the whole duty of the railway company is to use ordinary care and diligence to avoid injuring them after discovering their peril." And in the case of *Davis* v. *Wyskup,* 97 Okla. 239, 223 Pac. 357, it is said: "It is a well-settled rule that the only duty resting

upon a railroad company is to use ordinary care to prevent injury to trespassing animals, after the discovery of their presence and position of danger.''

Under the aforesaid section of the statute and the construction placed upon it by the Supreme Court of Oklahoma, there could be no liability to appellee by appellants, unless appellants failed to use ordinary care to prevent injuring the animals after they were discovered in a perilous position.

There is no lookout statute in Oklahoma, and no statute raising a presumption of negligence from the mere fact that it killed trespassing animals in the operation of its trains.

Since appellee's animals were trespassing upon appellants' right-of-way at a place where appellants were not required to fence against them, we must look to the record to see whether after discovering the animals in a perilous position they used ordinary care to prevent injuring them.

The record does not reflect the time of day or night the mare and mule entered upon the right-of-way of appellants, no one having seen them until they were seen by the engineer, M. C. Miller, who testified, in substance, as follows: He was on the engine on the night of October 16, 1937, when a mare and mule got on bridge or culvert No. 14, at or in Greenwood Junction in Oklahoma which was not very far from the depot. He first stopped his engine near the depot, and he and the crew remained at that point ten or fifteen minutes without moving the engine. At that time they did not see the mare and mule, nor did he see them until he got back in the cab and started to move it at which time he observed them near the bridge or culvert on the left side of the track walking upon the track and onto the bridge through which the mare fell. The mare walked the length of the bridge before she fell, and the mule walked to the opposite end, and when the mare did not get up the mule turned and went back. He then moved the engine up close to the bridge so that he and the crew could have light to take the mare out of the bridge.

We think the reasonable inference deducible from the engineer's testimony is that after he discovered the animals approaching the bridge, and practically upon it he did not continue to move the engine, but after the mare fell through the bridge he moved the engine up close to it so that the crew might have light to get her out. The culvert or bridge was only a short distance from the depot where the engine had been standing. After starting the engine and discovering the animals, the only thing the engineer could do to prevent injuring them was to wait and see whether they would succeed in crossing the bridge without falling through. During the interval the mule did succeed in walking across the bridge and returning without falling through, but the mare was not so fortunate. She fell through and broke a leg. Had the engineer blown the whistle or sounded the bell or continued to move the train the noise would likely have frightened the animals, and cause them to run across instead of walk across the bridge. Of course, running across the bridge would have enhanced their perilous position. We think in the exercise of ordinary care to prevent injuring the animals the engineer did the practical and reasonable thing to wait and see whether the animals would safely clear the bridge. Certainly, after the mare failed to do so and got caught in the bridge, the sensible thing for the engineer to do was to move the engine up closer to the bridge to light it up so the crew might get the mare out and off of same.

On account of the error in not instructing a verdict for appellant, the judgment is reversed, and the cause is dismissed.

MISSOURI PACIFIC RD. CO., THOMPSON, TRUSTEE, *v.* SULLIVAN.

4-5316 122 S. W. 2d 947

Opinion delivered December 19, 1938.

R. E. Wiley and *Henry Donham,* for appellant.

Tom W. Campbell, W. F. Denman and *Pace & Davis,* for appellee.

HOLT, J. Appellee, Martin Sullivan, filed suit in the Nevada circuit court against appellants for injuries he received on account of the alleged negligence of appellants, when he fell through a manhole of the water tank on the tender of an engine used to switch cars in the yards at Hope, Arkansas.

The negligence of appellants, as set up in the complaint, is as follows: "That appellee while working with the engine doing switching saw, while on the ground,

that a clinker hook was hanging over the edge of the tank attached to the engine, about three or four feet on the fireman's side, in a dangerous position and that he climbed upon the tank for the purpose of pulling it back on the tank and putting it in its proper place; that when he got up on top of the tank he stooped over to pick up the clinker hook and as he raised up with the same one end of the hook seemed to be caught or fastened and this overbalanced him causing him to step into the manhole which was open, thereby causing him to strike his left knee in such manner that he was permanently injured; that appellant Garrett, who had charge of said engine a short time before said accident, and who put water into the tank of said engine a short time before said accident occurred, had carelessly and negligently left said manhole open thereby causing the plaintiff to fall into said manhole and to be injured." The answer of appellants denied every material allegation in the complaint and, in addition thereto, pleaded the contributory negligence and assumption of risk on the part of appellee. A trial to a jury resulted in a verdict for appellee in the sum of $20,000.

The injuries to appellee were of a serious and permanent nature. No complaint is made here about the size of the verdict rendered, and the correctness of the instructions given is not questioned. The only assignments of errors presented here are (1) that the evidence is not sufficient to support the verdict; (2) that the appellee assumed the risk; and (3) that the court erred in permitting counsel for appellee to read to witness, Wyatt, an affidavit previously made by him and asked him if the contents of said affidavit were true, and in refusing to exclude this testimony.

Stating the facts in their most favorable light to appellee, they are substantially as follows: Appellee, Sullivan, was in the employ of appellant railroad company as brakeman on the night of the alleged injury, and prior thereto had been continuously employed by the company as brakeman for 13 years. On the night of October 31, 1936, at about 8:30 o'clock while working in the railway yards at Hope, appellee noticed the clinker hook extend-

ing out over the side of the engine in a dangerous position. This clinker hook is a metal rod about 12 to 15 feet long, and is used to draw clinkers from the furnace of the engine. Appellee climbed up the ladder on the left rear of the engine tender to adjust this clinker hook and put it in a place of safety. As he mounted the ladder he carried on his left arm an electric "bulls eye" lantern which threw the rays of light in front in the way that it was pointed and did not afford a complete circle of light. The top of the tender is surrounded by a raised solid, metal guard about 7 or 8 inches high, and in the center is a raised platform some 4 or 5 inches high covered by three manhole lids, each being about 25 x 33 inches. When appellee reached the top of the ladder, he stepped on the deck of the tender facing the left-hand or fireman's side. He then stepped on the left manhole cover, and with his lantern pointing toward the front and fireman's side of the engine and with his back to the rear, he reached down and took hold of the clinker hook with both hands (the clinker hook weighed between 40 and 50 pounds) and as he attempted to lift the hook it seemed to be caught, he was thrown off balance and fell into the middle manhole, or water tank, which was open at the time. He did not know that it was open. The night was very dark.

During his entire 13 years service with the railroad he had never known one to be left open before. The fall into the tank injured his left leg, especially his knee. When he got down from the tank he reported his injury to some other employees, but stated that he did not think it amounted to much at the time. Later, the injury developed into a most serious one which proved to be of a permanent nature. The facts further show that some three hours before this alleged injury, a Mr. Garrett, one of the appellants, had spotted this engine and tender near a city water connection, attached a 50-foot hose, into one end of which had been inserted a 16-inch pipe about 1½ inches in diameter for a nozzle, had carried this hose up on top of the engine, and through this middle manhole, into which appellee claims to have fallen and filled the tank with water. Garrett, on behalf of

appellants, testified that he raised the manhole cover a few inches, inserted the nozzle and, after the tank was filled, removed the nozzle and closed the opening. The facts further disclose that during this three-hour period from the filling of the tank until the alleged injury to appellee, no one had been on top of the tender except appellant, Garrett, who filled the tank at about 5:30 p. m., and appellee, Sullivan, who went on the tank to remove the clinker hook at about 8:30 p. m. of the same day.

Giving to the above facts their strongest probative force, as we must do, was the evidence sufficient to support the jury's verdict, and did the appellee, Sullivan, assume the risk?

While it is true that no eye-witness testified that he saw appellant, Garrett, leave the manhole in question open, still we think there was sufficient evidence of a circumstantial nature to go to the jury on this point. We have uniformly held that facts in issue may be established by circumstantial evidence as well as by direct testimony. In *St. Louis, Iron Mountain & Southern Railway Co.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171, this court said: "In an action against a railroad company for negligent killing, where there is no eye-witness to the injury, and the cause thereof is not established by affirmative or direct proof, if the facts established by the circumstances will justify an inference that the negligent condition alleged produced the injury, the jury are not left to the domain of speculation, but have circumstances upon which, as reasonable minds, they may ground their conclusions."

In *Pierce Oil Corporation* v. *Taylor,* 147 Ark. 100, 227 S. W. 420, this court said: "Plaintiff was not required to establish those facts by direct evidence, but could do so by proof of circumstances which warranted such an inference." And again in *Hanna* v. *Magee,* 189 Ark. 330, 72 S. W. 2d 237, we said: "The settled rule, which has been many times approved by this court, is that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by cir-

cumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions." To the same effect, see *Holmes* v. *Goldsmith,* 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

We cannot say as a matter of law that there is no substantial evidence, as disclosed by this record, to support the verdict.

On the question of assumed risk, appellee, Sullivan, under his employment as brakeman assumed all the risks ordinarily incident to that employment. He assumed no risk that arose from the negligence of the master himself, or any fellow-employee, unless it be shown that he was aware of the negligence and appreciated the danger therefrom to which he was exposed, or unless it be shown that the risk was so obvious that it would under the circumstances be seen and appreciated by an ordinary prudent person. This is a question for the jury to determine. Appellee had a right to assume, under the facts in this case, that the manhole in question would be kept closed. He had been working for appellant as brakeman for some 13 years, and had never known of one of these manholes to be left open. He testified positively that he did not know the manhole was open. In *Choctaw, Oklahoma & Gulf Railroad Co.* v. *McDade,* 191 U. S. 64, 24 Sup. Ct. 24, on p. 26, 48 L. Ed. 96, the Supreme Court of the United States said: "The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee."

In *Texas & Pac. Ry. Co.* v. *Archibald,* 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the Supreme Court of the United States said: "Without now considering the question whether the rule in this respect charges an employee with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence

in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that, he has the right to presume, without inquiry or investigation that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances."

We hold, therefore, that the jury was warranted in finding that appellee's injury was not the result of a risk which he had assumed.

Counsel for appellants cite a great many cases to sustain the contrary view. However, after a careful investigation of the holdings in these cases, we are convinced they do not control here.

Appellants in their third assignment contend: "The court erred in permitting the attorney for appellee to read to the witness, O. L. Wyatt, an affidavit previously made by him and ask him if the contents of said affidavit were true, and refusing to exclude the testimony of witness Wyatt with reference to said affidavit from the jury." Appellants in putting on their defense testimony introduced a witness, a Mr. Gentry, whose testimony, if believed, was very material. Gentry testified to the effect that he saw appellee, Sullivan, on the tender of the engine at the time of the alleged injury to him before he fell into the manhole, and heard a sound which indicated that appellee himself had opened the lid or covering over the manhole. On cross-examination of this witness, Gentry, appellee's counsel laid the foundation for his impeachment by asking him if he had not in the spring of 1937 in substance stated to Mr. Wyatt that he did not know anything about the accident in question, that he was not down there at the time and knew nothing about it. Gentry had denied he had made any such statement to Wyatt.

Appellee's counsel in rebuttal placed on the stand witness, Wyatt, and in the course of his direct examination the following occurred: "Q. I will ask you whether or not in the course of your investigation you went to see Mr. Gentry? A. I talked to all of them at Rex Roe's place. They stay down there and I thought maybe it was one of them. Q. Did you talk to Mr. Gentry? A. I am not so sure whether I walked out to the truck and

asked them or not. It was generally known that I was trying to find out who the men were, but he is the man that works in Hope and goes around with all of them—his bunch he runs with. Q. Mr. Wyatt, you made an affidavit, didn't you? A. Yes, sir, I talked to Mr. Gentry today and made an affidavit." Wyatt stated positively in the affidavit that he had talked to Gentry in the spring of 1937 and that Gentry told him he was not down there on the night in question and knew nothing about the case at all.

Counsel for appellee, having laid the proper foundation for impeaching Gentry, was taken by surprise when Wyatt upon being asked by appellee's counsel: "Did you talk to Mr. Gentry?" answered: "I am not sure." Counsel for appellee then said: "This is an affidavit taken and signed by you and I am reading it in order to refresh your memory." The affidavit was then read in which Wyatt stated that Gentry had told him that he was not down there that night and did not know anything about it. When Wyatt was asked if the statement he made in the affidavit was true and whether Gentry had made that statement to him in the spring of 1937, he answered in the affirmative.

We hold that there was no error in permitting this evidence to go in and admitting the affidavit.

Permitting counsel to ask leading questions is largely within the discretion of the trial court and unless this discretion be abused it is not necessarily error to admit it. *Plumlee* v. *St. Louis Southwest Ry. Co.,* 85 Ark. 488, 109 S. W. 515.

We think the testimony and affidavit introduced here were proper on the ground that appellee was taken by surprise by the testimony of his own witness, when his witness said, "I am not sure." Section 5196 of Pope's Digest says: "The party producing a witness . . . may contradict him with other evidence and by showing that he has made statements different from his present testimony."

In *Jonesboro, Lake City & Eastern R. R. Co.* v. *Gainer,* 112 Ark. 477, 166 S. W. 571, this court said: "Where a party is taken by surprise at the testimony of

his own witness, such testimony being entirely different from what the witness had given the party calling him to understand that his testimony would be, the party who is taken by surprise, and who is prejudiced by the testimony of his own witness, may contradict him with other evidence, and by showing that he had made statements different from his present testimony, provided the proper foundation is laid for contradiction of the witness by calling his attention to the circumstances of the time and place, etc."

In *Ward* v. *Young,* 42 Ark. 542, this court said: "It was also insisted that the court erred in admitting J. O. Young's testimony, to contradict the testimony of Will Ward, the plaintiff's own witness. Section 2523 of Gantt's Digest provides that 'the party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it is in a case in which it is indispensable that the party should produce him; but he may contradict him with other evidence, and by showing that he had made statements different from his present testimony.' The proper foundation was laid here by inquiring of the witness, whom it was proposed to contradict, concerning the previous statement, with the circumstances of time, etc."

On the whole case we find no errors, and the judgment is accordingly affirmed.

MORGAN *v.* STOCKS.

4-5308 122 S. W. 2d 953

Opinion delivered December 19, 1938.

Madrid B. Loftin and *Walter L. Pope,* for appellant.
McRae & Tompkins, for appellee.

HOLT, J. This appeal comes from a decree foreclosing a deed of trust in the Nevada chancery court. On January 7, 1929, Wash Morgan, and Martha Morgan, his wife, executed a note in the sum of $2,000, due October 15, 1929, in favor of E. H. Alsobrook, as trustee for J. M. Stocks. On December 14, 1929, Wash Morgan died and suit was instituted on December 1, 1931, by J. M. Stocks and E. H. Weaver, as substituted trustee, against his widow and heirs at law, some of whom, including appellants herein, Ollie Morgan and Alvin Morgan, were minors. Service was duly had on all the defendants with the exception of Roy Morgan and his wife, Lessie Morgan, on December 8, 1931. On December 31st, a warning order was issued for Roy Morgan and his wife, Lessie Morgan. On January 9, 1932, the answer of appellants herein, who were then minors, was filed by Thomas W. Blakely, as attorney for Martha Morgan, mother and statutory guardian of appellants. The case was heard by the lower court on March 8, 1932, approximately 60 days after the filing of the answer of the guardian, and a decree entered. Among other things, the decree recites that the cause was submitted and the decree rendered

"from the pleadings, process, returns, papers, note and deed of trust, and oral testimony taken before the court." It is further recited in the decree: "That after personal service of process on the said minor defendants herein, Elrey Morgan, Marjorie Lowe, Alvin Morgan, Ollie Morgan and Mary E. Morgan, the said Martha Morgan, guardian for the said minor defendants, filed, at a previous term of this court, on January 9, 1932, her answer herein, denying all the material allegations in the said complaint, and that all the other defendants have made default. . . ." The oral testimony is not in the record and has not been brought forward by a bill of exceptions. This appeal was taken August 8, 1938, by the appellants under § 2746 of Pope's Digest.

Appellant urges two grounds for reversal of the judgment of the lower court: (1) That the answer of the guardian was insufficient in that it did not deny the material allegations of the complaint. (2) That the judgment was premature because, under § 1512 of Pope's Digest, it was taken less than 90 days after the issues were made up.

Considering these assignments in their order: First, we are asked to determine whether or not the answer of the guardian was sufficient. We hold that it was. The guardian in her answer specifically denies the execution of the note and deed of trust, that the deed of trust was acknowledged, denies that the rights of dower and homestead were released, denies that the deed of trust was recorded, denies that the trustee named in the deed of trust was dead, or that plaintiff was authorized to appoint another trustee, denies that default was made in the payment of the note or that plaintiff was entitled to a foreclosure or to a judgment in any amount or had paid the taxes for the year 1930.

The statute requires denial of every material allegation in the complaint which may be prejudicial to the defendant. This was the rule laid down by this court in *Varner* v. *Rice,* 44 Ark. 236, 244, where it is said: "It is the duty of a guardian *ad litem* to make a full defense without regard to the truth of the denials as to anything which may be prejudicial to the minor." We think the

record shows that the interests of the minors were fully protected and that all of the material allegations of the complaint which could possibly be considered as prejudicial to their interests were denied by the guardian in her answer.

Coming now to the second assignment, was the decree premature? We hold that it was not. The decree in this case is governed and controlled by § 1512 of Pope's Digest, which is § 1288 of Crawford & Moses' Digest as amended by act 37 of the Acts of the General Assembly of 1929. As originally enacted and before the amendatory act 37 of 1929 was passed, this section did not permit the court or chancellor in vacation to set the action for trial on notice to opposing counsel or attorneys *ad litem* and to try the case if the court found that the proof had been completed at an earlier date. The cases cited by appellant, *Sager* v. *American Investment Company,* 170 Ark. 568, 280 S. W. 654; *Old American Insurance Company* v. *Perry,* 167 Ark. 198, 266 S. W. 943, and *Harnwell* v. *Miller,* 164 Ark. 15, 259 S. W. 387, were all decided under the old section of the statute, 1288 of Crawford & Moses' Digest, and before the amendment was enacted by the Legislature in 1929, and do not control in this case.

According to the record before us, suit was filed December 1, 1931, service was duly had on all parties, on January 9, 1932, the answer of the guardian was filed and the case at issue. It was submitted on March 8, 1932, and the decree recites that the submission was, with other things, "on oral testimony taken at the hearing." There is no bill of exceptions before us. This oral testimony is not in the record. Approximately 60 days intervened between the filing of the guardian's answer and the trial of the case.

In a recent case before this court, *Burks* v. *Cantley,* 191 Ark. 347, 86 S. W. 2d 34, we held that an attorney *ad litem* could waive the time for trial and expedite same. This court said: "It is contended that the guardian *ad litem* had no power to waive the time for trial, and that the decree of foreclosure was prematurely entered. We do not think there is any merit in this con-

tention. The guardian *ad litem* filed an answer denying all the material allegations of the complaint. It was not contended then and it is not suggested now that appellant has any defense to the cause of action. We held in *Sisk* v. *Becker Roofing Company,* 183 Ark. 101, 34 S. W. 2d 1078, that, under the provisions of § 1 of act No. 37, Acts of 1929, it was not necessary to wait ninety days after the issues are joined in a chancery case to have a trial as provided in § 1288, Crawford & Moses' Digest. . . . Appellee could have served notice upon the guardian *ad litem* and had the case set for trial on the day it was tried. This being true, we see no good reason why the guardian *ad litem* could not consent to a trial. We said in *Frazier* v. *Frazier,* 137 Ark. 57, 207 S. W. 215: 'It is the duty of the court to protect the interests of the infants, and see to it that their rights are not bargained away by those who represent them. Of course, this does not prevent them from assenting to such arrangements as are formal merely and which are only done to facilitate the decision of the case.' "

There is nothing in this record to negative the idea that the guardian waived further time. Certainly it does not affirmatively appear that there was no waiver of further time. In the absence of a showing to the contrary, this court must presume, on appeal, in favor of the validity of the finding and judgment of the trial court that every fact necessary to sustain the judgment was proved where evidence adduced at the proper time would justify the court's ruling.

In *Sisk* v. *Becker Roofing Company,* 183 Ark. 101, 34 S. W. 2d 1078, this court held: "We must indulge the conclusive presumption that the evidence heard justified the court in all orders made, as the evidence was not brought into the record by bill of exceptions or otherwise." (Emphasis added.) Also in the case of *McKinney* v. *Demby,* 44 Ark. 74, this court said: "In the absence of a showing that there was no other testimony heard at the trial every intendment is indulged in favor of the action of the trial court, and this court will presume that every fact susceptible of proof that could have aided the appellee's case was fully estab-

lished. The statutory rule of law is that every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it appear affirmatively that it is erroneous."

To the same effect see *St. L., I. M. & S. Ry. Co.* v. *Amos,* 54 Ark. 159, 15 S. W. 362, and *London* v. *McGehee,* 126 Ark. 469, 191 S. W. 10. American Jurisprudence, Vol. 3, p. 490, § 924, lays down the rule as follows: "The inference which the law raises is that every court does its duty and does right, and unless the record shows something to the contrary, it will be presumed that the lower court acted wholly within the law, that the decree or judgment was made upon proper grounds, that that which ought to have been done was in fact done by the court below, and that the court below applied the law correctly; the appellant must show error. It should not be presumed that the court attempted to do something which under the practice it could not properly do." The record fails to disclose in this case any defense that these minors might have had to the foreclosure suit, and that their rights have been prejudiced in any manner.

We are, therefore, of the opinion that the decree of the lower court should not be disturbed, and its judgment is, accordingly, affirmed.

WHITE *v.* MILBURN.

4-5314 122 S. W. 2d 589

Opinion delivered December 19, 1938.

Carmichael & Hendricks, for appellant.

George E. Morris and *Chas. B. Thweatt,* for appellee.

BAKER, J. We offer a brief statement of the issues involved in this case. A suit was brought by George H. Milburn for a decree of foreclosure of a mortgage executed by J. C. White and Laura White. In due time the decree was rendered, the property foreclosed upon was sold, and there was a deficiency of $3,306.65. Two or three months prior to the sale of this property J. C. White and his wife were sued to cancel an alleged fraudulent conveyance of other property wherein about five hundred acres of land were deeded to the two daughters of White and his wife and to a son-in-law, the husband of one of the daughters. White and his wife filed a suit which they have been pleased to call a "bill of review" to cancel the foreclosure decree and set aside the sale, pleading that they have a meritorious defense thereto in that two or three years prior to the foreclosure decree they had executed a deed and delivered same to Mr. Harry Ehlers, an agent for and in charge of properties belonging to the appellee, Milburn; that said conveyance was in satisfaction of all indebtedness.

It may be said that if this contention on the part of appellants is well founded, a decision so holding and declaring necessarily settles the second suit in regard to

the deficiency judgment and the alleged voluntary conveyance of property by the appellants. Appellants urge, first, that there was no service of summons upon Mrs. White in the matter of the foreclosure suit; that at the time it was instituted Mr. White was served with a copy of the summons at England, Arkansas, and that a copy was delivered to him for his wife who was ill at the time, and the proof offered on behalf of appellants, apparently, is sufficient to justify their contention that there was in fact no service upon Mrs. White. She was ill for several months and, according to her statements, decree of foreclosure had already been rendered when she recovered and first learned that suit had been instituted, and that this, as above stated, was several years after the alleged execution of the deed given in satisfaction of the entire indebtedness.

Many facts have been set forth, not only by Mr. and Mrs. White, but by other witnesses who were disinterested, as tending to establish the controversy they make in regard to the execution of the said deed. A general statement of them, without repetition of the evidence, will suffice.

Mr. White and Mr. William Ehlers were tenants in common in possession of the property involved in the foreclosure. Mr. White says that the amount of the indebtedness, $4,500, was the total amount that the two of them owed, covering their farm operations. Mr. Ehlers, however, says that the amount of the indebtedness was approximately $9,000; that he himself paid $4,500 and that Mr. White, not being able to pay, executed his note with the mortgage covering his interest in the land for $4,500, said amount being the amount he himself should have paid. The note and mortgage were delivered to Mr. Harry Ehlers, who was actively in charge of the Bank of England and who represented appellee, Milburn, his uncle, with full authority to act in all matters for Mr. Milburn, even to the extent that he had the right, power, and authority to accept the alleged deed in full settlement or satisfaction of such indebtedness. Such is the effect of Mr. Milburn's testimony.

Mr. White's contention is that late in 1932, although he had farmed the land for that year, Mr. Harry Ehlers came to his house, or place of business, at Coy, Arkansas, bringing with him a notary public, that he and his wife joined in the execution of the deed, at Mr. Harry Ehlers request, conveying this property. We think it undisputed that after, sometime in the fall of 1932, Mr. Harry Ehlers and Mr. William Ehlers had full charge of the property that had previously been conveyed by Mr. and Mrs. White's mortgage. They made all rental contracts, collected all rents. The only act of Mr. White, indicating that he may have had some interest in the property, is that he signed a rental waiver in 1933 at the request of Mr. Ehlers so that tenants could borrow money on crops. The two Ehlers brothers continued in possession of this property, handling it in all respects, as if it were their own. They even tore down some buildings, which were upon the land, some of which were of little value, moved them off the land, and used the lumber in building other structures. Mr. William Ehlers testified, as did Mr. White, that before the suit was instituted, he presented the note which was not surrendered at the time it is alleged the deed was executed, and asked Mr. White about it, and that Mr. White's answer was, "you know about that." Mr. Ehlers then said: "You mean a deed was executed conveying the land." Mr. White answered: "Yes."

Harry Ehlers died in 1933. The purported deed was never found. Suit was instituted to foreclose the mortgage. Mr. White says that at the time the suit was instituted he took a copy of the summons to a lawyer at England, Arkansas, and asked him to look after it for him. The attorney employed admits this fact, admits that he never at any time filed any answer, does not deny that he had a conversation with the attorney for plaintiff, Milburn, in regard to the suit in which he is alleged to have stated that all he thought White wanted was more time, but states that he has no recollection in regard to the said conversation and he has no explanation for the reason, he has fortgotten, why he did not file some answer or take care of the interest of Mr. and Mrs. White

under his alleged employment. Indeed, that is one of the grounds set up by the appellants why the foreclosure decree should be canceled and set aside, that is, that it was neglected by their counsel.

The questions on this appeal have been presented under five different heads, the first being, was there legal ground for vacating the foreclosure decree against White and, second, the same as to Mrs. White. Third, was there a meritorious defense to the foreclosure suit. Fourth, was it not proper to order a sale of the land alleged to have been voluntarily conveyed, and, fifth, was there no fraudulent conveyance of other property.

In discussing these matters, we shall, perhaps, not attempt to discuss these several issues separately, as many of the facts are so interwoven and related to each other that it seems better to state them in chronological order than otherwise. Let it be said in the beginning that if there was such a deed executed by White and his wife to Mr. Milburn in satisfaction of the indebtedness, that conveyance was a complete defense to the note and mortgage sued upon. It would be useless to attempt to argue the proposition. That defense was not tendered. Milburn and his nephew, William Ehlers, evidently did not believe that there had been such conveyance because they say they were not able to find it among Harry Ehlers' papers, nor in Mr. Milburn's lock box, which was kept in the Bank of England, nor were any of the employees at the bank able to locate the deed, and the notary public, who is alleged to have taken the acknowledgment, though she is said to have kept a record of notarial acts, and offered it in evidence, was unable to find that she had ever taken such acknowledgment and she did not remember the fact that she had done so. The note and mortgage executed by Mr. White and his wife were never surrendered and at the time of the filing and trial of this case could not be found, though the attorney who filed the suit testified that, at the time he took the decree, he had them in his files. The note when finally found, after the decree of foreclosure, did not show that it had been filed with the clerk, as it should have been at the time of the rendition of the foreclosure decree. But since there is

a presumption of regularity in the rendition of the decree, it may be presumed that the note was offered in evidence and submitted to the court when the decree was rendered, as was the mortgage, or a copy thereof.

Mr. White and his wife did not file an answer to this foreclosure suit, though they said they employed an attorney. However meritorious their defense may have been, it was not offered and there is no doubt that Mr. White had been duly served with summons long prior to the time of the rendition of this decree. It was he who employed the attorney. It should be here stated such attorney has no connection with the case under consideration. It was he who offered to accept service for his wife. He testified that he asked the officer not to attempt to serve the summons on his wife because of the fact that she was very ill and that he was afraid of the effect it might have upon her. It was long after she had recovered before she was advised of the suit. She says the time of her illness was from September until February. The summons, however, by its return shows that it was served on April 28th, some months prior to the time of her illness, and it was immediately after this service of summons, according to Mr. White, that he employed the attorney. So the reason urged and argued, as the one preventing the service of summons upon Mrs. White, wholly fails. There was no reason given why she was not served in April. The deputy sheriff, although he had testified, upon examination in chief, substantially as Mr. White had in regard to why he had not served the summons on Mrs. White, on cross-examination, admitted that he had served and returned a summons on her at one time, but that he did not remember the date therof. The reason given by Mr. White for not talking to his wife about this suit, when instituted, that she was too ill to be disturbed in regard to it, fails, when we consider that the summons was served in April and the beginning of her illness did not take place until September. So it seems almost inconceivable that Mr. White did not communicate these facts under the circumstances that seem to have been established.

In the face of these facts, as they appear in the record, we are impelled to hold that the proposition of

unavoidable casualty, as pleaded and sought to be established by the appellants, cannot be maintained. Appellants relied on the seventh sub-division of § 8246, Pope's Digest. Since the reason urged as the basis of the unavoidable casualty fails, the force of the argument is lost. It is a little peculiar, in the light of our decisions which seem to be according to the weight of authority, that the appellants, on this appeal, charge neglect of their attorney not now connected with this suit as a cause or reason for setting aside the decree of foreclosure. We have followed that line of authorities which hold that the neglect of counsel or attorney must be imputed to his client. It can be of no advantage to argue that proposition. *Dengler* v. *Dengler,* 196 Ark. 913, 120 S. W. 2d 340; *Merchants' & Planters' Bank* v. *Ussery,* 183 Ark. 838, 38 S. W. 2d 1087.

The only remaining question in this case is settled necessarily by our conclusions, first, that there is no meritorious defense shown; second, that if there were a meritorious defense in the matter of alleged execution of the deed it was waived by neglecting to plead it in due time. We now hold that the negligence of the attorney is attributable to his principal, his client.

Therefore, the decree may not be set aside for any of the causes shown. The sale of the property was made in due time, and, although counsel for the appellants wrote the clerk, counsel filed no pleading to prevent the confirmation thereof and there was no error in confirming the sale. The deficiency judgment was, therefore, a valid obligation and the transfer of the property by White and his wife by voluntary conveyance and sale at the time of this indebtedness, if not made with the actual intent to defraud creditors, must be deemed to have that effect, and the decree setting aside such conveyance on that account was proper. These are all the matters of substantial importance presented on this appeal, and it seems they must all be determined against the appellants.

The decree of the chancery court is affirmed.

WATERS *v.* MADDEN.

4-5303 122 S. W. 2d 554

Opinion delivered December 19, 1938.

Joseph Callaway, for appellant.

J. H. Lookadoo, for appellee.

McHANEY, J. Appellants own the east half of the southeast quarter of the southeast quarter of section 30, township 6 south, range 20 west, and appellee owns the west half of the same description. This litigation grows out of a difference of opinion as to the proper division line between their respective tracts of land. At the time appellants purchased their land in September, 1936, it, with other land purchased by them, was enclosed with a fence. Thereafter, appellee purchased the west half of southeast southeast of 30, had the line between him and appellant surveyed by the county surveyor, which survey showed the west line of appellants' fence to be on appellee's property 54 feet on the south side and 194 feet on the north side, the fence running from a point 54 feet west of the southwest corner of appellants' tract in a

northwesterly direction to a point 194 feet west of the northwest corner of their tract. This fence was built by one Golden, appellants' grantor, who purchased from Missouri State Life Ins. Company in 1929, and he estimated where the proper line was by stepping it off. Appellee, after the survey, started tearing down the division fence with the view of replacing it on the proper line, when he was temporarily enjoined by the action of appellants in bringing this action. Trial resulted in a decree for appellee, dismissing the complaint of appellants for want of equity, and in establishing the division line in accordance with the survey made at the instance of appellee by the county surveyor.

For a reversal of this decree two arguments are made: 1. Was the last survey made by the surveyor correct; and 2. If so, does the testimony establish title in appellants by adverse possession.

1. There were two surveys made of this division line. The surveyor testified that he was not satisfied with his first survey, and went back and ran the line a second time; that on this second survey he used as a starting point a big gum tree which is shown on the government field notes as a starting point, and he is satisfied that the second survey is correct. The trial court accepted this testimony. It is undisputed, and we see no reason to disregard it. Assuming that appellee had the burden of showing the correctness of this survey, we think at least a *prima facie* case was made.

2. As to the adverse possession of appellants, it is true their land has been under fence for more than seven years. Neither appellants nor their grantor ever had the land surveyed. They owned 50 acres in one body—this 20 and 30 acres in an adjoining section. They refused to join with appellee in the survey made by him, but said they were satisfied with the line as shown by the fence. Golden testified that he claimed only the 20 acres called for in his deed, as to this particular tract. The fence was built by estimate made by stepping off distance from another point. Appellee testified that he bought his land in December, 1937, and thereafter had a talk with Mr. Waters on Christmas Eve day, and told

him he thought the fence was over the line on this land, and that Waters told him to go ahead, have the survey made, and "if it wasn't on the line he wanted it on the line. 'Q. Did he tell you what he wanted done about it if the line wasn't right? A. Yes, sir, he said if the fence wasn't on the line he wanted it on the line, and if he had any of my land fenced up he wanted me to have it.' " Appellee was corroborated by two witnesses who heard the conversation between the parties on Christmas Eve, 1937.

The rule laid down in *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S. W. 706, and quoted with approval in *Couch* v. *Adams,* 111 Ark. 604, 164 S. W. 728, is: "The following is the law on this subject, which has been repeatedly announced and adhered to by this court:

" 'When a landowner, through mistake as to his boundary line, takes possession of land of an adjacent owner intending to claim only to the true boundary, such possession is not adverse, and though continued for the statutory period, does not divest title; but when he takes possession of the land under belief that he owns it, incloses it and holds it continuously for the statutory period under claim of ownership without any recognition of the possible right of another thereto on account of mistake in the boundary line, such possession and holding is adverse, and, when continued for the statutory period, will divest the title of the former owner who has been thus excluded from possession.' *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S. W. 706."

We, therefore, hold that the evidence was ample to justify the trial court in finding and holding that the possession of appellants and their grantor was through error in establishing the division line, and that they intended to claim only to the true boundary, and that such holding was not adverse.

The decree is, accordingly, affirmed.

TAYLOR *v.* J. A. RIGGS TRACTOR COMPANY.

4-5411 122 S. W. 2d 608

Opinion delivered December 19, 1938.

Dean, Moore & Brazil and *Fred A. Donham,* for appellant.

Barber & Henry, Williamson & Williamson and *P. A. Lasley,* for appellee.

GRIFFIN SMITH, C. J. This appeal presents questions requiring a construction of act 193, approved March 3, 1937.[1]

Appellee, for a consideration of $4,362.64, sold Perry county a tractor, payment to be made in equal quarterly installments of $545.33, beginning January 15, 1939. The last installment matures October 15, 1940.

[1] Act 193 is as follows: "An act to make it a misdemeanor for any county official in the state of Arkansas to violate the terms and

conditions set out in Amendment No. 10 to the Constitution of the state of Arkansas for 1874. Be it enacted by the General Assembly of the state of Arkansas: Sec. 1. Hereafter it shall be the express duty of each Prosecuting Attorney in each respective judicial district in this state to enforce, without requiring affidavits of information, the terms and conditions of Amendment No. 10 to the Constitution of 1874 wherein it is provided, among other things, that no County Judge, County Clerk or other county officer, shall sign or issue any scrip, warrant or make any allowance for any purpose whatsoever or authorize the issuance of any contract or warrant, scrip or other evidence of indebtedness in excess of the revenue received from all sources and, hereby, especially from the provisions of act 63 of 1931, being the County Turnback Funds, for any current fiscal year, provided the various county judges at their discretion are hereby authorized to set aside out of said Turnback Fund hereafter received not more than 50 per cent. of said fund for the purpose of constructing and maintaining county roads, and when so set aside by proper order of County Court the same shall be used for that purpose only, and provided further this act shall not prevent the carrying out of any pledge made by any county for the payment of bridge improvement district indebtedness, and provided further that this act shall not affect any agreement heretofore entered into for the payment of judgment or judgments heretofore entered against any county or counties of this state. Section 2. The General Assembly realizing the terms and conditions imposed upon county officials in this state by virtue of Amendment No. 10 does hereby make this express intent as the intention of this act; namely, that, henceforth, it shall be the duty of each Prosecuting Attorney in each judicial district in this state to adequately enforce the provisions of said Amendment No. 10 and that said Prosecuting Attorney shall be liable to impeachment of office if he or his office does not see to it that the provisions, terms, and conditions of Amendment No. 10 are adequately complied with; for the purpose it shall hereafter be necessary for each county official in this state to annually, during the last week of each year he is in office, supply the Prosecuting Attorney or his office in their office in their respective districts with a report showing funds received and funds paid out during each fiscal year. Section 3. All laws and parts laws in conflict herewith are hereby repealed and this act is hereby designated to be severable and should any part thereof be held invalid such holding shall not affect any other part thereof. Section 4. Although the people of this state adopted Amendment No. 10 to the Constitution of the state of Arkansas for 1874, and although its provisions are adequate if properly enforced, the same have not been enforced and has thereby brought about a condition of laxity on the part of our county officials relative to expending more funds than received during each fiscal year; therefore, an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage. Approved March 3, 1937.

The purchase is evidenced by an agreement of August 16, 1938, executed by the County Judge. At an adjourned term of County Court August 29, 1938, the contract was confirmed by an order which, if valid, would have the effect of a judgment.

Appellant Taylor, a citizen and taxpayer, intervened. He was granted an appeal to Circuit Court, where the cause was heard on stipulation,[2] without jury.

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[2] Stipulation: (1) On or prior to August 29, 1938, the plaintiff delivered to the defendant one D-6 Caterpillar Tractor 72-inch gauge, serial No. 2 H 5382 W, fully equipped. Said tractor was accepted by said county. (2) The delivery and acceptance of said tractor was made pursuant to a contract of sale and purchase executed on behalf of said county on August 16, 1938, by Oscar Brazell, County Judge thereof, wherein the said county agreed to purchase of the said J. A. Riggs Tractor Company the tractor aforesaid, f. o. b., Little Rock, for the sum of $4,362.64. The purchase price for said machinery and equipment was to be paid by eight warrants of said county, each in the sum of $545.33, payable out of any money in the treasury of said county to the credit of the Highway Improvement Fund. (3) On August 29, 1938, the same being an adjourned day of the regular July, 1938, term of said court, the County Court of said county made and entered an order approving, ratifying and confirming said contract of purchase and sale, and upon the same day, after examining the duly verified and itemized claim of the said J. A. Riggs Tractor Company filed against said county for the purchase of said tractor, approved the same and ordered the County Clerk to issue and deliver the warrants in the amount and payable out of the funds as hereinbefore set out. Said warrants have been issued and delivered. (4) At the time of the purchase of said tractor said county was in need of machinery and equipment with which to maintain and construct county roads. That the equipment hereinabove described is suitable for said purposes, and was purchased at a price that was fair and reasonable. That is was to the best interest of said county to purchase the machinery and equipment aforesaid; that the county is now using the machinery and equipment and has been so doing since the date of its delivery, for the purpose of constructing and maintaining roads of said county, and that said tractor has been found to be satisfactory in all respects. (5) The Highway Improvement Fund hereinabove mentioned and out of which the warrants aforesaid are payable, consists exclusively of money received by Perry county from the state of Arkansas under act 11 of the Second Extraordinary Session of the Forty-ninth General Assembly, approved February 12, 1934, which designates said money in the state treasury as the "County Highway Fund," sometimes also referred to as the "County Turnback Fund." (6) The amount of money called for by either of

The Circuit Court properly held that Amendment No. 10 to the Constitution[3] does not prohibit counties from making contracts for expenditures in excess of revenues derived or anticipated from the so-called Turnback Fund.

In *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. 2d 444, we held that the Turnback was not a county fund, and was not controlled by Amendment No. 10. Other decisions have been consistent with the Anderson Case.[4]

The Circuit Court's second declaration of law was that act 193 did not prohibit Perry county from making contracts and incurring expenditures for the 1938 fiscal year in excess of amounts received during such period if payment is pledged from the Turnback.

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the said contract of purchase, the allowance of the claim for the purchase price of said tractor, or the warrants issued thereon, all as aforesaid, when added to the aggregate of the contracts, allowances and warrants previously made and issued during the year 1938, payable also from the Highway Improvement Fund, exceeds the amount that will be received from the state of Arkansas by said county for credit to its Highway Improvement Fund during the fiscal year 1938.

[3] Pertinent parts of Amendment No. 10 are: "The fiscal affairs of counties . . . shall be conducted on a sound financial basis, and no county court or levying board or agent county shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; nor shall any county judge, county clerk, or other county officer, sign or issue any scrip, warrant or make any allowance in excess of the revenue from all sources for the current fiscal year. . . . When the annual report of any . . . county in the state of Arkansas shows that scrip, warrants or other certificates of indebtedness had been issued in excess of the total revenue for that year, the officer or officers of the county . . . who authorized, signed or issued such scrip, warrants or other certificates of indebtedness shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not less than five hundred dollars nor more than ten thousand dollars, and shall be removed from office."

[4] *Burke* v. *Gullege,* 184 Ark. 366, 42 S. W. 2d 397; *Stanfield* v. *Kincannon,* 185 Ark. 120, 46 S. W. 2d 22; *Ogden* v. *Pulaski County,* 186 Ark. 337, 53 S. W. 2d 593; *Independence County* v. *Independence County Bridge District No. 1,* 187 Ark. 140, 58 S. W. 2d 938; *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555.

In its third declaration the court held that if the act should be so construed as to prohibit counties from making contracts and incurring expenditures in excess of amounts actually received from the Turnback and other funds during a designated fiscal year, that part of the act would be void because the command can only be understood and the legislative intent ascertained by referring to Amendment No. 10, and § 23 of Art. 5 of the Constitution does not permit laws to be revived, amended, or the provisions thereof extended by reference.[5]

In conclusion, the court held that the contract to purchase, the order of the County Court approving the claim, and the eight warrants payable from the Turnback were in all respects valid.

Counsel for appellee insists it is not reasonably possible to spell out of the language of act 193 any limitations upon expenditures from the Turnback. In the first place, they say, title to the act is the Legislature's assurance that nothing is to be dealt with except Amendment No. 10.[1]

After stating the duties of Prosecuting Attorneys with respect to enforcement of the Amendment and mentioning by way of emphasis its purpose to prohibit issuance of warrants or the making of contracts in excess of revenues received from all sources, the act says: . . . "and, hereby, especially from the provisions of act 63 of 1931, being the County Turnback Fund, for any current fiscal year."

This provision is followed by a clause authorizing County Judges "to set aside out of said Turnback Fund heretofore received not more than 50 per cent. of said fund for the purpose of constructing and maintaining county roads." Other portions of the section relate to pre-existing indebtedness, which will be referred to in order.

Appellee contends that § 1 deals with but two matters: duty of Prosecuting Attorneys to enforce Amend-

[5] Article 5, § 23, of the Constitution: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

ment No. 10, and the right, created in County Judges, to set aside fifty per cent. of the Turnback, and . . . "in accomplishing these objects the act certainly did not, by its language, place any limitation or inhibition on the expenditure of the Turnback. The only mention of the Turnback found in the act is that part of § 1 following the figures '1874' beginning with the words 'wherein it is provided' and ending with the words 'fiscal year.' The part of the section just referred to is certainly only descriptive. It merely, gratuitously and futilely, expresses the opinion of the Legislature as to what Amendment No. 10 provides. This language, being purely descriptive, has no legislative force or effect, and therefore of itself can place no limitation upon the expenditure of the Turnback."

We agree with appellee that the language employed cannot, "of itself," place a limitation upon expenditures from the Turnback. But the language is not intended to stand alone. Some meaning must be given to words used by the Legislature in its obvious endeavor to identify the Turnback. We must presume the lawmaking body was apprised of the interpretation given Amendment No. 10 by this court. There was knowledge that the Turnback had been classed as a state fund—a fund exempt from the provisions of the Amendment. With this information before it, the General Assembly undertook to compel enforcement of what it considered salutary provisions of Amendment No. 10—enforcement through express directions to Prosecuting Attorneys. But following the mandate so expressed, and following enumerated prohibitions of the Amendment which was designed to prevent any county officer from making expenditures and creating obligations in a manner counter to the Amendment's purpose, there was added the language in controversy, . . . "and, hereby, especially from the provisions of act 63 of 1931, being the County Turnback Fund, for any fiscal year." To give the quoted part of the section effect, the word "from" must be construed as meaning revenue arising from the Turnback.

In *White* v. *Loughborough*, 125 Ark. 57, 188 S. W. 10, in disposing of a case involving annexation of additional

territory to a pre-existing paving improvement district, Chief Justice McCulloch, speaking for the court, said: "It is an instance of the Legislature declaring a right and referring to other existing laws for the remedy, which method of legislation does not offend against that provision of the Constitution which declares that 'no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only.' "[6]

The instant statute is not one where a law was "revived, amended, or the provisions thereof extended or conferred by reference to the title only." Section 1 sets out, in explicit terms, the essential provisions of Amendment No. 10. There is no reference whatever to a title. But there is a declaration that the Turnback shall be controlled by the provisions of Amendment No. 10, and this may be done by the method adopted. Further evidence of the legislative intent to require counties to conduct their financial affairs with revenues received from *all* sources for a particular year is reflected by the emergency clause (§ 4 of act 193) where it is declared that failure of officials to enforce the Amendment has "brought about a condition of laxity . . . *relative to expending more funds than* [*are*] *received during each fiscal year* . . ." [Italics supplied].

[6] In *Scales* v. *State*, 47 Ark. 476, 1 S. W. 769, 158 Am. Rep. 768, Chief Justice Cockrill said: "It is well settled that § 23 of article 5 of the Constitution does not make it necessary, when a new statute is passed, that all prior laws modified, affected, or repealed by implication by it should be re-enacted."

In *Watkins* v. *Eureka Springs*, 49 Ark. 131, 4 S. W. 384, this court said: "We are not, however, prepared to assert that when a new right is conferred or cause of action given, the provision of the Constitution quoted requires the whole law governing the remedy to be re-enacted in order to enable the courts to effect its enforcement. . . . They (the makers of the Constitution) meant only to lay a restraint upon legislation where the bill was presented in such form that the legislator could not determine what its provisions were from an inspection of it. What is not within the mischief is not within the inhibition. Every intendment is to be indulged in favor of the prerogative of the legislative branch of the government. A doubt of its powers to legislate inures to its benefit. The language of the provision is so broad that a literal construction would hamper legislation almost to the extent of prohibiting it." See *Farris* v. *Wright* and cases cited in dissenting opinion by Mr. Justice Smith, 158 Ark. 519, 250 S. W. 889.

It must be conceded that the act is ineptly expressed; yet, if we are able, from the terms employed, to determine what the purpose of the Legislature was, and if the manner of enactment does not violate accepted constitutional construction, it is the duty of this court to give effect to the intent.

County Judges, "at their discretion," are authorized to "set aside out of said Turnback Fund heretofore received, not more than fifty per cent. of said fund for the purpose of constructing and maintaining county roads." A limitation on this right is that its exercise shall not impair pledges for payment of bridge improvement district indebtedness, nor shall the act affect "any agreements heretofore entered into for the payment of judgment or judgments entered against any county or counties of this state."

Prior to approval of act 193, it was lawful for County Judges to pledge expectant funds from the Turnback. Hence, if an apportionment of 50 per cent. or any other part of such Turnback, when set aside in a separate account for construction and maintenance of county highways, should result in impairment of contracts made before the act was approved, to such extent the statute would be void.[7]

We are of the opinion that the reference in § 1 of act 193 to "agreements heretofore entered into for the payment of judgment or judgments" contemplated valid contracts made by County Judges payable from the Turnback. Where purchase was so made, an implied agreement arose that such judge, when County Court convened and the claim was duly presented, would make an order of allowance. Such allowance would have the effect of a judgment. Under this construction no distinction is made between valid contracts, and agreements for judgments.

The judgment is reversed. The cause is remanded with directions to the Circuit Court to enter an order adjudging that payment of the warrants in question may be made from any presently available funds of the county.

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[7] Article 2, § 17, of the state Constitution is: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts shall ever be passed."

As to that part of the judgment directing payment from prospective Turnback funds—funds accruing to succeeding fiscal years—there is disregard of what we construe to have been the legislative intent, as expressed by act 193. Therefore, the agreement upon which the judgment was predicated is prohibited.

ROBINSON *v.* THE INCORPORATED TOWN OF DEVALLS BLUFF.

4-5433 122 S. W. 2d 552

Opinion delivered December 19, 1938.

Charles B. Thweatt, for appellant.

Melbourne M. Martin, for appellee.

MCHANEY, J. Appellant, a citizen and taxpayer of the town of DeValls Bluff, Arkansas, brought this action against said town, its mayor, recorder, and aldermen to enjoin them from carrying into effect an ordinance passed and approved by the town council and mayor on December 5, 1938, which proposes to establish barge terminals in said town and to issue revenue bonds in the sum of $411,000 for such purpose. To secure the payment of said bonds, the physical property is to be mortgaged and the revenues to be derived from the operation of the barge terminals are also pledged. No tax of any kind on the property of the citizens of said town is to be levied or collected for such purpose.

This undertaking finds its authority under the provisions of act 231 of the Acts of 1937, p. 827. The title of said act is as follows: "An act to provide for the purchase, construction, and to promote the improvement of navigation on the navigable rivers of Arkansas, by the cities and incorporated towns in the state of Arkansas, and to purchase, establish, construct and build barge terminals together with tenders and barges, and to provide for the issuance of revenue bonds payable solely out of the revenue derived therefrom and to provide for the operation of such barges and terminals and declaring an emergency."

Appellant attacked the act and the proceedings under nine separate headings, briefly stated as follows: 1. That the legislature has no power to confer such authority as here undertaken on cities and town; 2. that said act 231 is unconstitutional; 3. that even under said act, appellees cannot enter into the proposed contracts; 4. that the proposed improvement is not a public, but a private one; 5. that its operation is not a public, but a private business; 6. that it is *ultra vires;* 7. that § 1 of said act confines the operations to the corporate limits of the town, and that freight movements cannot go beyond the town corporate limits which would destroy the proposed business by the act itself: 8. that the word "time" in § 3 of the act is used in its singular sense, so that, as we understand appellant's contention, all the bonds to be issued would have to be made due and payable at the same time and not over a period of years; and 9. that § 14 of said act provides that the "Sections and provisions of this act are inseparable and are not matters of mutual essential inducement," etc. It is said that in view of the entire act this destroys the act itself. To a complaint setting up these grounds of invalidity and praying injunctive relief, a demurrer was interposed and sustained. Appellant declined to plead further and his complaint was dismissed for want of equity. The case is here on appeal.

Many of the grounds of attack are vague and uncertain. In *Ringgold* v. *Bailey,* 193 Ark. 1, 97 S. W. 2nd 80, we construed a similar act relating to the construction of water works in cities and towns, act 131 of the Acts

of 1933, and held that bonds issued under authority of the ordinance and legislative act could not become obligations of the town. See, also, *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5; *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223. It is also contended under grounds 1, 2, 3, 4, and 5 that, under the Constitution, the Legislature is without power to confer authority on municipalities to undertake the project here proposed. But we held to the contrary in *Lambert* v. *Wharf Imp. Dist. No. 1 of Helena,* 174 Ark. 478, 295 S. W. 730, where we said: "It will be seen that it is expressly provided in the act that no indebtedness, no obligation, no liability or interest thereon, which may be created under the provisions of this act, shall be paid from assessments or taxation on the real property. The act, therefore, is not void because of any tax or assessment on real property, and we know of no acceptable provision that would prohibit the Legislature from passing the act in question. It has been repeatedly held by this court that the Constitution is not a grant of powers, and that the Legislature may do anything not prohibited by the Constitution. This court has also many times held that all doubts as to the constitutionality of a statute must be resolved in favor of the statute." A like provision as to the payment of the bonds from the revenue of the proposed improvement is to be found in § 6 of said act 231. But for said act, appellant would be correct that said town could not engage in the proposed business. We know of no constitutional provision denying such power to the Legislature and appellant cites none.

The other contentions made are likewise without merit. One is that § 1 of the act limits the operations to the corporate limits of the town. We do not so understand said section. His contention about the use of the word "time" in § 3 is captious, and as to that of the word "inseparable" as used in § 14, it is clear from the context that it is a typographical error and that the word "separable" was intended.

Affirmed.

MEEK *v.* LOVE.

4-5311 122 S. W. 2d 606

Opinion delivered December 19, 1938.

[redacted]

Scott & Goodier, for appellant.

Neill Bohlinger, for appellee.

SMITH, J. Appellee—plaintiff below—seeks by this suit to enjoin the erection and maintenance of a fence parallel with and extending into a road running through the center of section 22, township 6 north, range 20 west. It was alleged and the court below found the fact to be "That said road is a public thoroughfare by prescription," and upon this finding enjoined its obstruction. It is conceded that the erection of the fence operates to prevent the use of the road as such.

The testimony is conflicting as to whether the road had become public, and we are unable to say that the chancellor's finding on this question of fact is contrary to the preponderance of the evidence.

The grounds chiefly relied upon for a reversal are (1) that if the road had become public by prescription, it

had ceased to be so by nonuser, and (2) that appellee had no such special interest as entitled him to maintain this suit.

The excellent briefs filed by opposing counsel manifest a thorough investigation of our numerous cases on these subjects. It is conceded by appellant that a road may become public by prescription. We have numerous cases so holding; and we shall not review them, but it was held in the case of *McLain* v. *Keel,* 135 Ark. 496, 205 S. W. 894, that ". . . it is also equally well settled that the right to a public highway once established by limitation or prescription may be abandoned by non-user, and if so abandoned for a period of more than seven years, the right of the owner of the fee to re-enter and to thereby exclude the public from the use of the highway is restored."

The testimony is as conflicting as to whether the road had been abandoned as a public road as it was as to whether it had become a public road by prescription. But upon that question we are unwilling to disturb the finding of the court below as being contrary to the preponderance of the evidence. One of the strongest circumstances tending to show abandonment was that for a number of years the road had not been worked under the directions of the county court as a public road. It was held in the case of *Brumley* v. *State,* 83 Ark. 236, 103 S. W. 615, that "The fact that the road overseers had not repaired or worked a road within seven years did not constitute an abandonment of the road by the public." There was testimony in the instant case to the effect that road overseers had not worked the road for a longer period of time than seven years; but, under the authority of the case just quoted from, this was a circumstance to be, and which has been, considered in connection with other testimony upon that issue, without being conclusive of it.

The remaining question is whether appellee had such a special interest as entitled him to bring suit in his own name to enjoin the obstruction of the road. Our leading case on this subject appears to be *Wellborn* v. *Davies,* 40 Ark. 83, where the right was denied. The headnote in that case reads as follows: "Injunction may be main-

tained by a private person against the creation or continuance of a private nuisance even where the damages are merely nominal; and also against a public nuisance from which he suffers a special and peculiar injury not common to the citizens generally. But in regard to enclosures of a public highway and other nuisances of a public nature affecting a common right, the remedy is by indictment, or by proceedings of some public officer on behalf of the public and for the common benefit." But that case recognized the right of the citizen who had suffered a special or peculiar injury to maintain such a suit.

The court below found the fact to be "That said road constitutes the means of ingress and egress to plaintiff's land, and that plaintiff has an especial interest in said road and is entitled to maintain this action." The testimony appears to support this finding. It is to the effect that with the road in question closed to the public appellee will be required to travel about two and one-half miles farther to reach his farm, and that he can do so even then only by using the field turn rows of adjacent owners for a distance of more than half a mile. The use of these turn rows is permissive, and might be withdrawn at any time, in which event appellee would be without means of access to his land. This, we think, constitutes a special interest within the meaning of the cases requiring that interest to be shown as a condition upon which injunctive relief will be granted. *Ruffner* v. *Phelps*, 65 Ark. 410, 46 S. W. 728; *Citizens Pipe Line Co.* v. *Twin City Pipe Line Co.*, 178 Ark. 309, 10 S. W. 2d 493.

The decree is correct, and is, therefore, affirmed.

MISSOURI PACIFIC RD. CO., THOMPSON, TRUSTEE, *v.* DAVIS.

4-5312 122 S. W. 2d 546

Opinion delivered December 19, 1938.

R. E. Wiley and *Richard M. Ryan,* for appellant.

Thomas E. Toler and *Kenneth C. Coffelt,* for appellee.

HUMPHREYS, J. Appellee brought suit in the circuit court of Saline county against appellants to recover damages in the sum of $3,000 for personal injuries received by her while assisting C. C. Toll, an employee of appellants, lifting at his request, a motor-car on the railroad track of appellants near Traskwood.

The negligence alleged was that while she and her son-in-law, John Dixon, were assisting said employee in turning the motor-car around and replacing it on the track, C. C. Toll gave it a sudden shove or jerk without warning to her, which caused her to either slip or catch her foot on a tie or rail and twist her ankle and strain her back, shoulder and right side, thereby painfully injuring her.

Appellants filed an answer denying that C. C. Toll had authority to request appellee to assist him in lifting the motor-car back on the track or that an emergency existed from which such authority to make the request might be implied.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court resulting in a verdict and consequent judgment for $100 against appellants, from which is this appeal.

The evidence, stated in the most favorable light to appellee, is, in substance, as follows: On May 20, 1936, in the daytime, C. C. Toll had taken the motor-car off the track to allow a train to pass and it rolled down a slight embankment; that she and her son-in-law were going up the railroad to see the foreman about her yearling that had been killed in the operation of one of their trains; that when they arrived at the point where the motor-car was, she inquired of Toll where the section foreman could be found and was informed that the foreman was in Benton; that after explaining to Toll that her heifer had been killed, he requested them to help him lift the motor-car back on the track, and said he would let them ride down to the mile post where her yearling was killed, and he would turn the information in to the office for her; that he told them where to take hold of the motor-car to help him, and when they lifted the car "her foot 'kinda' got tangled up with the rail and twisted in her shoe, and when this happened it gave her a wrench and twisted and wrenched her shoulder" which caused her much pain and suffering for many months; that after her injury they rode down to the mile post and Dixon showed Toll where the yearling was killed and Toll got on the motor-car and went down the track toward Malvern; that she did not fall or turn the car loose, but got blind; that the others did not stumble or turn the motor-car loose. No evidence was introduced tending to show that Toll shoved or jerked the motor-car during the time appellee and her son-in-law were helping Toll lift it on the track. The weight of the motor-car is not disclosed by the evidence. Appellee testified that it was heavy, but Dixon swore it was not very heavy. The undisputed evidence showed that when operating the car one person lifted it off and on the track.

Two questions are involved in this appeal the first being whether there is any substantial evidence showing that an emergency existed that warranted or justified

appellants' employee in requesting or employing appellee in lifting the motor-car back on the rails and, if so, the second being whether the employee was guilty of any negligent act which caused the injury complained of.

(1). The general rule is that a servant has implied authority to employ or request assistance to perform a duty where an emergency or exigency arises requiring immediate action to protect the interest of a master. *Henry Quellmalz Lbr. & Mfg. Co.* v. *Hays,* 173 Ark. 43, 291 S. W. 982; *Booth & Flynn* v. *Price,* 183 Ark. 975, 39 S. W. 2d 717, 76 A. L. R. 957.

There is no substantial evidence in this record tending to show that there was any pressing or immediate necessity for lifting this motor-car back on the rails to protect the interests of appellants. We, therefore, conclude that appellee was a volunteer and assumed the risk incident to the assistance she rendered.

(2). There is no substantial evidence in the record showing that C. C. Toll was guilty of any act of negligence that caused appellee to catch the heel of her shoe on the rail so as to twist her foot and wrench her shoulder and back. It was alleged in the complaint that Toll shoved or jerked the motor-car when she was helping lift or pull it on the rails, but neither she nor her son-in-law testified that he shoved or jerked it while lifting it on the rails.

In order to recover, the burden was upon appellee to prove by a preponderance of the evidence that such an emergency had arisen as would call for her assistance in the matter, and that C. C. Toll was guilty of some act of negligence that was a proximate cause of her injury. There is no substantial evidence in the record to support the verdict of the jury finding that such emergency had arisen or that Toll was guilty of negligence. The court should have instructed a verdict for appellants on the record made in accordance with the request of appellants to do so, and, as the case has been fully developed, the judgment is reversed, and the cause is dismissed.

MISSOURI PACIFIC RD. CO., THOMPSON, TRUSTEE,

v. MITCHELL.

4-5310 122 S. W. 2d 544

Opinion delivered December 19, 1938.

Thomas B. Pryor and *Daggett & Daggett,* for appellant.

D. G. Beauchamp, for appellee.

MEHAFFY, J. Appellee filed a complaint in the Greene circuit court against the appellant for damages to his automobile, and alleged in the complaint that he was driving his automobile with several persons in the car, returning from a funeral, and undertook to drive across the tracks of appellant, where there was a dump, and just as he struck the railroad tracks he saw several persons coming up the dump meeting him, and one of the women in the car cried: "Look out!" and at this time the front wheel of appellee's car dropped off the

rail, and when the woman cried out appellee thought that he had struck someone, and in his excitement threw on the emergency brake and the foot brake, and got out of the car to ascertain if he had struck anyone, and found out that he had not. He then returned to the automobile and attempted to release the brake and drive off the track, but he was unable to release the brake; had thrown the brakes on tighter than ordinarily. After making all efforts to release the brakes, and being unable to do so, several of the parties in the automobile got out and attempted to push the car off the track, but were unable to do so; that one of appellant's trains was about two miles south of the crossing, and in plain view of said automobile; after the men were unable to release the brakes and drive the automobile off the track, or to push it off, appellant's train continued to approach at a high rate of speed, and appellee became alarmed; he instructed the passengers in his automobile to get out, as it was apparent that appellant's servants were not making any effort to avoid striking the automobile; the passengers in the automobile opened the doors and alighted in plain view of appellant's servants who were operating the train, and proceeded to go down the dump out of danger; at the same time one of the passengers proceeded down the railroad south a few feet from the automobile and waved his hands and arms to indicate to the persons operating the train that they were in danger; but, notwithstanding this, the persons operating the train carelessly, negligently and wilfully failed and refused to make any effort to slow up or stop, but continued at full speed and collided with appellee's automobile and ruined the same to appellee's damage in the amount of $600.

The appellant answered denying each and every allegation of the complaint, and also alleged in the answer that the collision and damage were caused solely and proximately by the defective condition of the brakes on appellee's automobile, and that it did not occur or result from any negligence on the part of appellant, its agents, servants, or employees.

There was a trial by jury, and the evidence of appellee and his witnesses sustained the allegations of the

complaint. The evidence showed that they could see the train for two and a half miles; there was no obstruction and nothing to prevent the persons operating the train from seeing the automobile; that the speed of the train was not reduced; but appellee testified that he went to the scene of the accident the next day and could distinguish a man two and a half miles down the track. The engineer and fireman got off the engine, and someone remarked that the train had been going 73 miles an hour; that appellee did not think the brakes had been applied on the engine, but he thought that he was opening up; he heard a peculiar sound.

Appellee's evidence was corroborated by other witnesses.

The engineer testified that he sounded the whistle at the crossing and saw the automobile when he was coming up to the crossing, but did not have time to stop; did all he possibly could do to avoid hitting the automobile; that the train was running about 60 or 65 miles an hour; and when operating an engine and seeing an automobile on the track a quarter of a mile away and not knowing whether it would get across, then the engineer makes a service application of the brakes; throws off 10 or 15 pounds of air, and if he sees that a man is going to get out, then he throws off 90 pounds of air, and it does not jam on; if the train is running 60 to 65 miles an hour, and he stops with an emergency application, it would unseat every passenger in the train. The engineer then testified as to the manner of stopping the train and the distance it required; and the distance at which the automobile could be seen from the engine.

The evidence shows, however, that the road was parallel with the railroad for some distance before the automobile reached the crossing; the engineer saw the automobile before it turned onto the crossing, and saw the automobile and persons on the track; saw them trying to shove the car off, and he was blowing the whistle trying to get them out of the way. The fireman did not testify.

Appellant requested the court to instruct the jury to return a verdict for it. The court refused to give this

instruction, and appellant excepted. The court then gave several instructions, and there was a verdict and judgment for $600. The case is here on appeal.

It was the duty of the persons operating the train to keep a constant lookout for persons and property on the track, and when persons are discovered on the track, it is the duty of those operating the engine to exercise reasonable care to avoid striking or injuring persons or property.

Appellant says that there are only two disputed questions of fact in the entire record, one of which, it is conceded, passes out of consideration in view of the jury's verdict. The second question, and the one that appellant argues, is: "When, by keeping a lookout, could the engineer have discovered the peril of the automobile?"

It is true that the engineer said that he did all he could to avoid striking the automobile after it was discovered; but the evidence of the appellee and his witnesses, and the circumstances in the case, made it a question for the jury, and the jury's verdict, where there is any substantial evidence to support, cannot be disturbed by this court.

In testing the legal sufficiency of the evidence to support the verdict, it must be considered in the light most favorable to the appellee. *Union Securities Co.* v. *Taylor,* 185 Ark. 737, 48 S. W. 2d 1100; *Fort Smith Traction Co.* v. *Oliver,* 185 Ark. 227, 46 S. W. 2d 647; *Ark. Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45; *St. L.-S. F. Ry. Co.* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440; *Life & Casualty Ins. Co. of Tennessee* v. *Kinchin,* 183 Ark. 1153, 37 S. W. 2d 871.

There are many other decisions of this court to the same effect. We have uniformly held, also, that the jury is the sole and exclusive judge of the credibility of the witnesses and the weight to be given to their testimony; and when the case reaches this court, if there is any substantial evidence to sustain the verdict, it must be upheld, although it might appear to this court that it was against the preponderance of the evidence.

In this case, the verdict is supported by substantial evidence, and the judgment is affirmed.

INGRAM *v.* BOARD OF COMMISSIONERS OF STREET IMPROVEMENT DISTRICT No. 5.

4-5297 123 S. W. 2d 1074

Opinion delivered December 19, 1938.

[redacted]

Ingram & Moher, for appellant.

Reinberger & Reinberger and *E. D. Dupree, Jr.,* for appellee.

SMITH, J. Street Improvement District No. 5 of the city of Stuttgart was regularly and properly organized in 1916 to improve certain streets in that city. The ordinance levying assessments of benefits was passed August 7, 1916. Money was borrowed by the district to pay for the improvement, bonds were executed and sold and the assessments pledged for the payment thereof.

The district's commissioners filed suit in its own name on October 5, 1934, to enforce payment of certain delinquent assessments. The town lots of appellant Ingram were included in this suit. At the time the district was formed Ingram was the owner of lots 1 to 19, both inclusive, block 8, of Union Addition to the city of Stuttgart, and the valuation thereof, as shown by the last county assessment, was $2,000, and betterments were assessed against these lots by the improvement district in the sum of $2,496.81. He paid taxes for five years, aggregating $843.42, and then refused to pay any more and requested a revision of the assessments, which request was denied. In 1925, Ingram sold lots 9, 10, 11 and 12 to Stroh and Young, who have since paid the assessments against their lots, and they are not involved in this suit.

Under the ordinance levying the assessments of benefits the annual assessments became delinquent on October 17 of each year if not paid by that date. Ingram's first delinquency occurred October 17, 1923, for the taxes due in 1923, but the suit for these taxes and the other taxes which later became delinquent was not filed until October 5, 1934, which was ten days after the last bond issued by the district had been paid. The district at that time

had no indebtedness outstanding except the sum of $350 due its attorney for services rendered, the validity of which indebtedness is not questioned.

Ingram alleged in his answer that he had already paid a sum in excess of any benefits received, and he alleged that the bonds and other indebtedness of the district had been paid except said sum of $350. He alleged that the commissioners of the district had misappropriated the sum of $3,052, which, if collected, as it could and should be, would render any other collection unnecessary and that the commissioners then had in their hands the sum of $669,30. Upon these allegations he denies the authority of the district to enforce payment of delinquent assessments.

H. S. Neal filed an intervention in the suit to collect the delinquent taxes, in which he alleged that he was a property owner and taxpayer within the improvement district, and that the last assessment against the property in the district was for the year 1934, which he and other property owners had paid in full, together with all prior assessments. He alleged that the aggregate of all assessments due and unpaid was $2,563.31, exclusive of interest and costs.

The intervener alleged that the taxes paid by himself and other taxpayers had created a fund sufficient to retire all the bonds and practically all other indebtedness owing by the district, so that he and other taxpayers similarly situated have contributed a greater amount towards the payment of the indebtedness of the district than they would have been required to pay if all other taxpayers had paid their annual assessments, as the same became due and payable. He, therefore, prayed that all delinquent taxes be collected, and that the balance remaining after the payment of the debts of the district be prorated among the taxpayers who had paid their assessments. An answer was filed to this intervention denying the equity of granting this relief.

An agreed statement of facts was filed relating to the value and betterments of Ingram's lots, which appears to show that his assessments were excessive and were greater than those of certain other owners of similar

property; that the commissioners of the district paid out of the funds of the district the sum of $3,052 for repairs made to the streets which the district had improved, and that the streets of the district had been turned over to the city of Stuttgart, which city had levied a special tax in the fall of 1935 to repair the streets within the improvement district and certain other streets in the city, and further that no warrant for the collection of delinquent assessments against any property within said district was ever issued by the clerk or recorder of said city, or any other officer, for any year except 1918.

It was stipulated that the cause might be heard and a decree rendered in vacation, and this was done, and a written opinion was prepared by the chancellor. In this opinion it was found that the delinquent taxes, exclusive of penalty, interest and costs, amounted to $2,563.31; that the original complaint had been adopted by the intervener, and that the assessments were not demonstrably erroneous.

Upon the question of the expenditure of the $3,052 by the commissioners for repairs, the court found that the money had been spent for this purpose without authority, "and that some adjustment should be made of the amount so expended before a final decree is rendered in this case. In other words, I am holding that the commissioners are personally liable for the amount of the expenditures made by them for repairs in the sum of $3,052, and that the defendants are liable for the payment of the delinquent taxes for the years set out in the agreed statement of facts. Of course, there can be no penalty collected. The Supreme Court of Arkansas has so held in the case of *McPherson* v. *Board of Commissioners,* 178 Ark. 289, 10 S. W. 2d 876."

The opinion of the chancellor reviews and quotes from the opinion of this court in the case of *Paving District No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795, and the same case in 144 Ark. 550, 223 S. W. 24, and from the case of *Thibault* v. *McHaney, Receiver,* 127 Ark. 1, 192 S. W. 183. The effect of the opinion is to grant the relief prayed by the district and the intervener, and concludes with the direction that "A decree will be entered

in conformity with this opinion when prepared and approved by counsel for the respective parties." The opinion is dated April 6, 1938, and is indorsed by the clerk of the court July 25, 1938.

A decree was entered in vacation directing the commissioners to pay the attorney's fee, and recites that "The court finds all the questions of law and fact in favor of the answering defendants, and finds that there is no equity in the complaint as against said defendants, nor is there any equity in the intervention, and that both the said complaint and said intervention should be and the same are both hereby dismissed, as to said answering defendants, for want of equity as to all the lots hereinbefore described." It was ordered that the district be dissolved, and that after paying the attorney's fee to distribute any balance among the parties who paid their last assessment, and that all decrees or claims of the district "be and they are hereby satisfied."

The decree does not reflect the finding and opinion of the court, but is in direct contravention of it. There is no intimation that any fraud was practiced or attempted upon the court, but, in effect it would be a fraud if the decree was permitted to stand as the decree of the court.

On July 25, 1938, which was a day of the same term of court, a motion was filed by attorneys for the improvement district to set aside this vacation decree, upon the ground that it was entered without notice and did not conform to the opinion rendered by the court on April 6, 1938. This motion was sustained on the day on which it was filed, and it was ordered that the decree be vacated and set aside. On the same day the court rendered a supplemental opinion. It cannot be said that the chancellor may have changed his mind between the date of the first opinion and the date of the entry of the vacation decree, for the reason that this last opinion differs from the first one in a single respect, and that was to set aside the direction that a decree be rendered against the commissioners. In explanation of this change in directions in the decree the opinion recites:

"It will be observed from reading the above portion of the agreed statement of facts that the court had no way of ascertaining as to when this expenditure was made, whether beyond or within the statutory period of limitation, and as the court did not feel justified in assuming that the expenditure of this amount was barred by limitation the commissioners were found to be liable for this unauthorized expenditure. This finding was, of course, based on decisions of the Supreme Court of Arkansas.

"However, it has now been shown by the answer of one of the original commissioners of the district, C. H. Denslow, and oral testimony in support thereof, that the above amount, $3,052, was expended by him and the other former commissioners of the improvement district for necessary repairs made upon the streets embraced in this particular paving district. It is further shown by his answer that this expenditure was made many years ago and any claim for this amount is now and has long since been barred by the statute of limitation. Therefore the former or old commissioners of this improvement district, including Mr. Denslow, could not be legally held for this expenditure, even though it was not authorized by law, and that part of the original opinion rendered in this cause on April 6, 1938, which holds the commissioners liable personally for the sum of $3,052 expended by them, for the reasons herein stated is eliminated, and the decree will be confined solely to the rendition of judgment against the delinquent defendants for the amount shown to be due by them, which, as I understand, is $2,563.31, exclusive of penalty, interest and cost.

"The opinion rendered herein on April 6, 1938, is therefore amended, as stated herein, and the decree will be entered accordingly."

Upon this amended opinion there was rendered and entered the decree from which is this appeal. Upon the opinion amended in this respect only this decree finds and adjudges that the claim for revenues improperly expended by the commissioners is barred by the statute of limitations, and a lien for the delinquent taxes was declared and a sale of the lots ordered if the taxes be not

paid within the time limited for that purpose. The commissioner appointed to make the sale was directed to report his actions thereunder for such further orders as may be necessary. Both the first and second opinions of the court above referred to manifest the intention of the court to have the delinquent taxes collected and reported and the proceeds, after paying all the obligations of the district, prorated among the property owners in a manner later to be directed.

The first question to be disposed of is the effect of the decree entered as a vacation decree. The insistence is that this decree dismissed the whole proceedings as being without equity, and has become final, inasmuch as no appeal was prosecuted therefrom.

This contention cannot be sustained for several reasons. The first is that this appeal has brought before us for review the entire proceedings. The second—which is, of itself, a sufficient reason—is that the alleged vacation decree was not the decree of the court. It not only did not reflect the order and judgment of the court, but was in direct contravention of it. Certainly, the court was not without power to correct this obvious error. The second decree was somewhat in the nature of a *nunc pro tunc* order, made to have the records speak the truth, not to change the court's order and direction, but to make the decree conform to the order which had been made and the directions which had been given in the opinion, and this opinion had directed that a decree be prepared to conform with its directions, but, as has been said, this was not done. Another reason is that both decrees were rendered at the same term of court, and the matter remained within the control of the court until after the expiration of the term, and the change was made before the term had expired.

It is conceded that this would be the law but for the fact that the first decree was rendered in vacation. We think that this distinction is artificial, and not substantial and does not accord with our cases on the subject.

The case of *Metz* v. *Melton Coal Co.*, 185 Ark. 486, 47 S. W. 2d 803, involved a vacation decree which was later

vacated and set aside. This case declared the practice under § 2190, Crawford & Moses' Digest, which reads as follows: "A chancellor may deliver opinions and make and sign decrees in vacation in causes taken under advisement by him at a term of the court; and, by consent of parties, or of their solicitors of record, he may try causes and deliver opinions, and make and sign decrees in vacation. Such decrees, and all other orders and decrees which a chancellor may make in vacation shall be entered and recorded on the records of the court in which the cause, or matter is pending, and shall have the same force and effect as if made, entered and recorded in term time, and appeals may be had therefrom as in other cases."

Act No. 5 of the Acts of 1937, p. 16, was "An act to amend § 2190, C. & M. Digest of the statutes of the state of Arkansas, so as to provide that chancery courts will always be in session for the rendition and enforcement of orders and decrees affecting domestic relations." As thus amended the act appears as § 2817, Pope's Digest. This act of 1937 effects no change in § 2190, Crawford & Moses' Digest, so far as it relates to the question here under consideration, that of the power of the court to amend, vacate, or correct decrees rendered in vacation before the expiration of the term of court.

The holdings of the court in this case of *Metz* v. *Melton Coal Co., supra,* as reflected in the headnotes of that case, are as follows: A default judgment may be set aside on motion and without notice at the same term at which it was rendered, and no appeal lies from a decree setting aside a default judgment. In the body of that opinion it was said: "This court has many times held that the trial court may during the term vacate its judgments, and that it might do so without notice."

We perceive nothing in this § 2190, Crawford & Moses' Digest, which indicates that sanctity should be given to vacation decrees, making them impervious to the further order of the court during the same term. The contrary appears to be true, as the section quoted provides that such decrees ". . . shall have the same force and effect as if made, entered and recorded in term

time, and appeals may be had therefrom as in other cases." See, also, *Browning* v. *Berg,* 196 Ark. 595, 118 S. W. 2d 1017.

We conclude, therefore, that the vacation decree does not conclude the question that the suit of the improvement district to enforce the payment of the delinquent taxes is without equity.

The court expressly found the fact to be that no demonstrable error had been made to appear in Ingram's assessments of benefits which operated to invalidate them. There was no testimony in refutation of that offered by Ingram to the effect that his assessments were excessive in comparison with those of other owners of similar property; but this was not a demonstrable mistake, within the meaning of our decisions permitting their cancellation when collaterally attacked, as they are here. The remedy provided by the legislation under which the improvement district was created to correct such errors is by appeal from the assessments within the time and manner allowed by law for that purpose. Among the innumerable cases to this effect is the late case of *Wood* v. *Tobin,* 193 Ark. 964, 104 S. W. 2d 203.

In the case of *Carney* v. *Walbe,* 175 Ark. 746, 300 S. W. 413, Chief Justice HART said: "By the expression, 'demonstrable mistake,' is meant a mistake of fact as to the existence of which there is no room for doubt. (Citing cases.)" He further said: "Where the property owner delays until after the period of time prescribed by statute for a direct attack on the action of the council establishing the district and the assessment of benefits to the real property situated therein a suit of the property owner to review the proceedings of the common council establishing the district or the board of assessors in assessing the benefits to the real property within the district is a collateral attack, and such proceedings can only be set aside when they appear on their face to be demonstrably erroneous. In the case last cited, in discussing the rule as to a collateral attack on a street improvement district, it was expressly stated that the court could only look to the face of the papers to discover whether or not there was a demonstrable error in the assessment of

benefits, and *House* v. *Road Improvement District,* 158 Ark. 357, 251 S. W. 21, was cited."

Certainly the fact that appellant's betterments were assessed at an amount more than twenty per cent. greater than his last assessed valuation for general taxation does not constitute a demonstrable mistake. As a matter of fact they were more than one hundred per cent. greater than his assessed valuation for general taxation, but this court has uniformly held that this twenty per cent. limitation relates to the latest assessed valuation of all the property in the district, and not to the assessed valuation of any particular piece of property. The law was so declared in the case of *Kirst* v. *Street Improvement District,* 86 Ark. 1, 109 S. W. 526, and that interpretation of this limitation has been frequently reaffirmed.

The contention that the suit to enforce payment of the delinquent taxes was unauthorized, because no warrant for the collection of assessments was ever issued by the clerk or recorder of the city of Stuttgart, as required by § 5669, Crawford & Moses' Digest, is answered by the opinion in the case of *Martin* v. *Board of Commissioners Street Improvement District No. 5 of Stuttgart,* 190 Ark. 747, 81 S. W. 2d 414. It was stipulated in that case "That no warrant was issued by the city clerk or town recorder to the city collector authorizing the collection of assessments upon the property except the first within forty days after the passage of the ordinance creating the district, and fixing a lien upon the property within the district." That case involved the collection of delinquent taxes of 1928 and each year thereafter, including 1934. It will be observed that we have here the identical district—Street Improvement District No. 5 of Stuttgart—trying to enforce payment of delinquent taxes for some of the same years involved in the Martin Case, *supra.* In overruling the contention made in that case, as in this, we there said: "We are unable to see, particularly in this case, any prejudicial effect arising out of the failure of the clerk or recorder to furnish to the city collector a list of properties, together with the assessments to be collected, with a warrant authorizing the collection thereof. This dereliction of duty on the part

of the clerk certainly did not operate as a discharge of the lien. . . ."

It was contended in that case, as here, that the right to collect delinquent assessments was barred by the statute of limitations when suit was filed, but it was there held, to quote a headnote in that case, that "The time for enforcing the lien of assessments in municipal improvement districts is not limited by statute."

This is not a case where all property owners have paid their taxes equally and sufficiently to discharge the indebtedness of the district, but, notwithstanding that fact, the attempt is made to collect additional taxes. In such a case any propery owner might well resist the collection of further taxes. But it will be remembered that this Martin Case, *supra,* involved taxes due appellee, Street Improvement District No. 5 of Stuttgart, for the same years for which appellants' lands were delinquent. Whether there was only one suit or separate suits does not appear, but the facts are the same in both cases, and there is the same authority to sue in this case as existed in the Martin Case, and the relief granted there was to compel the delinquent landowners to pay their taxes.

It is finally argued that the court was in error in holding that the suit against the commissioners for the diversion of funds, as hereinabove stated, by using the taxes of the district to repair the streets, was barred by the statute of limitations, and it is insisted that if these funds were recovered, as they may be and should be, there would be no occasion to collect further taxes, especially so as the commissioners then had $669.30 in their hands.

The case of *Roper* v. *Greene & Lawrence Drainage District,* 194 Ark. 493, 108 S. W. 2d 584, is cited to support the contention that the custody of the taxes collected for the benefit of the improvement district constituted an express trust, against the enforcement of which the plea of the statute of limitations is not available.

The $3,052 was expended for the benefit of the district, but for a purpose not authorized by law. In the Roper Case, *supra,* assessed benefits had been collected for the purpose of retiring the bonds issued by the dis-

trict, to construct the improvement. The holder of one of these bonds sued to enforce its payment. The bond had matured more than five years before the suit was filed. It was said that the commissioners held tax revenues as trustees of an express trust, against which the statute of limitations did not run, and the bondholder was permitted to recover. The commissioners here did not have possession of the money spent to repair the streets, indeed it had been spent many years ago, as found by the court; but in view of what will later be said, this affords no excuse to appellant for refusing to pay his taxes.

It appears to be true that if the collection of the delinquent taxes here sued for is enforced the commissioners will then have in their hands a sum greater than is necessary to discharge the obligations of the district, and the court has reserved for future decision the disposal of this excess. But this fact constitutes no defense. When appellant has paid or been compelled to pay the taxes here sued for, he will then have paid no more than any other property owner in the district has been compelled to pay.

This question has been decided adversely to appellants' contention in several different cases. These payments by others were not voluntary payments. It was said in the case of *Thibault* v. *McHaney,* 127 Ark. 1, 192 S. W. 183, that "The ascertainment by the court of the amount necessary to assess against the property was a mere estimate, and the payment by the property owners was upon the implied assurance that the amount in excess of what was required to discharge the obligations of the district would be refunded *pro rata* to the property owners. Now these recalcitrant taxpayers say that they should be permitted to profit by the fact that they held back and refused to pay until the other property owners paid substantially enough to discharge the joint obligations. The position is wholly untenable, and the doctrine invoked has no application, which is based entirely upon the theory of estoppel—that one who pays money voluntarily, and with full knowledge of the facts will not be heard to assert the right to recover it back. In this instance the property owners undoubtedly paid volun-

tarily with knowledge of the facts, but, as already stated, they paid upon the implied assurance that all of the taxpayers would be required to respond in like proportion, and that any sum in excess of the amount required to discharge the obligations would be refunded."

In the case of *Paving District No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795, the facts were that the commissioners of a municipal improvement district, after paying the cost of the improvement, and after discharging all obligations of the district, had $22,000 in their hands. It was held in that case that the act of the General Assembly authorizing the expenditure of this money for repairs was an unconstitutional diversion of public funds, and it was there also held that the action of the chancellor in appointing a receiver to work out the equities between the property owners was error, for the reason that the control of the funds could not be taken from the hands of the commissioners of the district, as the court might give to and enforce any directions to the commissioners as well as to a receiver. But that portion of the decree which directed that unpaid taxes be collected, to the end that all property owners might share equally the burden of paying for the improvement was affirmed, notwithstanding the fact that the district then had no outstanding obligations. This was true because, as there said, "All the affairs of the district could not be wound up until all the outstanding assessments had been collected, as it could not be known prior to that time the sum to be divided among the taxpayers." In other words, until all the taxpayers had paid proportionately the excess in the hands of the commissioners could not be ascertained and equitably divided.

By the time this Fernandez Case reached this court on the second appeal (144 Ark. 550, 223 S. W. 24), it was said in that opinion that "It affirmatively appears that the major portion of the taxes have since been collected by foreclosure proceedings. The court considered the advisability of postponing the distribution of the fund until all delinquent taxes had been collected, but in the decree rendered the court found the fact to be that the cost of collecting such assessments as remained unpaid

would practically equal the sum collected and would add so small a sum to the amount to be distributed that further delay was not advisable." The right and the duty of the commissioners to collect delinquent assessments was not questioned, but was fully recognized. It was there said: "In view of the fact that more than three years have elapsed since the filing of this audit, showing the delinquent assessments, we cannot say that the court abused its discretion in ordering the distribution at this time. Moreover, the decree reflects the purpose of the court to retain control of the case until all equities have been adjusted."

In the case of *Chicago Mill & Lumber Co.* v. *Drainage District No. 17,* 172 Ark. 1059, 291 S. W. 810, so many landowners made default in paying their drainage taxes that it became necessary to increase the per cent. of the betterments to be collected. The lumber company complained that this would not be necessary if all the landowners paid their taxes, as it had done, and that this increase discriminated against those who were willing to pay, and had done so. It was there said: "The contention of appellant, expressed in its second request, that the levy of the proposed rate would result in requiring it and other landowners who had paid and who continued to pay their taxes to bear a greater proportionate burden than that imposed upon the lands which were allowed to go delinquent, is answered in the Rowland Case, *supra,* and in that of *Arkansas-Louisiana Highway Imp. Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355. It was pointed out in those cases that the lien of the district continued until the taxes were paid or until the lands themselves were acquired by the district through sales for the nonpayment of the taxes, and that, when the delinquent taxes were paid, they became available and should be used in paying the obligations of the district, and further, that, if the lands were sold to the district and not redeemed, then the entire value of the lands to be realized by a sale thereof would be available for this purpose. So that, while a delay would be entailed in obtaining and applying revenues from the delinquent lands, these revenues would finally be obtained and applied, and thus no unequal burden would be imposed."

It is insisted that even though appellants' assessments are not demonstrably erroneous, it would, nevertheless, be inequitable and unnecessary to require him to pay more taxes, for the reason that the district has discharged its bonds and owes but little else. This is true as to the debts, but, as was said in the Chicago Mill & Lumber Company Case, *supra,* and in the Fernandez Cases, this result has been achieved by certain landowners paying their taxes, while others declined to do so, and when appellants have paid delinquent taxes against their lands, they will then have done no more than other property owners have already been required to do. They will then, and not before, have discharged their proportionate parts of the district's debts, and as the decree permits payment without penalty or interest, they have had an indulgence not enjoyed by the other property owners who long since paid their taxes. When all have paid their taxes the court, as in the Fernandez Case, *supra,* may do equity. It cannot do so before.

The decree of the court below is correct, and it is, therefore, affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEYER *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND.

4-5306 122 S. W. 2d 586

Opinion delivered December 19, 1938.

Bradley & Patten, for appellant.

McKinley & Thompson, Lee Cazort and *Horace Chamberlin,* for appellee.

BAKER, J. This case on appeal is very similar to one in which we rendered an opinion on November 14, 1938, *Fidelity & Deposit Co. of Maryland* v. *Meyer, Guardian, ante* p. 42, 121 S. W. 2d 873.

The cases are not exactly identical. For that reason it is necessary to give some consideration to matters appearing in this appeal, not presented in the first case. We see no reason in this case for a restatement of the facts further than to set forth matters anew that distinguish this appeal from the other, and only such other facts necessary for the continuity of a statement of propositions herein discussed.

There were five Louis B. Seigel notes, each being for the sum of $1,000. One of these notes was involved in the case decided November 14th. It was separated from the other four and presented in that case because it had been taken over and held by the guardian and curator of the minors who were suing upon a guardian's bond, given by the present guardian's predecessor.

The four notes involved here were part of the same series and they were taken over and held by the administrator with the will annexed of the estate of William F. Meyer, deceased. In each case the suit was instituted in the name of the minor children of William F. Meyer by their guardian, Ora Lee Meyer, who was also their mother. The bond sued on in this case is one executed by the American Exchange Trust Company as the administrator in succession to Exchange National Bank.

The allegations or facts upon which liability are founded is substantially to the effect that the Exchange

National Bank was administrator, with the will annexed, of the estate of William F. Meyer, deceased, and that that banking institution, while acting as such administrator, bought from itself, as the banking institution, the four $1,000 notes now in controversy; that later the Exchange National Bank was succeeded as administrator by the American Exchange Trust Company, and that the Exchange National Bank made a final settlement which was duly approved by the probate court and delivered over to the American Exchange Trust Company the four notes and took a receipt therefor. Later the American Exchange Trust Company became insolvent and Mrs. Ora Lee Meyer was then appointed administratrix in succession with the will annexed, and from settlement made by the American Exchange Trust Company, accepted the four notes, receipting for the same and without any objection upon her part to the settlement made, the American Exchange Trust Company's settlement was duly approved and it was discharged. All of this occurred six or seven years ago, but the statute of limitations, as affecting the administrator's bond is not raised and perhaps could not be if there is any liability. That statute is eight years. Pope's Digest, § 8936.

Mrs. Meyer, as administratrix, after accepting these notes, sued on them, foreclosed the mortgage, and procured sale of the property mortgaged to secure the notes, bought in the property herself for her wards and has continued to hold the same since 1931. Now since she, as guardian, or the children, in their own right, have acquired title, a difficulty in the disposition of such property has arisen. It did not arise out of any inherent defect in the notes or mortgage given to secure them. Whatever question there is arises out of the will of William F. Meyer to the effect that the corpus of his estate should be retained for the benefit of his children until they have attained the age of twenty-six years. It is urged now that this land is of comparatively little or no value; that taxes have accumulated against it, and that it is not income producing, but is wild and unimproved. The relief prayed for is that the bonding company, the appellee herein, should be compelled to accept the land under a

decree awarding the same to it and that it should be required to pay the $4,000 represented by notes, with interest from the date of the wrongful purchase of the notes with the money belonging to the estate of Meyer by the Exchange National Bank, the predecessor of the American Exchange Trust Company.

The chancery court held against this contention, denied the right to recover and it is from this decree that this appeal has been taken. There is no substantial dispute concerning the facts involved in this controversy. The appellants state their contention in the following language:

"We predicate the liability of the American Exchange Trust Company and its surety, the Fidelity & Deposit Company of Maryland, upon the following: (1) the Exchange National Bank, as administrator with the will annexed of the estate of William F. Meyer, deceased, could not legally purchase from itself, and such attempted purchase was void; (2) the investment of the said Exchange National Bank of funds of the estate in notes held by itself without authority of the probate court was void; (3) the $4,000 was deemed to still be in the possession of the Exchange National Bank when it merged with and was absorbed by the American Exchange Trust Company; (4) the investment of the funds of an estate without authority does not vest title to such property in the purchaser and consequently the funds were transferred to the American Exchange Trust Company by the merger; (5) the $4,000 represented unadministered funds and the title to same passed to the American Exchange Trust Company by the merger; (6) the administrator is required by law to pursue its successor and failed to do so at its peril, consequently, the American Exchange Trust Company is to be charged with the $4,000; (7) the American Exchange Trust Company, by its agreement, assumed all of the deposits and trust funds of the Exchange National Bank, and, consequently, assumed and took over the $4,000 of the estate on deposit in the Exchange National Bank; and (8) the American Exchange Trust Company failed and refused to turn over to Ora

Lee Meyer, as administratrix in succession, the $4,000, with interest.

An analysis of this contention is to the effect that the investment made by the Exchange National Bank in the purchase of these notes was illegal and void and that the American Exchange Trust Company should not have accepted the notes, but should have declined to do so; that it should have sued the Exchange National Bank and its bondsmen for the $4,000 and interest; that upon its failure to do so, the bond executed by it to account for property coming into its hands became liable to the same extent and with like effect as if it had received the $4,000 in cash, with interest instead of the notes purchased by its predecessor.

It is argued now that had it sued its predecessor it would have been able to collect the said debt. The American Exchange Trust Company, however, did not sue the Exchange National Bank and, so far as this record discloses, Mrs. Ora Lee Meyer, as administratrix in succession and as guardian, did not sue the said bank. This is merely mentioned, however, as an argument *ad hominum,* as it perhaps indicates what was in the mind of all parties at that time, a belief that the notes were valuable securities, worth probably more than their face, because they were substantial investments considered amply secured.

It is argued also at this time that this suit is one by the minors and it is stated, presumably from the record, that Mrs. Ora Lee Meyer had disavowed and disclaimed any interest under the will, but had elected to claim under the law and had received from the estate of her husband her part thereof and for that reason the children were proper parties to maintain this suit.

The appellee in response to the arguments urged to the effect that the sureties on the bond for American Exchange Trust Company became liable for the default of the predecessor, Exchange National Bank as administrator with the will annexed, is that, since the act of the Exchange National Bank was illegal in the investment of money belonging to the estate in the notes without first having procured an order from the probate court

authorizing such action, that the money so invested must be treated as a continuing fund, even after such investment, in the hands and possession of the Exchange National Bank, and in like manner must be treated as in the possession of the American Exchange Trust Company when it became administrator in succession, is to the effect that the bond executed by the American Exchange Trust Company does not so provide by its express terms nor by implication. It is true that there are numerous decisions to the effect that the administrator in succession may make his predecessor account for assets belonging to the estate and nobody doubts the soundness of the principle urged, but that is not the contention made here by the appellants. Their contention is to the effect that notwithstanding the fact that the Exchange National Bank had made settlement, its settlement had been duly approved by the probate court; that every administrator in succession thereafter became liable when it accepted property and assets from the predecessor and was charged with liability for any wrongful act of any kind or default of such predecessor.

In answer to that contention let it be said that the bond of the administrator is a statutory bond. If insufficient by reason of any inadvertent omission from its express terms, such deficiency must be deemed as supplied by the law. If there were additions to the bond not authorized by law, such additions would be declared as surplusage. *Jones* v. *Hadfield,* 192 Ark. 224, 96 S. W. 2d 959, 109 A. L. R. 488.

Our holding is that an administrator in succession is not charged with the illegal acts of his predecessor to the extent that he, if he accepts the trust when appointed and when he makes bond, must take such trust coupled with the absolute or mandatory duty to determine the legality or illegality of his predecessor's conduct and act accordingly. The administrator with the will annexed and the surety here involved received, according to order of the probate court, property tendered without loss, without any act of bad faith and in accordance with the contractual obligations of suretyship of the appellee, bonding company. See §§ 24, 32 and 45 of Pope's Dig.;

Sebastian v. *Bryan,* 21 Ark. 447; *State* v. *Stroop,* 22 Ark. 328; *Fidelity & Deposit Co.* v. *Fairchild,* 164 Ark. 498, 262 S. W. 322.

While the foregoing is a conclusion of the rights of all the parties, it is not amiss to answer the earnest arguments and suggestions of counsel for appellants. They say, first, that this proceeding must be regarded as if the money were actually in the possession of American Exchange Trust Company when it made this bond for the reason that he had a right to recover it in proper suit; that in law the money was in possession of the administrator.

If that fiction be indulged, then the fiction must go further and hold that, since it had the money and there was no default and it delivered over the same property that it received, then the present administrator with the will annexed, carrying the same fiction to the ultimate conclusion, now possesses the assets sued for. A mere statement of the proposition is its answer. There certainly cannot be liability without default. No default has been established against the American Exchange Trust Company or its surety.

It is argued also that, since this suit is one by the minors themselves, and not by their mother who accepted the four notes sued on, foreclosed the lien and bought in the property, such minors are not estopped and, although Mrs. Meyer, administratrix in succession, might be deemed estopped, these children will not be because they have not so acted. This contention is contrary to the holding in the case of the same style, decided by us on November 14th. In addition, it is contrary to an essential part of the record here presented. These children claim under the will of their father and the will is a part of this record. We have also recited the fact that the will provides that they shall not have possession of this property until they attain the age of twenty-six years and it is recited in some of the briefs to the effect that that period is approximately ten years off.

The correctness of the declaration that the corpus of the estate is to be held by the administratrix until the children shall attain the age of twenty-six years is not

disputed. They cannot recover a judgment for property, the possession of which is denied them both by the will and by the law. If they could recover under any theory, their recovery would have to be for the benefit of the administratrix with the will annexed, else a recovery would defeat the purposes of the will. That is not allowable. Although it seems such must be the ultimate conclusion of appellant's contentions, they refrain from a discussion of this result.

All other questions presented have been duly argued, have been found to involve the same principles decided in the case of *Fidelity & Deposit Co.* v. *Meyer, Guardian, ante* p. 42, 121 S. W. 2d 873.

We cannot think there is any merit in repetition or duplication. Since the opinion delivered November 14th is conclusive upon us and the parties involved in this litigation, we hold that the decree in this case is correct.

It is affirmed.

GILL *v.* WHITESIDE-HEMBY DRUG COMPANY.

4-5302 122 S. W. 2d 597

Opinion delivered December 19, 1938.

Edwin W. Pickthorne and *Tom W. Campbell,* for appellant.

Moore, Burrow & Chowning, for appellee.

GRIFFIN SMITH, C. J. We determine whether certain instructions given at appellee's request were erroneous, and whether it was prejudicial for the trial court to hold that counsel for appellant should not interrogate prospective jurors as to insurance affiliations.

Appellant, plaintiff below, was struck by a motorcycle. He was attempting to cross Victory street (in Little Rock) in front of a street car. The motorcycle was being operated by Victor Wild, who had a companion with him. Wild was making a business trip for appellee. When the accident occurred, the street car was about two-thirds through an intersection.

From satisfactory evidence the jury could have found that appellant undertook to cross in front of the street car while the car was moving; that in doing so he stepped into a position of peril; that Wild was not negligent in failing to anticipate appellant's movements, and that the collision was unavoidable.

There was a verdict for the defendant.

The first assignment of error is that the court improperly ruled that plaintiff's counsel should not interrogate members of the jury panel on the subject of possible insurance affiliations.

The question was, "Do any of you have any business connection with any insurance company writing liability insurance?"

Upon objection being made, the court retired to chambers, and in the absence of the jury the president and the secretary of appellee corporation testified that when the accident occurred there was no liability insurance, but that a policy was procured a few days later. Prior to the accident the two witnesses had discussed advisability of procuring insurance, but they had not contacted or talked with any insurance representative with respect to the subject.

Specifically, the court ruled: "Let the objection be sustained. The court holds that counsel for plaintiff would have the right to ask the jurors what business they are engaged in, without referring to any particular occupation or profession."

Ground for objection was that the plaintiff should not be denied the right to ask whether any of the veniremen was connected with the insurance company which wrote the policy issued subsequent to the injury.[1]

The principle was announced in *Pekin Stave & Manufacturing Company* v. *Ramey,* 104 Ark. 1, 147 S. W. 83, that if counsel for plaintiff, acting in good faith, had reason to believe any of the veniremen was connected with a casualty company insuring the defendant, an in-

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[1] "The plaintiff objects to the ruling of the court in reference to permitting the plaintiff to have the jurors answer specifically whether they have any business connections with an insurance company writing accident insurance on vehicles or motor vehicles in Little Rock, for the reason that notwithstanding that these defendants have stated that they didn't have any such insurance at the date of this injury, yet they say that they have a policy, for which they were then negotiating, and which was written a few days thereafter. If any venireman in the prospective jury panel is connected with that insurance company the plaintiff ought to know it so that the plaintiff might use a challenge upon such prospective juror. That is all."

quiry directed to a discovery of such fact was proper. Other cases are to the same effect.[2]

In *Baldwin, et al., Trustee for Missouri Pacific Railroad Company* v. *Hunnicutt,* 192 Ark. 441, 93 S. W. 2d 131, it was held that counsel had the right to interrogate prospective jurors to ascertain their names, residence, business, and such other information as would enable counsel to exercise the right of challenge for cause or peremptory challenge without cause.[3] Other Arkansas cases cited by appellant are *Williams* v. *Cantwell,* 114 Ark. 542, 170 S. W. 250, and *Cooper* v. *Kelley,* 131 Ark. 6, 198 S. W. 94. In the Cooper-Kelley Case Mr. Justice Wood, speaking for the court, said: "Questions that are intended to elicit any possible bias or prejudice that the veniremen might have, 'likely to influence his verdict one way or the other,' are always proper."

In the recent case of *Ward* v. *Haralson,* 196 Ark. 785, 120 S. W. 2d 322, an attorney for the plaintiff, in addressing a witness, said, "You went out there representing the state of Arkansas, representing the defendant

[2] In the Pekin Stave Company Case the court said: "If counsel for plaintiff honestly and in good faith thinks that any of the veniremen is in any way connected with a casualty company insuring the defendant against loss for the injury complained of in the case, he can ask the jurors on their *voir dire* relative to this. If, however, his real purpose is to call unnecessarily the attention of the jury to the fact of the insurance and thereby to prejudice them against the defendant's rights, then this would be clearly an abuse of this privilege and should be promptly stopped by the trial judge."

[3] A paragraph in the Baldwin Case is: "We think counsel had the right to interrogate the jurors to determine their names, residence, business, and such other information as would enable him to exercise his right of challenge for cause or peremptory challenge without cause. In *Clark* v. *State,* 154 Ark. 592, 243 S. W. 868, we held that a party is entitled to the same latitude in examining a juror to determine whether to exercise a peremptory challenge as when seeking information relative to challenge for cause, subject to the sound discretion of the court. The court not only denied counsel this right, but in doing so—facetiously, no doubt—hurtful, nevertheless—stated that counsel was unfortunate in not knowing the jurors by name, because he did not live in Saline county. The error, however, is the denial of a litigant the right to try to determine, in good faith, by examination on *voire dire,* who and what the jurors are who are to try his case."

and an insurance company, and made those measurements.'' It was held that this was prejudicial error.[4]

It is our view appellant has not shown that he was prejudiced by the court's refusal to permit counsel to specifically pursue the inquiry regarding the possible interest or non-interest of veniremen in an indemnity insurance company. It is not shown that any venireman was asked what his or her business was, or that an equivocal answer was given. It will be presumed that, under the court's ruling, questions within the latitude accorded were asked, or that counsel elected not to pursue the subject. It is not shown that because of doubt or uncertainty created by any of the answers given, appellant exhausted his peremptory challenges. Peremptory challenge would not have been necessary if responses to the character of questions sought to be asked by appellant had shown the right to challenge for cause, and it is appellant's contention that such showing could not be made because of limitations imposed by the court.

Instruction No. 2 told the jury that ''the defendant cannot be held liable for the result of any act or omission of Victor Wild, the result of which could not have been reasonably foreseen or anticipated by Victor Wild.''

It is urged that the measure of care contemplated by the law was not what Victor Wild could have foreseen, but what a man of ordinary prudence, in the circumstances, would have anticipated.[5] The instruction is not

[4] In the Ward-Haralson Case it was said: "The statement of counsel for appellees, injecting into the case the fact, if it be a fact, that appellants had insurance coverage, was wholly inexcusable, uncalled-for by anything that had previously occurred in the case, and was highly prejudicial. We think the remarks of the court were not sufficient to remove the prejudice, and that a mistrial should have been declared. The obvious and only purpose in making the statement was to advise the jury that an insurance company would have to pay any judgment rendered. This was error."

Instruction No. 2 reads: "You are instructed that the defendant cannot be held liable for the result of any act or omission of Victor Wild the result of which could not have been reasonably foreseen or anticipated by Victor Wild. If you find that the injuries of the plaintiff were sustained in such manner as could not have been reasonably anticipated or foreseen by Victor Wild by the exercise of ordinary care on his part, the plaintiff is not entitled to recover."

inherently wrong.[5] There was only a general objection. Effect of the instruction was merely to tell the jury that liability does not attach to one who, without fault of his own, is precipitated into an unavoidable accident. In *Taggart* v. *Scott,* 193 Ark. 930, 104 S. W. 2d 816, an instruction similar to the one here complained of was given.[6] We there held that, properly construed, the instruction told the jury that ordinary care was required.[7]

The vice urged against instruction No. 14 is that it told the jury that operation of the motorcycle by appellee's employee at an excessive speed, or running the motorcycle past the street car at the intersection in viola-

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[5] Appellant's argument is: "Victor Wild was a boy whom appellee had employed to make its deliveries. It was enough to render appellee liable if the result of the act or omission of this boy causing the injury to appellant could have been reasonably foreseen or anticipated *by a man of ordinary prudence,* under the circumstances, whether the results of such acts or omissions could have been 'foreseen or anticipated *by Victor Wild*' or not. Appellee had no right to employ a *boy* to make its deliveries over the streets of a populous city on a motorcycle and then have the question of its liability for his acts or omissions turn on whether this *boy* could foresee or anticipate the result of such acts or omissions. Appellant had a right to have appellee's liability depend upon whether *a man of ordinary prudence* could have reasonably foreseen or anticipated the result of such acts or omissions." NOTE: The record as abstracted does not show the age of Victor Wild.

[6] The Taggart-Scott instruction was: "You are instructed that the defendant cannot be held liable for the result of any act or omission, the result of which could not have been reasonaby foreseen or anticipated. And in this case, if you find that the injuries and damage, if any, sustained by the plaintiff could not have been reasonably anticipated or foreseen, by the use of ordinary care by the defendant, the plaintiff is not entitled to recover."

[7] In commenting upon the instruction in the Taggart-Scott Case, this court said: "It is argued that this instruction in effect told the jury that appellant could not recover if it found that the injuries sustained by her in person and to her car could not have been reasonably anticipated or foreseen by appellee's driver. We think, properly construed, the instruction means, and the jury were told, that appellee would not be liable unless injury and damage to appellant or her car could have been, by the exercise of ordinary care, anticipated or foreseen by appellee's driver."

tion of city ordinances, "would not of itself or themselves conclusively establish negligence."[8]

We have frequently held that violation of a state law, or violation of a city ordinance, is merely evidence of negligence, and does not constitute negligence *per se*.[9]

Instruction No. 16 told the jury that the rule of law requiring drivers to exercise care commensurate with the dangers reasonably to be anticipated did not require Victor Wild to anticipate appellant's action.[10] Appellant in-

[8] Instruction No. 14: "Even though you believe from the evidence that Victor Wild was operating his motorcycle at an excessive rate of speed just prior to or at the time of the accident or passed the street car then being operated by W. C. Bently under circumstances which constituted a violation of one or more ordinances of the city of Little Rock, you are instructed that such act or acts, if any, of the said Victor Wild, would not of itself or themselves conclusively establish that Victor Wild was guilty of negligence, but such act or acts, if any, may be considered by the jury only for the purpose of determining whether or not Victor Wild was guilty of negligence, and even if you find that Victor Wild did violate one or more ordinances of the city of Little Rock, either with respect to the then speed with which he was operating said motorcycle or the circumstances under which he passed the street car, you must further find, before you find for the plaintiff, that such act or acts, if any, were the sole and proximate cause of the injury."

[9] Instruction No. 16 reads as follows: "If you believe from the evidence that the plaintiff, just before the accident, attempted to cross Victory street, at a point several feet north of the cross-walk which is located on the north boundary of the intersection of Second and Victory streets, and that at the time he made such attempt he was trotting or hurrying across Victory street to cross said street ahead of a northbound street car which then was entitled to the right-of-way over the plaintiff, and that plaintiff's view of the motorcycle then being operated by Victor Wild was obstructed by the street car, you are instructed that the rule of law which requires drivers of motorcycles to anticipate the presence of pedestrians upon the street and to exercise reasonable care to avoid injuring them and which requires such drivers to exercise care commensurate with the dangers reasonably to be anticipated, would not require Victor Wild to anticipate such action, if any, on the part of the plaintiff, and the failure of Victor Wild to anticipate such action, if any, on the part of the plaintiff, would not establish conclusively that Victor Wild was negligent in passing said street car."

[10] *Shipp* v. *Missouri Pacific Transportation Company*, *ante* p. 104, 122 S. W. 2d 593, and cases therein cited.

sists that it is for the jury to find, in a particular case, whether violation of a safety ordinance constitutes negligence. We think any uncertainty in that part of the instruction to which exception is taken was cured by other language in the same instruction which told the jury that "failure of Victor Wild to anticipate such action, if any, on the part of plaintiff, would not establish *conclusively* that Victor Wild was negligent in passing said street car."

Finally, appellant insists that it was error to give multiple and duplicate instructions at the request of defendant. It is true a great many instructions were given; yet, they are not duplicates. It is better practice to limit instructions to the law applicable to essential subjects of controversy brought out by the evidence, but in the instant case the record does not disclose an abuse of the privilege each side to the controversy had to submit its theory under appropriate instructions.

The judgment is affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J. (dissenting). I cannot agree with the majority in holding that the court did not err when it refused to permit appellant's counsel to ask the jurors the following question: "Do any of you have any business connections with an insurance company writing liability insurance?"

In a recent case the attorney said: "I want to know if any of the jurors are employed by liability insurance companies, or engaged in the insurance business, or employed in the insurance business?" Objection was made to this question and exceptions saved, and this court said: "The question propounded by counsel for appellant was a proper one in order that he might intelligently exercise appellant's right of challenge. *Smith Ark. Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. 2d 1052. That question was very much like the question in this case.

A party in a civil case not only has the right to challenge for cause, but each party has three peremptory challengers, and has as much right to get information so that he can intelligently make those challenges as he

has to trial by jury. The refusal of the court in this case to permit the question to be asked absolutely denied the appellant the right to ascertain whether any of the jurors had any business connection with the insurance company writing liability insurance. He certainly had a right to know this in order to intelligently exercise his right to a peremptory challenge. To permit appellant to ask what business the members of the jury were engaged in does not give him the information that he seeks and which he had a right, under the law, to have.

Again this court said recently, when counsel asked the jurors if any of them were interested in any liability insurance company for protection against automobile accidents:

"It is argued that the only purpose of asking the question was to leave a false impression upon the minds of the jurors that appellant was protected by insurance against the accident, so that they would the more readily return a verdict in favor of appellees. The argument is not supported by the record. In answer to a question asked by the court, counsel for appellees stated that the question was propounded to obtain information. They were entitled to the information in order to intelligently exercise their right of challenge under the rule announced in the case of *Smith Ark. Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. 2d 1052." *Bourland* v. *Caraway,* 183 Ark. 848, 39 S. W. 2d 316.

This court, in another case, said: "In this case only one juror was questioned as above indicated, and there was nothing in the record to disclose that counsel for appellee was not acting in good faith in asking the questions to determine whether the juror had any bias or prejudice for or against either party." *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. 2d 167.

In another case this court said: "Questions that are intended to elicit any possible bias or prejudice that the veniremen might have 'likely to influence his verdict one way or another' are always proper, and the rulings of the trial court in permitting such questions will never be dis-

turbed unless there is a manifest abuse of its discretion. The questions propounded to the veniremen in the instant case in and of themselves were not objectionable, and the record does not disclose anything in the conduct of the attorney in the manner of propounding the questions, or other conduct on his part aside from this, that was calculated to cause the jury to believe that the defense was actually being conducted in the interest of some casualty insurance company instead of those who were named and who appeared as defendants at the trial." *Cooper* v. *Kelly,* 131 Ark. 6, 198 S. W. 94.

Again this court said: "The authority of the attorney and the duty of the trial court in such matters was recently considered by this court in the case of *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83, in which case Mr. Justice Frauenthal, speaking for the court, said: "If counsel for plaintiff honestly and in good faith thinks that any of the veniremen is in any way connected with a casualty company insuring the defendant against loss for the injury complained of in the case, he can ask the jurors on their *voir dire* relative to this." *Williams* v. *Cantwell,* 114 Ark. 542, 170 S. W. 250.

"The privilege of such questioning by the defendant for peremptory purposes should not be denied.

"The right to challenge peremptorily is sacred and valuable; and the exercise of it does not rest upon any legal qualification of the juror, but it may be exercised by the defendant for any peculiar reason, or no reason, and without legal cause." *Funches* v. *State,* 125 Miss. 140, 87 So. 487.

"In civil cases it is said that peremptory challenges are allowed to protect parties, not so much from the bias or prejudice which might arise in the mind of a juror from personal dislike or hatred of those who might happen to be plaintiffs or defendants in the action, but rather that which might relate to or grow out of the subject-matter in controversy." *State* v. *Skinner,* 34 Kan. 256, 8 Pac. 420.

Again this court said, when the attorney asked the jurors if any of them were represented by a certain firm

of lawyers, and objection was made and overruled by the court: "There was no error in this ruling. Counsel had the right to have this information in determining what peremptory challenges he should exercise." *Anderson v. Erberich,* 195 Ark. 321, 112 S. W. 2d 634.

The right to challenge peremptorily, as said by the Mississippi court, is "sacred and valuable." It is as sacred as the right to trial by jury because, if attorneys are not permitted to examine jurors for the purpose of getting information in order to determine what peremptory challenges they shall make, the jury may be composed partly of persons who could not and would not give the party a fair and impartial trial. Besides, our statute provides, in addition to challenges for cause: "Each party shall have three peremptory challenges, which may be made only orally." Section 8343, Pope's Digest.

It would be absurd to give a party the right to peremptory challenges and then not permit him to ask questions to determine what peremptory challenges he wished to make. Some of our cases hold that the questions by the attorney must be asked in good faith. I think the attorney has the right to the information without regard to what his motive is. Of course, the trial court would have the right to prevent any attorney from doing anything that would create prejudice in the minds of the jurors.

Section 8312 of Pope's Digest provides that jurors must be of good character, of approved integrity, sound judgment, and reasonable information, qualifications that are not required of a judge. I do not think jurors are any more subject to influence, bias, or prejudice, than we are, and there is not a scintilla of evidence in this record that the attorney for the appellant did or said anything that had any tendency to create bias or prejudice in the minds of the jurors. There may be a few lawyers that would act in bad faith, but from my experience in the trial of lawsuits for forty years, I am thoroughly convinced that the great majority of lawyers on both sides, as well as the great majority of jurors, act uprightly and would not resort to any practice not justified.

Since there is no evidence to indicate that the attorney in this case did anything improper, it is our duty to hold that he did not; and in judging his conduct, or the conduct of any attorney in the trial of a lawsuit, we should put ourselves in his place, because: "We are apt to be selfish in all our views, in this jostling, headlong race, and so to be right, before you censure a man, just put yourself in his place."

It is said in the majority opinion that it does not appear that any prejudice resulted to appellant. It does appear, however, that he was deprived of a sacred right, and in such cases prejudice is conclusively presumed. If one was being tried for murder and the court should conclude that the jury was prejudiced and might base their verdict on conjecture and speculation, and for that reason discharged the jury and tried the case himself, when the case came to this court on appeal there would be no more prejudice appearing than there is in this case, but no one would hesitate for a moment to declare the conduct of the judge improper, and reverse the case. I think that is what we should do here.

Mr. Justice Humphreys agrees with me in the view herein expressed.

Albritton, Admr., *v.* C. M. Ferguson & Son.

Park *v.* Same.

4-5254 122 S. W. 2d 620

Opinion delivered December 19, 1938.

Sam M. Levine, O. E. Gates, Max Smith, Reinberger & Reinberger and *E. D. Dupree, Jr.,* for appellant.

Rowell, Rowell & Dickey, for appellee.

BAKER, J. These two cases upon appeal furnish us with a voluminous record, a large abstract, with briefs on behalf of each of the two appellants, a brief by appellee and a reply brief by appellants. Any analysis of all this record would be too tedious for the benefit that might be derived therefrom. It would seem, however, that the two cases combined here on appeal, as they were upon trial in the circuit court, are hand made for a prolonged discussion. The ultimate conclusions that we have reached necessitate a reversal of one of the judgments rendered and a remand for a new trial, and an affirmance of the other and, since that is true, it will be our purpose to point out and state in the most concise manner available the particular errors that require a reversal, making the least comment possible.

Eight young people were in an automobile belonging to the appellant, H. F. Parker. They made a short trip from Tamo along what is known as the Tamo Pike, a paved highway to Pine Bluff. At Pine Bluff they visited several roadhouses where they had some drinks and danced. After an hour or two of pleasure, in going from one place to another and dancing, they started on their return trip from Pine Bluff to Tamo, where several of the young people were staying at the particular time, though they were there on a visit from other communities. Upon the return trip, at about 11:30 at night, they had a most serious accident in which Miss Retha Belle Albritton was injured so badly that she died, and H. F. Parker, the owner and driver of the automobile, himself seriously injured. The administrator of Miss Albritton's estate sues to recover on account of her injuries and death. Parker also sued on account of the injuries and loss sustained by him. They have alleged that the injuries were occasioned or caused by the operation of two trucks upon the highway, belonging to the appellee. One of the trucks had broken down so that it could not move on its own power and was being towed by another, the coupling, or tow-line, or cable being attached to the front truck and extending back some feet was there tied to the rear truck which was being towed toward Pine Bluff. It was alleged this tow-line was so tied or attached

to each of the trucks and that it was of such length, that as the two trucks proceeded upon the highway, to cause the drawn truck to sway or swerve in and out from a direct line as it followed the lead truck, swaying or swerving across the middle or black line in the highway; that it was without lights; and, in the darkness of the night, Parker, in driving the automobile, could not avoid being struck by the truck as it swayed from the straight driveway; and, at the time of the contact, or collision, there was a blowout of a tire on his car and the car proceeded from that point on, not in a straight line down the highway, but swerving to the left, causing the car to run into a culvert; that the car was practically destroyed, that the personal injuries and death, for which the suits were brought and maintained, were suffered.

It seems that the parties to this litigation, in the zeal, or desperation of their attempts to sustain their respective positions, have gone somewhat far afield in some respects and we call attention to it not by way of criticism, but in the hope that many of the immaterial matters, as they seem to us, might be omitted from the future trial. We mention this here and will perhaps call attention to some others as we proceed to a discussion of different steps and alleged errors in the development of the case. It is most seriously argued that the appellee was upon a highway with these trucks, at a late hour, in the darkness of the night. Of course, it is understood generally that conditions and circumstances that prevailed at the time are matters that must be considered in determining what may or what may not be negligence, but certainly it could never be negligence to make use of the highway whether in darkness or daylight; that the correlative rights of those people who drive upon the highways are equal, whether it be in the darkness of night or otherwise.

We shall state just so much of the evidence in this case as may be necessary to an understanding of the matters under discussion.

These young people as they drove about the city of Pine Bluff, and as they were seated on the way home,

after the night's pleasure and entertainment, were four in each seat. As hereinbefore stated they had been to places where they had bought some drinks, including the usual so-called soft drinks, some beer, and some gin. Appellee insisted, upon instructions, based upon the theory that at least the driver of the car was under the influence of intoxicating liquors to the extent that he was reckless or an unsafe driver; that all of them were engaged in a common purpose or joint enterprise in the search of their entertainment and pleasures and that the negligence of one was the negligence of all. Certain instructions given, certain authorities cited to sustain the certain instructions indicate clearly that theory on the part of the appellee in the trial of this case. The suit, however, brought by Albritton as administrator, is brought and prosecuted upon the theory that the young lady entered the car as a guest and remained one throughout the entire evening as they went about from place to place and upon their return home. Without going into a minute or detailed discussion of either theory presented to us by the voluminous briefs upon the subject, we suggest that both parties have read and cited to some extent the same authorities and it may be suggested that the instructions, under which the so-called joint enterprise or common purpose might be determined are taken from the announcements in Blashfield on Automobiles. The insistence on the part of appellants is that under the undisputed facts Miss Albritton must be regarded as a guest and that the instructions in regard to common purpose or joint enterprise are, therefore, abstract and should not have been given. We are unwilling to say as a matter of law that the evidence was such as not to justify the submission of this question to the jury. We think it a matter attended with some serious degree of doubt under the facts as established in the case, as to whether Miss Albritton was one engaged in a joint enterprise with Parker on the night of the injury. While it may appear to us that the guest theory is the sounder one, the facts in evidence to determine the particular status of the young lady on that fatal night may be susceptible of different interpretations by reasonable men, and that being

true there is a jury question. Certainly, if we may not say as a matter of law that she was a guest, then it was a question for the jury to determine whether she was engaged in a joint enterprise or whether she was a guest, so that question should have been, under proper instructions, submitted to the jury for determination. Our conclusion in this regard makes inevitable an adverse criticism of instructions Nos. 12 and 16, given by the court at the request of the defendant. Instruction No. 12 as given does assume that Retha Belle Albritton and H. F. Parker were engaged in a joint enterprise. The fact assumed is not undisputed. It tells the jury in effect that the burden is upon the plaintiffs to show, by a preponderance of the evidence, that their injuries and the death of Retha Belle Albritton were accomplished solely by some act of negligence of the defendant, its agents or employees. Surely, if Retha Belle Albritton were a guest in that car at the time of the injuries, and was without contributory negligence, her administrator would be permitted to recover although her injuries were caused by the concurring negligence of Parker and of the employees or agents of the appellee. It is true her administrator was not suing Parker, and for the very good reason perhaps that he was considered protected by the so-called guest act, but notwithstanding the fact that he may have been so protected, the doctrine of concurring negligence, that is to say, the negligence of Ferguson & Son, combined with the negligence of Parker might have been such as to have caused her injuries and consequent death, and, under the law prior to the enactment of the guest statute, her administrator would have been permitted to have sued either, and, no doubt, now he might sue the appellee under a proper allegation of facts presenting the issue of concurring negligence. It is not inconceivable that the manner in which the crippled truck was being towed, combined with high speed, or other negligence on the part of Parker, might have combined or concurred to bring about the young lady's injuries and death. So instruction No. 12 is not only erroneous in that it denies a right to recover on account of concurring negligence, but it is also erroneous in that it assumes, as a

matter of fact, that Parker and Miss Albritton were engaged in the so-called joint enterprise.

Instruction No. 16 as given by the court at defendant's request has the same inherent vice or defect, in that it assumes the same matter of fact and the instruction is based thereon. So it must be determined that both these instructions are erroneous.

We think it hardly necessary to cite a numerous lot of authorities illustrative of the doctrine of concurring negligence as these matters must be known to counsel as well as to the trial judge, but it seems that the importance of them did not occur at the time of the trial. Our attention has been called to the following cases: *Pine Bluff Company* v. *Whitelaw,* 147 Ark. 152, 227 S. W. 13; *Bona* v. *S. R. Thomas Auto Co.,* 137 Ark. 217, 208 S. W. 306; *Miller* v. *Fort Smith Light & Traction Co.,* 136 Ark. 272, 206 S. W. 329; *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71; *Ward* v. *Ft. Smith Light & Traction Co.,* 123 Ark. 548, 185 S. W. 1085. There are many other cases of similar import, but these serve to illustrate the point as effectively as if supported by a dozen others.

Attention is called also to the fact that instructions Nos. 23 and 18, as given at the request of defendant, have this same defect. It is unnecessary, however, to go to a more minute analysis of these matters, as the court will, no doubt, find it proper, upon a new trial and a reconsideration of these matters, to correct errors that are now so apparent.

We call attention next to an instruction given by the court of its own motion, No. 19, and in that instruction it is evident that the court did not intend to have foreclosed or decided the question of whether the parties were engaged in a joint enterprise, as distinguished from the relation of host and guest, as the court submits to the jury a proposition to be determined as they might find from the facts, whether Retha Belle Albritton was engaged in a joint enterprise with Parker, or if she were, on the other hand, his guest. But the court was unfortunate in the method of expression employed and the announcements of the law, for these tell the jury that if the injuries and death complained of were the result of

the negligence of the Ferguson Company, or its servants, in the manner in which they were towing the truck, and that such negligence was the sole and proximate cause of the collision and the wreck of Parker's car, to find for plaintiff Albritton, unless it be determined that she was engaged in a joint enterprise with Parker. This instruction either assumes the negligence of Parker (and on that account that the joint enterprise did constitute a defense) but it is so stated that, notwithstanding the jury may determine as a matter of fact that Parker and Miss Albritton were neither negligent, yet if the jury believed from the evidence that they were engaged in a joint enterprise, this fact, that they were so engaged, was a complete defense. It takes no argument to convince anybody that such cannot be the law.

As we have proceeded in our analysis of this case and instructions given by the court, we have reached the conclusion that the basis for most of the errors complained of arises from the so-called matter of joint enterprise, which appears to be one of the conditions almost impossible to define or describe as distinguished from the relation of host and guest under ordinary conditions.

The court's instruction No. 18, given at the instance of the court, is, perhaps, correct as far as it goes. While we have approved in some of our cases the announcement in Vol. 4, Chapter 65, p. 171, § 2372, of Blashfield on Automobiles, we have considered that matter in the case of *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73, and announced our conclusions, a reference to which makes it unnecessary to set forth or repeat our holding.

So it must appear that this question, so frequently referred to as "common purpose," or "joint enterprise," or "joint adventure," should be defined according to the definitions that we have heretofore given. If upon a new trial the court may not determine, as a matter of law, from undisputed evidence whether the relation between the parties, the driver of the automobile and Miss Albritton, was such as to be classed as a joint enterprise, or whether they were merely host and guest, and it be necessary to a proper conclusion, on account of disputed evidence, or evidence of such character that reasonable

men might differ as to its effect and value, the court will in such event submit to the jury the proposition and give instructions to determine the relative rights of the parties as their relations may have been determined arising out of this question as to joint enterprise, or host and guest.

We cannot think it profitable to seek out each instruction for a critical analysis and determination to aid the court upon a new trial. In fact we are convinced it is wholly unnecessary to do so and would unduly extend this opinion.

The appellants argue that instructions given by the court upon the matter of intoxication are abstract and that there is no evidence to justify the giving of such instructions. We agree with this theory of the appellants, at least, to the extent that we think it apparent under the state of the record, as presented here that there is nothing from which the jury might have inferred Miss Albritton was intoxicated, or, at least, under the influence of liquor to the extent that such condition had anything to do with the driving or wrecking of the car, inasmuch as Parker was the driver and she was merely seated by him in the car at the time of the accident.

It is not shown that Miss Albritton did very much drinking, but even if she had been drinking there is no development of the case that tends in the least to show that this might have affected the driving of the car, nor do we think that such drinking that she may have done at the time shows or establishes a condition as relates to her, similar to that in the Chitwood Case. *Sparks* v. *Chitwood Motor Co.*, 192 Ark. 743, 94 S. W. 2d 359.

The foregoing statements are directed almost exclusively to the case of *R. E. Albritton, administrator,* v. *C. M. Ferguson & Son.*

It is necessary now to discuss the alleged errors in the case of *H. F. Parker, appellant,* v. *C. M. Ferguson & Son, appellee.* It is urged most seriously in this phase of the case that all instructions given by the court in regard to the drinking were abstract and that it was error on that account to give them. We are not in accord with that contention. It is also argued that it was error to permit Hooker to testify as to statements made to him by Park-

er, as Parker explained that he was intending to take the girls home as quickly as he could.

The only other substantial objections made are as to the dying declarations of Miss Albritton, the alleged privileged communications, and instruction No. 19, given at the request of the defendant. These matters will be disposed of and our conclusions stated in the shortest order possible.

Parker was the driver of the car and had the responsibility for its control and operation. According to the testimony of the appellants, at least, whatever drinking he did might be regarded very differently by a jury trying this case from what counsel for appellants argue as a conclusion from evidence, as a basis for a rejection of the instructions in regard thereto. The record is not free from evidence that Parker was not wholly unaffected by the liquor he had drunk. The remark that he made to witness Hooker and his declaration to the effect that he was going to get rid of the young ladies as soon as he could might well have been the language of a gentleman affected with drink, and, by way of parenthesis, we might say that as to Parker this evidence of Hooker was admissible, but it should have been received under proper admonition of the court limiting and applying this testimony to Parker. At the time Parker made this remark, on the same occasion when he went to the car where Hooker was found, he picked up that gentleman's glass of buttermilk, drank it and dropped a nickel in the plate to pay for it. There is no explanation for that conduct by him or the other witnesses, if, in fact, under all the circumstances, it needs any. This is said in consideration that there is evidence that the young ladies did not do much drinking. One of the young men did not drink any. The drinking done by the young ladies was of soft drinks and beer for the most part. A bottle of gin, 4/5 of a quart, was disposed of by the party and there is some evidence that another bottle of gin was also drunk by them. Most men know that some people can drink what others consider large quantities without being outwardly affected thereby.

The foregoing statement testified to by Hooker in giving Parker's explanation of the reason he was speeding his guests home, if they were guests, in fact, was competent against Parker as indicating not only his condition, but the rapidity with which he was discharging his social obligations. Parker himself says that he was driving at a moderate rate of speed, perhaps thirty-five or forty miles an hour. He did not see the truck that was being towed. He says that he was driving straight ahead when the truck must have swerved over and struck the car he was driving. If that statement be true, althought it is seriously doubted, we cannot find any reasonable excuse for his not having seen the truck that was towed by the one that he says he did see. There were four in a seat. Parker is a large man, weighing approximately 200 pounds. If he was sitting straight in the car seat, he occupied a considerable portion of that front seat. If he was crowded into the corner, as he must have been, he was not so turned that he could observe objects immediately to his left without turning his head away from the usual or normal position.

These are all matters which the jury had a right to consider and which they no doubt did consider, together with other facts that are in no sense in dispute. Young Jimmie Harris was a member of this party. He was the only one who did not drink. He was acquainted with the road over which they were driving when the wreck occurred and testified he knew the difference between fast and slow driving. At the time of the accident they were going approximately seventy-five miles per hour. The car swerved when it went around a curve near Wright's filling station; that he began to fear for his safety. Someone, he did not remember who it was, asked Parker to slow down. They saw vehicle lights ahead, the ones upon the truck. They passed the first at the same speed at which the car had been traveling. Just before hitting the second truck the car seemed to swerve off the highway onto the shoulder and the driver evidently turned back to the left and that was when the collision occurred. It was only a glancing lick and the real trouble came when the car hit the culvert and went into a ditch.

This witness testified as to many other matters, but we have stated the above because it is in conformity, we think, with the effect of the testimony of another witness, Hillary Rudder. Rudder was city engineer of the city of Pine Bluff. He went there to the scene of the accident, made a survey of the situation where the wreck occurred, drew a plat, and made measurements. He testified that the road was eighteen feet wide. On each side was a ditch beyond the shoulder of the road. He found the skid marks upon the highway. He identified by a line indicating where the car left the road, as shown by the impression the wheels made in the grass and weeds along the highway. The line marked by the travel of the car was a straight line, approximately 499 feet long.

Mr. J. T. Stone, a man who lived near that part of the highway where the accident took place, testified that he was in bed when he heard the collision; that he got up and dressed and went out upon the highway, and that he saw two trucks in front of his house. About 200 yards or better down the road, in a ditch, was a car, and he saw the wheels turning in the air. He called an ambulance. The next morning he traced the tracks of the car that had been in the wreck and saw the marks of the tires all the way down to the place where it had hit and went into the ditch. He identified photographs. There were some skid marks at the place where the accident took place. When he had offered his assistance and was helping people get out of the car, he smelled alcohol on the breath of Parker and McCombs.

The instruction that is seriously objected to by counsel for Parker is instruction 19, given on behalf of the defendant, and that part to which the objection is particularly directed is that the court told the jury "In order, therefore, for you to return a verdict for the plaintiffs in these cases it will be necessary for you to find from the evidence not only that the driver of the defendant's truck was negligent, but also that the plaintiff H. F. (Red) Parker and the deceased, Retha Belle Albritton, were not negligent, or if they were negligent to the slightest degree, that such negligence did not contribute to cause his or her injury."

The objection urged is that this instruction put upon the plaintiff, Parker, the burden of proving there was no contributory negligence, the burden of proving which, of course, rested upon the defendant. We do not think this instruction is susceptible of that interpretation and this is particularly true in the light of other instructions given upon the same point and not in conflict therewith. One of these is No. 6, given by the court upon its own motion. The court, in explaining the issues to the jury in the case of *Parker* v. *Ferguson,* said:

"The main issues for you to determine are: Whether or not the injuries of Parker were caused solely by the negligence of the agents and servants of Ferguson in the operation of the trucks and trailer, or whether or not the injuries of Parker were caused solely by the negligence of Parker in the manner in which he was driving his automobile at the time, or whether or not the negligence of Parker, if any, combined or concurred with the negligence, if any, of the servants of Ferguson to cause or contribute to Parker's injuries." It appears that the issues were clearly and directly presented to the jury and that the jury must have understood these issues as defined, particularly as to the rights of Parker.

We do not think there was prejudicial error in this submission of Parker's case. If he was guilty of negligence that contributed to or caused his injury, he did not have a right to a recovery. The jury's verdict, under a submission of these facts above stated, found against him and that verdict is conclusive upon appeal, provided there is no error that shows an improper submission.

In addition to these matters as determined by the jury, we think it may be said, without an invasion of that field which is perfectly within the realm of the jury to find and determine facts, that the physical facts in this case demonstrate beyond any doubt, that Parker, the driver of the car was negligent in its operation at the time of the collision and accident.

The proof of the engineer is undisputed that the car ran on for a distance of approximately 500 feet after the collision. It then hit the culvert with so much force as to wreck the car which had to that time only suffered

the blow-out of a casing. It is not disputed that after Mr. Stone heard the crash, he dressed and went 200 yards and found the car with the wheels in the air still spinning. If the car were driven at that moderate rate of speed, which Parker testified to in his evidence, then he was negligent in not stopping it before this crash occurred. The car had been driven, according to his testimony only five or six thousand miles. It was in good condition. Traveling at thirty-five or forty miles it could have been stopped at not more than half the distance it ran after the collision with the truck. There was a wide margin of safety if there had not been unusual speed. The engineer's evidence corroborates and fortifies what was said by Jimmie Harris who fixed the rate of speed at approximately seventy-five miles an hour.

These physical facts and conditions presented, without substantial dispute or controversy, in regard to their accuracy, conclusively determined that Parker was not entitled to recover.

The verdict should have been directed by the court against Parker. That being true, any instruction not going that far was too favorable and not prejudicial.

The foregoing disposes of the most important of the alleged errors. The only other matters are in regard to the dying declarations and the suggested privileged communications.

It is argued that the court committed error in the matter of permitting the nurse who waited on Miss Albritton to testify in regard to statements she had made as a dying declaration; that this violated two rules of evidence arising out of recent legislation, Pope's Dig., § 5201, one that it was not proper to permit the nurse to detail the dying declarations of Miss Albritton. Without considering the competency of her statement as made, let us suggest that the dying declarations become competent by reason of a declaration of the law that formerly existed as re-enacted by the Legislature in 1935. No doubt it was the purpose of this legislation to open a way to get in proof otherwise held inadmissible. Now, it would seem sufficient to say that since the Legislature has made these declarations admissible in civil cases, we

have no hesitancy in saying that either party under proper allegations may use such dying declarations for purposes set forth in the act after proper foundation is laid. We suggest there may be a difference, however, in attempting to prove facts by such declarations and in the presentations of mere conclusions.

The other error suggested is that the court improperly permitted the nurse to testify, the objection being that since she was the nurse communications made to her and in her presence were privileged. It is argued that comparatively recent legislation, see § 5159, Pope's Dig., to the effect that if a patient shall offer his physician as a witness the other party may in like manner call other physicians, regarding the privilege as having been waived. The theory of appellants is that although they put on a physician, appellee could not offer any one who was not a physician, or, if they had put on a nurse, the appellants could not have offered a physician. We think that interpretation of the statute is too technical to serve the purpose no doubt intended by the Legislature. Without an attempt or effort at construction we merely declare our conclusion.

It had heretofore been the law that certain communications to or with doctors or nurses are privileged. Occasions are not infrequent in which perhaps two or three physicians, or maybe more, may have examined a patient and have determined the extent and effect of his injuries. Yet they would not be permitted to testify and the so-called injured party might take or choose such physician or party as he deemed most favorable to him in the statement of the nature, extent and effect of his injuries, and at the same time each of the other attending physicians be equally competent to declare the result of their investigations and findings. So it was deemed to the best interest of the public to leave the question of privileged communications entirely within the control of the injured party; that he need not call any physician to testify as to what his findings were, in his professional relationship with him, but should he deem it necessary or proper to do so, when he shall have exercised that privilege and called his physician to testify in that re-

spect, his conduct would operate as a waiver of the privilege, and opposing side might call others who had occupied the exact and same relation with the injured party, and it would make no difference in that view of the case, whether the privileged communication was one in the mind or recollection of a doctor or nurse. If the litigant waived the privilege, he waived it as to all nurses or physicians. Such must have been the intention of the Legislature and we so declare it.

It must not be understood upon a trial anew, in the Albritton Case, that we have approved instruction No. 19, as requested by defendant. While we do not think the language is susceptible of the interpretation put upon it by counsel for appellants, there is no doubt but that it might be improved and the suggested and supposed error be entirely eliminated.

It need not be argued that contributory negligence is an affirmative defense, the proof of which rests upon the defendant unless it appears otherwise.

For the errors indicated the judgment in the case of *Albritton* v. *Ferguson & Son* is reversed and remanded for a new trial.

The judgment in the case of *Parker* v. *Ferguson & Son* is affirmed.

SANDERS *v.* MISSOURI PACIFIC RAILROAD COMPANY.

4-4664 106 S. W. 2d 177

Opinion delivered May 24, 1937.

For the case on second appeal see 196 Ark. 269.

Griffin & Griffin and *J. Paul Ward,* for appellant.

Thos. B. Pryor, H. L. Ponder, Jr., and *H. L. Ponder,* for appellee.

GRIFFIN SMITH, C. J. Appellant alleged and testified that he was severly injured in September, 1935, as the result of a fall occasioned through negligence of a fellow-servant. The trial court ruled that proof offered on appellant's behalf was not sufficient to establish liability, and so instructed the jury.

The accident occurred near Vineland, Mo., and suit was brought under the Federal Employers' Liability Act. Appellant was working with others in constructing a large form into which concrete was to be poured in the process of building bridge piers. The lining of the structure was made of one-inch "lagging" laid horizontally and supported by vertical 2 x 4 studs. This was reinforced externally by 4 x 8 horizontal timbers 18 feet long, called "wales," and these heavier timbers, in turn, were "tied" with steel rods extending from outside-to-outside, through the wales and lagging. The wales were not long enough to reach the full length of the form, and were "spliced" by placing a short piece end-to-end with longer piece. In order to give strength and rigidity, and to overcome defect incident to the use of shorter timbers, the wales were laid two-ply so that the "breaks," or "joints" were covered by overlapping alternate timbers. When each complement was laid, the result was that two 4 x 8's were bolted side by side, giving a completed 8 x 8 wale.

The first and second wales had been finished with the crew working from the ground. Thereafter, it was necessary for one man to work from the side of the form placing the timbers. For convenience in temporarily placing the wales, brackets were nailed to the 2 x 4 studs at convenient distances along the side of the form, upon which the heavier timbers were laid until bolted.

At the time appellant experienced his misfortune, he was working at a point about fourteen feet from the ground. He was standing on a completed wale, assisting in the placing of timbers on the bracket above.

The first 4 x 8 for the fourth wale had been put in position, but not bolted when the second timber was drawn up by a fellow-servant named Cook, operating from the top of the form by means of a rope. Appellant testified that he had followed the timbers up, and while standing about six feet from the end of the form on the bolted 8 x 8 platform, he held to one of the 2 x 4 studdings with his right hand. While in this attitude one end of the timber which was being drawn up by Cook caught under the bracket near appellant, the other end then extending to a point beyond the west end of the form, where a fellow servant named Robertson was stationed. Appellant says he undertook to disengage the timber from the bracket, and as he did so Robertson negligently jerked the other end; that he (appellant) grabbed for safety and caught the wale that had been temporarily placed on the brackets; that not having been bolted, it turned, and he fell to the ground and sustained serious injuries.

Appellant admitted that he had been in the bridge building service about four years; that he was experienced in building forms, and knew all about the work.

We think there was sufficient testimony for submission to the jury. If appellant's claim that Robertson negligently manipulated the timber is sustained, recovery would lie. Appellant said: "I had the timber out this way (indicating) and this other wale was next to my shoulder. It wasn't fastened, and when he (Robertson) jerked that wale to him, why, it jerked me loose and I hollered at him and grabbed at the first waling that had been put up there, and it rolled over and I fell . . . Robertson grabbed the timber and jerked it around toward him . . . That jerked me loose from the studding I was holding on to."

Reversed and remanded for a new trial.

Opinion delivered January 9, 1939.

[redacted]

John L. McClellan, for appellant.

Jack Holt, Attorney General, and *Millard Alford,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, C. J. This appeal is from judgments rendered on directed verdicts finding the defendant guilty (1) of selling liquor on Sunday, and (2) of selling, in dry territory, beer containing alcohol in excess of 3.2 per cent. by weight.

Appellant owned and operated the Elite cafe in Malvern. On Sunday in August, 1938, the prosecuting attorney purchased Budweiser beer. Chemical analysis showed an alcoholic content of 3.76 per cent. by weight, and 4.70 per cent. by volume. The chemist testified that, in his opinion, the beer could be used as an intoxicating liquid. Testimony of other witnesses that Budweiser beer had made them drunk was admitted over defendant's objections. Grounds of objections were that the witnesses had not bought the beer from defendant, and that they did not know the alcoholic content.

Exceptions were saved to the court's action in holding that instructions received from the State Revenue Department, and a letter written by the Attorney General construing the law, were not admissible.

Evidence that the beer was sold on Sunday is not contradicted; nor is the chemist's testimony as to alcoholic content denied.

A fine of $25 for violating the Sunday law was assessed, this being the lowest penalty permitted by § 3421 of Pope's Digest.[1]

One of the early cases involving violation of a similar law was *Bridges* v. *State,* 37 Ark. 224. The indictment was under § 1618 of Gantt's Digest,[2] and the opinion was handed down in 1881. The court held that "Alcohol is embraced in one of the terms, *goods, wares,* or *merchandise,*" and affirmed the judgment of conviction. In dealing with the same section of Gantt's Digest the court said, in *Seelig* v. *State,* 43 Ark. 96: "Where an act is in itself indifferent and only becomes criminal when done with a particular intent, there the intent must be proved. But if the act be unlawful, as to keep open a store on Sunday, the law implies the criminal intent, and proof of justification or excuse must come from the defendant." This opinion was in 1884. In March, 1885, the statute now appearing as § 3421 of Pope's Digest was enacted.

The section appearing in Gantt's Digest as 1618 seems to have been taken from Ch. XLIV, Revised Statutes, where it appears as § 5. There is a slight, but unimportant, variation in phraseology between Gantt's § 1618 and § 5 of Ch. XLIV, Revised Statutes, but with respect to each a section immediately following is: "Charity or necessity on the part of the customer may be shown in justification of the violation of the last preceding section." The quoted provision now appears as § 3422, Pope's Digest.

In appellant's brief it is urged that the law's intent was "to keep closed on Sunday all stores and general

[1] Pope's Digest, § 3421: "Every person who shall, on Sunday, keep open any store or retail any goods, wares and merchandise, or keep open any dram shop or grocery, or who shall keep the doors of the same so as to afford ingress or egress, or retail or sell any spirits or wine, shall, on conviction thereof, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars."

[2] Gantt's Digest, § 1618: "Every person who shall, on Sunday, keep open any store, or retail any goods, wares, or merchandise, or keep open any dram-shop or grocery, or sell or retail any spirits or wine, shall, on conviction thereof, be fined in any sum not less than ten dollars nor more than twenty."

merchandise establishments, including dram shops and saloons. It does prohibit the sale of 'spirits or wine.' " A summation of appellant's position appears in a footnote.[3]

We do not agree that the act of 1885 is to be regarded as "an old Sunday Blue Law"; nor is it a regulation based exclusively upon religious considerations. The contrary has been held.

An interesting discussion of the subject is to be found in *Swann* v. *Swann,* 21 Fed. 299. The opinion was written by Judge Caldwell in a controversy involving validity of a note executed in Tennessee on Sunday, enforcement of which was sought in Arkansas in 1884. Judge Caldwell quoted the Arkansas statute (now appearing as § 3418 of Pope's Digest) and § 1617 of Gantt's Digest.[4] The latter section was repealed, but a new law was passed in 1887 covering the same subject-matter. The 1887 enactment appears in § 3420 of Pope's Digest.[5]

[3] Counsel says: "The appellant . . . has engaged in [the cafe] business for a number of years. Beer of the alcoholic content testified to with respect to the bottle sold to the Prosecuting Attorney is a part of the regular stock of provisions and refreshments regularly served to customers of his restaurant business. The sale of such beer is now legal in this state and in the city of Malvern, and unless the prosecution and the lower court can invoke this old Sunday Blue Law to sustain a penalty against the appellant, he did not commit an illegal act. Therefore, under the law, the bottle of beer must be regarded and treated as any other beverage or refreshments generally and customarily served in restaurants and cafes. Since its sale is not illegal *per se*, it must be classed along with coffee, milk, tea, coca-cola, or other bottle beverages usually served at restaurants with food and meals. The beer sold is not wine, and neither is it 'spirits' as now defined by act 108."

[4] Gantt's Digest, § 1617: "Persons who are members of any religious society, who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalties of this act, so that they observe one day in seven, agreeably to the faith and practice of their church or society."

[5] Pope's Digest, § 3420: "No person who from religious belief keeps any other day than the first day of the week as the Sabbath shall be required to observe the first day of the week, usually called the Christian Sabbath, and shall not be liable to the penalties enacted against Sabbath breaking. Provided, no store or saloon shall be kept open or business carried on there on the Christian Sabbath; and provided further, no person so observing any other day shall disturb any religious congregation by its avocation or employment."

Referring to these provisions, Judge Caldwell said:

"It is obvious the statute does not attempt to compel the observance of the first day of the week, as a day of rest, as a religious duty. It would be a nullity if it did so. In this country legislative authority is limited strictly to temporal affairs by written constitutions. Under these constitutions there can be no mingling of the affairs of church and state by legislative authority. . . . . No citizen can be required by law to do, or refrain from doing, any act upon the sole ground that it is a religious duty. The old idea that religious faith and practice can be, and should be, propagated by physical force and penal statutes has no place in the American doctrine of government. Force can only affect external observance; whereas, religion consists in a temper of heart and conscious faith which force can neither implant nor efface. . . . The statute, then, is not a religious regulation, but is the result of a legitimate exercise of the police power, and is itself a police regulation. . . .

"Experience has shown the wisdom and necessity of having, at stated intervals, a day of rest from customary toil and labor for man and beast. It renews flagging energies, prevents premature decay, promotes the social virtues, tends to repress vice, aids and encourages religious teachings and practice, and affords an opportunity for innocent and healthful amusement and recreation. . . .

"While the law does not enforce religious duties and obligations as such, it has a tender regard for the conscience and convenience of every citizen in all matters relating to his religious faith and practice. The statute is catholic in its spirit, and accommodates itself to the varying religious faiths and practices of the people."

In *Scales* v. *State,* 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768, Chief Justice Cockrill said: "The principle which upholds these regulations underlies the right of the state to prescribe a penalty for the violation of the Sunday law. The law which imposes the penalty operates upon all alike, and interferes with no man's religious be-

lief, for in limiting the prohibition to secular pursuits it leaves religious professon and worship free."

In *Rosenbaum* v. *State,* 131 Ark. 251, 199 S. W. 388, L. R. A. 1918B, 1109, Mr. Justice WOOD traced the origin of compulsory Sabbath observance.[6] In the Rosenbaum Case the undisputed evidence showed that the defendant operated a moving picture show in violation of the statute, and a directed verdict of guilty was upheld.

A more recent case (1926) is *Rhodes* v. *Hope,* 171 Ark. 754, 286 S. W. 877, 47 A. L. R. 1104. Upon undisputed proof that the defendant had sold gasoline on Sunday, in violation of a city ordinance patterned from the state law, the court directed a verdict of guilty. On appeal the judgment was affirmed. The opinion cites *Petty* v. *State,* 58 Ark. 1, 22 S. W. 654, and *Goff v. State,* 20 Ark. 290.

Trial courts are empowered to direct verdicts of guilty in misdemeanor cases where the punishment is by fine only if the facts are undisputed, and where from all the evidence the only inference to be drawn is that the alleged crime has been committed by the defendant in circumstances which do not disclose legal justification.[7]

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[6] In the Rosenbaum Case Mr. Justice WOOD said: "The Frank emperors had Sunday observed; the Code of Napoleon ordered it, and the observance of the Lord's day has been enjoined by statutes in England from the earliest times. Coming on down to the legislation in the mother country, which forms the basis of such legislation in practically all of the states of the Union, we find that in the reign of Charles II an act entitled, 'An act for the better observation of the Lord's day, commonly called Sunday,' was passed, which, among other things, provides: 'That no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof (work of necessity and charity only excepted).' Stat. at Large, 29 Chas. II, Ch. 7, p. 412, (12 Chas. 3, p. 412)."

[7] In *Collins* v. *State,* 183 Ark. 425, 36 S. W. 2d 75, it was held that in the circumstances there shown the trial court did not have the right to direct a verdict of guilty. "Where the punishment may be imprisonment, or where the law provides that it may be fine or imprisonment, the trial judge has no power to direct a verdict." Citing *Roberts* v. *State,* 84 Ark. 564, 106 S. W. 952; *Wylie* v. *State,*

It may be urged that social intercourse, and personal, professional, and business relationships, have so changed within the past 53 years that the law promulgated in 1885 has become obsolete; that it should be treated as a dead letter decreed by custom and modern convenience to be a relic of other days. Answer to this argument is that courts are interpreters, and not the makers, of laws. As Chief Justice COCKRILL said in the Scales Case, "If the law operates harshly, as laws sometimes do, the remedy is in the hands of the Legislature. It is not the province of the judiciary to pass upon the wisdom and policy of legislation—that is for the members of the legislative department,—and the only appeal from their determination is to their constituency."

The defendant in the instant case was guilty of violating § 3421 of Pope's Digest; and, since the statute imposes a fine only, and not less than $25 could be assessed, it was not error for the court to direct a verdict. We are not willing to say that beer, in the circumstances in which it was being sold, was a necessity. Obviously, the defendant understood that the prosecuting attorney was making the purchase in order to test the law. The conclusion is inescapable that the defendant was keeping his place of business open for general commercial purposes, and that beer was being sold regularly and generally.

The next question is whether the sale of beer of the alcoholic content reflected by the record was unlawful in Malvern at the time in question.

Act No. 7 of the Extraordinary Session of 1933, p. 20, § 2, defines beer as "any fermented liquor made from malt or any substance thereof and having an alcoholic content of not in excess of 3.2 per cent. by weight." Such beer was legalized under terms of the act.

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131 Ark. 572, 199 S. W. 905; *Parker* v. *State*, 130 Ark. 234, 197 S. W. 283; *Snead* v. *State*, 134 Ark. 303, 203 S. W. 703; *Burton* v. *State*, 135 Ark. 164, 203 S. W. 1023; *Huff* v. *State*, 164 Ark. 211, 261 S. W. 654. But in the Collins Case it was held that an instructed verdict may be given where the punishment is by fine only, etc.

By § 27-A,[8] provision was made for special elections in the several counties, upon petition of 51 per cent. of the qualified electors of any county presented to the county court within sixty days from the effective date of act 7. If a majority of the qualified voters opposed the sale of beer, such sale was prohibited. At the succeeding regular election the question might be submitted under the initiative and referendum amendment to the Constitution (which permits 15 per cent. of the electors to initiate a law).

Act No. 108 was approved March 16, 1935. It authorizes the manufacture, sale, transportation, possession, or other disposition of spirituous, vinous, and malt liquors. By § 6 of Art. 1 the word "malt" is defined as "liquor brewed from the fermented juice of grain and containing more than five per centum of alcohol by weight." There is this further provision: "Beer containing not more than five per centum of alcohol by weight and all other malt beverages containing not more than five per centum of alcohol by weight are not defined as malt liquors, and are excepted from each and every provision of this act. It is further provided that malt and vinous beverages containing more than 3.2 per cent. of alcohol by weight and not more than 5 per cent. of alcohol by weight shall be taxed and regulated as provided for malt and vinous beverages containing not more than 3.2 per cent. alcohol by weight under the provisions of act 7 [of 1933]."

[8] Section 27-9 of act 7 of 1933, in part, is: "At each general election for state and county offices after the passage of this act, or at a special election called by the county court upon a petition of 51 per cent. of the qualified electors of the county presented within sixty days next after the passage of this act, there may be submitted to the qualified electors of any county in the state of Arkansas so desiring in the manner provided for the submission in a county of the question under the initiative and referendum provision of the Constitution and laws of the state of Arkansas the question as to whether the sale of beer and light wine containing alcohol not in excess of 3.2 per cent. by weight shall or shall not be permitted within said county for two years in case the matter is voted on at a general election and in the case of a special election the question shall be voted on as to whether the sale of beer and light wine containing alcohol not in excess of 3.2 per cent by weight shall or shall not be permitted until the day of the next general election."

It will be observed that after defining the word "malt" to mean *liquor containing more* than 5 per cent. alcohol, beer containing *not more* than 5 per cent. alcohol is excluded from the provisions of act 108 and "malt and vinous beverages" containing *more* than 3.2 per cent. of alcohol, and *not more* than 5 per cent. of alcohol, "shall be taxed and regulated as provided for *malt and vinous beverages* containing not more than 3.2 per cent. alcohol."

The intent, as expressed by the language used, is to classify beer having an alcoholic content of not more than 5 per cent. as a *malt beverage,* as distinguished from *malt liquor.*

Section 1 of art. 7 of act 108 permits 35 per cent. of the voters of any county, city, town, district, or precinct, to petition the county court for an election upon the proposition whether "spirituous, vinous or malt liquors shall be sold, bartered, or loaned therein." Section 4 of art. 7, with respect to such election, directs that if a majority "shall be in favor of prohibiting the sale of liquor in the territory in which the election shall have been held, the law prohibiting such sale shall be in full force and effect at the expiration of sixty days from the date of the entry of the certificate of the canvassing board." Penalty for violation is a fine of not less than $60 nor more than $100, and confinement in the county jail for not less than 20 days nor more than 40 days.

An election was held in Malvern in 1935 on petition of 218 of the 492 qualified electors of the city—218 being more than 35 per cent. of 492. The county court order recites that such election was held under authority of act 108 to determine whether "intoxicating liquors shall be sold, loaned, bartered in any hotel, dispensary, club, restaurant, or any other place or thing within the city of Malvern." By a vote of 179 to 118 such liquor traffic was prohibited.

It is contended by appellant that because the Malvern election was under authority of act 108, and because the election had for its purpose the sounding of public sentiment on the question of selling liquor as defined in the act, beer of an alcoholic content of not more than 5 per cent. was not within the purview, and could not be, since

act 108 by express terms declares such beer to be a beverage and not a liquor. Therefore, it is insisted, control of sale of the beverage is referable to act 7 of 1933. It is further argued that act 7 contemplates the county as a unit, and under such act a city may not prohibit the sale of beer.

It must be conceded that the language of acts 7 and 108 in so far as it has been quoted by appellant justifies the result contended for. Act 7, by its terms, contemplates a county-wide vote, and sections one to four, inclusive, of art. 7 of act 108, deal with a drink having an alcoholic content of more than five per cent. If act 108 ended where appellant has terminated his citation of its terms, clearly his position would be sound.

But we must consider all of the act, rather than its partial recitals, to determine the legislative intent.

Section 5, art. 7, act 108, contradicts appellant's theory that the beer in question may be legally sold until, in a county-wide election conducted under authority of act 7 (on petition of 51 per cent. of the electors) the voters have expressed opposition to the traffic.

Section 5 is: "It shall be unlawful for anyone to sell, barter or loan, directly or indirectly, *any beverage containing any alcohol;* or any liquid mixture or decoction of any kind which produces or causes intoxication in any county, city, town, district or precinct in which the sale, barter or loan of spirituous, vinous or malt liquors is or shall be prohibited in accordance with the local option law."[9]

This section permits prohibition of the sale of malt liquors, etc., and it contemplates procedure as set out in the act—not procedure under authority of act 7. The first six words on page 260 of the printed acts of 1935

[9] Section 5 of art. 7 of act 108 of 1935, in addition to that part quoted in the opinion, also provides. "Any person who shall sell, barter or loan, directly or indirectly, any such beverage, liquid mixture or decoction in any such county, city, town or precinct, shall, upon conviction, be fined the sum of not less than $20 nor more than $100 for each offense or any sale, barter or loan of any article with the agreement expressed or imposed that the right or title to or possession of any such beverage, liquid, mixture or decoction, shall also pass, shall be considered a sale, barter or loan within the terms of this act."

are: "The word 'malt' shall mean liquor." The optional vote authorized by § 1 of art. 7 relates to the sale of "spirituous, vinous or malt liquors," and the sale of such may be prohibited in the manner set out in act 108.[10]

The election in Malvern was in conformity with act 108. The only vice urged against it is that authority to prohibit the sale of beer of not more than 5 per cent. alcoholic content is not within the act.

Article 9 of act 108 repeals all conflicting laws or parts of laws—

"Provided, however, that this act is not intended to repeal or conflict in any way . . . with the taxing provisions of act No. 7 of the Extraordinary Session of the Forty-Ninth General Assembly of the state of Arkansas, approved August 24, 1933."

Specifically, the Legislature, by the language of art. 9, has said that it did not intend to repeal the *taxing* provisions of act 7. It did intend, as we have seen, to substitute a permissive and increased alcoholic content for beer; and it is our view that it intended to provide new local option machinery.

It will be observed that the mandate of § 5 of act 108 applies only to areas where the "sale or loan of spirituous, vinous, *or malt liquors* shall be prohibited *in accordance with the local option law.*".

If it be said that the only local option law applicable to beer of not more than 5 per cent. alcoholic content is act 7 of 1933, we are met with the contradiction that the 1933 enactment does not apply to cities, towns, precincts, or districts. It is inconceivable that the framers of act 108, and the Legislature that passed it, could have intended, by § 5, to require proponents of prohibition to proceed under a statute which could afford them no relief in any subdivision less than a county. Article 9 dis-

[10] We pretermit a discussion of Amendment No. 7 to the Constitution, commonly referred to as the Initiative and Referendum Amendment. One of its provisions is: "Fifteen per cent. of the legal voters of any municipality or county may . . . invoke the initiative upon any local measures." Under "Definition," the word "measure" is construed to be "any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character."

pels such theory. It will not be assumed that the lawmakers, in one sentence, extended an option, and in another sentence withdrew it.

It is not necessary, in this opinion, to determine whether the language in § 5 of act 108 prohibits the sale in dry territory of a beverage containing "*any alcohol,*" or whether it merely prohibits sale of "a liquid mixture or decoction of any kind which produces or causes intoxication." Following the word "alcohol" in § 5 a semicolon is used, followed by "or," a co-ordinating particle that marks an alternative. However, proof in the case at bar is sufficient to show that the beer sold by appellant contained enough alcohol to cause intoxication in certain circumstances, and with respect to certain people. Dr. Manglesdorf, the chemist, testified that 3.2 beer is intoxicating "if you drink enough of it." He also testified: "It is generally conceded by medical men that you can get stimulation and sufficient disorganization of the mental equilibrium to become intoxicated [by drinking 3.2 beer]."

In *State* v. *Hutchinson,* 194 Ark. 1057, 110 S. W. 2d 7, the defendant below was charged with selling intoxicating liquors in a pool room. The question was whether 5 per cent. beer (as distinguished from beer having an alcoholic content of "more than 5 per cent.") was intoxicating. In discussing act 108 of 1935 the opinion says: "[The act] says in the latter part of § 6 [of art. 1] that 'beer containing not more than 5 per cent. of alcohol by weight and all other malt beverages containing not more than 5 per cent. of alcohol by weight are not defined as malt liquors, and are exempt from each and every provision of this act.' This is far from saying that 5 per cent. beer is not an intoxicating liquor. The effect of the words quoted above are that said act 108 excludes from its taxation and regulation malt and vinous beverages containing more than 3.2 per cent. of alcohol and not more than 5 per cent. of alcohol."

The opinion then mentions certain provisions of act 7 of 1933, and continues: "We are not willing to construe these acts as saying that the Legislature passing them intended to say that 5 per cent. beer was non-

intoxicating liquor. Such a declaration on the part of the Legislature would be arbitrary and contrary to what everybody knows."

Other authority is to the same effect.

The judgment of conviction for violating the Sunday law is affirmed.

Violation of § 5 of art. 7 of act 108 is punishable by a fine of not less than $20 nor more than $100. No jail sentence is imposed. The trial court directed a verdict calling for a fine of $60 and imprisonment in the county jail for a period of twenty days. This was error. The judgment rendered on this verdict is reversed and the cause is remanded with directions that the provisions of § 5 of art. 7 are applicable. However, a new trial on this charge must be had. It is so ordered.

SMITH, J., concurs.

McHANEY and BAKER, JJ., dissent.

McHANEY, J. (dissenting). Appellant was charged by information with two alleged offenses: 1. with selling liquor on Sunday; and 2, with selling beer containing alcohol in excess of 3.2 per cent. in dry territory. He was convicted by instruction of the court on both charges, fined in the first and fined and ordered imprisoned in the second. The majority have affirmed on the first and reversed and remanded on the second because the court cannot instruct a verdict of guilty where the punishment involves imprisonment. I concur in the judgment of reversal, but go further and would hold that appellant should be discharged on both charges.

Discussing the second charge first, I am of the opinion that appellant did not violate the law and that the information did not state a public offense. The facts are that the city of Malvern held a referendum election under the provisions of act 108 of 1935, and voted dry as to the liquors covered by that act. Such an election requires a petition equal to 35 per cent. of the qualified voters before the county judge shall order such election, and the question submitted to the voters is "whether or not spirituous, vinous or malt liquors, shall be sold, bartered or loaned" in any "county, city, town, district, or precinct." But, as heretofore stated, the result of such

election applies only to such liquors as are covered by said act. Section 6 defines the words "spirituous," "vinous" and "malt" and as to the last says: "The word 'malt' shall mean liquor brewed from the fermented juices of grain and containing more than five (5%) per centum of alcohol by weight. Beer containing not more than five (5%) per centum of alcohol by weight and all other malt beverages containing not more than five (5%) per centum of alcohol by weight are not defined as malt liquors, and are excepted from each and every provision of this act.

"It is further provided that malt and vinous beverages containing more than 3.2% of alcohol by weight and not more than 5% of alcohol by weight shall be taxed and regulated as provided for malt and vinous beverages containing not more than 3.2% of alcohol by weight under the provisions of act No. 7 of the Acts of the Extraordinary Session of the General Assembly of 1933, approved August 24, 1933." The repealing section of said act 108 is very significant and is as follows: "All laws or parts of laws in conflict herewith are hereby repealed; provided, however, that this act is not intended to repeal or conflict in any way with the taxing provisions of act No. 4 of the Second Extraordinary Session of the Forty-ninth General Assembly of the State of Arkansas, approved January 12, 1934; nor with the taxing provisions of act No. 7 of the Extraordinary Session of the Forty-ninth General Assembly of the State of Arkansas, approved August 24, 1933, nor with act No. 9 of the Second Extraordinary Session of the Forty-ninth General Assembly of the State of Arkansas, approved January 26, 1934, and in case there is any conflict between the taxing provisions of this act and either of the former acts hereinbefore mentioned, the provisions of the former act or acts shall be the law and govern the case."

Act No. 4 and act No. 9, mentioned above, are not material to this inquiry, but act No. 7 is and will now be discussed. It is entitled "An Act to Permit the Manufacture, Sale and Distribution Within the State of Arkansas of Light Wines and Beer, and to Provide for Taxing the Manufacture, Sale and Distribution of Such Prod-

ucts, and for Other Purposes." It was the first step in the repeal of prohibition made in this state. It legalized the manufacture and sale of light wines and beer. It defined these terms as follows: "The term 'Beer' means any fermented liquor made from malt or any substitute therefor and having an alcoholic content of not in excess of 3.2 per cent. by weight."

"The term 'light wine' means the fermented liquor made from malt or any substitute therefor and having an alcoholic content of not in excess of 3.2 per cent. by weight." This definition is erroneous as shown by the original bill and should read: "The term 'light wine' means the fermented juice of grapes or other small fruit including berries and having," etc., as above. Also intoxicating liquor is defined to "mean vinous, ardent, malt fermented liquor or distilled spirits with an alcoholic content in excess of 3.2 per cent. by weight."

It appears to me that the necessary effect of said act 108 is to repeal these definitions in said act 7 and to substitute the definitions in act 108 for those in act 7. They are most certainly in conflict and the repealing section of 108 specifically says it repeals all laws or parts of laws in conflict with it, except as to the taxing provisions of the acts mentioned therein. The conclusion is irresistible to me that beer containing 5 per cent. or less of alcohol by weight is not now, nor has it been since the passage of act 108 of 1935, classed by the legislature as intoxicating liquor and that such beer can be lawfully sold in all parts of the state, except where it has been voted out under the provisions of said act 7 of the Special Session of 1933, which provides the precedure in § 27-A. There the question may be submitted to the whole county and not to a part thereof and, if by a petition, it must contain 51 per cent. of the qualified electors of the county.

It is undisputed in this case the beer for which appellant is convicted of selling contains more than 3.2 per cent., but less than 5 per cent. of alcohol by weight. Therefore, the provisions of said act 108 have no application and a referendum election held under the provisions thereof could only bar the liquors covered by that

act—in the case of beer, of an alcoholic content of more than 5 per cent., and since appellant is not selling beer of more than 5 per cent. he cannot be convicted of a violation of that act.

Act 108 of 1935, art. 7, § 5, provides: "It shall be unlawful for anyone to sell, barter or loan, directly or indirectly, any beverage containing any alcohol; or any liquid mixture or decoction of any kind which produces or causes intoxication in any county, city, town, district or precinct in which the sale, barter or loan of spirituous, vinous or malt liquors is or shall be prohibited in accordance with the local option law," and making it an offense punishable by a fine only for a violation thereof. Just what does this quoted language mean? My thought is it must be read in connection with the other provisions of the act and that it means that it shall be unlawful to sell any "spirituous," "vinous" or "malt" liquors as these words are defined in the act in any territory which has voted dry under the provisions of the act, bearing in mind that, under the express provision above quoted from art. 1, § 6, "beer containing not more than 5% of alcohol by weight and all other malt beverages containing not more than 5% of alcohol by weight are not defined as malt liquors, and are excepted from each and every provision of this act." We must, therefore, read the prohibition in § 5, art. 7, above quoted as applying only to beverages, liquid mixtures or decoctions containing more than 5% of alcohol by weight, instead of beverages "containing any alcohol," or liquid mixtures or decoctions "which produces or causes intoxication." To construe this provision of the act otherwise is to make it applicable to beer "containing not more than 5% of alcohol by weight" as well as all other malt beverages with a like content, in the very teeth of the provision excepting them "from each and every provision of this act."

My conclusion on this charge of the information is that the demurrer should have been sustained, as it fails to charge a public offense.

As to the charge of selling liquor on Sunday, the information charges it to have been done in violation of § 3421 of Pope's Digest and § B of art. 6 of act 108 of the

Acts of 1935. This charge is based on the sale of the same bottle of beer, on a Sunday, as that relied on on the other charge above discussed. He was convicted under said § 3421 of Pope's Digest. The information evidently refers to subsection (b) of § 1 of art. 6, and the court evidently found that this section had no application to the kind of beverage sold. Section 3421 of Pope's Digest is act 33 of 1885 amending § 1887 of the Revised Statutes to read as follows: "Every person who shall, on Sunday, keep open any store or retail any goods, wares, and merchandise, or keep open any dram shop or grocery, or who shall keep the doors of the same so as to afford ingress or egress, or retail or sell any spirits or wines, shall, on conviction thereof, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars."

This section has no application to the facts in this case and cannot, in my opinion be the basis of a conviction of appellant. The only part of it that has any possible bearing on this case is the prohibition against the retailing or selling "any spirits or wine." He is not charged with keeping open any store, or that he retailed any goods, wares or merchandise, nor that he kept open any dram shop or grocery. The charge is that he "did unlawfully sell liquor, and was unlawfully interested in the sale and giving away of alcoholic, vinous, malt spirituous, fermented and medicated liquors on Sunday," etc. The proof was that appellant is engaged in the restaurant or cafe business, in the city of Malvern and that on Sunday, August 13, 1938, he sold a bottle of "Budweiser" beer containing 3.76% of alcohol by weight, and that beer of more than 3.2% and 5% or less is being sold all over Arkansas and in territory that has voted dry under act 108, on Sunday and every other day. Appellant did not sell any "spirits or wine" and was not so charged, and there was no proof to sustain such a charge had it been made. "Spirits" means spirituous liquors as defined in act 108 and must contain "more than 21% of alcohol by weight. The sale of wine is governed by act 69 of 1935, wine being excepted from the provisions of act 108 where the term "vinous" is defined. In so far as said

§ 3421, Pope's Digest, (act 33 of 1885) applies to the sale of "spirituous," "vinous" and "malt" liquors is concerned, it has been repealed by act 108 of 1935 and act 69 of 1935, where the sale of these beverages is regulated and where sales on Sundays, election days, to minors and otherwise are specifically prohibited.

The commissioner of revenues is given authority to administer the provisions of these acts herein referred to and to make rules and regulations regarding their enforcement. There has never been a referendum election under the provisions of said act 7, and the department now rules that it is not a violation of law to sell beer in dry territory, that is, territory which has voted dry under act 108, which has an alcoholic content of 5% or less by weight, or light wine of 5% or less, and that it may be so sold on any day, Sunday or election day, because it is not a liquor covered by the provisions of act 108. It is an admitted fact, and would have been given in evidence in this record, but was excluded by the court, that such beverages are being so sold all over Arkansas, with the knowledge, consent, or at least, the acquiescence of the state commissioner of revenues who holds that it is not a violation of law to sell same in so-called "dry territory" or on Sunday or any other day, if the beverages are tax paid and the dealer holds a license. It would seem to me to be a great injustice for the state to license a dealer to do the very things appellant did, and then to prosecute him for doing them.

Administrative or executive construction of statutes and long time operation under such construction are entitled to great weight and consideration by the courts, and if a reasonable construction may be made by the courts conformable with executive construction it should be done. In *Baxter* v. *McGee,* 82 Fed. 2d 695, certiorari denied by United States Supreme Court; and *McGee* v. *Baxter,* 298 U. S. 680, 56 S. Ct. 948, 80 L. Ed. 1401, it was held that considerable weight, in arriving at the meaning of a doubtful statute, must be given to the practical construction placed upon it by the executive officers of the state, especially when such construction has been unchallenged over a long period of years. See, also, *State* v.

Sorrels, 15 Ark. 664; *State* v. *Lancashire Fire Ins. Co.,* 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348. In *Moore* v. *Tillman,* 170 Ark. 895, 282 S. W. 9, it was held that the interpretation of federal homestead laws by the Federal Land Department, though not controlling on courts, is highly persuasive, and, where in harmony with United States Supreme Court's decision, must govern. Act 7 of 1933 has been in force nearly six years and act 108 of 1935 has been in force nearly four years, and during all this time they have been given the interpretation and have been administered as herein contended, and I think the court should not now, at this late day, disturb such construction. I am, therefore, of the opinion that the state failed to make a case against appellant on this charge, and that a directed verdict should have been given in his favor.

To the extent the views herein expressed may be in conflict with *State* v. *Hutchison,* 194 Ark. 1057, 110 S. W. 2d 7, I would overrule same.

I would reverse and dismiss both charges and am authorized to say that Mr. Justice BAKER concurs in this dissent.

RONE *v.* SAWREY.

4-5319 123 S. W. 2d 524

Opinion delivered January 9, 1939.

B. B. Spencer and *Vol T. Lindsey,* for appellant.

Earl Blansett and *Ely Lefler,* for appellee.

BAKER, J. The appellant states the issues on appeal as follows: "The court based its decree upon the law of estoppel, that the evidence was such as precluded the plaintiff from asserting his rights to said real estate and that through silence of the Hitt heirs, the defendants, as Trustees, had acquired title to such lands."

To this the appellees add: "That the learned Chancellor rendered his decree not upon the theory of estoppel by silence, but by words, acts, acquiescence and silence."

We shall attempt to state such facts as we think are necessary to settle the sole issue of estoppel which is conclusive of all the rights involved.

The appellants filed a suit praying for a temporary restraining order to stop the construction of a church building on an acre and a quarter of land which is particularly described in the complaint, but it is sufficient in this case to say it is a tract of land located within the southwest quarter of the northwest quarter and the northeast quarter of the northwest quarter of section 17, township 17 north, range 31 west. This small bit of land had been deeded to Neil Sawrey and others as trustees of the Assembly of the Church of God. It was alleged, and we think sufficiently established, if not admitted, that the title to the property had been in John Hitt, who died and left surviving him Alice Hitt, his widow, and four children, as the sole heirs-at-law. The children were adults,

none of them residing upon or really close to the property. It had been left for sometime in the sole or exclusive possession of the widow, Alice Hitt, who executed the deed of conveyance to the property in controversy. After the deed was executed, but before the land was purchased by John Rone, and while Alice Hitt was still living, a church building was begun on the acre and a quarter of land. Those who were interested met and leveled off a place for the construction of the building. Thereafter, a concrete foundation was put down, then the frame-work of the building was commenced. During the time of the construction of this part of the building, prior to the death of Alice Hitt, it is alleged that all the children or heirs-at-law of John Hitt and Alice Hitt knew that these improvements of a substantial nature were being constructed upon the land and none of them at any time, so far as the evidence discloses, made any objection thereto, but at least one of the heirs, Otis Hitt, joined with laborers and friends in doing a part of this work of construction. It is not understood from this evidence, however, that he was employed, but, like others who worked upon the building, was a volunteer laborer rendering his services in an effort to construct the building for the use of the church organization. We think it may be said to be within the understanding of all the parties that this acre and a quarter of land was a part of the homestead of John Hitt, deceased, although the evidence discloses that the tract of land owned by John Hitt consisted of 180 acres. Of course, it is well known that the homestead could not have contained more than 160 acres, but we assume, as have all counsel in this litigation, that the land in controversy was a part of the actual homestead of John Hitt. The conclusion, therefore, necessarily arises that Mrs. Hitt's conveyance was not effectual as such, as it amounted only to an abandonment of that portion of the homestead which she attempted to convey. Since she attempted to convey only the acre and a quarter of ground described that must be the portion which she abandoned and it is the same portion or parcel of land which the parties to this controversy, by their counsel, have agreed, in the foregoing statements

from their briefs, the title to which must be determined under the doctrine of estoppel.

In addition to the foregoing facts, that the conveyance had been made, that the heirs-at-law had knowledge thereof, that they had permitted and to some extent assisted in making substantial improvements thereon for the benefit of the church organization, the proof discloses the further fact that the appellant after the death of Mrs. Alice Hitt, decided to purchase the entire Hitt tract of land from the heirs; that he made an investigation or inspection of the land prior to his purchase and that at that time he found the church building under construction. In fact, he was upon the ground while the construction work was being performed. He entered into a contract to buy the land, but refused to accept a deed to it unless the acre and a quarter of land was incorporated in the conveyance and made a part thereof. He advised the two Hitt brothers that if they expected to sell and convey to him this land they must stop the construction work. Although they had agreed up until that time that their mother's conveyance should be ratified and confirmed by them, they then went to those who were working upon the house and had them cease their labors until they could sell the land. Neil Sawrey, one of the appellees here, and one of the trustees to whom the land had been conveyed, immediately after this interruption of the work went to the home of John Rone in Oklahoma and attempted to purchase the land from him for his church organization, but Rone refused to sell, but according to his own testimony offered to give or donate the land for church purposes to the community if all denominations alike were to be treated as the beneficiaries of the grant. There was no settlement or agreement, but later the work was resumed upon the church building. Then this suit was instituted to procure a temporary restraining order. This fact that Sawrey, as a representative of the church organization, attempted to buy the property from John Rone is argued as an additional reason or ground that the appellees should not prevail in this litigation. Without attempting to minimize the justice of this argument, we think it may be answered by saying that perhaps at

this time Sawrey and his co-trustees had all been advised that the deed executed by Mrs. Hitt was not effectual as a conveyance and it is now admitted and conceded by appellees that her conveyance of the acre and a quarter of land was a nullity.

We think it might well have been argued, though it has not been suggested, that Sawrey and his co-trustees were seeking some form of settlement or compromise, trying to find a peaceful solution of a controversy, the outcome of which at that time, at least, was very doubtful. When the proceedings had progressed to this extent, a concrete foundation for the church had been built, about 24 ft. by 52 ft.; oak frame-work and some siding had been put up. The roof had been constructed and this had all been done at the expense of the community in the erection of their church building, with a knowledge, at least, of all the heirs, with their acquiescence, with the actual aid of some of them, with the assurance from those who talked about it that they wanted to do what their mother had attempted to do, aid in the construction of the church building. This work, no doubt, had cost the community a substantial sum of money. We do not know how much as that fact is not disclosed with any degree of certainty. In addition to the money, the labor donated was of considerable value. The proof discloses further that this building was of such form of construction and proportions that it could not be moved to another site without completely wrecking and destroying it as a building and much of the material be lost. When Mr. Rone saw this building in that condition, we must and do assume that he knew something of the expense and labor expended for the improvements. Prior to the time he bought, he made no effort to determine, by consultation, from those who were interested whether his purchase would be respected, but advised the Hitt heirs that they must stop construction before he would buy. We do not assume that he was attempting to proceed at the expense of the church community. There is no evidence that would justify such an assumption. In fact there is no evidence that, if he did not obtain possession of the acre and a quarter of land, he would suffer any seri-

ous damage or actual loss. It is a very small proportion of the larger tract. The value is not a very material issue if he had the right of possession. Rone, however, has not insisted on possession of the property, except as an incident authorizing him as the donee of the property to direct and control the manner of its use from and after the date of his purchase of the property by the conditions of his donation.

However liberal or generous his conduct may seem, we think its true value must be measured by what had transpired prior to the date of his purchase and the exact conditions that existed at that time. The mere fact that appellant Rone would not profit by this course of conduct is not conclusive of the rights of the appellees. Considered from that standpoint the first question that arises is would the appellees suffer an actual loss by reason of having relied, in error, upon the deed of conveyance, and also upon the conduct of the heirs of John Hitt, those who were in the actual possession and control of the adjacent property and who held the legal title thereto at the time of the conveyance to Rone.

The other proposition argued, that Rone was willing that the property should be used for church purposes, but insisted that it should be for the benefit and use of all denominations alike, is open to an equally serious objection, and that is that Rone, in the exercise of his generosity in releasing claims to the land did not have a right to take from the church organization its labor and property, represented in the building and bestow the same upon others.

The foregoing constitutes our analysis of the facts which we think are supported by all the evidence, and, at least, it is a proper construction to put upon their conduct.

In support of this proposition we should, perhaps, add that the four Hitt heirs, who are referred to as the two boys and the two girls, were in Arkansas and in the home community and knew what was going on while the structure was being erected sometime prior to their sale. None of them made any objection. None of them claimed adversely to the church organization. Otis Hitt on every

occasion has reaffirmed what his mother did, assisted in the construction of the building. Ernest Hitt changed his mind in order that he might help sell the property, but prior to that time he too had been in accord with the attempted grant of the property.

The law in this case, we think, has been concisely stated by that eminent authority Pomeroy, Equity Jurisprudence, 4th ed., Vol. 2, § 808, p. 1658, as follows: "The conduct creating the estoppel must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment, and who claims the benefit of the estoppel. The conduct may consist of external acts, of language written or spoken, or of silence."

See, also, the same authority, § 818, p. 1680: "Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fradulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent."

Stated in another form we have this expression of the law: "Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights and fails to assert his title or right, he will be estopped afterward to assert it." 21 C. J. 1152, § 155b.

So it must be concluded from the foregoing that it is not actually necessary that John Rone, the appellant, should have taken some inconsistent position in order that he should be estopped in this case, but from the foregoing we hold that if his predecessors in title, the Hitt heirs, are estopped then they could not and did not convey to Rone who knew the facts an indefeasible title. It has been held by this court that the vendee of one who is

estopped from granting title is also estopped. *Allen* v. *Daniel,* 94 Ark. 141, 126 S. W. 384; *Brownfield* v. *Bookout,* 147 Ark. 555, 228 S. W. 51.

It was announced in the last cited case that one who maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.

It is but a repetition of what we have just quoted from Pomeroy.

Numerous authorities covering each phase of this case are sprinkled through our reports as a substantial part of the law of property in this state. *First National Bank* v. *Godbey & Sons,* 181 Ark. 1004, 29 S. W. 2d 272; *State ex rel. Independence County* v. *Citizens Bank and Trust Co.,* 119 Ark. 617, 178 S. W. 929; *Rogers* v. *Galloway Female College,* 64 Ark. 627, 44 S. W. 454; *Illinois Standard Mortg. Corp.* v. *Collins,* 187 Ark. 902, 63 S. W. 2d 342; *Fagan* v. *Stuttgart Normal Institute,* 91 Ark. 141, 120 S. W. 404; *Ferguson* v. *Guydon,* 148 Ark. 295, 230 S. W. 260; *Lacey* v. *Humphres,* 196 Ark. 72, 116 S. W. 2d 345.

Many other authorities might be cited materially and substantially to the same effect as the foregoing, but this would perhaps add nothing to our opinion as the authorities cited are sufficient to indicate the established principles.

It might be well to add that we have recently had under consideration, a contract for the sale of timber from a tract of land which constituted a homestead of the seller of this timber. His wife did not join in the timber deed. The husband collected the purchase money for the timber, aided in the cutting and removal of it, bought groceries and supplies and delivered them to his wife, with the money received and she knew the supplies had been so procured by the use of the purchase money of the timber, and she received from him benefits on account of the sale of the timber. She remained silent at all times until the timber had been cut and removed and then joined her husband in a suit asserting the invalidity of the conveyance and prayed for a second recovery which was not permitted. *Edwards* v. *Jones, ante* p. 229, 123 S. W. 2d 286.

From the foregoing it follows that the Chancellor's holding was correct.

Affirmed.

STEELE *v.* GANN.

4-5317 123 S. W. 2d 520

Opinion delivered January 9, 1939.

Ben D. Brickhouse and *Linwood L. Brickhouse,* for appellant.

John Sherrill and *Frank Wills,* for appellee.

MEHAFFY, J. This action was commenced by appellant who filed in the circuit court the following complaint:

"Comes the plaintiff and for cause of action herein states: That on March 29, 1926, defendant performed an operation on plaintiff for gall stones and for hernia, in the city of Little Rock, Arkansas, at St. Vincent's Infirmary. That seven or eight weeks after said operation plaintiff began suffering pains in the region of the gall bladder, which suffering continued almost constantly from then until the date of plaintiff's re-operation on March 26, 1936. That in September, 1935, plaintiff suffered a physical and nervous breakdown due to constant suffering, ill health and worry over her physical condition. Plaintiff was in such a weakened condition that re-operation at the time of her collapse was not advisable. After six months of nursing and confinement to bed the second operation was performed on plaintiff in the gall bladder region to discover the cause of plaintiff's suffering. This operation was performed at St. Edwards' Infirmary in the city of Fort Smith, Arkansas, on March 26, 1936; That upon entering the region of the gall bladder, where the gall bladder should have been, there was encountered an enlarged abscessed mass about the size of a small orange. The mass was covered by omentum, and the walls of same were definite, distinct and movable. In the process of removing this mass an old puss-soaked gauze sponge exuded from a rupture therein. This mass developed to be the gall bladder of plaintiff in a swollen, abscessed and decayed condition. That said gauze sponge had been left in the gall bladder or the cavity enclosing same by the defendant at the time he operated on or dressed plaintiff's wound March 29, 1926. The existence of the foreign matter in the wound of the gauze sponge caused the abscess and decay of the gall bladder, the processes of nature covering the affected party by omentum preserving said sponge until its discovery in 1936.

"That the leaving of said gauze sponge in the gall bladder or the gall bladder area by the defendant was due to the careless and negligent conduct of said operation by the defendant or those under his direction. That as a result of such negligence and carelessness aforesaid

plaintiff endured almost constant pain from 1926 to 1936. That since the removal of the abscessed mass from plaintiff at the time of the second operation plaintiff has been relieved of the pain suffered in the gall bladder region and has in some measure regained a semblance of health, but the impaired condition of her entire system due to the absorption of pus over the long period of years, had permanently injured her health. Arthritis has developed in both arms and shoulders and will continue to exist during the rest of her natural life. Plaintiff is without strength with which to perform her normal household duties and is forced to, and has been since the beginning of her last trouble in 1926, employing household help.

"That during the period of illness caused by defendant's negligence in 1926 until and including the operation in March, 1936, plaintiff has expended large sums of money in doctors, hospital, nursing and medical bills. That by reason of the physical pain and suffering, including the second operation, mental anguish and financial expenses caused plaintiff in the past and the pain, suffering and general ill health which she will suffer for the rest of her life by reason of the carelessness and negligence of the defendant as hereinbefore alleged, plaintiff has been damaged in the sum of forty thousand ($40,000) dollars.

"Wherefore, plaintiff prays judgment against the defendant in the sum of forty thousand ($40,000) dollars, together with all costs herein expended."

The appellee filed the following demurrer:

"The defendant, with permission of the court, withdraws its answer heretofore filed in this case and demurs to the complaint of plaintiff, because same shows upon its face that it is barred by the statute of limitations."

The court sustained the demurrer, and appellant refused to plead further, and the complaint was dismissed. The court, in sustaining the demurrer, held that the cause of action was barred by act 135 of the Acts of 1935, which reads as follows:

"An Act to Provide a Definite Statute of Limitations Relative to All Actions of Contract or Tort Arising Out of Malpractice of Physicians, Surgeons, Dentists, Hospitals and Sanitaria.

"Be It Enacted by the General Assembly of the State of Arkansas.

"Section 1. Hereafter all actions of contract or tort for malpractice, error, mistake, or failure to treat or cure, against physicians, surgeons, dentists, hospitals, and sanitaria, shall be commenced within three years after the cause of action accrues. The time of the accrual of the cause of action shall be date of the wrongful act complained of and no other time.

"Section 2. All laws or parts of laws in conflict herewith are hereby repealed and this act shall take effect and be in force from and after its passage."

The appellant contends that the legislature intended the act to mean that the law existing at the time of the passage of the statute to the effect that a person wronged has three years from the time of discovery of the wrong in which to bring his suit was being changed to read that from henceforth or "thereafter" the action must be brought within three years from the time of the commission of the wrongful act regardless of the time of the discovery. It is contended that the appellant would have three years from the date of the passage to bring suit, and she cites and relies on the case of *Baldwin* v. *Cross,* 5 Ark. 510. The court stated in that case that prior to the passage of the act which the court then construed, there was no statute in force in the territorial government as to limitations upon foreign judgments, and that all demands existing when the act went into operation must be sued for within the time prescribed, or they would be barred. But the court also said in that case: "No statute can be construed retrospectively when it takes away subsisting vested rights. It cannot cut off all remedy and deprive a party of his right of action."

Act 135 did not take away any subsisting vested rights and did not deprive the party of her right of action. Act 135 contained no emergency clause, and we recently said: "If, therefore, an act is passed which does

not contain an emergency clause in which the fact is stated constituting the emergency, the act does not become effective until 90 days after the adjournment of the session of the general assembly at which it was enacted." *Gentry* v. *Harrison,* 194 Ark. 916, 110 S. W. 2d 497.

The general assembly of 1935, after the passage of this act, adjourned on March 14, 1935, and therefore the act did not become effective until 90 days after March 14, 1935. Appellant therefore had 90 days after the passage of the act in which she might have brought her suit.

This provision of our constitution providing that acts without the emergency clause take effect 90 days after the adjournment of the Legislature gives parties 90 days and has the same effect that an act would if passed and it were expressly stated in the act that in causes of action that had already accrued parties should have 90 days after the adjournment of the Legislature in which to bring suit.

The Massachusetts court said: "The fact that the time allowed under the statute is the 30 days between the passage of the law and the day when it takes effect, instead of the same length of time expressly given by the terms of the act is immaterial." *Mulvey* v. *City of Boston,* 197 Mass. 178, 83 N. E. 402, 14, Ann. Cas. 349. The court in that case also said: "What shall be considered a reasonable time must be settled by the judgment of the Legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly, so insufficient that the statute becomes a denial of justice."

The Legislature could not pass a law that would cut off all remedy and deprive a party of his right of action.

"Statutes of limitation have to do, not with the obligation, but the remedy. They 'are to be applied to all cases thereafter brought, irrespective of when the cause of action arose, subject, of course, to the universally recognized rule that they cannot be used to cut off causes of action without leaving a reasonable time within which to assert them.' *Osborne* v. *Lindstrom,* 9 N. D. 1, 81 N.

W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516. The time cannot be pronounced unreasonable unless 'so short as under the circumstances to amount to a practical denial of the right itself.' " *Kozisek* v. *Brigham,* 169 Minn. 57, 210 N. W. 622, 49 A. L. R. 1260.

It is a general rule that statutes of limitation are to be applied to all cases thereafter brought without any regard to when the cause of action arose, subject, of course, to the rule that they cannot be used to cut off causes of action without reasonable time given in which to bring suits.

In construing statutes, it is the duty of the court to ascertain the intention of the Legislature. There does not appear to be anything in act 135 to indicate that it was the intention of the Legislature that it should apply only to causes of action that thereafter arose; but we think the act applies to all actions brought after the act became effective. The act provides that "hereafter all actions shall be commenced within three years after the cause of action accrues." Again, there is no emergency clause, and the Legislature, in passing the act without such a clause, thereby gave all parties 90 days in which to bring suits where the cause of action accrued before the effective date of the act. The suit, of course, brought after the passage of the act and before it became effective, would be under the law that existed prior to the passage of the act.

In the instant case the appellant had 90 days after the passage of the act in which to bring her suit, and whether 90 days was a reasonable time, was a question for the Legislature.

"It is established that a statute of limitations, because it relates to the remedy only, will apply to a cause of action existing at the time it is passed if sufficient time has been allowed between the passage of the act and the time for the new limitation to take effect to give opportunity to persons having such causes to bring their suits or actions." *Cunningham* v. *Commonwealth,* 278 Mass. 243, 180 N. E. 147.

"But the Legislature may reduce the period of limitation within which an existing cause of action may be

brought, if reasonable provision is made for opportunity to bring suit upon claims before they are barred, and the statute in question is applicable to rights previously vested, as well as to rights subsequently acquired." *Colby* v. *Shute,* 219 Mass. 211, 106 N. E. 1006; *Maloney* v. *Brackett,* 275 Mass. 479, 176 N. E. 604.

The complaint shows that on March 29, 1926, the operation was performed for gall stones and hernia; that seven or eight weeks after the operation appellant began to suffer pains in the region of the gall bladder; that this suffering continued constantly until March 26, 1936, when she had another operation. It was therefore practically ten years from the time of the operation by the appellee before she had the second operation, and, according to her own statement, she knew within seven or eight weeks after the first operation, as much as she knew ten years thereafter, when she had the second operation. She, of course, did not know that a gauze had been left, and that this was what caused the suffering, but she did know that something caused the suffering and that it continued constantly for ten years.

There is no allegation in the complaint that there was any fraudulent concealment by the appellee or any concealment at all. Appellant only claims that she did not discover what caused the pain and suffering until the second operation.

We think the cause of action was barred under act 135 of the Acts of 1935, and that the circuit court correctly sustained the demurrer.

The judgment is affirmed.

WESTERN CLAY DRAINAGE DISTRICT *v.* SPRAGUE.

4-5318 123 S. W. 2d 518

Opinion delivered January 9, 1939.

F. G. Taylor, J. L. Taylor and *W. A. Jackson,* for appellant.

C. T. Bloodworth and *Kirsch & Cathey,* for appellee.

McHaney, J. At the time of his death F. B. Sprague was the owner of 23 bonds, of the face value of $500 each, of Sub-District No. 3 of the Western Clay Drainage District. Prior to his death he brought this action against said district, its Board of Commissioners, the County Judge of Clay county, and certain taxpayers of the district to recover judgment on said bonds, all being in default, and to compel the levy of further assessments and the sale of delinquent property for the purpose of paying said indebtedness. Some of the landowners in the district intervened in said action which on his death was revived in the name of appellee. The district and its directors, as also the interveners, defended on the ground that the Board was without power under the act of its creation to levy further assessments. The trial court found against appellants, entered judgment for appellee for $11,448 with interest from the date of the decree at 6 per cent. per annum, and for costs, and also ordered and directed the Board of Directors of the district, and their successors in office, forthwith to make a levy of 8 per cent. on the assessed benefits against the lands of the district, same to be certified to the County Judge of Clay county, or his successor in office, and by him entered as an order of the county court, and that said levy be collected, annually beginning with the next collection period, until such judgment should be paid, or until the further order of court. It was further ordered that as to all lands annually returned delinquent, the directors cause suit to be instituted to enforce collection. This appeal followed.

Western Clay Drainage District, Sub-District No. 3, was created by authority of act 368 of 1907, and act 278 of 1909, amending same. Benefits were assessed against the lands in the district in the sum of $53,017.50. Bonds were issued in the total sum of $50,000. For the purpose of paying said bonds as they matured, the Commissioners levied an annual tax on the betterments for twenty-five years. These annual levies and collections failed to be sufficient to pay the bonds owned by appellee's decedent. The trial court found that there were still unexhausted assessed benefits amounting to 24½ per cent. of the original amount, and this finding was based on evidence not abstracted by appellants, so we must presume that the evidence supports the finding.

The sole contention of appellants is that, since there have been twenty-five annual levies, the board has exhausted its power in the premises, and that the court is without power or authority, under the acts above mentioned, to direct it to make additional levies, and this too in the face of the fact that all the assessed benefits have not been exhausted. Said act of 1907, sub-section (o) of § 8 provides: "Said special assessments may by said corporation be made payable in successive annual installments, for a period not to exceed twenty-five years, and they shall be of sufficient amount in the aggregate to pay the whole cost of the improvement for the making of which that sub-district was formed and for maintaining the same, and may be levied annually until all of the expense incurred in making of said improvement shall have been paid." The same language is carried in the amendatory act of 1909, except the words "with interest" are added after the word "improvement." We think this language, standing alone, imparts the intention of the Legislature that the indebtedness of the district shall be paid, even though more than twenty-five levies are required. But such intention is further emphasized and made certain, if there be any doubt, by other provisions of said acts. For instance, in § 12 of said act 368, the district is given power to issue bonds, and in paragraph 3 of said section it is provided that: "Such bonds shall be issued in separate and distinct series for each sub-

district. The said property in each sub-district formed under the provisions of this act shall be liable for the payment of assessments sufficient to pay the bonds issued for the construction of the improvement in that sub-district, but not for issues of bonds made for the construction of improvements in any other sub-district." And again in the next paragraph of the same section it is said: "When any sub-district is formed . . . all of the unpaid installments thereof are hereby pledged to the payment of any bonds, issued for that sub-district as herein provided."

These excerpts from the act demonstrate the incorrectness of appellants' contention. They show conclusively that it was the intention of the lawmakers that all bonds should be paid, regardless of the twenty-five year limitation mentioned, so long as there remained unexhausted assessed benefits against the lands. Of course the assessed benefits could not be exceeded, but it is conceded that this has not been done.

The decree is correct, and is affirmed.

THE COCA-COLA BOTTLING COMPANY *v.* WOOD.

4-5320 123 S. W. 2d 514

Opinion delivered January 9, 1939.

Roth & Taylor and *C. E. Yingling,* for appellant.

Rolland A. Bradley and *Gordon Armitage,* for appellee.

HOLT, J. Appellee, Alice Wood, recovered judgment for $1,000 against appellant, in the White circuit court, to compensate damages alleged to have been sustained by drinking a portion of a bottle of Coca-Cola, bottled by appellant, which contained a rusty and corroded Coca-Cola bottle cap. The acts of negligence set out in her complaint are: "That the said plaintiff drank practically all of the contents of the said bottle of 'Coca-Cola'; that the contents of the said bottle were poisonous, unwholesome and unfit for human consumption in that it contained a bottle cap which was rusty and corroded and from which all of the paint had been eaten away and which caused the said bottle of fluid to become poisonous and unfit for human use, and that the said plaintiff did not discover that the said bottle cap, so rusted, was in the said bottle until she had consumed practically all of the contents thereof. That the defendant was careless and negligent in the preparation of the said bottle of 'Coca-Cola' in that it permitted the said bottle top, which was made of metal, with a cork filler and painted, to be sealed in said bottle and sold for human consumption; and that by reason of such carelessness and negligence, the plaintiff became extremely sick and nervous and her system poisoned . . ." Appellant interposed a complete denial of all allegations of negligence.

There are three assignments of error presented here: 1. That the trial court erred in overruling appellant's motion to require appellee to file cost bond. 2. That the court erred in refusing to instruct the jury to find for the defendant because there was no substantial evidence upon which a verdict of the jury could be based. 3. That the verdict is excessive. The view that we have taken of this case makes it necessary for us to consider only the second assignment.

The material facts, as disclosed by the record, stated in their most favorable light to appellee, substantially are: On October 18, 1936, appellee, in company with her husband, stopped at a filling station and while sitting

in their car, drank about three-fourths of a bottle of Coca-Cola. After drinking most of the contents of the bottle she discovered a crushed Coca-Cola cap with a dark substance around it inside the bottle. Before drinking it she had been in good health. Some ten minutes after drinking same she became nauseated and nervous. They drove immediately to Beebe, Arkansas, where she was given an emetic which caused her to vomit several times. She remained in Beebe an hour or two and then proceeded to her home in Conway. Three or four days later she called her family physician and he prescribed for her and treated her from time to time at his office until she left Conway. She was unable to go to her husband's place of business, a cleaning and pressing establishment, where she kept the books and assisted in waiting on the customers, for a few days, during which time she kept the books at her home. Her doctor prescribed a soft diet for her which she has kept up more or less until the date of the trial. Her weight dropped from 145 pounds to 135 at the time of the trial, but was holding her own now and still suffers from pains in her stomach. The testimony of appellee's husband was substantially the same as her own.

Dr. Abington, who gave her an emetic at Beebe, which caused her to vomit several times, stated he knew nothing as to the cause of her condition except what she told him.

Dr. Brook, appellee's family physician, testified in substance that appellee had previously been in good health; that she came to him several days after the occurrence complained of and he told her he didn't know whether it was the Coca-Cola, the dinner she ate or Dr. Abington's treatment, but that she was a pretty sick girl, and continued to be sick for some time after that; that he treated her until April or May and put her on a diet because she kept having a gastritic condition and pains; that she would talk to him by telephone and come to the office and he would see her at her place of business and that he gave her anti-acids.

Dr. Dunklin, on behalf of appellee, testified in response to a hypothetical question as follows: "Q. Dr.

Dunklin, I will ask you to state to the jury whether or not, in your opinion, if a bottle of Coca-Cola had sealed up in that bottle a cap consisting of metal, cork and paint, the usual Coca-Cola top, and remaining therein for some time, if the liquid in the said bottle of Coca-Cola with the cap sealed therein is taken into the human stomach if it would cause gastritis or an irritation to the inner lining of the stomach? A. Yes. Q. Do you know of any case in which that has occurred? A. No, I can't cite you specifically to a case." The testimony is undisputed that there was no chemical analysis of that part of the Coca-Cola remaining in the bottle in question from which appellee drank.

On behalf of appellant, the testimony of Dr. J. M. Kilbury was introduced, and he testified in substance that he was a chemist engaged in laboratory work, chemistry and pathology, or the study of diseases, in which he had been engaged for about twenty years; that he was also a licensed physician; that he conducted tests by breaking down Coca-Cola bottle caps, as well as other caps, so as to make a chemical analysis of same, which caps consisted of the paint on them together with the iron, tin and cork in them; that iron is often given as a medicine and that an ordinary dose is three or four times as much as was found in one of these bottle caps; that the human body will absorb only a certain amount of iron, any excess passing into the intestinal tract; that no harmful effects result from a large dose of iron; that the amount of iron in a bottle cap taken into the human stomach would produce practically no effect; . . . that the bottle caps were dissolved by the use of acid and heat and the liquid content was fed to mice upon which it had no effect and that it would have produced practically the same effect on the mice that it would on a human being; that caps, both with paint and without paint, were placed in bottles and put in incubators which maintain a heat of about that of a human body and left there two weeks; that in the case of the caps that had paint still on them there was no substance in the Coca-Cola and in the ones from which the paint had been removed there was some tin that could be recovered, but that it was a very small amount, twenty to one hundred

times less than a toxic dose and that in his opinion either of these Coca-Colas could have been drunk by anyone without any ill effects.

Giving to the above testimony of appellee its strongest probative force, and ignoring appellant's testimony, we hold that it is not sufficient to support a verdict for appellee, because there is no evidence disclosed by this record of a substantial nature upon which a verdict can be based. The contents left in the bottle of Coca-Cola in question were never chemically analyzed and no one knows whether there were any harmful ingredients in these contents or not. To assume that there were and such was the proximate cause of appellee's injuries, would be the purest speculation and conjecture, and but a guess. It has long been the settled rule of this court that verdicts of juries cannot be based upon speculation and conjecture, or guess. In *Russell* v. *St. Louis, S. W. Ry. Co.,* 113 Ark. 353, 168 S. W. 135, we said: "But conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *St. Louis, I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171, and cases there cited."

In the recent case of *Coca-Cola Bottling Company of Southeast Arkansas* v. *Bell,* 194 Ark. 671, 109 S. W. 2d 115, this court said: "Proof of the fact that a fly was found in the bottle, and that flies do carry the germ of the disease from which appellee is suffering, does not suffice to support the verdict. It is mere conjecture that the fly found in the bottle was a carrier of the germ and had communicated the disease to appellee. The only definite proof upon the contamination of the drink is to the effect that no parasites were found therein; and while it may be true that this test was not conclusive, the fact is that it is the only testimony upon that issue of fact, and it is mere surmise and conjecture to say that the portion of the drink consumed by appellee was in fact tainted and infected with a germ which caused the disease, while the remaining portions of the drink were not."

"Again in *Lewis* v. *Jackson,* 191 Ark. 102, 83 S. W. 2d 69, we said: "Giving to the testimony its strongest

probative value will not supply matters not proved nor will surmises be converted into verities. The proximate cause of the fatal accident cannot be determined. The verdict was possible only by permitting surmise and conjecture to supply facts incapable of proof. This was error. See *Turner* v. *Hot Springs Street Railway Co.,* 189 Ark. 894, 75 S. W. 2d 675, and cases cited therein."

The rule is again well stated in *Turner* v. *Hot Springs Street Railway Co.,* 189 Ark. 896, 75 S. W. 2d 675, as follows: "In the recent case of *National Life & Accident Ins. Co.* v. *Hampton, ante* p. 377, 72 S. W. 2d 543, we stated the applicable rule as follows: 'It is the well-settled doctrine in this state that a jury's verdict cannot be predicated upon conjecture and speculation,' and continuing we adopted the rule as announced by the Supreme Court of the United States in *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361 as follows: 'It is not sufficient for the employee to show that employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is not satisfactory foundation in the testimony for that conclusion."

And again in *Hough* v. *Leech,* 187 Ark. 719, 74 S. W. 2d 970, this court said: "Verdicts of juries must be based on evidence, must be supported by some substantial evidence, and not on mere speculation." As we view the record in this case when we give to the testimony on behalf of appellee its strongest probative force, the most that can be said is that it raises the mere conjecture that the illness suffered by her and the pain and suffering therefrom might have resulted from the consumption of the Coca-Cola in question. The evidence in this case falls far short of the character of

proof required to support a judgment for damages under the principles laid down in the foregoing cases.

Our conclusion is that the trial court erred in refusing to instruct a verdict in favor of appellant, and since the case seems to have been fully developed it will be reversed and dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J. (dissenting). I do not agree with the majority in reversing and dismissing this case. We are all agreed that jury verdicts cannot be based on speculation or conjecture, and the majority in this case states that it was pure speculation, conjecture, and a mere guess.

The appellee testified that she is 33 years old, married and was with her husband and others at the time she drank the bottle of Coca-Cola. She said it had a peculiar taste; she looked into the bottle and saw a bottle top. When she discovered the top in the bottle, she did not drink any more of it. It was eight or ten minutes after she drank the Coca-Cola until she became nauseated and nervous; she was treated by physicians after that, and testified positively that she never did have any trouble with her stomach until she drank this Coca-Cola, and since that time she has had trouble. There is no conjecture about her drinking the Coca-Cola, and no conjecture or speculation about her becoming sick; no conjecture or speculation about the fact that she had never had stomach trouble before, and that she has had it since. It is true the majority may believe that she did not tell the truth, but it is a well established rule of this court that whether she did or not was a question for the jury.

I am at a loss to know what it is claimed that the jury speculated about. Certainly it was not about her drinking the Coca-Cola, and certainly not about whether it made her sick; because the positive testimony establishes these facts.

Dr. E. H. Abington testified that Mrs. Wood came to his office, said she was sick at the stomach; she had been vomiting and wanted some medical attention, and he gave it to her; gave her something to empty her stomach; she seemed to be cramping and griping about the

stomach; she was nauseated and told the doctor she had been vomiting before she reached the house; she vomited some after she got there. He said he was not sure whether she had been vomiting or trying to vomit. She stayed at the doctor's between one and two hours. Certainly the majority cannot say that the jury conjectured or speculated about this.

Dr. H. C. Brook, a practicing physician at Conway, said he had been Wood's family physician for nine or ten years; that she came to him and said she had drunk a Coca-Cola and that it had made her sick; she had stopped at Dr. Abington's and he treated her, but she was not getting any better; she was pretty sick, and she continued to be sick some time after that; up to this time she had been in apparently normal health, and after that she had been upset. On cross-examination he testified that it was his idea that it was some peculiar acid, some acute irritation at that time, but it did not get well.

The jury had a right to believe, and evidently did believe, the positive testimony of these witnesses, and I am unable to see how anybody could say that the jury's verdict was based on conjecture. I can understand that the majority might not believe these witnesses and might think that the verdict was contrary to the preponderance of the evidence, but under the law, it is the business of the jury, and not this court, to determine where the preponderance of evidence is.

I think any ordinary person would believe from this testimony that the appellee drank the Coca-Cola and that it made her sick, and they would not have to speculate or conjecture to do that.

We have many times held that the credibility of witnesses and weight to be given to their testimony are questions for the jury. We have, also, held that where there is a conflict in the evidence, it is the province of the jury, and not this court, to determine the weight of the evidence; and even if it appears to us that the verdict is contrary to the preponderance of the testimony, this furnishes no ground for reversal.

"Common experience rather than technical rules should be adopted as the test. Mercantile and industrial

life, producing, as they do nearly all transactions of men that come before the courts of law and equity, are essentially practical. That which is the final basis of action, of calculation, reliance, investment, and general confidence in every business enterprise, may safely, in general, be resorted to prove the main fact. The courts need not discredit what the common experience of mankind relies upon. Judge Cooley once said that courts would justly be subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon." 10 R. C. L. 861, 862.

Article 2, § 7, of the Constitution of the State of Arkansas reads as follows: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

Section 23, Art. 7, of the Constitution of the State reads as follows: "Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."

It appears, therefore, from the Constitution, that parties are entitled to a trial by jury, and that it is their province to pass on the facts without any charge from the judge with regard to matters of fact. Of course, it is a matter of fact as to whether appellee drank the Coca-Cola and whether it made her sick, and, in my judgment, these were questions for the jury, and their finding is conclusive here, and the judgment should be affirmed.

Mr. Justice HUMPHREYS agrees with me in the conclusions herein reached.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
v. PAGE.

4-5260 123 S. W. 2d 536

Opinion delivered January 9, 1939.

J. J. Jarnan and *Huie & Huie,* for appellant.

N. A. McDaniel, Ben M. McCray and *Jehu J. Crow,* for appellee.

SMITH, J. Judgment was rendered in the court below upon an insurance policy for the amount thereof. Death by suicide was a risk not insured against, and the sole question presented on this appeal is whether the insured had committed suicide. There is no substantial conflict in the testimony in this case. It was all given by the family and friends of the insured, and is to the following effect: Insured had been an employee of a railroad company for a number of years. His health failed in August, 1935, and he quit work for a while for treatment, but returned to work for the railroad com-

pany in January, 1936, when, on account of continued sickness, he gave up his job. He did no work after that time, and was worried and nervous. His section foreman testified: "Well, he was worrying about his financial condition and being out of work. He was worried quite a bit about that." This foreman had told the insured that he would have to go to the hospital, and that he would not be able to work any longer, and insured did no work after that time. Shortly thereafter, and a few days before his death, insured was taken to the State Hospital for Nervous Diseases for examination. Nothing appears in the record as to the result of, or the report upon, this examination.

On May 12, 1936, insured and his wife, the beneficiary of the policy, went to visit his daughter in Benton, Arkansas, and arrived there about two o'clock in the afternoon. Insured went to the room assigned to him in his daughter's house, and remained there. His wife left and went to town. After his wife departed insured requested his daughter to get him a drink of water, and she went to the well a short distance from the house to do so, when returning with the water, she heard a noise in the house, and was told by a passerby that it was a gun shot. She hurried into the house, and found her father in a dying condition, lying on the floor, with his head resting against the wall, and a discharged pistol lying on the floor a short distance from his right hand and about two feet from his body. The insured lived only a short time and did not regain consciousness. The pistol belonged to the daughter of insured, and had been left on a shelf in a corner of the room, which was about three feet above the floor. The pistol was easy on the trigger, according to the daughter's testimony, and would go off from a jar or the slightest touch of the trigger.

It may be stated with entire certainty that the insured killed himself, either accidentally or intentionally. The thought that he may have been murdered has not been suggested, and it is inconceivable that any member of the jury should have entertained even a suspicion that the devoted daughter had killed her father, and no one else had the opportunity to do so.

How, then, did the insured kill himself? Appellee makes this answer: "It is as reasonable to assume that deceased was examining the pistol, when it was accidently discharged, or that he was overcome by one of his falling spells (to which he was subject), and in attempting to steady himself by grabbing at the shelf on which the pistol lay, caused its accidental discharge, as to assume that he deliberately placed the gun to his head and took his own life."

We do not think these theories can be accepted with any show of reason, or that they would be seriously considered, if this were not a controversy between a bereaved widow and an insurance company. The undisputed testimony is to the effect that deceased was not examining the pistol when his daughter left him to get the drink of water, and the fatal shot was fired during her short absence. The daughter testified that the pistol was "on a shelf in a corner of the room he was in," but the undisputed testimony is to the effect that the body was not found near the shelf nor in that corner of the room. The coroner testified that appellee had stated at the inquest that insured had been seen weeping on the day of his death, and while that testimony is denied, there appears to be no question but that insured was in the depths of utter despair on the very day of his death, on account of his physical and financial condition.

When the daughter returned hurriedly from her mission for her father, she found him lying on the floor, with his head resting against the wall, and the pistol lying on the floor a short distance from his right hand, which was outstretched. There was a mirror hanging on the wall to the left of the door, and the bottom of the mirror was about five feet above the floor, and to the right of the mirror were some splotches on the wall that looked like blood. Insured's feet were some two or three feet from this wall and almost directly in front of the mirror, and his body was lying at an angle out from the mirror.

The coroner testified that "The wound was practically halfway between the ear line and the top of the head, just a fraction of an inch to the rear of the median

line going to the ear." He further testified that he probed the wound, and that the bullet was still in deceased's head, and had ranged downward. He testified also that there was evidence of powder burns on the deceased's head. Appellee's brief concedes the truth of these facts, but states that "There were very few powder burns around the wound." The significant fact is not the extent of the powder burns, but, rather, the fact that there were powder burns above or behind the ear at the place where the bullet entered.

It must be conceded that we have a number of cases, of very tenuous character, affirming verdicts apparently finding that the insured had not committed suicide, in which the evidence greatly preponderated to the contrary. But we have always recognized the fact that the legal sufficiency of the testimony to support such a verdict was a question of law for the court. *Catlett* v. *St. Louis, I. M. & So. Ry. Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254.

In the following cases the jury had found that the insured had not committed suicide: *Industrial Mutual Indemnity Co.* v. *Watt*, 95 Ark. 456, 130 S. W. 532; *New York Life Ins. Co.* v. *Watters*, 154 Ark. 569, 243 S. W. 831; *Ætna Life Ins. Co.* v. *Alsobrook*, 175 Ark. 523, 299 S. W. 743; *Fidelity Mutual Life Ins. Co.* v. *Wilson*, 175 Ark. 1094, 2 S. W. 2d 80; *Home Life Ins. Co.* v. *Miller*, 182 Ark. 901, 33 S. W. 2d 1102.

We reversed each of those cases, for the reason that, in our opinion, there was no reasonable conclusion which could be drawn from the testimony recited in those opinions except that death had been caused by suicide, notwithstanding the verdicts of the jury to the contrary. A comparison of the facts stated in those opinions—which we shall not pause to make—will show that in none of them was it more certain that the insured had committed suicide than in the instant case. It is, therefore, our duty, when, in our opinion, there is no reasonable view of the testimony except that the insured had committed suicide, to reverse the judgment pronounced upon the contrary finding by the jury.

The cases above cited and others on the subject have recognized the case of *Grand Lodge A. O. U. W.* v. *Banis-*

ter, 80 Ark. 190, 96 S. W. 742, as our leading case on the subject, and all subsequent cases have professed to follow the principles of law there announced, in the application of which some judgments have been affirmed, while others have been reversed. That case and all others announce the proposition—which we here reaffirm—that "There is a presumption against suicide or death by any other unlawful act, and this presumption arises even when it is shown by proof that death was self-inflicted—it is presumed to have been accidental until the contrary is made to appear." But no case has ever held that this presumption was conclusive and might not be overcome by testimony. Nor has any case ever held that the testimony must be that of eye-witnesses. It is, on the contrary, a matter of common knowledge that suicide is usually committed with as much secrecy as possible, and could be but rarely shown, except by proof of the facts and circumstances attending its commission.

In the case of *Fidelity Mutual Life Ins. Co.* v. *Wilson, supra,* we quoted with approval from 14 R. C. L. 1236-7 the following statement of law on this subject: "The presumption against suicide will stand and be decisive of the case until overcome by testimony which shall outweigh the presumption."

We think the undisputed testimony and the physical facts outweigh this presumption and leave no reasonable doubt but that the insured committed suicide.

The judgment must, therefore, be reversed, and as the cause appears to have been fully developed, it must be dismissed. It is so ordered.

HUMPHREYS, MEHAFFY and BAKER, JJ., dissent.

HUMPHREYS, J. (dissenting). This suit was brought in the circuit court of Saline county by appellee against appellant to recover $500 as a designated beneficiary out of a death benefit fund maintained by appellant to pay a designated beneficiary of one of its members who should die in good standing unless the death of said member occurred by suicide or the use of alcohol.

The answer filed by appellant admitted that R. L. Page, the husband of appellee, was a member of its organization in good standing from the year 1919 to the

day of his death, May 12, 1936, and that appellee was his designated beneficiary; but denied any liability to her for the reason that its constitution and by-laws provided that if deceased met his death by suicide no benefits would be paid and alleged that R. L. Page, deceased, met his death by suicide.

The cause was submitted to a jury upon the issue joined of whether R. L. Page committed suicide under the evidence adduced, resulting in a verdict for appellee for $500, from which verdict and consequent judgment is this appeal.

At the conclusion of the evidence appellant requested the court to instruct a verdict for it, which the court refused to do, over appellant's objection and exception.

Appellant contends for a reversal of the judgment on the sole ground that the evidence is insufficient to support the verdict.

The evidence, stated in the most favorable light to appellee is, in substance, as follows: R. L. Page had been an employee of a railroad company for a number of years. His health failed in August, 1935, and he quit work for a while for treatment, but went back to work for the railroad company in January, 1936; but on account of continued sickness gave up his job. He did not work after that time and was worried and nervous. About a week before his death he went to the state hospital for nervous diseases for examination. Nothing appears in the record as to the result of the examination. On May 12, 1936, he and his wife, the appellee herein, went to visit his daughter in Benton, Arkansas, Mrs. Jim Mormon, and arrived at her home about two o'clock in the afternoon. He remained in his room and his wife went down town. He requested his daughter to get him a fresh drink of water and she went to the well a short distance from the house to do so. When returning with the water she heard a noise in the house and was told by a passerby that it was a gun shot. She hurried in and found her father in a dying condition lying on the floor with his head resting against the wall and a discharged pistol lying on the floor a short distance from his right

hand and about two feet from his body. She took hold of his shoulders and laid his body down on the floor and then called for help. He lived only a short time and did not regain consciousness. The pistol belonged to the daughter of deceased and had been left on a shelf in a corner of the room which was about three feet from the floor. It was easy on the trigger and, according to the testimony of his daughter, would go off from a jar or the slightest touch of the trigger. There were a few powder burns near the wound in his head. The ball had entered about halfway between the right ear of deceased and the top of his head and was slightly to the rear and the ball according to the probe made took a downward course. The ball remained in his head. There was a mirror hanging on the wall to the left of the door resting on a shelf about five feet from the floor and one witness said there were some splotches on the wall to the right of the mirror that looked like blood. No examination was made to ascertain whether the splotches were blood splotches. There was no evidence of a struggle and deceased had his clothes on, but no hat. The body was lying at an angle out from the mirror and no one was in the room when it was entered by the daughter with the water which she had brought for her father. The coroner who had been sent for testified that appellee and her daughter stated that deceased was nervous and had cried at some time during the day. The daughter denied that she told the coroner her father had cried. There is no evidence in the record showing that appellee was in financial straits or that during his illness he had ever threatened suicide. The deceased had never seen the pistol or handled it before entering the room. The deceased was given to having spells, but the record is silent as to the nature of them save that of his foreman who said when he had spells he would "fall out." Just what the foreman meant by "falling out" is not clearly revealed. Appellant says that the witness meant to say that he would quit work, but it might have meant that he would fall down when he had one of these spells. Just what interpretation the jury put on this piece of testimony is not for this court to say.

The legal presumption is against the theory of suicide and the presumption is such a strong one that this court has said in the case of *Grand Lodge of the A. O. U. W.* v. *Bamister,* 80 Ark. 190, 96 S. W. 742 (quoting syllabus No. 3), that: "The presumption against suicide or death by a wrongful act arises even where it is shown by proof that death was self-inflicted; it being presumed that death was accidental until the contrary is made to appear." The court also said in the case cited that the burden of proving that one committed suicide is upon the one alleging that fact and also that if men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute it became a question for determination by the jury and not by the court. These declarations of law run through many subsequent cases decided by this court and will be found thus announced in the cases of: *Industrial Mut. Indemnity Co.* v. *Watt,* 95 Ark. 456, 130 S. W. 532; *New York Life Insurance Co.* v. *Watters,* 154 Ark. 569, 243 S. W. 831; *Mutual Life Insurance Co. of New York* v. *Raymond, et al.,* 176 Ark. 879, 4 S. W. 2d 536; *New York Life Insurance Company* v. *Redmon,* 191 Ark. 1003, 88 S. W. 2d 324; and *Ancient Order of U. W. of Kansas* v. *Duensing,* 192 Ark. 919, 95 S. W. 2d 900. In most of the cases mentioned above in applying the declarations of law announced the question of intentional self-destruction was held to be a question for determination by the jury.

Appellant's theory of the instant case is that the deceased had a motive for killing himself and that in order to accomplish his purpose he took the pistol off the shelf in the corner of the room and walked to the mirror so that he might see what he was doing and placed the point of the pistol near his head about halfway between his ear and the top of his head and just to the rear of a line between his ear and the top of his head, pulled the trigger and killed himself. They based their conclusion that he was standing in front of the mirror on the fact that some splotches supposed to be blood were on the wall just to the right of the mirror and because his body was found lying face up with his head and shoulders against the opposite wall and his feet extending in the

direction of the mirror. The trouble with this theory is that the splotches on the wall were not proven to be blood splotches and because the bullet took a downward instead of an upward course. It is mere surmise or speculation under the evidence to say that the splotches on the wall were blood from the man's body and it is extremely doubtful that under the circumstances the bullet would have taken a downward course instead of an upward course. In order to explain the course the bullet took appellants say that it must have struck some bone or hard substance that deflected the upward course that it would naturally have taken. Whether it struck such a substance is speculation pure and simple. The evidence is entirely circumstantial as to whether appellant killed himself intentionally or accidentally. This court said in the case of *Mutual Life Insurance Company of New York* v. *Raymond, et al.*, 176 Ark. 879, 4 S. W. 2d 536, that "there is a presumption of law against a man taking his own life intentionally, even where it is shown that he came to his death at his own hands, the law presuming that the death was accidental rather than suicidal." It may be that the deceased took the pistol off the shelf for the purpose of examination and that in some way it went off accidentally and killed him. The jury might have found that after picking the pistol up and while examining it he had one of his spells and in falling to the floor he threw his hand up in the direction of his head at which time it fired and accidentally killed him. There were only a few powder burns near the wound and they might have been found there even if the deceased accidentally killed himself.

In the first place there is very little evidence tending to show any motive for suicide. The deceased was not in financial straits. He was simply out of a job which is the case with many men. He was ill, but nothing to show that he was incurable and nothing to show that he ever threatened to take his life or had any intention of taking his life before his death. The physical facts do not point unerringly and with certainty to a suicide.

It is argued that he remained in his own room, but this is not an unusual thing for a man feeling badly to do.

It is argued that he was alone in the house after his wife went down town and after he asked his daughter to go to the well and get him a drink. It is quite probable that he was thirsty after being in the house as long as he was and that his real purpose was to get a cool drink of water instead of getting his daughter out of the house so that he would be alone. The probability is that if he had been overly nervous or very sick his wife would not have gone down town and his daughter would not have gone out of the house even to draw a bucket of water. There is nothing in the entire record that indicated this man had planned prior to his death to take his life and the motive assigned for the act is so slight that it is hardly appreciable. I think the facts and circumstances in this case are not sufficient to overcome the legal presumption against sane persons committing suicide and to meet the burden of proof resting upon appellant to show that he did commit suicide, and hence, this court should not say as a matter of law that he did commit suicide. I think under the facts and circumstances in the instant case that men of reasonable intelligence might honestly draw therefrom different conclusions on the question of whether the deceased committed suicide or whether he killed himself accidently and, in view of this conclusion, I think it was proper to submit the issue to the jury for determination and, as there is substantial evidence in the record to support the verdict of the jury, the court should affirm the judgment instead of reversing it and dismissing the case.

Mr. Justices MEHAFFY and BAKER authorize me to say they concur in my views and this dissenting opinion.

THE B. F. GOODRICH COMPANY *v.* MCEACHIN, ADM'X.

4-5325 124 S. W. 2d 833

Opinion delivered January 16, 1939.

House, Moses & Holmes, H. B. Solmson, Jr., for appellant.

Frank Wills, Charles Mehaffy and *Osro Cobb,* for appellee.

BAKER, J. In the discussion of the matters arising on this appeal the appellant will be referred to as such, or as the Goodrich Company, and each of the appellees will be referred to generally by name, or the whole number of them as appellees.

This litigation arose out of an effort on the part of all the parties concerned to revive and rehabilitate a local corporation, Finley-Turner, Inc. This corporation

was doing business at the corner of Broadway and Capitol avenue, in the city of Little Rock, and had somewhat advantageous contracts with the Goodrich Company. The Goodrich Company supplied tires and other automobile accessories and maintained a large warehouse or distributing center in Little Rock to supply merchants in other communities. During the depression years the indebtedness owing by the Finley-Turner, Inc., to the Goodrich Company gradually built up until the result was depressing upon both creditor and debtor. The Goodrich Company became uneasy, sent representatives from the home office to make investigations, increased the line of credit, extended times of payment, made many investments, but without satisfactory results. Finley-Turner, Inc., instead of responding to the efforts made by all the parties to operate upon satisfactory business principles, continued each year to lose money and to become somewhat more greatly indebted than before. Finally Finley and Turner, two members of the Finley-Turner, Inc., extended themselves by borrowing money individually and finally by putting up their capital stock in the Finley-Turner corporation. The Goodrich Company, in an effort to keep Finley-Turner, Inc., a going concern, bought the capital stock from the stockholders of the Finley-Turner, Inc., and finally the stock of both Finley and Turner was delivered over and canceled in satisfaction of debts made by them individually for the benefit of the company. Before this was done, or about that time, Finley-Turner, Inc., was owing the Goodrich Company more than $40,000. The Goodrich Company elected a majority of the directors of the Finley-Turner corporation. The operators, however, of the Finley-Turner corporation, both Mr. Finley and Mr. Turner, continued in the management and control of the company. The situation grew worse until a critical condition existed, wherein the corporation owed the Goodrich Company fifty or sixty thousand dollars, the exact figures being immaterial. Auditors of the Goodrich Company were sent to audit the books of the local corporation and at that time the entire stock of merchandise and other properties of the local corporation were gone over and valued according to what was

then believed to be a true market value of all the property. It was found at this time that a considerable part of the stock of the local corporation had depreciated by reason of obsolescence. As an illustration it is said many automobile rims, which at the time of their purchase represented substantial values, had, by reason of changed devices and models, become of no practical value, except for the amount of metal that might be regarded as junk. A few of their radios were still carried upon the books of the company at their original price, though it was determined that they could not be sold for anything near such sum. Finley and Turner, the men who had originally owned a larger part of the capital stock and who had operated this establishment, helped fix this new assessment of values. This audit of the books of the company, at that time, discloses the fact not known prior to that date that even without this new assessment of values, the corporation was insolvent. This new assessment of values, however, reduced the book value of the assets nearly $25,000.

There is nobody in this whole controversy that takes issue with this account on the part of Finley and Turner and the officers, or agents of the Goodrich Company, in the revaluation of the assets of the company, and in an effort to determine the true value of such assets. We think it must be conceded by all who have any knowledge of the situation that the assets of the corporation, after this revaluation process, were worth at least $25,000 less than the admitted liabilities. At that particular time business had not revived to the extent that anyone could be sure of any very great development in any new business that would aid in paying off the indebtedness. Goodrich Company was by far the largest creditor. Debts owing by Finley-Turner were canceled out by the surrender and cancellation of their stock. While this may not have been entirely proper, yet at the time it was done, nor within any reasonable time thereafter was any complaint made by any interested party. In truth it was one of the ineffectual efforts to place the local corporation upon some kind of profit-earning basis. The corporation owed one of the local banks about $12,500 which it

was unable to pay. The Goodrich Company advanced money and compromised this indebtedness by paying for it $8,000 and increased in that manner the indebtedness owing it.

All the appellees mentioned in this suit were owners of preferred stock in the Finley-Turner, Inc. No dividends had been paid them in some time. In fact, if we understand the record, the last dividends declared or paid were in 1929.

It was finally decided that the corporation could never pay the Goodrich Company and pay any dividends even upon preferred stock, and that the only way to rehabilitate the corporation and put it upon a profit-earning basis was to cancel off a large part of its indebtedness and to take a large part of the indebtedness not canceled off and convert that into capital stock as representing the investment in the corporation by the Goodrich Company. But this plan was subject to certain objections, one of which was that it would place the Goodrich Company, which at that time was a creditor of the local corporation, in an inferior position if it took its debt in stock. One effect was to increase the value of the preferred stock without any new investment or aid from the preferred stockholders. The Goodrich Company was unwilling to assume this inferior position and argued that either the preferred stockholders must surrender their stock in order that the corporation might be reorganized or that they would have to take such steps as might be necessary for their protection as a creditor. Finley, who had been to that time one of those in actual control and management of the local corporation, undertook to secure a surrender of all the preferred stock to him as a trustee. In this he was aided by the officers and agents of the Goodrich Company. They helped him work out, prepare and deliver a letter to the stockholders which was accepted by the preferred stockholders and who in response thereto surrendered their stock. This letter written by Joe Finley was more than it purports upon its face, as a proposition from him, and that fact is so admitted and acknowledged by the Goodrich Company at this time. The Finley letter is as follows:

"Little Rock, Arkansas
"June 7, 1933.

"Dr. F. W. Carruthers,
"Exchange Bank Bldg.,
"City.

"Dear Sir:

"This acknowledges receipt from you of Certificate No. 102 for 40 shares of preferred stock of Finley-Turner, Inc., upon the following understanding: This stock will be transferred to my name and will be pledged with the B. F. Goodrich Rubber Company to secure advances made by the B. F. Goodrich Rubber Company to or for use of Finley-Turner, Inc.

"At the present time all of the Common Stock of the Company is pledged with the B. F. Goodrich Rubber Company, and if all the outstanding Preferred Stock of Finley-Turner, Inc., can be delivered, upon the same basis, to the B. F. Goodrich Rubber Company, they have indicated their willingness to co-operate with Finley-Turner, Inc., in revamping the financial structure of our Company, by writing off a proration of the indebtedness due the B. F. Goodrich Rubber Company and by capitalizing some of Finley-Turner's indebtedness to the B. F. Goodrich Rubber Company, in order that Finley-Turner, Inc., will be in position to again show a net profit on its operation.

"From these net profits the net obligation to the B. F. Goodrich Rubber Company will be liquidated. If and when said indebtedness has been paid, the stock will be returned to me and 40 shares of new Preferred Stock will be issued to you.

"Assuring you of the appreciation of all concerned for your co-operation in this instance, I am

"Respectfully yours,
"(signed) J. F. Finley."

Without attempting to analyze the Finley letter, which will be referred to hereafter as such, it is perhaps better that the subsequent developments be stated.

After the preferred stock had been surrendered, leaving the Goodrich Company in the dominant position of creditor, which it had occupied at all times, it then

charged off about twenty-eight or thirty thousand dollars of its indebtedness. It issued $40,000 of capital stock which was paid for by indebtedness due it by the local corporation. There was still an indebtedness of little more than $3,000 not charged off or converted into capital stock.

When this development had been reached in the process of reorganization it was discovered that the new corporation had approximately thirty-one or thirty-two thousand dollars in property and merchandise assets and that its admitted indebtedness was less than $4,000. This condition would have shown an increase in assets of approximately the same value as the indebtedness charged off, and the value of the local assets, which upon a statement of assets and liabilities, would have subjected the local corporation to a large income tax, according to the experts to whom the problem was submitted, when considered upon the so-called book earnings or increase of assets over liabilities. Such increase did not in fact exist and the company was no more able to pay a large sum in income taxes than it had been at any time previous to that date for the several years past.

It was finally determined, when this situation arose, that the best method of showing and expressing the true condition of the corporation, was a complete reorganization, and in furtherance of that plan there was organized by the Goodrich Company and by Finley and Turner, the moving forces of the old corporation, a new corporation known as the Finley-Turner Tire Company, and to this new corporation was transferred the assets of the old corporation and it did not assume any of the old debts or liabilities except the net sum of money then due Goodrich Company. About 51 per cent. of this stock was sold after issue, as we understand the record, by the Goodrich Company to J. F. Finley and it was the understanding and agreement that after this stock was paid for by Finley from his share of the net earnings in the new corporation, or otherwise, it should be delivered to him for himself and as trustee for the preferred stockholders in the Finley-Turner, Inc.

This new corporation continued for nearly a year, but notwithstanding the fact of its advantageous position, in that it was able to buy gasoline at 1c a gallon cheaper than other local gasoline dealers, and in that it had the advantage of buying as a favored unit in the Goodrich organization, it was unable to make any profits, and during the period it functioned it lost almost an additional $10,000. There was nothing with which to pay debts. It had practically an unlimited credit with the Goodrich Company and was unable to show any progress or development during the entire period it attempted to operate as a new organization. According to the record, it seemed unreasonable to expect the Finley-Turner Tire Company to continue in business except at a loss to itself and a loss to the Goodrich Company, which had stood by and served its every requirement for additional credit, merchandise and supplies. With this loss continuing to mount and repeating the experiences of the former corporation, the Goodrich Company, which had now become practically the sole creditor and whose employees were its stockholders, took over the corporation and operated it thereafter as the Goodrich Silvertown Stores.

The several appellees filed their suits against the Goodrich Company, alleged the Finley letter and explanations made of it by officers and agents of the Goodrich Company, as a contract fixing and establishing their rights, and a breach of that contract by the Goodrich Company, and the consequent loss by such preferred stockholders of the values of the respective shares owned by each of them.

The defense of the Goodrich Company was a denial of the breach of the contract and insistence upon its part that it had substantially in all respects performed each part of the agreement as set forth in the so-called Finley letter, and further that inasmuch as the capital stock of the Finley-Turner, Inc., was without value even though there had been a breach of the agreements set forth in the Finley letter, such breach had not contributed to any loss to said stockholders, inasmuch as said stock was at no time of any value for a considerable length of

time prior to the surrender of it by the preferred stockholders to J. F. Finley.

The foregoing statements and facts and conclusions are substantially correct, though no effort has been made to show or give any exact figures for the reason that such minute detail will in no manner be helpful in the solution of the problems presented.

A considerable volume of evidence is found in the record and only that portion will be considered in stating our conclusions which we think necessary to a complete understanding of the matters in controversy.

The issues were tried resulting in a jury verdict for 25 per cent. of the face value of the preferred stock owned by each of the appellees. The appeal of the Goodrich Company is a challenge to the correctness of the verdict and consequent judgments.

The issues presented are largely those arising out of admitted facts and not of disputed questions of fact. Indeed, we think it may be said that every substantial fact affecting the rights of the parties to this suit is fairly stated by counsel for the respective parties and without dispute, except the resulting declarations of law arising out of such facts as a determination of the rights of the parties.

Our conclusions, therefore, will be stated as concisely as we are able after having expressed this view of the melancholy results of these large but unprofitable investments of all the parties.

The Finley letter copied above is one written to Dr. F. W. Carruthers. A similar letter or receipt was delivered to each of the appellees. The only difference in the letter copied in this opinion and the one delivered to the other parties is in the name of the addressee and in the number of the stock certificate and designated shares of stock owned by the addressee. This letter or contract, as it is called in the briefs, shows that it was the intention that the preferred stock delivered over to Finley after it was transferred to J. F. Finley, would be pledged to the Goodrich Company to and for the use of Finley-Turner, Inc., so if we assume that these transfers were made in good faith, then the stock was pledged from and after

the date of the transfer in 1933 to the creditor, the Goodrich Company. All the common stock had already been pledged or sold to it, and it was then agreed that if the outstanding preferred stock be delivered upon the same basis, the Goodrich Company had expressed its willingness to co-operate with the Finley-Turner Company in revamping its financial structure and in writing off a proration of the indebtedness to the Goodrich Campany and in capitalizing some of that indebtedness.

We understand that the parties meant that after a surrender of this stock, by pledging it so that it became subservient to or under the control of the Goodrich Company, the Goodrich Company would be willing to cancel or charge off as an actual loss a part of its indebtedness. The exact amount was not agreed upon, but it must be said that the understanding was such that a sufficient amount would be charged off so that Finley-Turner, Inc., would be in a position to show net profits or earnings without having to devote all such earnings to the payment of the large amount of indebtedness that had accrued, but still another unnamed amount owing to the Goodrich Company would be paid by the issuance of capital stock by the Finley-Turner Company, and this amount, though not stated, was to be a sufficient amount to leave not an unreasonable or extremely large indebtedness which would continue the insolvency of the corporation.

Complaint is not made, as we understand from the argument of all the parties, that the Goodrich Company did not act in the utmost of good faith in the amount charged off, or in the amount that it considered paid by the issuance of capital stock to it. Nor is there any objection made that the amount of indebtedness remaining unpaid was out of proportion to the capital stock issued, or to the amount of assets owned by Finley-Turner, Inc. That amount was $3,865.66, which, of course, showed quite a material reduction from the more than $75,000 indebtedness that was owing at the time the Finley-Turner Tire Company was incorporated.

The alleged breach relied upon by the appellees is that the agreement was from the net proceeds, the net

obligation, that is to say, the $3,865.66 owing to the Goodrich Company would be liquidated and that the Goodrich Company had no right, in its operation or control of the Finley-Turner Company or the Finley-Turner Tire Company to take over the assets of the company to satisfy this net indebtedness. We do not agree with that theory or contention made on the part of appellees, who insist that it is expressed or undisputed in the language used in the contract. In the first place, all the facts disclose that Finley-Turner, Inc., was indebted in so large an amount that it was wholly insolvent and it was recognized that its ability to pay the indebtedness was hopeless. The Goodrich Company refused to charge off this indebtedness in a way that even the preferred stockholders would be in position to be preferred or have the advantage over it as a creditor. At that time, as a creditor, it had an advantageous position over even preferred stockholders and this method of having a surrender of this preferred stock and pledging the same to the Goodrich Company was intended, as to this particular part of the proceeding, to make the Goodrich Company safe as to the remaining or net indebtedness not charged off or capitalized and also by the express terms of the contract to justify the extension of further credit to enable this faltering company to continue in business. It must appear, when these facts are considered with others, including the admitted fact that during the succeeding months, almost a year after the reorganization of the Finley-Turner Company, and which operated as the Finley-Turner Tire Company, there was an additional loss of approximately $10,000.

It will be remembered that J. F. Finley was one of the owners, the manager, and almost in sole or exclusive charge of Finley-Turner, Inc., but he was the trusted agent of the preferred stockholders, in whose hands the preferred stock was delivered to be by him pledged. No bad faith, mistake, or even bad judgment is urged as to the conduct of J. F. Finley in acting under the express authority given him. It is not urged that there were any earnings by which these net debts might have been paid or that would have entitled any stockholder to a return of his capital stock. Instead of these net debts

being the only amount due, Goodrich Company was confronted with a situation whereby the advanced money added to the enormous sum charged off and represented by capital stock as unpaid indebtedness, there was a loss of about $10,000 and another year would have represented perhaps a similar amount or sum of money for continued operation.

It is not urged that the company was not permitted to operate for a sufficient length of time to be in a position to earn money upon the investment, but it is urged, for some unaccountable reason, that since the Goodrich Company could have been paid only from net earnings, as to the past-due indebtedness, it could not cease to support or continue the losing or failing corporation. There was no agreement for such continuation or indulgence on the part of the Goodrich Company, nor is there any legal obligation on the part of any creditor of the corporation to continue to support and maintain it as a losing investment or adventure in the absence of a contract so to do. At most, in this case there was an understanding or contract arising out of the Finley letter that such advances would be made as were made under the advantageous position occupied by the new corporation to enable it, if it were possible to do so, to show its ability to rehabilitate itself.

J. F. Finley, the trusted agent of the preferred stockholders, continued in charge of the business and there was still no charge of bad faith or improper conduct on the part of the Goodrich Company or its officers, or agents.

We do not think any act of bad faith is proven or established in any respect against the Goodrich Company. It abused no legal right or privilege, but at that time did only what it was authorized by law to do having control of all the capital stock.

Rightful possession of assets was delivered to it in satisfaction of the indebtedness owing to it. Finley and Turner, as individuals, have lost perhaps more than anybody else. They had been in actual charge and control. They knew all the facts and circumstances. They have charged no bad faith, but bowed to the inevitable result

following the depression and lack of profitable business. Certainly at no time before the pledge of this preferred stock, for a number of years, was the capital stock worth anything at all. It is argued that the common stock was sold for 25 cents on the dollar as a book value, but it seems now to be admitted that this book value was fictitious for the reason that much obsolete merchandise was carried at original invoice prices and not at any thing approximating its actual value at the time the common stock was deemed worth 25 per cent. There never was a time after the surrender of this stock, during the continued existence of Finley-Turner, Inc., that that company was solvent. It could not have paid its debts. There was more than a $40,000 deficit. In the reorganization the Goodrich Company put up the entire capital stock and the method of capitalizing these enormous debts is not questioned, perhaps could not be by the preferred stockholders, who, through Mr. Finley, their agent, participated therein. It was all pledged for such advancements as were made by the Goodrich Company, and if it had had any value, no doubt Goodrich Company would have resorted to that value first to have satisfied its claim.

No effort has been made to show by any proof in this record that from and after the day of the pledge of this stock by the several preferred stockholders it ever had any value whatever and appellees' case has wholly failed because it has shown no loss in that respect.

We present as conclusive of the factual controversy the admitted proposition that the preferred stock amounting to $6,000, was pledged for the advances, after the new organization, to June, 1935, and that these advances amounted to several thousand dollars more than the face value of the stock. These advances have not been paid. Further, after that date, when the Goodrich Company had attempted to continue operations in its own name and right, it offered in proof the fact that it continued to lose money. This proof was held inadmissible.

This state of the record, as shown by the foregoing admitted facts, must be such as to be determinative of the rights of all parties, without serious consideration of the interesting questions of law presented and argued.

Appellees do not seriously urge that the Goodrich Company should have continued to make advances in the face of continued losses, but argue only that when it took over the assets, such taking over was a breach of the contract. We do not think so, but we consider that the foregoing factual presentation conclusively shows that even if there were such a breach, the preferred stockholders suffered no loss as their stock was pledged for these advances and there is no way to avoid the effect of that pledge.

We think the Goodrich Company, in the exercise of good business discretion, had the right to elect whether it would continue to face large losses of operation, to rehabilitate a constantly losing and failing corporation, and that the law justified it, under the facts, since it was the owner and holder or, at least, in control of all the capital stock, in taking over all assets to apply on liabilities.

The following authorities seem to support that contention: 4 Thompson on Corporations (3rd Edition), § 2505; *Phillips* v. *Providence Steam Engine Co.*, 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560; *Rhea* v. *Newton*, 262 Fed. 345. Under similar conditions the authorities seem to be practically unanimous and to the same effect.

We think it clear the judgments of the circuit court are not supported by any substantial evidence; that the court erred in not directing verdicts for the appellant as to each of the appellees.

The judgments are, therefore, reversed, and the actions dismissed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* WARD.

4-5335 124 S. W. 2d 975

Opinion delivered January 16, 1939.

J. W. Jamison and *Warner & Warner*, for appellant.
George A. Hurst and *Partain & Agee*, for appellee.

McHaney, J. This action was brought by appellee against J. M. Kurn and John G. Lonsdale, trustees in bankruptcy, for the St. Louis-San Francisco Railway Company, hereinafter called appellants, and one Hollowell, to recover damages in a large sum alleged to have been sustained by reason of personal injuries on October 14, 1937, while in the employ of appellants, occasioned by the alleged negligence of said Hollowell, a fellow-servant. Trial resulted in a verdict and judgment for $5,000, for a reversal of which this appeal is prosecuted.

Appellee, Hollowell and a number of other employees were engaged as laborers in the dismantling and removing of the railway tracks, including rails, ties, etc., of the St. Paul branch of appellant railway company and in loading the rails and ties on cars. At the time of the alleged accident to appellee, he and Hollowell were carrying a heavy crosstie, weighing from 350 to 400 pounds, on their right shoulders to a box car some 300 feet away, appellee being in front, into which it was to be loaded.

The complaint alleged that, "as was the custom and practice, when they got to the car they both stopped for the purpose of permitting two other employees inside the car to lift same off of plaintiff's shoulder, so that same could be loaded into the car; that when plaintiff and said defendant so stopped the said defendant (meaning Hollowell) suddenly and without any signal or warning whatever to the plaintiff, carelessly and negligently stepped forward, thereby causing the plaintiff to be pushed against said railroad car and to stumble and his body to be twisted and wrenched by the heavy weight of said crosstie so that plaintiff was seriously and permanently injured," as later detailed. Appellant's answer was a general denial of all the material allegations of the complaint, and a plea of contributory negligence and of assumed risk, in bar of the action. Hollowell filed no answer or other pleading in the case, and did not testify to any fact in connection with this action, his only testimony being directed to the fact that he worked for appellants on the St. Paul branch job, and that he has a claim against appellants for an injury he received, he being represented in said claim by one of counsel for appellee.

We think the court erred in refusing to direct a verdict for appellants at their request on the ground that no actionable negligence is shown, conceding that the complaint states a cause of action, a question not raised or presented.

In detailing how the accident occurred, appellee testified as follows: "Q. In this particular instance, when you said you were hurt, what was the weight of that tie? A. I judge somewhere between 350 and 400 pounds. Q. Was it helped up onto your shoulder where you took them up? A. Yes, sir. Q. How far did you carry it to the box car? A. Between 200 and 300 yards. Q. When you reached the box car, what did you do? A. Stopped there and waited there a minute; there were two men ahead of us and waited until they got out of the way. Q. Where was the end of the tie? A. Pretty close to the door. Q. Was it or not on your shoulder? A. It was. Q. Then what happened? A. This Hollo-

well stepped forward. Q. Did he let you know that he was stepping forward? A. No, sir. . . . Q. What happened to you then? A. It threw me in a twist and threw me up against the side and bottom of the door on the box car and hurt me along in here. Q. Where was the tie at this time? A. Still on my shoulder. Q. Then what happened? A. These fellows took it off of my shoulder as quick as they could. Q. What did you do? A. I walked off and sat down." On cross-examiantion he testified: "Q. Now, Boyd, let's see; you and Hollowell walked up with this tie, you on the front end, and he on the back end? A. Yes, sir. Q. And you walked up to the door on the front end, close to the door where the tie was to be delivered? A. Yes, sir. Q. And you stopped? A. Yes, sir. Q. You waited for the men inside to come and take it off your shoulder? A. Yes, sir. Q. And Hollowell came forward? A. Yes, sir; stepped forward. Q. And that threw you against the box car? A. Yes, sir; and in a strain. Q. You don't know what made Hollowell do that? A. No, sir. Q. You were not looking at him. A. No, sir. Q. Your back was to him? A. Yes, sir. . . . Q. He didn't explain why he stepped forward? A. No, sir. Q. And you don't know now why he did? A. No, sir. Q. The ground was dry where you were standing? A. Yes, sir. Q. And where he was standing? A. Yes, sir. . . . Q. Did the tie go against the sidewall of the box car or did your body? A. My body. . . . Q. The door of the car was open and that made the floor about level with your shoulder or something like that? A. The bottom of the door was right about along there (indicating). Q. Below the level of your shoulder? A. Yes, sir. Q. The man in the car would reach down and get the tie in his hands? A. Yes, sir."

Two other witnesses testified they saw Hollowell take a step forward and shove appellee into the car. The two men working inside the car said they knew nothing about his getting hurt at the time, and only learned about it afterwards.

For the purpose of this decision we accept appellee's testimony and that of his witnesses as true. The

mere fact that Hollowell took a step forward without notice to appellee that he would do so cannot be said to be negligence. Negligence is the doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do, under the same or similar circumstances, and to be actionable there must be a violation of duty resulting in injury to another. *Armour & Co.* v. *Rose,* 183 Ark. 413, 36 S. W. 2d 70. Negligence is never presumed, but the burden is on the party asserting it to establish the fact by a preponderance of the evidence. Nor is it to be presumed from the fact of injury, and no one is liable in damages for a purely accidental injury. In this case, we think the evidence discloses a pure accident, for which appellants are not liable. Appellee and Hollowell were performing a very simple operation—the carrying of crossties to a box car to be loaded therein. They were given and needed no instructions as to how the work should be done. The fact that Hollowell took a step forward may have been intentional on his part for some particular good purpose or reason, such as shifting his position on account of the heavy burden, or it may have been inadvertent, unintentional and involuntary. They were carrying a heavy tie, weighing possibly 400 pounds. Hollowell was on the stand, but neither party questioned him as to whether he did take the step, or the occasion for doing so.

In *St. L. S. F. Ry. Co.* v. *Burns,* 186 Ark. 921, 56 S. W. 2d 1027, the late Justice BUTLER, speaking for the court, said: "It is a matter of ordinary observation that frequently there is some danger attendant upon the most common and ordinary transactions, but the care required is only to provide against such dangers as ought to be foreseen in the light of the attendant circumstances, and the ideal 'prudent person' will therefore not neglect what he can foresee as probable nor divert his attention to the anticipation of events barely possible, but will order his conduct by the measure of what appears likely in the ordinary course of events (citing authorities)."

In *Mo. Pac. R. Co.* v. *Medlock,* 183 Ark. 955, 39 S. W. 2d 518, we said: "From aught that appears from this testimony the slipping or stumbling which caused Sleepy Reeves to release his hold on the car may have been due to an accidental misstep. Had the testimony tended to show even inferentially that the slipping or stumbling was due to a failure on the part of Sleepy Reeves to watch where he was walking, or to walk as slowly as he should or to inattention or disobedience or other misconduct in the performance of his duties, then such testimony would have created a question of fact upon the issue of negligence for determination by the jury; but, since the cause of the slipping was conjectural only it was improper to submit the issue of negligence to the jury. Upon the record as it stands the court should have instructed a verdict for appellant." See also *St. L. S. F. Ry. Co.* v. *Bryan,* 195 Ark. 350, 112 S. W. 2d 641.

We think this case is ruled in principle by the above cases, but if there is any lingering doubt, then the recent case of *Missouri Pac. R. Co.* v. *Vinson,* 196 Ark. 500, 118 S. W. 2d 672, should dispel it. There the plaintiff, an experienced employee, was engaged with a fellow-employee in lifting and stacking crossties in a box car. He was lifting in front, facing the stack, with his side or back to the fellow-servant at the other end who was also lifting and facing the stack. Plaintiff got his end almost to the top of the stack when the fellow-servant gave it a shove, which threw him in a strain, causing him to lose his balance, and he felt a sharp pain in his side. He did not know just when the fellow-servant was going to shove, but thought he would see whether the tie was high enough before doing so. Negligence was laid on this account. In reversing a judgment for plaintiff and dismissing the action, we said: "The situation is this: An experienced laborer, assisted by a fellow-servant, was doing the kind of manual labor he was employed to perform. There were no concealed dangers. Appellant, as well as anyone else, knew the weight of crossties. He, perhaps better than others, knew the height of the stack upon which the tie in question was to be placed. He undertook to lift his end high enough to clear the stack,

and 'supposed' the fellow-servant, before pushing, would see that it was in position. 'I got almost to the top, and, of course, there was a strain on me, trying to put it there, and this colored boy gave it a shove. . . . I felt a sharp pain in my side.'

"There is no evidence of a custom requiring the fellow-servant to wait (before pushing the tie) until appellee gave a signal. Appellee merely 'supposed' that such fellow-servant would watch the process of elevation and would withhold the shoving operation until the tie had cleared the stack.

"Employers are not required to have a foreman standing at the side of every person who works at a job alone or in conjunction with others. Industry is not charged with the duty of supplying every man who works with a blue print or chart showing how every step shall be taken, nor must a crier be present at all times to look, listen and anticipate on behalf of those who have the ability and the experience to exercise their own normal faculties. Two men performing the simple task of carrying and stacking crossties will be charged with knowledge that such ties possess weight, and that the law of gravity has not been suspended. Every man will be presumed to know more about his own strength and to be better informed as to his ability to lift than is a stranger, and every manual task, however, menial, requires the exercise of some intelligence upon the part of those who undertake to perform it."

Assuming, therefore, that Hollowell took the step as charged, and that appellee was injured, as he claims, it could not have reasonably been foreseen as a probable consequence that an injury would occur.

We think the case of *Consolidated Construction Co. of Okla.* v. *Hatchett,* 195 Ark. 556, 114 S. W. 2d 31, cited and relied on by appellee in his brief and in oral argument, is not in point here, as also the other cases mentioned.

Since no actionable negligence is shown, the judgment must be reversed, and as the cause has been fully developed, it will be dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

ST. LOUIS-SAN FRANCISCO RAILWAY CO., J. M. KURN, TRUSTEE, v. CHILDERS.

4-5331 124 S. W. 2d 964

Opinion delivered January 16, 1939.

J. W. Jamison, Warner & Warner and *Paul E. Gutensohn*, for appellant.

Partain & Agee and *Ralph W. Robinson*, for appellee.

SMITH, J. Appellee filed a complaint alleging two separate causes of action, under the Federal Employers' Liability Act, against the trustees in bankruptcy of the appellant railway company.

The first count in the complaint alleges an injury suffered in September, 1936. Appellee was then a section hand, with thirty years' experience in that service, and he testified that he was more familiar with that work than was Hess, his foreman. The section crew of which appellee was a member consisted of himself, his foreman, and two other section men—Bryan and Perryman.

This crew, while riding on a motor or hand-car, saw a train approaching, which was not an unusual event. The crew stopped the car and proceeded to remove it from the track. No attempt is made to predicate negligence upon the time or manner of removing the car, which was done by two of the men lifting each end thereof. Perryman and appellee were at the front end of the car, lowering it down the railway embankment or dump, which was about four feet high. Hess and Bryan were at the other end, near the railroad track. There was a space of about five feet between the rear end of the car and the railroad crossties. As the train approached, Hess and Bryan released their hold and testified that they did so to avoid being struck by the train. One of the controverted questions of fact in the case is whether it was necessary for Hess and Bryan to release their hold on the car to protect themselves. Appellee testified that they could have retained their hold on the car without endangering their safety, and that if they had done so the car would not have rolled down on him and Perryman, as it did do. No orders were given by the foreman, and none appear to have been necessary, except to remove the car from the track. All the men understood how the car should be removed.

Appellee testified: "Clyde Bryan and Jake Hess, the section foreman, turned loose of the car, and let it right on down on Perryman and me and that rod that comes from the sills on the car sticks out. We both turned sideways to check the car and that rod caught me right here." Appellee testified that as a result of being struck in this manner he sustained a hernia from which he has since suffered. A judgment was recovered by appellee on this count in the sum of $4,000.

The testimony is sharply conflicting as to whether appellee sustained a hernia or other serious injury; but we pretermit a discussion of the injury, as we dispose of the case upon a consideration of the question of liability for the injury, without regard to its extent.

Appellee knew that Hess and Bryan had released their hold on the car, but stated that "I thought they ought to have helped hold the car." He described the cause of the injury as follows: "I was just trying to

hold it, I was trying to hold it to keep it from going on down the dump, trying to keep it from going on down where it would be hard to get back up." Appellee and Perryman did hold the car and it did not run down the dump. This was an act of their own volition. Perryman does not claim to have been injured. There appears to have been no reason why appellee might not have stepped aside to a place of safety, as did the foreman and Bryan, except that appellee knew it would be difficult to roll the car up the dump, if it were allowed to roll down.

As has been said, the suit was brought under the provisions of the Federal Employers' Liability Act, and the sufficiency of the evidence to establish negligence is governed by the terms of that act and the applicable provisions of the common law. *Missouri Pacific R. R. Co.* v. *Montgomery,* 186 Ark. 537, 55 S. W. 2d 68. A headnote to the case of *Toledo, St. Louis & Western R. R. Co.* v. *Allen,* 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513, reads as follows: "3. Except as specified in § 4 of the Federal Employers' Liability Act, the employee assumes the ordinary risks of his employment, and, when obvious or fully known and appreciated, the extraordinary risks and those due to negligence of his employer and fellow employees."

Here, there was no superior knowledge on the part of the foreman, nor were any orders given by him to appellee as to the manner in which he should perform his duties. He knew Hess and Bryan had released their hold on the car, and there was no reason why he, too, should not have done so, except that he knew it would be difficult to roll the car up the dump, if it were allowed to roll down. He knew better than anyone else whether his strength would enable him to prevent the car rolling, and we, therefore, conclude that any injury which he may have sustained—whatever its extent may be—was the result of a risk which he had assumed as an incident to his employment.

Appellee's injury did not prevent him from remaining in the service of the railway company, and with the loss of only a few days' time he continued working as a section hand, under the same foreman, until August 10, 1937, at which time he sustained a second injury, to com-

pensate which he sued in the second count of his complaint, and upon this count a judgment was recovered in his favor for $6,000, making a total recovery of $10,000 on the two counts.

Appellee's second injury occurred in the following manner. The section crew remained unchanged except that Raymond Temple had replaced Bryan. The motor car had been taken off the track at the noon hour while the men ate their lunch. After eating, the car was placed back on the track or re-railed, as that action was called.

Appellee detailed the circumstances of his injury as follows. This was the same motor car that I was in the first time I was hurt, and the same foreman. We were putting the car on the track to go back to work. Me and Rufus Perryman picked up the front end and started west with it, and when we came around here the right hind wheel hit the rail; it didn't take it, and when Mr. Perryman dropped it, it would not have hurt me any worse if you had stabbed a knife into me. To put the motor car on the track you just pulled it over there and leave the rear wheels in the middle of the track, and the two head men will pick up the front end of the car and come around here with it, and then the two rear men pick up their end and come around here with it, and that is all that is done. I was standing astraddle of the east rail holding the motor car. We had our backs to it. Perryman was to my left on the same end. Hess and Temple were at the rear of the car. I couldn't see them, as I had my back to them. Perryman was at the left end, south of me, and we were headed north. I was working on the north side of the rail, on the right-hand corner. Perryman and I were lifting that end of the car, and we had it off the ground and the track, Mr. Rufus Perryman —when the weight of the car came down on me, I looked over my shoulder to see what was going on, and he was grabbing hold of the car. He had broken loose, and he grabbed for it and the weight of the motor car struck me and injured my back, and I haven't been clear of pain since.

In answer to the question, "It (the car) dropped suddenly?" appellee answered: "Yes, sir, it went down."

Upon his cross-examination appellee testified as follows: "Q. You were not looking at Perryman? A. Not until the weight of the car hit me. Q. You don't know what he did? A. I don't know what he did. All I know is that he dropped the car."

Perryman testified as follows: As we started to pick up the car, to re-rail it, Mr. Childers said: "The handle bar is too hot," and he reached back and got Mr. Hess' sack and put it on it, and we went ahead and balled the car. Witness did not drop his end of the car, but did let it down when appellee said the handle bar was too hot. When this was done appellee picked up the gunny sack and put it on the handle bar, and we went ahead and picked up and balled the car, and we both let the car down together. He did not at any time take his hands off the front end of the car and cause it to fall on appellee, and he knew nothing about appellee being injured until the following morning, when appellee stated that he had sprained his back.

Temple testified that he did not notice anything unusual in the way the car was let down, and he didn't hear appellee and Perryman say anything to each other. He saw appellee put the sack on the handle bar, and they went ahead and put the car on the track, and the first he heard of appellee being injured was when the car stopped and they were going to put it off, he said he had strained his back at the other place. Was lifting the back corner of the car, and it didn't seem to jar me any.

Hess, the foreman, testified that he and Temple were at the rear end of the car, and appellee and Perryman picked up the front end, and they walked on around until the car came against the east rail, and that is where the car was set up, and when the car hit the rail he jumped off to ball the left rear wheel. His shoulder was under the car and he couldn't see what happened. Appellee said nothing about being hurt at that time, but after we had put the car off at another stop about a half a mile away appellee said something about wrenching his back. The car was let down all at once, abruptly enough to cause him to look up, and he saw appellee and Perry-

man looking at each other, and then they reached down and picked the car up. He thought they let it down to get another hold on the car.

On his cross-examination Hess was asked: "Q. You knew that somebody had done something that they shouldn't have done in putting the car on the track?" and he answered, "No, sir." He was then examined as follows: "Q. Why did the hand car fall? A. I knew they let the car down. Q. You knew that one of them or both of them did something to cause it to come down, one or both? A. I figured both. Q. Did one of them or both of them? A. Both, I judge. Q. But did one or both of them? Mr. Warner: He answered that. Q. No, he didn't, he is judging, you didn't cause it to be dropped? A. No, sir. Q. The other man on the rear of the car by you didn't cause it? A. No, sir. Q. One or both of them in front? A. Yes, sir, one or both of them. Q. It dropped suddenly? A. Yes, sir, it went down."

On his redirect examination Hess testified as follows: "Q. Did the car go down in any different manner than it usually goes down? A. They just let it down when I noticed it. Q. Did you notice any jolt or jar or anything like that? A. No, sir."

On his further cross-examination Hess testified as follows: "Q. You stated they let the car down in the usual way that they set it down? A. We set it down all the time. Q. Yet you told this jury that it dropped abruptly and suddenly and you looked up and saw them facing each other? A It didn't go down no faster than ordinary. Q. They put it down like they always do? A. It just went down. Q. Was that the usual customary way of handling a car; tell the jury why you looked up? A. Because they didn't have it all the way around and set it down before they got to where they should have set it down."

The second count—like the first—was based upon the Federal Employers' Liability Act, and the Supreme Court of the United States, in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Saxon,* 284 U. S. 458, 52 S. Ct. 229, 76 L. Ed. 397, said: "As often pointed out, one who claims under the Federal Act must in some adequate way

establish negligence and causal connection between this and the injury." In other words, before there can be a recovery, to compensate an injury to the employee, there must be negligence on the part of the employer with causal connection between that negligence and the employee's injury.

Upon this issue, we think the case of *Missouri Pacific R. R. Co.* v. *Medlock,* 183 Ark. 955, 39 S. W. 2d 518, under the facts therein stated, is controlling here. In that case the injured employee relied upon testimony to the following effect: "'We worked until about 2 o'clock, and we started to turn our car to come back to town; it was at the crossing, and we started to turn the car around, and it got hung and one of the boys went around to prize it loose, and that left two at my end of the car, and some way Sleepy Reeves stumbled and left the weight on me.'" We there said that the fact that one section hand had let the weight of the car down upon his fellow servant was not, alone, sufficient to support a recovery, but it was essential to show that there had been inattention or disobedience of orders, or other misconduct in the performance of duty, on the part of the employee who had let the weight of the car fall on his fellow servant.

In the instant case the testimony is sharply conflicting as to whether Perryman let the car fall; but inasmuch as appellee testified that he did, we must assume that the jury found the fact so to be. But, even so, there is no testimony that Perryman was negligent in this respect. Appellee did not, at the time of his injury, reproach Perryman, nor did he then make complaint that Perryman had improperly performed his duty in assisting to re-rail the car. He admitted that he did not see what Perryman did, and he gave no testimony to support the finding that Perryman had negligently allowed the car to fall upon him. All the other witnesses testified that they saw nothing out of the ordinary to attract their attention.

The weight of the car was such that one might sprain his back by lifting it, and especially so if he performed that duty in an improper manner. This, we think, is one of the risks of the employment in which appellee was

engaged and which he must be held to have assumed. There can be no recovery here unless it be shown that Perryman was guilty of some act of negligence causing the car to fall which occasioned appellee's injury, and appellee offered no proof to show what that act was, except to say that Perryman let the weight of the car fall down upon him. That fact was shown in the Medlock Case, *supra,* but we there said that the proof of that fact alone did not establish liability—an affirmative showing of negligence being required.

Inasmuch as that showing was not made, the judgment must be reversed, and, as the causes appear to have been fully developed by the testimony of all the witnesses present, the case will be dismissed.

HUMPHREYS, MEHAFFY, JJ., dissent.

MCCARROLL AGENCY, INC., *v.* PROTECTORY FOR BOYS UNDER THE CARE OF THE FRANCISCAN BROTHERS OF CINCINNATI.

4-5323 124 S. W. 2d 816

Opinion delivered January 16, 1939.

Grover T. Owens and *Brundidge & Neely,* for appellant.

F. W. A. Eiermann, for appellee.

MEHAFFY, J. This suit was begun by appellant, and the original complaint named Poor Brothers of St. Francis, Inc., as defendant. Answer was filed in which it was admitted that appellant was a corporation, but it was denied that the appellee was incorporated, and denied that it owned any property. It was alleged in the answer that the corporation which owns the property and operates the school is known as the "Protectory for Boys under the care of the Franciscan Brothers of Cincinnati, Ohio." Thereafter, the appellee was made party defendant.

The appellant alleged that on March 6, 1929, the appellee entered into a contract with appellant to obtain a loan and to insure said property for the amount of the loan through the appellant for a period of ten years; that said contract was made with Remmel & McCarroll, and that Remmel & McCarroll assigned said contract to the McCarroll Agency, a corporation; that the contract contained the following clause:

"I agree to insure in full paid policies the buildings on said premises in the sum of at least $129,000 fire and $90,000 tornado, loss, if any, to be paid to lender as its interest may appear. All new and renewal policies to be

placed with Remmel & McCarroll, in companies acceptable to them."

The contract purported to be made with Poor Brothers of St. Francis, Inc., and was signed by Bro. Anthony Collassowitz. After the name was "Pres." This was stricken out, and "Sec'y" was written. This was stricken out, and "Superior" was written in pencil.

The evidence tended to show that the appellee owned the property and operated the school in White county, and that it wanted to borrow $20,000 to make improvements, and through Remmel & McCarroll a loan was secured at the bank in St. Louis, the Mercantile Commerce Bank & Trust Company.

The case was tried before the judge sitting as a jury, and the court found that, at the time of the inspection of the property, the appellee had not authorized the local Superior, Anthony Collassowitz, to enter into any contract like the one sued on; that Brother Anthony Collassowitz was the local Superior and was not authorized to make the contract for insurance. The court found that at the time he signed the contract the only thing he signed was his own name, and that the rest of the signature was placed there by Mr. W. S. McCarroll; that there had been added since the signature was signed by the Superior, the words "Pres." and "Sec'y" as the position held by Brother Anthony. The court further found that he was the local Superior at Morris Institute, and as long as he was local Superior there, he kept the insurance with Remmel & McCarroll and their assignee; that the local Superior had no authority to bind the corporation at this or any other time pertaining to any expenses longer than a period of one year; that the mortgage securing the loan, which was executed by the proper persons, made no reference to the insurance, and that the officials of the corporation had no knowledge of the insurance contract at the time it was made, and did not ratify it. The court further found that no insurance policies were tendered or delivered by the McCarroll Agency to the local Superior, or to the holder of the mortgage for the periods for which the sum sued for was alleged to have been earned.

It is earnestly contended by the appellant that Brother Anthony Collassowitz had authority to make the contract, and appellant states that the uncontradicted testimony shows that Brother Anthony Collassowitz was authorized and directed to enter into a contract to procure a loan, and that the pleadings admit this. The appellee does not dispute this. It says that he had authority to procure the loan, and that he had authority as local Superior to pay current expenses which included paying the insurance premiums for one year; that he had no authority beyond this; that he did not have authority to make the contract relied on by appellant.

Mr. McCarroll testified that he did not inquire into the authority of the agent, but just assumed that Brother Anthony had authority.

The general rule is that a person who deals with an agent is bound to take notice of the extent of the agent's authority. 7 R. C. L., § 623, p. 626.

An agent cannot confer authority on himself or make himself agent by merely saying he is one, and where he varies from the particular authority given him, his acts will not bind his principal. The declarations of an agent do not establish his agency. Neither agency nor the extent of an agent's authority can be established by his declarations.

"The authority of an agent, and its nature and extent, where these questions are directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself or make himself agent merely by saying that he is one. Evidence of his own statements, declarations or admissions, made out of court, therefore (as distinguished from his testimony as a witness), is not admissible against his principal for the purpose of establishing, enlarging or renewing his authority, nor can his authority be established by showing that he acted as agent, or that he claimed to have the powers which he assumed to exercise. His written statements and admissions are as objectionable as his oral ones, and his letters, telegrams, advertisements and other writings cannot be used as evidence of his agency.

The fact that the agent has since died does not change the rule. Where his authority is in writing, he cannot extend its scope by his own declarations. His act and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence.

"This court has many times held that the acts or declarations of one does not prove that he is an agent, and that the agent cannot bind his principal beyond the limits of his authority. It therefore follows necessarily that the act and declarations of Walz, that were beyond his authority as contained in the written contract, are not binding on the bank." *American Southern Trust Company* v. *McKee,* 173 Ark. 147, 293 S. W. 50; Mechem on Agency, vol. 1, § 285.

The appellant says: "It is a well-known principle of law that an agent has the right to bind the principal within the apparent scope of his authority."

If the acts done by the agent are within the apparent scope of his authority, the principal will be bound whether the agent was given the authority actually or not.

"Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume, or which he holds the agent out as possessing, such authority as he appears to have by reason of the authority which he has; such authority as a reasonably prudent person, using diligence and discretion in view of the principal's conduct, would naturally suppose the agent to possess." *American Southern Trust Co.* v. *McKee, supra; Ozark Mutual Life Ass'n* v. *Dillard,* 169 Ark. 136, 273 S. W. 378.

It is contended by appellant that one is bound by a contract which he signs whether he read it or not, and that is generally true. It is unnecessary, however, to discuss this question, because if the agent did not have authority to sign the contract, it is immaterial whether he read it or not.

On the question of ratification it is sufficient to say that in order to be binding, it must have been made with

knowledge of all material facts, and there is no evidence here that the appellee knew the facts.

This suit is to collect 20 per cent. $304.78, the amount of premiums that would have been earned by appellee on two policies, which appellee contends were never received by it. The testimony on the part of the appellant shows that Mr. McCarroll wrote a letter and inclosed it with the policies and mailed it to the bank in St. Louis.

The assistant secretary of the bank testified that he had no record of having received any policies at the time Mr. McCarroll testified that he mailed these policies, and the president of the appellee testified that they did not receive the policies.

Appellant states that, under the laws of this state and other states, when a letter is properly addressed, stamped and mailed, it is presumed that it is received. The evidence shows that these policies were mailed, but the evidence tends to show that they were not received.

Appellant quotes from the *Travelers Ins. Co.* v. *Thompson,* 193 Ark. 332, 99 S. W. 2d 254, as follows: "This presumption could be rebutted by testimony that it was not in fact received, but the positive denial by the 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."

The denial of the parties that the policies were received did not, as a matter of law, nullify the presumption that when mailed by the sender, they were received; but it is a question of fact then for the jury to determine from all the evidence, whether the policies were received.

A verdict supported by evidence of a substantial character will not be disturbed on appeal. *Hill* v. *Newell,* 182 Ark. 1185, 32 S. W. 2d 174; *Platt* v. *Owens,* 183 Ark. 261, 35 S. W. 2d 538; *Price-Snapp-Jones* v. *Brown,* 184 Ark. 1143, 45 S. W. 2d 517; *Texas & Pacific Ry. Co.* v. *Stephens,* 192 Ark. 115, 90 S. W. 2d 978.

Numerous cases might be cited supporting this well-established rule. Juries generally hear the witnesses testify; they have an opportunity to observe their de-

meanor on the witness stand, and a much better opportunity to determine whether they are telling the truth, than the judges of the appellate court. They are, therefore, the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony.

This case, however, was tried before the judge sitting as a jury, and we have many times held that where a case is submitted to the trial judge, his finding of fact is as conclusive as the finding of a jury. *American Ins. Co.* v. *Brannan,* 184 Ark. 978, 44 S. W. 2d 346; *Sternberg* v. *Snow King Baking Powder Co.,* 186 Ark. 1161, 57 S. W. 2d 1057; *Horvell* v. *Matthews,* 189 Ark. 356, 72 S. W. 2d 214.

As to whether the policies were mailed, and as to whether they were received by the parties to whom they were mailed, was a question of fact, and there is substantial evidence to support the verdict of the trial court.

The judgment is affirmed.

[redacted]

AMERICAN SNUFF COMPANY *v.* STUCKEY.

4-5324 123 S. W. 2d 1063

Opinion delivered January 16, 1939.

[redacted]

[redacted]

L. W. Bower, for appellant.

L. B. Smead, for appellee.

HUMPHREYS, J. Separate suits were brought by appellant, the American Snuff Company, in the circuit court of Ouachita county, second division, to recover separate amounts for snuff which it shipped and invoiced to each appellee, to Bearden, Arkansas.

It was alleged that it shipped and invoiced to T. T. Stuckey on written order snuff of the net value of $406.76, and to Julius Anthony snuff of the net value of $597.13, and judgments were prayed against each for the value of the snuff shipped and invoiced to each.

The defense interposed in each case was that under the terms of the contract the snuff shipped and invoiced to each was on consignment to be paid for as sold on commission and was not an outright sale, and that, at the time the snuff was destroyed by fire, appellee, T. T. Stuckey, had sold snuff out of the shipment to him of the value of $132.59, and that Julius Anthony had sold out of the shipment to him snuff of the value of $119.89, and denied liability in excess of the amount sold by each.

The issue involved in each case being the same, the causes were consolidated for the purposes of trial and were submitted to a jury upon the testimony adduced and instructions of the court, resulting in a verdict against Julius Anthony for $119.89 and against T. T. Stuckey for $123.59 in favor of appellant, the value of the snuff sold by each, but the jury found in favor of Julius Anthony and T. T. Stuckey as to the balance claimed by appellant from each and has duly prosecuted an appeal to this court from the adverse finding of the jury and the consequent dismissal of its complaint for such balances.

The testimony introduced by appellant consisted of the orders and invoices which contained the clause that the snuff should be paid for as sold and oral evidence to the effect that the trade meaning of the words "to be paid for as sold" meant that this gave the merchant the privilege of paying for the snuff along as he sold it instead of making a specific date of payment and maybe working a hardship on the merchant by making it become

due on a date when he would not probably be able to pay it; and to the effect that it never sold any merchandise on consignment in which it retained title, but that the transactions were absolute sales and that the title to the snuff passed to appellees upon delivery thereof to them.

Appellees testified that the trade meaning of the words "to be paid for as sold" in the orders and invoices was that the snuff was left with each as agents of appellant to sell same on a commission and was not to be paid for until sold.

The orders were taken by Gordon Roberts, who represented appellant in the transactions, and the following answer is copied from the testimony of T. T. Stuckey: "A. Well, he came in there and wanted to sell me some snuff, and I told him I didn't want much; and he wanted to ship me a large order, and I told him I could not use that much. I had been buying it from time to time when he came around, prior to that time and I paid for it every thirty days; and he wanted to sell me a large shipment, and I didn't want it; and he asked me to put in four or five hundred dollars worth and leave it in there in my store, and for me to pay for it when he came around to check up; and for me to take it and sell it and he would have control of what I didn't sell; and he would come in from time to time and check up on what I had sold and give me credit; and he had the right to do anything he wanted to with the snuff. . . . Q. If you had any other conversation with reference to the control of it, please state what that was. A. He said he had a right to come out any time and take it somewhere else, any amount of it that he wanted to. Q. What were you to get, Mr. Stuckey, for handling it in that way? A. I was to get five and ten per cent. off of the list price on what I sold. Q. You were to get that as a commission? A. Yes, sir."

It was agreed that the goods were shipped and invoiced to appellee on March 19, 1936, and that the snuff was not mingled with the stock of goods each was carrying, but that it was placed in a separate part of their respective buildings or in separate rooms and when needed a case was taken out of the shipment and checked off

until their store buildings burned. On September 16, 1936, the business houses of both appellees were destroyed by fire and the snuff which had not been used was completely destroyed. Neither appellant nor appellees carried insurance on the snuff, and the snuff was not invoiced as a part of the stock, and when same was destroyed by fire no claim was made by appellees against the insurance companies for the snuff.

Gordon Roberts denied that he made statements to either Anthony or Stuckey to the effect that the goods should be sold by them as agents for appellant or that he had any authority to sell to them on consignment, but stated that his only authority was to make absolute sales of the snuff.

Appellant objected and excepted to the admission of oral testimony offered by appellees to support their theory that the goods were ordered, shipped and received by them to sell on commission on the ground that such testimony contradicted the terms of the written agreements. Appellant requested an instructed verdict in its favor on the ground that the evidence showed under the written contract that the sale of the snuff by appellant to appellees was an absolute sale and purchase and not a conditional sale in any respect. This instruction was refused and the court submitted the cause to the jury over the objection of appellant under the following and other similar instructions: "If you find from a preponderance of the evidence in these lawsuits that the snuff in question was sold by appellant to appellees, and that the property then passed to appellees when they accepted it from the railroad company, it constituted an outright sale and the nature of the transaction was not changed merely because the property was not to be paid for until resold. If you should not find that to be true, but, on the other hand, you believe from the evidence in the case that the appellees in these cases were merely acting as the agent for the appellant, American Snuff Company, and permitted the property to be placed in their places of business to be sold by them as agents of the American Snuff Company, and that the American Snuff Company did not part with the title to it, but retained the title, and retained

the right to control it at any and all times after the delivery then, it does not constitute a sale, but merely a consignment of the snuff in question. . . ."

We think the written contract was ambiguous and that the court correctly admitted the evidence tending to show the trade meaning of the words "to be paid for as sold" and that the instructions properly and correctly submitted to the jury the question of whether the sale was an absolute sale or a conditional sale.

In instructing the jury the court was governed largely by the declarations of law announced by this court in the case of *Sternberg* v. *Snow King Baking Powder Company, Inc.*, 186 Ark. 1161, 57 S. W. 2d 1057. The facts in the main are the same in the instant case that they were in the Sternberg Case and the declarations of law announced by the court in that case are succinctly stated in syllabi 1, 2, 3, 4, 5, 6 of the Sternberg Case. We insert them here as declarations of law applicable to the facts in the instant case.

"1. In construing contracts, the court must, if possible, ascertain and give effect to the intention of the parties as far as this can be done consistently with legal principles.

"2. To arrive at the intention of the parties to a contract, the courts may acquaint themselves with the persons and circumstances and place themselves in the same situation as the parties who made the contract.

"3. Evidence which tends to show the intention of the parties to a written contract, provided it does not contradict or vary its terms, is admissible to show the real meaning of the words used.

"4. In determining the meaning of a contract, the court must look at the whole contract and ascertain what the parties did thereunder and how they construed the contract.

"5. Reservation of title in sale of merchandise may be implied from the contract, the term 'conditional sale' not being necessary.

"6. Where baking powder was shipped by the manufacturer to a jobber, not to be paid for until sold by the jobber and insurance being carried by manufac-

turer, it will be implied that the title should remain in the manufacturer."

In other words, we think the instant case is ruled by the Sternberg Case, *supra.*

No error appearing, the judgments are affirmed.

FROMAN *v.* J. R. KELLEY STAVE & HEADING COMPANY.

4-5321 123 S. W. 2d 1081

Opinion delivered January 16, 1939.

W. J. Dungan and *Ross Mathis,* for appellant.

E. W. Moorhead and *C. W. Wall,* for appellee.

GRIFFIN SMITH, C. J. From a verdict directed against appellant, who was plaintiff below, this appeal is prosecuted on the theory that the trial court erred in finding that A. D. Froman (appellant's brother) had independently contracted with J. R. Kelley Stave & Heading Company to operate a mill owned by the latter.

The injury occurred while appellant was standing back of an employee who was operating an equalizing saw. Appellant testified that he had worked for the Stave Company about ten years. Just before the injury was inflicted he observed that the operator of the equalizing saw[1] was behind with his work. This caused a general slowing down. It was customary, in such circumstances, to help out. In the process of manufacturing staves, bolts were conveyed in a small wagon immediately behind the sawyer. The sawyer, if unassisted, had to turn partially around to pick up the bolts, but if they were handed to him time was saved. Appellant, on his own volition, undertook to speed the output by lending a helping hand. He says the sawyer negligently fed a bolt too rapidly against the saws. This would cause the teeth to clog, and dust which ordinarily followed past the carriage and into a chute beneath the carriage table would be misdirected; or, in the alternative, if errant sawdust did not in the manner thought probable by appellant cause his injury, then bark or a splinter was thrown from the bolt with such violence that appellant could not avoid being struck in the left eye, as a consequence of which the sight has probably been lost.[2]

[1] An equalizing saw is described as "a couple of saws on each side with arms out this way [indicating]. They work on hinges. A man picks up a bolt and lays it on the arm and pushes it through there and cuts the ends off." The effect of this operation would seem to be that the bolt is pushed in such manner that it passes against saws which simultaneously cut off each end.

[2] Appellant's partial description of the accident is: "I passed [the equalizing saw operator] the bolt. It was not such a large bolt. The best I remember, he took the bolt and laid it in the carriage and the carriage went back to the trip. It was more of a swing fastened overhead, and it had two arms. He tripped this bolt. . . . When he tripped this it fed into the saw too fast, which clogged up the teeth and carried the stuff over and threw it out over the top and it hit me in the eye. . . . If the bolt had been pushed into the

Ordinarily the equalizing saws were manned by Hall or Brown. Fred Froman (another brother) testified that at the time in question the saw was being operated by Hall. In a statement signed by appellant, Brown was mentioned as the operator. Although appellant testified he could not read or write, and that the statement was prepared by an insurance representative, he did not allege any specific inaccuracies. When asked if he had "told them those facts recited in the statement," appellant replied: "I won't say, because I don't remember; part of it might be true and part of it might not." The part that might not be responsive was not explained.

On direct examination A. D. Froman testified that he was working for the Stave Company; payrolls were made up and the men were paid at Shackleford's store at DeWitt, not far from the mill; witness was doing piece work for the Stave Company; had no contract for a definite period; was not employed to make any specified number of staves; the Company had a right to discharge him at any time; Hudkins was general manager for the Stave Company; staves were made according to Hudkins' instructions.

On cross-examination Froman testified he was paid $5 per thousand for staves; the Company bought the bolts; witness hired the men who worked under him, and could discharge them. The question was asked: "Did Hudkins have anything to do with [employing and discharging] the men?" His reply was: "Not a thing."

"Q. Who owned the property—the stave mill? A. J. R. Kelley Stave & Heading Company. Q. You operated it? A. Yes, sir. Q. Mr. Hudkins had nothing to do with the operation of it? A. No, sir. Q. What did he do? A. He was supervisor of the mill; he bought the bolts and timber and loaded out the staves. Q. You did have charge of running the machinery and making the staves out of the bolts? A. Yes, sir. . . . I paid my men by the thousand. . . . I made out the payroll and [the men]

saw properly the accident likely would not have occurred. They have run for years and I never knew them to hurt anybody before. . . . If you don't feed the timber in there properly it will throw dust. I have never seen one that won't do it."

were paid off at the store. Q. You stated a while ago that the J. R. Kelley Stave & Heading Company paid them; was that for your benefit? A. They paid off the employees. Q. They were your employees? A. Yes, sir."

The same witness further testified that the Stave Company charged him with amounts paid employees "against the total amount [I] received under [my] contract," and the difference between the total sum due at $5 per thousand and deductions for the payroll would be A. D. Froman's profit. During the week in which the accident occurred, 17,250 staves were made. The payroll was $68.97, and the Stave Company "paid the payroll off and paid me the balance. A weekly time sheet was made out, showing the names of the men who were working under witness. All were paid on a per thousand basis.

Continuing his testimony, A. D. Froman said that C. M. Froman's duties were those of a filer and millwright. [A millwright] "keeps the machinery in working order and sees to it that it is all working; files saws. He would go around over the mill from place to place looking after the machinery."

"Q. Did he supervise the men in their work? A. If they didn't know how to do their work he showed them how. Q. Did he do that while you were gone, and while you were at the mill also? A. Yes, sir. Q. All Mr. Hudkins did around the mill was to look after the timber and staves, and see that you turned out staves according to requirements? A. Yes, sir."

On redirect examination appellant's attorney asked: "You didn't pay these men at all out of your money?" The answer was: "Certainly; out of my contract."

It is conceded that the saws were in good condition. Defects with respect to any of the machinery are not alleged.

Other testimony shows that at the end of each week (or when payment was desired for a specified number of staves), A. D. Froman would draw on the Stave Company at $5 per thousand. The instrument by which a transfer of funds was effectuated is referred to as a draft, and as a check; but under any classification—whether draft or check—it evidenced the amount due for

a finished product manufactured by A. D. Froman; and Froman had a contract to operate the mill with means and by methods of his own adoption. Hudkins visited the plant about once a week. It is true there is testimony that Hudkins was superintendent of the mill, but immediately the witness amplified this assertion by explaining that such supervision consisted of buying the bolts and timber, and loading the staves.

Fred Froman thought that under a contract made by the Stave Company similar to the one here shown, Hudkins had discharged two men "some few years ago at Hunter." Arrangement with the Stave Company at Hunter, and the plan of operation at DeWitt, were "practically the same—I know, because that was the only way my brother would take a contract."

Facts in the instant case are so similar to the facts in *C. M. Farmer Stave & Heading Company* v. *Whorton*, 193 Ark. 708, 102 S. W. 2d 79, that the rule there announced must control here. Farmer, president of the Company, testified to ownership of a number of mills. These mills were turned over to parties with whom contracts were made for their operation. The Farmer Company furnished money for use in purchasing timber and staves—"paid a certain price for staves delivered on board the cars."[3] It was held that Whorton was not

[3] In the Farmer Stave & Heading Company Case, Farmer had testified: "We hired these men; they took it by contract, and we would furnish them the mills and the money, and contract for them to make staves and heading; I was superintending the operation at the time and furnishing the mills and the money and they were operating the mills for us; we made an agreement with them to go and make these staves and give them so much a thousand for them delivered on board cars." Asked to explain further, Farmer said: "Well, I meant this: we bought these mills; we turned these mills over to fellows to operate, and furnished them money; we gave them a certain price for staves delivered on board the cars; now, that is to what extent we operated the mills." Again testifying, Farmer said that he or some one acting for him would occasionally go out to the mill to see how Wharton was getting along and to see that the heading was being manufactured properly; that his company did not, directly or indirectly, exercise any control or superintendency over Wharton in the operation of the mill further than to see that the heading was sawed according to specifications; that Wharton was paid no salary and that he used the mill after suit was filed making heading and selling it to other parties.

entitled to recover for personal injuries alleged to have occurred because of faulty equipment.

In a more recent case—*Moore and Chicago Mill & Lumber Co.* v. *Phillips, ante,* p. 131, 120 S. W. 2d 722, we held that where one was employed to perform on specified terms, in a particular manner, and for a fixed compensation, and where the employer was interested only in the result to be obtained, and the method or manner of accomplishment was left solely with the party who was to perform, such employer was not liable in damages under the doctrine of *respondeat superior* to persons injured through negligence of the person whose duty it was to produce the results contemplated by the contract, unless, by actions subsequent to the contract, the employer's conduct amounted to an abandonment of the relation of owner and contractor and created that of master and servant. See, also, *Wilson* v. *Davison, ante* p. 99, 122 S. W. 2d 539.

The special judge correctly directed a verdict on the ground that A. D. Froman was an independent contractor, and that appellant was his employee, and not the servant of appellee.

We are also of the opinion that appellant assumed the risk.

The judgment is affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

GARDNER *v.* HILL, TRUSTEE.

4-5327 123 S. W. 2d 1071

Opinion delivered January 16, 1939.

J. R. Long and *A. D. Shelton,* for appellant.

William G. Bouic, for appellee.

HOLT, J. This case comes here on appeal from the action of the chancellor of the Garland chancery court in overruling the demurrer of appellant (plaintiff below) to the answer and cross-complaint of appellee (defendant below) and the dismissal of the appellant's complaint.

The record reflects that on February 5, 1938, appellant filed a complaint alleging that on the 25th day of January, 1938, an order was entered by the Garland probate court whereby the defendant, Dr. L. A. Hill, now deceased, was directed to collect rents on certain property in Hot Springs, as trustee in succession under the will of Thomas Benjamin Hill. That under an order made and entered of record on the 22d day of May, 1934, by the Garland probate court, three commissioners were appointed to lay off and set apart in fee simple to Mabel Hill, widow of Thomas Benjamin Hill, as dower interest in the real property of her deceased husband, a one-third interest of his real property of which he died seized and possessed, which one-third interest so set aside to her in fee simple as her dower interest is described as lots 111 and 113, Fox street, and lot 319, Linden street, in the city of Hot Springs, Arkansas.

It is further alleged in the complaint that Mabel Hill married appellant herein, Frank O. Gardner, and following this marriage on February 14, 1935, she executed a warranty deed to one Tate, a single man, conveying this real property, and on the same day Tate executed a warranty deed to Mabel Gardner and Frank O. Gardner, appellant, conveying the same property to them as ten-

ants by the entirety, and that Mabel Gardner having died, title in fee vested in appellant, and that he is now entitled to the possession of said property free from the interference of appellee or anyone else.

The complaint further alleges that appellee claims to be acting under an order of the probate court entered of record April 2, 1935, which is an order attempting to set aside order of May 22, 1934, aforesaid; that said order of April 2, 1935, is void, that appellant was not made a party or served with notice. Then follows appellant's prayer that appellee be restrained and enjoined from interfering with his possession and rights with reference to said property, that the order of April 2, 1935, be canceled and title to said lots declared to be vested in Frank O. Gardner, appellant, in fee simple. Exhibit "A" to appellant's complaint sets out the probate order made on May 22, 1934, which was an order amending and correcting the first order previously made by the court on the 24th day of April, 1934, recorded in book "O," p. 18, the said first order of April 24, 1934, having awarded Mabel Gardner (at that time Mabel Hill) a one-third interest in the real property above described, for her life, and the said order of May 22, 1934, amended said first order so as to award Mabel Hill fee simple title to the said property. Exhibit "B" is the warranty deed executed by Mabel Gardner on the 14th day of February, 1935, to Tate, above referred to. Exhibit "C" is the warranty deed executed on February 14, 1935, by Tate to Mabel Josephine Gardner and Frank O. Gardner, appellant, husband and wife.

Exhibit "D" to said complaint is an order made by the Garland probate court on April 2, 1935, and is as follows: "In the Matter of the Estate of Benjamin Hill, Deceased. Order. On this day comes Mabel Hill Gardner, wife of Thomas Benjamin Hill, deceased, by her attorney, C. T. Cotham, and comes Thomas Dean Hill, the sole heir at law of the said Thomas Benjamin Hill, deceased, by his attorney, W. G. Bouic, and by consent of the court, and of the parties hereto, the petition to amend and correct order allotting widow dower on report of commissioners, is withdrawn, and the order allotting said widow dower in one-third of certain real estate made and entered on the

22d day of May, 1934, is amended and corrected by striking out the word 'one-third' the real estate allotted to said widow by the terms of said order being in fact one-third of the real estate of which the said Thomas Benjamin Hill died seized and possessed to said widow for and during her natural life only."

To this complaint appellee, on the 8th day of February, 1938, filed answer and cross-complaint, alleging that Thomas Benjamin Hill died testate in 1932 leaving surviving one child, Thomas Dean Hill, and a widow, Mabel Hill (Gardner); that the widow renounced the will and elected to take her dower; that commissioners were duly appointed, who, on January 1, 1934, filed their report with the court setting aside her said dower interest; that on April 24, 1934, the report of said commissioners assigning one-third interest in the real estate of the deceased, Thomas Benjamin Hill, to Mabel Hill (Gardner) for and during her natural life was approved and entered of record in Book "O," p. 18, said petition and order having been filed by the attorney for the executor upon notice served upon appellee herein as guardian of Thomas Dean Hill, a minor and sole heir at law of Thomas Benjamin Hill, deceased.

The answer further alleges that on May 22, 1934, petition to amend and correct the order filed in the name of the executor on April 24, 1934, was filed by the widow without notice to any party in interest and was by the court granted. Further answering, appellee admits that the records of the Garland probate court reflect that on May 22, 1934, petition was filed by the said widow in her name seeking to change certain wording in the order made in the Garland probate court on the 24th day of April, 1934, recorded in book "O," p. 18, without notice to the parties of interest in the estate; that on March 8, 1935, the disabilities of minority of Thomas Dean Hill were removed by the Garland chancery court.

It is further alleged in the answer that as sole heir at law of the late Thomas Benjamin Hill, his father, he did in April, 1935, after the removal of his disabilities, through his attorney, direct the probate court's attention to the void order allotting dower on

May 22, 1934, and caused notice to be served, and in open court ask permission of the court to withdraw said petition and allot dower to the said widow for and during her natural life, which said permission was granted by the court and appears set out in full above as exhibit "D" to the complaint of appellant. Appellee further in his answer denies that the plaintiff, Frank O. Gardner, appellant herein, has any interest in the property described in his complaint, but alleges that any interest which he may have had terminated at the death of his wife, Mabel Hill (Gardner), and the fee title was vested in Thomas Dean Hill, the ward of this defendant, appellee herein.

Appellee in his cross-complaint alleges that the deeds referred to in complaint of appellant are a cloud on the fee title of Thomas Dean Hill and should be canceled and set aside and a general prayer for all further and proper relief.

To this answer and cross-complaint appellant (plaintiff below) filed a demurrer, which was overruled, and plaintiff declining to plead further, his complaint was dismissed.

From this record it appears that Thomas Benjamin Hill died testate leaving a widow, Mabel Hill, and as his sole heir a minor son, Thomas Dean Hill, by a former wife. His widow, Mabel Hill, shortly after the death of Thomas Benjamin Hill, married appellant, Frank O. Gardner. The property involved is the real estate which the deceased, Mabel Hill (Gardner), was allotted during her lifetime as dower in the estate of Thomas Benjamin Hill, deceased. No children were born to the deceased, Thomas Benjamin Hill, and Mabel Hill, his second wife, Thomas Dean Hill being his child by a former marriage. This litigation arose out of the effort of Mabel Hill to convert her dower estate from a life estate to an estate in fee. On April 24, 1934, the Garland probate court, after Mabel Hill had renounced the will of her husband and had elected to take her dower, set aside to her a life estate in the property above referred to. Subsequently on May 22, 1934, without notice to the appellee herein (defendant below), she secured an amended order from the Garland probate court setting aside to her the prop-

erty in question herein in fee simple. This, according to the record, was an *ex parte* proceeding. Subsequently after Thomas Dean Hill had had his disabilities removed and learning of the order of May 22, 1934, upon due notice to appellant herein and by agreement of Mabel Hill (Gardner) and all parties in interest herein, did on April 2, 1935, secure another order from the Garland probate court which in effect set aside the order of May 22, 1934, and restored the first order made by said court on April 24, 1934. This order of April 2, 1935, is copied in full above and need not be repeated here.

On this state of the record we hold that the order of May 22, 1934, was erroneously made by the Garland probate court and that the order of April 2, 1935, made when all parties were present and to which all interested parties, including Mabel Hill (Gardner), agreed, is binding and controlling. As to the warranty deed executed on February 14, 1935, by Mabel Hill (Gardner) to one Tate, she could convey no better title than she possessed, which this record shows to be but a life estate in the property in question. At her death her interest in said property terminated and the fee simple title to this property being in Thomas Dean Hill, the son and only heir of Thomas Benjamin Hill, his right to possession arose.

Appellant by its demurrer to the answer and cross-complaint of appellee admits all allegations set up therein by appellee (defendant below) to be true. As will be observed from appellee's answer, it was definitely set out therein that Thomas Benjamin Hill died leaving surviving him one child, Thomas Dean Hill, and a widow, Mabel Hill.

We, therefore, conclude that the decision of the chancellor should not be disturbed, and, no errors appearing, the judgment is affirmed.

4-5328 124 S. W. 2d 5

Opinion delivered January 23, 1939.

[redacted]

Eugene W. Moore and *M. A. Hathcoat,* for appellant.
W. S. Walker and *John H. Shouse,* for appellee.

SMITH, J. W. H. Young owned at the time of his death in 1936 a farm consisting of 552 acres. He had executed a note to C. C. Harris in the sum of $552, which at the time of his death was owned by E. B. Brotherton. Charles Rowland qualified as administrator of Young's estate, and this suit was brought against him in that capacity on the note. The widow and heirs at law of Young were made parties, and as to them it was prayed that certain deeds executed by Young to his wife and their children be declared void as having been executed to defraud Young's creditors. The relief prayed was granted, and from that decree is this appeal.

The statute of non-claim was pleaded, it being alleged and insisted that the note was not presented to the administrator in the time and manner provided by law. Attached to the complaint, as an exhibit thereto, was a copy of the note with the statutory affidavit of Brotherton attached thereto, but no affidavit of the assignor, C. C. Harris, was attached.

Testimony was offered to the effect that Brotherton filed, on October 27, 1936, a petition in the probate court of Boone county, wherein testator resided, praying the appointment of an administrator of the estate of Young, and Brotherton at the same time verified his demand as required by law. For some reason letters of administration were not actually issued until December 1, 1936, The affidavit of Harris, the assignor, was also exhibited to the administrator. The administrator, in his answer, admitted that the note, duly verified by both the assignor and assignee, as required by § 104, Pope's Digest, had been presented to him, and his attorney made the admission in open court upon the trial of the cause that this had been done before the commencement of this suit in January, 1937. There is no testimony in the record to show that the fact thus admitted was untrue. The court was, therefore, fully warranted in finding that the statute of non-claim did not apply.

The decree of the court below adjudged that the deeds from Young and wife to their children were void, not only as to the creditors of Young, but for all or any purposes. We think the decree was too broad in this re-

spect, in any event, and that the court should have set the deeds aside only for the purpose of paying intestate's debts, and there appears to be now no debt except the note due Brotherton. The value of the land so greatly exceeds the judgment, which was for $1,190.85, that the heirs may prefer to pay this judgment and preserve the partition of their father's estate which he made by deeds to his children. The decree will be modified in this respect to permit them to do so, if they wish.

It is earnestly insisted, however, that it was error to set the deeds aside for any purpose, for the reason that Young was solvent both before and after the execution of the conveyances to his children, and that they paid the fair value of the lands, and this contention presents the serious and real question in the case.

It appears that on June 10, 1931, Young and his wife executed their two notes to the Citizens Bank & Trust Company and the Citizens Investment Company for $2,-285.95 and $1,428.86, respectively, to secure the payment of which they executed a real estate mortgage on the 552 acres of land owned by Young and a chattel mortgage on 87 head of cattle which he also owned.

Soon after the execution of these notes and mortgages, a family conference was held in which it was decided that Young should divide his lands and convey them to his children, and that the children should thereafter support him and his wife. Young was then about 75 years old. Before executing these deeds Young filed a suit to cancel the mortgages which he had given. This suit was compromised by the payment of the sum of $2,-100 to the holders of the notes. The money with which this payment was made appears to have been derived from the sale of cattle which Young owned. The testimony is uncertain as to the number of cattle not sold and as to their disposition.

The administrator had no assets in his hands with which to pay the note here sued on, and this suit was filed December 24, 1936, to cancel the deeds of conveyance made by Young to his children. In the answer filed by them they alleged the solvency of their father at the time of the execution of the deeds, and that they had

paid full value for the lands by assuming the obligation to pay the mortgage on them, and by agreeing to take care of their parents.

It is insisted—and we think properly so—that, in determining the value of the land conveyed to the children, the value should be determined as of the date of those deeds, and that the value of the homestead should be taken into account. It was said, in the case of *First State Bank* v. *Gilchrist,* 190 Ark. 356, 79 S. W. 2d 281, that, in determining the adequacy of the consideration of a deed alleged to be fraudulent, whereof a part was the debtor's homestead, that part must be deducted from the total area. But, even so, it was not shown that the average value of the homestead was greater than the average value per acre of the remainder of the land.

There were 552 acres of the land, and no one placed its value at the time the deeds were made at less than $10 per acre. Now, there was a debt for the amounts above stated which was secured by mortgages on both the land and the cattle, but the children paid but little to discharge these mortgages, although they assumed their payment. It was paid by the sale of cattle which Young himself owned. No one attempted to account for the cattle not sold, although it was shown that none of them were ever delivered to the administrator, and they never became assets to pay the intestate's debts.

It appears, therefore, that the children received lands worth not less than $5,520.00, and probably much more, for which they paid nothing except the value of the services rendered their father, including expenses of his last illness. Certain of the children claim to have made advances which were used in the discharge of the mortgage debt, but they do not account for the cattle which were of a greater value than the sum paid in satisfaction of the mortgages. A son-in-law who lived in Missouri testified that he loaned and advanced to the heirs the sum of $1,348.50, but he made no attempt to show how much of this was used in paying the mortgages. His wife, one of the heirs, testified that she agreed that she would advance $350, and thus discharge her proportionate share of the mortgages. It is fairly

inferable that the children got the cattle which were not sold to pay the mortgages, and it is certain that the cattle were never delivered to the administrator.

The testimony shows various attentions to Young by his children, although he was never taken into the home of any one of them. He was bedfast during the last three months of his life, during which time two of his children attended him. A doctor who attended Young estimated the value of those services at $2.50 per day for each attendant, and his own bill was only $230. Other doctors appear to have attended Young, but the amount of their bills was not shown.

After allowing credit for all expenditures claimed to have been paid by way of payment for the lands or in consideration of their conveyance, too great a difference exists between payments made and the value of the land conveyed to overturn the chancellor's finding that fair value was not paid, and we find the fact to be that the value of all credits which may be treated as a part of the consideration for the deeds bears no fair relation to the value of the property conveyed.

Even though it were conceded that Young was solvent when he made the deeds, there can be no doubt that these conveyances rendered him insolvent, and, this being true, the chancellor's finding that the deeds were made in fraud of creditors must be upheld.

It does not appear that any of the children paid Young himself any sum of money which was used by him in discharging the mortgages against his real estate and personal property; but this would not have been of controlling importance had they done so.

In the case of *Simon* v. *Reynolds-Davis Grocery Co.*, 108 Ark. 164, 156 S. W. 1015, Simon, an embarrassed debtor, sold all his lands, except his homestead, to his sons for an amount considerably less than the value of the lands conveyed. In holding that this was a strong badge of fraud, the court said: "It matters not that Phil Simon used the whole or a part of the proceeds of the sale, in payment on his debts, for he was unable to pay his debts and was insolvent, and the fact that the conveyance was made to his sons under such circum-

stances would warrant the conclusion that he was making the conveyance in order to put the property in the hands of his children, and to give them the benefit of the difference between the price paid by them and the real value of the land." Continuing it was there said: "This court has often held that 'conveyances made to members of the household and near relatives of any embarrassed debtor are looked upon with suspicion and scrutinized with care, and when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors.' [Citing cases.] To the extent that the price paid was less than the value of the land, the conveyance, so far as creditors are concerned, must be held to be voluntary and without consideration."

Here, if all credits were allowed which the heirs have any reasonable right to claim as the price paid by them for the land, the total amount thereof is far less than the value of the land, the difference being much more than the sum for which judgment was rendered against the estate. To this extent, at least, as was said in the Simon case, supra, the conveyance must be held to be voluntary and without consideration.

The court below found there were no assets in the hands of the administrator with which to pay the indebtedness adjudged to be due, and that it was necessary to sell the real estate of the deceased to pay the judgment rendered. It was ordered, however, that the widow might claim her right of homestead (and this she may, of course, do), and that the remainder be sold if the judgment be not paid.

The decree of the court below will be modified, in the particular herein indicated, and will be remanded for that purpose.

4-5329 124 S. W. 2d 828

Opinion delivered January 23, 1939.

[redacted]

C. L. Polk, Jr., for appellants.

A. M. Coates, for appellee.

MEHAFFY, J. Appellants seek to reverse the judgments in this cause on the theory that the trial court erred in excluding certain testimony.

Appellee and the four appellants had been interested in the Old Safety National Life Insurance Company. In 1930, $3,000 was borrowed from the Interstate National Bank of Helena by one of the appellants. The note was indorsed by all of the appellants, and by appellee. It is conceded that funds realized from the loan were used by the insurance company. In December of the year the

note was executed, the Interstate Bank failed; and in 1937, the receiver declined to extend further time for payment. Suit was filed in federal court. All of the parties to this appeal were named defendants, and were duly served with process.

Appellee testified that he informed appellants he did not want a judgment to be rendered against him, and he proposed that if appellants would pay $100 and execute their note for $2,797.71, he (appellee) would pay the Interstate Bank obligation. Appellants were to discharge the note through weekly payments of $20. An agreement to this effect was consummated and the note was executed. Beginning October 14, 1937, $20 payments were made until January 3, 1938, at which time they were discontinued.

Appellee, on cross-examination, was asked whether he and appellants did not endeavor to arrange for payment of the note from funds of the insurance company. The question was objected to on the ground that an affirmative answer would contradict the terms of the written obligation. The objection was sustained, and exceptions were saved. It was admitted by appellee that the payment of $100 was from insurance company funds, and that the insurance company made the $20 payments amounting to $200.

Two of the appellants offered testimony that they had been discharged in bankruptcy, and that they had listed the Interstate Bank debt with their liabilities. The court held that, inasmuch as the new note was given subsequent to such discharge, the plea was unavailing.

Appellants direct attention to *McClintock* v. *Skinner & Company,* 126 Ark. 591, 191 S. W. 230, where it was held that, although recitals, and the expressed considerations in a deed or mortgage cannot be contradicted by parol evidence to defeat the conveyance, such testimony is competent to show that the considerations have not been paid as recited, "or to establish the fact that other considerations not recited in the deed were agreed to be paid, when it does not contradict the terms of the writing."

It is urged that the instant case . . . "falls squarely within this rule, as the writing is not contradicted by [the

testimony offered], the amount of the payment is not questioned, or the installments, but only as to where payment was to come from."

Reliance is also placed upon *Vinson* v. *Wooten,* 163 Ark. 170, 259 S. W. 366, where parol testimony was admitted to show that Wooten's original obligation to Vinson (evidenced by a note) was subsequently expressed in a note payable to Mrs. Vinson—Vinson having died. Wooten testified that Vinson borrowed from a bank and that he (Wooten) indorsed Vinson's note with a contemporaneous understanding that any payments made by Wooten on such note should be treated as credits on Wooten's obligation to Vinson. When sued by Mrs. Vinson, Wooten pleaded payment. Exceptions were saved to the admission of this evidence, but on appeal the judgment in Wooten's favor was affirmed.

In the instant case there is no contention that the note has been paid, other than to the extent of credits shown. To meet appellants' point of view, we are asked to hold, in effect, that parol testimony was admissible to show that, in personally paying the bank obligation as to which all of the parties were liable, there was an agreement that appellants were not be personally liable on the note they executed in favor of appellee, but that assets of the Old Safety National Life Insurance Company were to be looked to exclusively as the source from which payment should come.

We are of the opinion that the testimony does not sustain this theory.

Appellee testified on cross-examination that he and the appellant Isaacs . . . "tried to make arrangements for payment of the note out of the funds of the Old Safety National Life Insurance Company at the rate of $20 per week." To this testimony appellee's counsel interposed the objection: "There is absolutely nothing in the face of the note, which has been testified on, to show that the Old Safety National Life Insurance Company would be looked to for payment." The objection was sustained. However, the appellant Isaacs testified that . . . "at the time the note was signed [there was] an understanding with Mr. Keeshan relative to it, the understanding being

that the [insurance] company would pay it out of the funds of the company at the rate of $20 per week.'' The jury was instructed to disregard this testimony. At the conclusion of all the testimony, the court directed that a verdict be returned for the plaintiff.

If it be conceded the testimony was admissible to show that the parties intended the insurance company should be primarily liable, still, there is nothing in the record to show that the corporation assented, unless the fact of partial payment be regarded as such; nor is there any affirmative testimony that the individuals were to be excused. Such evidence, if available, could have been brought into the record for the purpose of appeal, regardless of the trial court's action in excluding it from the jury.

It is urged that appellee, having been one of the original obligors equally liable with appellants, should not be permitted to change his position by accepting the note of appellants. This is a suit at law, and contributions between the parties cannot be determined according to the principles of equity. No motion to transfer to chancery was made.

The court did not commit error in refusing to permit the two appellants who had been discharged in bankruptcy to plead want of consideration. The moral obligation was sufficient to support the new promise to pay. *Fonville* v. *Wichita State Bank & Trust Co.*, 161 Ark. 93, 255 S. W. 561, 33 A. L. R. 125.

The judgments are affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* THOMAS, ADM'X.

4-5338 124 S. W. 2d 820

Opinion delivered January 23, 1939.

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

D. H. Howell, for appellee.

HOLT, J. Appellee, Mrs. Flora Thomas, administratrix of the estate of Lee Thomas, deceased, began this action in the Crawford circuit court against Guy A. Thompson, trustee in bankruptcy for the Missouri Pacific Railroad Company, a corporation, and R. E. Hendren and J. P. Brown, to recover damages for the injury and death of Lee Thomas, appellee's husband. A trial was had and a jury returned a verdict in favor of defendants, Hendren and Brown, but against the trustee of the railroad company, in the sum of $2,000.

In her complaint appellee alleges that defendants were negligent in the following manner: "That the defendant, Guy A. Thompson, trustee, his agents, servants, and employees and R. E. Hendren, engineer, and J. P. Brown, fireman, in charge and operating said train approached the scene of the accident at the great, unsafe and dangerous rate of speed of fifty miles per hour, ran down, injured and killed the deceased without sounding the bell, blowing the whistle or giving any warning whatever of

the approach of the train. Plaintiff alleges that the defendants in operating said train neglected and failed to keep a proper lookout for persons and property on the railroad track and right-of-way, and that had a proper lookout been kept they could have seen deceased on or near the track in time to have stopped the train and prevented injuring and killing him." She further alleged that the deceased at the time he was struck and killed was near the end of the cross ties forming defendant's track and was there by the consent of the railroad company; and was upon an extensively traveled path used by the public generally.

The defendants filed a joint answer in which they denied every material allegation set out in the complaint and in addition thereto set up the contributory negligence of appellee's intestate and that he was a trespasser at the time of the accident, which resulted in his death.

Appellants in apt time filed their petition and bond for removal to the federal court. This petition was overruled by the trial court and removal denied, to which action appellants duly excepted.

The principal ground of error urged upon this court is that the plaintiff, under the law and evidence, failed to make out a case against the defendants and that the trial court erred in refusing to instruct a verdict on behalf of the defendants.

The material facts, as disclosed by this record, substantially are: Some time early in the afternoon of October 24, 1937, Lee Thomas, husband of appellee, according to appellee's testimony, was seen walking on the railroad company's right-of-way, about a quarter of a mile from Lee's Creek bridge, traveling east toward Van Buren, in the direction in which the train that struck him was traveling, and at the time, according to appellee's testimony, was either walking between the rails or on the ends of the ties. According to the testimony of engineer Hendren, who, it is conceded, was the only eye-witness to the fatal accident, the deceased Thomas was walking about four feet from the rail when he first discovered him and that he continued about this distance from the rail down the track with his back to the engineer until the

engine was within a few feet of him when deceased suddenly stepped near the track and was hit and killed by the engine. The engineer further testified that he was keeping a lookout and first saw the deceased, Lee Thomas, when within 450 to 500 feet of him, and that he immediately began to blow his whistle, some ten or twelve times, to warn Thomas, but that Thomas paid no heed to his warning; that his train consisted of fifty-two cars, about half of which were empties, and was moving at a speed of about thirty-five miles per hour, at the time. The engineer, Hendren, testified that he could not have stopped the train, after he first discovered appellee's intestate, before striking him; that he could not have stopped it under about 1,200 feet. There was some testimony on the part of appellee, however, that the train could have been stopped within about 600 feet. There is testimony on the part of appellee that no whistle was blown and no warning signal given to deceased. The record, also, reflects that appellee's intestate might have been seen by the engineer, Hendren, for a distance of one thousand feet or more had a lookout been kept and that a stiff wind was blowing in the deceased's face, and toward the train, at the time. There is testimony on the part of appellant that the deceased met his death on the second or right-hand curve after the railroad track crosses Lee's Creek bridge. The testimony on the part of appellee, however, is to the effect that deceased was struck and killed on the first or left-hand curve after crossing the bridge going east.

Although there is some testimony in this case of a pathway which was being used by the public generally at the point on appellant's right-of-way where the deceased was killed, we are of the opinion that under all the facts as disclosed by this record, the deceased, Thomas, at the time he met his death was a trespasser, or at the most a bare licensee, and in accordance with a long line of decisions from this court, the only duty which the railroad company owed him at the time was not to willfully or wantonly injure him after discovering his perilous position, or if, by the exercise of ordinary care, it could have discovered him in such position in time to have

avoided the injury. In the case of *Baldwin* v. *Clark,* 189 Ark. 1140, 76 S. W. 2d 967, this court, in stating the rule applicable here, said: "Under § 8569, where a trespasser is killed on the track, there is no presumption of negligence on the part of the railroad company, but the plaintiff must show a failure to keep a lookout, and show that if a proper lookout had been kept, the railroad company could, by the exercise of reasonable care, have avoided the injury."

We have reached the conclusion that, when we give to the evidence in this case its strongest probative force in favor of appellee as we must do, we cannot say as a matter of law, as is insisted by appellant, that a man walking not more than four feet from the rail, as engineer Hendren's testimony shows the deceased to have been walking at the time he was struck and killed, was in a place of safety, and that no duty rested upon engineer Hendren, or the defendant railroad company, in the exercise of reasonable care, to warn the deceased Thomas of the train's approach by blowing the whistle or ringing the bell. We think under this record that it was a question for the jury to say whether or not the deceased walking not more than four feet from the rail, as appellant contends, was in a place of safety or one of peril.

In *St. Louis-San Francisco Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S. W. 2d 611, the rule applicable, as to the duty which appellant owed appellee's intestate, is very clearly stated as follows: "The only duty owing to her, as a trespasser under the common law, was to exercise ordinary care under the circumstances to avoid injuring her after discovering her presence on the track and consequent peril. But, by an act of the General Assembly approved May 26, 1911, which appears as § 8569, Crawford and Moses' Digest, it is made the duty of all persons running trains in this state to keep a constant lookout for persons and property upon the track, and it is therein provided that, if any person or property shall be killed or injured by the failure to keep such lookout, the railroad company operating the train is made liable and responsible for all damages resulting from such neglect, notwithstanding the contributory negligence of the per-

son injured, where, if such lookout had been kept, the person charged with the duty of keeping it could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden is imposed upon the railroad to establish the fact that the duty to keep such lookout had been performed."

Appellant very earnestly insists that since the engineer, Hendren, was the only eye-witness to the injury to appellee's intestate, which resulted in his death, his evidence cannot be arbitrarily cast aside by the jury and, therefore, must be treated as undisputed and uncontradicted. This contention would be correct were it not for the fact that the engineer, Hendren, was a party defendant in this case, and remained so throughout the trial and until the verdict of a jury finding in his favor. This very question and contention was raised in the case of *Kansas City Southern Ry. Co.* v. *Cockrell,* 169 Ark. 698, 277 S. W. 7, wherein the facts are similar on the principle involved, to the facts in this case. There the plaintiff sued the railroad company and its conductor, Roberts, and a jury found in favor of Roberts but against the railroad company, and there the rule was restated that the testimony of a party to an action interested in the result, cannot be regarded as undisputed in testing the legal sufficiency of the evidence. We quote from Chief Justice McCulloch's opinion as follows: "The plaintiff failed, as against Roberts, to make out a case against him, the burden of proof being upon plaintiff to do so, but Roberts' own testimony, though containing absolute denial of fault on his part, did not, as against appellant, constitute undisputed evidence of nonliability. His testimony afforded no affirmative evidence of negligence and added nothing to the plaintiff's case against him or the appellant. It did not constitute undisputed evidence of nonliability, for he was a party to the suit, and the rule established by our court is that the testimony of a party to an action interested in the result cannot be regarded as undisputed in testing the legal sufficiency of the evidence. *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243." We do not think it can be

said, therefore, that the testimony of the engineer, Hendren, is undisputed or uncontradicted.

It was finally contended by appellant that the trial court erred in overruling and denying its petition and bond for removal of the case to the federal court. We do not think any error was committed in this regard. We think the case of *Kansas City Southern Ry. Co.* v. *Cockrell, supra,* and *Chicago, Rock Island & Pacific Ry. Co.* v. *McKamy,* 180 Ark. 1095, 25 S. W. 2d 5, are against appellant's contention and control here. See, also, the well considered case of *Missouri Pacific Railroad Co.* v. *Miller,* 184 Ark. 61, 41 S. W. 2d 971, where this question was very extensively discussed by Mr. Justice BUTLER and is against appellant's contention here.

No complaint is made on the amount of the judgment, and, no errors appearing, we concluded that the judgment should be affirmed, and it is so ordered.

WHITTINGTON *v.* STATE.

4111 124 S. W. 2d 8

Opinion delivered January 23, 1939.

Russell J. Baxter and *Paul Johnson,* for appellant.

Jack Holt, Attorney General, and *Jno. P. Streepey,* Asst. Atty. General, for appellee.

HUMPHRIES, J. Information was filed by the prosecuting attorney in the circuit court of Drew county, on the 20th day of September, 1938, charging appellant with the crime of murder in the first degree. On the 21st of September, 1938, attorneys were appointed by the court to defend him. On the 23rd day of September the attorneys filed a motion requesting the court to commit appellant to the State Hospital for Nervous Diseases for observation pursuant to § 3913 of Pope's Digest whereupon the court made the following order:

"Defendant's counsel at 2:30 p. m. September 23, 1938, asked for an order under Int. Act No. 3 to send defendant (appellant) to State Hospital for Nervous Diseases for examination for insanity. Court refuses to issue order at this time, but directs that if defendant (appellant) makes a plea of insanity that a motion to that effect be filed, and a hearing will be had thereon, when defendant (appellant) is called for arraignment."

Appellant objected and excepted to the ruling.

When appellant was arraigned on September 27, 1938, he pleaded not guilty and immediately filed the following motion:

"Comes Russell J. Baxter and Paul Johnson, attorneys for the defendant in the above styled cause, and pursuant to § 3913 of Pope's Digest move the court to commit the defendant to the Arkansas State Hospital for Nervous Diseases and for reasons state:

"That in 1911, Maggie Bethea, sister of the defendant, Jesse Whittington, was indicted in Bradley county for the crime of murder in the first degree and that the said Maggie Bethea interposed a plea of insanity as a complete defense to said charge; that upon the trial of the said cause the jury returned a verdict of 'not guilty'; that attached hereto is the affidavit of B. L. Beasley, circuit clerk of Bradley county, marked Exhibit A and made a part hereof, and an affidavit of G. B. Colvin marked Exhibit B and made a part hereof, said affidavits both being in support of this motion; that this motion is not made for the purpose of delay but only in order that justice may be done defendant.

"Wherefore, premises considered, defendant through his attorneys moves the court for an order committing the defendant, Jesse Whittington, to the Arkansas State Hospital for Nervous Diseases for observation and examination for the purpose of determining his sanity or insanity."

The facts set up in the motion were supported by the affidavits of B. L. Beasley and G. B. Colvin. The court then heard the testimony of several witnesses introduced by the prosecuting attorney to the effect that appellant was sane and overruled the motion to commit appellant to the State Hospital for Nervous Diseases for observation over appellant's objection and exception.

After the motion was overruled appellant was tried and convicted of murder in the second degree and his punishment was assessed at thirteen years imprisonment in the state penitentiary from which judgment of conviction appellant has duly prosecuted an appeal to this court.

Appellant admits that only one error was committed in the case and that the court's refusal over his objection and exception to commit him to the State Hospital for Nervous Diseases on September 23, 1938, and again on September 27, 1938, contending that § 3913 of Pope's Digest, same being a part of Initiated Act No. 3 of 1936, Acts 1937, p. 1384, is mandatory and that under its mandate the circuit court was required to commit him to that institution for examination upon his request for such action on the part of the court and in support of the contention relies upon the following part of § 3913 of Pope's Digest, to-wit: "Whenever a prosecution for any crime has been instituted in the circuit court by indictment or information, and the defense of insanity at the time of the trial or at the time of the commission of the offense has been raised on behalf of the defendant, and becomes an issue in the case, *or the circuit judge has reason to believe that the defense of insanity will be raised on behalf of the defendant and will become an issue in the cause, or shall* be of the opinion that there are reasonable grounds to believe that the defendant was insane at the time of the alleged commission of the offense with which he is charged, or has become insane since the alleged commission of such offense, *the judge shall postpone* all other proceedings in the cause and *shall* forthwith commit the defendant to the Arkansas State Hospital for Nervous Diseases, where defendant *shall* remain under observation for such time as the court *shall* direct, not exceeding one month. . . ."

In the main, the section of the digest relied upon is mandatory but before a defendant, appellant in this instance, could invoke the mandate, he should bring himself within the provisions of the section. It will be observed that said section of the digest requires that a defendant be committed to the State Hospital for Nervous Diseases for an examination as to his sanity or insanity when the defense of sanity is raised on behalf of the defendant and becomes an issue in the case or when the circuit judge has reason to believe that the defense of insanity will be raised on behalf of defendant and will become an issue in the cause or that the court has reason-

able grounds to believe that a defendant was insane at the time of the alleged commission of the offense with which he is charged or has become insane since the alleged commission of the offense. The record in the instant case does not show that appellant pleaded insanity as a defense nor that such defense would be pleaded or raised in behalf of appellant nor that insanity would become an issue in the cause. The record reflects that the first motion made was to commit appellant to the State Hospital for Nervous Diseases for examination without stating that such defense would be raised or without a plea of insanity, and the second motion filed in writing on the 27th of September does not suggest that appellant was insane at the time he committed the crime or afterwards, but asked that he be committed on the ground that appellant's sister some two or three years prior to that time had been charged with murder and was acquitted on a trial therefor. The section relied upon by appellant requires a circuit judge to commit appellant for examination to the State Hospital for Nervous Diseases not on the mere suggestion of insanity, but in case he notifies the court that he intends to plead insanity as a defense or in case he actually interposes insanity as a defense. If the proper construction of the section permitted the defendant at the time of the trial upon request only to be committed to the State Hospital for Nervous Diseases for examination without informing the court that he intended to plead insanity or without pleading insanity as a defense any defendant might make a suggestion that he be sent for that purpose at great expense to the state or to gain time which might work a continuance of his case. The purpose of the statute was to furnish a means for the examination of one who should give notice to the court in apt time that he intended to plead insanity or who actually pleaded insanity or in case the court had reasonable information from some source that a defendant was insane either at the time he committed the crime or had become insane since that time.

We do not think appellant brought himself within the provisions of the act relied upon. A mere suggestion of insanity is not sufficient under the terms of the statute

to require the court to commit a defendant to the State Hospital for Nervous Diseases for examination as to his sanity or insanity.

No error appearing, the judgment is affirmed.

McHaney, J., dissents.

Missouri Pacific Railroad Company, Thompson, Trustee, v. Holmes.

4-5337 124 S. W. 2d 14

Opinion delivered January 23, 1939.

[redacted]

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

R. E. Hough and *Batchelor & Batchelor,* for appellee.

BAKER, J. In the presentation and discussion of the issues upon this appeal an effort will be made to follow the legal terminology of the courts of the state of Oklahoma, and, by way of explanation, to avoid confusion in regard to such legal terms wherein our courts have expressed a different meaning, necessary references will be made.

The death of the infant child, 18 months old, at Vian, Oklahoma, on October 10, 1937, by reason of having been struck by one of appellant's trains, became the basis of this suit.

The facts were substantially as follows: While the parents of the child were temporarily away from home the child was left in custody of Unice Brown, its grandmother, who, after dressing the child on the morning of its death, left it at play in one room of her home while she went about the duties of her household. After perhaps ten or fifteen minutes, absence of the child was discovered, and a search revealed its body beside the railroad track a short distance away. The grandmother's property, in which she lived, was near or about the middle of a long block south of the right-of-way of the railroad, which at that point was 150 feet wide. If McConnell Street, which formed the western boundary of the grandmother's home, had been extended north and over across the railroad property, it would have crossed the railroad track at or near the place where the child was killed. From one side of the long block, beginning on Unice Brown's property, there was a trailway or well worn pathway across the railroad's right-of-way to the north side thereof. This path was and has been in general use

for fifteen years or more by pedestrians who desired to avoid the longer walk around and through the open streets at the ends of the block. The business section of Vian lay north of this point, which tended to make this crossing a popular one.

The railroad company and its employees, including those operating its trains, knew of this pathway, and its constant and habitual use. In truth, the railroad company had put up on this path, on the north and south boundaries of its property, "NO TRESPASSING" signs. Nothing else was done, however, to prevent the continued use of the trailway.

We are advised that under the laws of Oklahoma railroad companies are not required to fence their rights-of-way in cities and towns, and perhaps that is about all else that might have been done.

Although the child's body was not mangled, it was picked up near the track, and circumstances were admittedly such as to indicate it had been struck by a train, which, but a few minutes before, had passed, going south. Therefore, the sufficiency of the evidence concerning the cause of death is not questioned. From a judgment in favor of the parents of the child comes this appeal.

The appellant challenges the propriety of the verdict of the jury, and consequent judgment, upon several grounds stated in the brief, including objections to several instructions, most of these objections may be said to be to the instructions *en masse,* and, since some of these objections are not tenable, it would be a waste of time and effort to sort out and discuss the more doubtful ones. Besides, we think our conclusions upon the whole case, arising out of issues fairly and fully presented, obviate the necessity of a discussion of any propositions except those we deem of vital importance. In this presentation, we will state such further facts as may be deemed necessary to an understanding of the propositions of law that may be involved.

Oklahoma has no statute similar to the Arkansas lookout statute, but there is a recognized duty resting upon operatives of trains "to exercise ordinary and reasonable care to operate the train at a reasonable speed,

commensurate with the physical surroundings and the probability that persons may be upon the tracks at that point (the footpath, in this case), and consistent with the practical operation of the defendant's train." The quoted portion of the above statement is from an instruction the principal or real objection to which is that the court should have directed a verdict for appellant, instead of giving same.

In addition, we should add that in that jurisdiction there is no presumption of negligence arising out of an injury caused by the operation of a train. Instead of such presumption, the courts have consistently announced that negligence is not and will not be presumed, but must be established by proof.

It is, perhaps, better, at this point, to say that the Oklahoma courts have given to the term or word "licensee" the same meaning we give to "invitee" in our courts, and what we have been characterizing as a "licensee" Oklahoma jurists designate as a "bare licensee." Distinctions in terminology appear from our definitions in some of our decisions. *Armour & Co.* v. *Rose,* 183 Ark. 413, 36 S. W. 2d 70; *Arkansas Short Line* v. *Bellars,* 176 Ark. 53, 2 S. W. 2d 683.

Appellees, in support of the judgment, insist that, under proper instructions, the jury has found that the child was a licensee, and that due regard to that status required the employees of the railroad company to approach and pass the point where the accident occurred in expectation that some one would be upon the intersection of the path and railroad track. Only because both parties seem to have treated this matter concluded by the verdict of the jury as if it should be interpreted under the laws of Oklahoma, do we refrain from declaring that the law of the forum is that a licensee may not be willfully or wantonly injured after a discovery of his peril. Since the law of the forum declares him a licensee, it might well award the remedy suitable to that status.

Since we prefer to decide the issues upon their merits, and, since counsel for appellant seem to have regarded this term "licensee" upon the trial below and in briefing the case as a chosen expression in legal terminology of

our sister jurisdiction as tantamount to our "invitee," we pass to other propositions.

Only two people saw and were able to relate any facts in regard to the accident, telling how and where it occurred. Wash Downing was 75 yards away. He saw the child standing, facing the railroad track, at the trail, as the train approached about 30 feet distant from it. The child was crying. The witness turned away to avoid seeing the deadly impact. Quinton Barnes, a negro youth 14 years of age, testified to the same facts as were stated by Downing, except that he does say the child was near the path. Although Barnes was strongly contradicted, we accept his statement as true, as found by the jury, together with the reasonable inference, that the child was near the pathway where it crossed the railroad.

The engineer and fireman both testified. The effect of the fireman's testimony was that he was keeping a lookout on the morning in question when the train went through Vian. It was not necessary for him to leave the seatbox in the performance of his duties as fireman, as the fire was kept up by a stoker. That in the performance of his duties he was watchful as they went through cities and towns. That he did not see this small negro child at any place on that morning. He was upon the left-hand side of the engine, or north side, as the train proceeded on its way through Vian. He says that the train might have been stopped in seven hundred or eight hundred feet in an emergency. That they had no knowledge of having struck the child and killed it until they were notified of that fact when they reached Greenwood Junction. He suggests, however, that if the child was back behind the stock pens or where there was some vegetation, it could have approached the track after the engine had passed and been hit by some portion of the train other than the engine.

The engineer's statements were not essentially different in material matters from the fireman's, except that he was on the right-hand side of the engine which is the opposite side from the one on which the child was seen by Barnes and Downing. The proof does not make clear whether the engine was one of those large types such that

the engineer might not have seen a small object like this child if it had been near the track as the train approached the point where it was struck and killed. The engineer, however, states that he saw Mr. Harp, the section foreman, recognized him, although he did not know his name, and that they waved at each other as the train went on its way.

It is argued by appellees that this fact testified to by the engineer and verified by Mr. Harp who states the same fact, was one that justified the jury in finding the operatives of the train negligent in failing to keep a proper lookout at the intersection of this pathway with the railroad track. The conclusion reached by counsel in this argument is that, at the very moment the engineer was observing Mr. Harp, had he been looking upon the railroad track, he would have most likely observed this child in a perilous or dangerous situation. According to the plat, that was barely 200 or 300 feet west of the trail. That argument might be sound, but, if it is, it does not explain why the fireman did not see the child at the same time and place. At most, this conclusion from the circumstances must be regarded as speculation, not supported by any evidence and not a reasonable inference from any testimony in this record.

A statement with many more details could possibly be made; but the foregoing gives the material and essential facts from all the evidence, and we think it unnecessary to elaborate or set forth matters in greater detail. The plaintiffs below relied on the negligence of the operatives of the train by running it at an excessive speed through the town of Vian, and, second, the failure to keep proper lookout for persons who might be at the intersection of the trailway and railroad track in that town.

Before we begin to analyze the cases from the Oklahoma jurisdiction, we make this comment in regard to the speed of the train. There is no evidence tending to show that forty miles per hour was an unusual speed for trains operated in that locality, nor was there any evidence of any particular condition, on that occasion or time of day, that required a slower rate of speed. We understand perfectly that it might be argued that the

train should have been operated at a speed such that the train could have been stopped, had an emergency occurred, in order to prevent an accident. That argument is unsound, and its mere statement is its contradiction, for probably no train is ever operated but that it might be moved so slowly that no accident would ever occur.

We have purposely refrained from a discussion of many of the interesting propositions of law that have arisen, mentioning only those, so far, that have appeared necessary to a complete understanding of the facts in the case. We shall attempt to dispose of the several questions without following any regular or fixed order, but as these matters are presented in the authorities we expect to use.

The appellant argues, as a proposition to justify a directed verdict, that the grandmother, Unice Brown, who had charge of the child, was guilty of contributory negligence, and, since she was the agent of the child's parents into whose care the child had been given, her negligence should be imputed to them. However sound that legal conclusion may appear, the answer thereto is found in art. 23, § 6, of the Constitution of the state of Oklahoma. The effect of this is that the defense of contributory negligence, or of assumption of risk, shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury. This declaration of policy of that state by its Constitution needs no discussion or elaboration. *Dickinson* v. *Cole,* 74 Okla. 79, 177 Pac. 570.

In the case cited, there was also a discussion by the court of a proposition of the speed of trains. It was held there that, inasmuch as the speed of the train was in excess of a rate prohibited by a city ordinance, such fact would constitute negligence *per se.* In the case under consideration there is no ordinance or statute fixing or intended to fix or determine the rate or speed of trains at the time and place of the accident.

One of the cases cited and discussed by counsel for both appellant and appellee is that of *Missouri, K. & T. R. Co.* v. *Wolf,* 76 Okla. 195, 184 Pac. 765. It was there held that to constitute actionable negligence where the wrong was not willful three essential elements were nec-

essary. (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury, (2) failure of the defendant to perform that duty, and (3) injury of the plaintiff resulting from that failure.

In that case there was also an announcement of the principles of law controlling situations such as we have under consideration. It was announced therein that the railroad company is bound to exercise special care and watchfulness at any point upon its tracks where people may be expected in considerable numbers as where the road-bed is constantly used by pedestrians. At such places the railroad company is bound to anticipate the presence of persons and to keep a reasonable lookout for them. It was in this particular case that the court announced the policy of the state to be in conformity with the announcement of Thompson on Negligence, second edition, § 1726, rather than to continue to follow the view expressed by Elliott on Railroads, second edition, § 1250.

Because we think it would unduly extend this opinion we do not attempt here to set up or discuss this new policy as announced in that case, but we do keep it in mind in the determination of the issues involved in the instant case In passing, we venture to remark that this is one of the cases in which it was held that negligence relied upon for a recovery must be established by proof and that reasonable inferences only may be deduced therefrom as distinguished from any presumption of negligence arising out of the injury from the operation of the train.

Upon this same point concerning the establishment of negligence by proof there are no doubt many Oklahoma authorities, and, since we think that almost any case from that jurisdiction upon that subject is sufficient, we venture to call attention to the case of *Chicago, R. I. & P. Ry. Co.* v. *Pedigo,* 102 Okla. 72, 226 Pac. 72. We find that the first headnote in that case is to this effect: A railroad company will not be held liable for persons injured where there is no positive evidence or reasonable inference to be drawn from the testimony that the railroad company was guilty of negligence.

Because it would unduly extend this opinion we must content ourselves with the bare announcement as in the foregoing without attempting more elaborate statement of facts upon which it is based. We think, however, the conclusions of the court as announced to the effect that in any case, under the facts stated where there is no valid ground to establish negligence and the inference of negligence on the part of the employee is lacking, the verdict of the jury upon the unproven primary negligence of the railroad company should not be allowed to stand. The principal is exceedingly well stated in above citations. Numerous other authorities are cited by the court sustaining the position. Our attempt at further discussion would not add to these well considered and elaborately stated principles. We suggest that the court in this case held, as we often have in our courts, that a verdict rendered solely upon conjecture will not be permitted to stand.

The Supreme Court of Oklahoma in a comparatively recent case has set out with somewhat minute details the principles involved in a matter not essentially different from the one we have under consideration. A mere glance at the facts indicates that the same principles of law arising therein have been discussed by counsel in the instant case. An infant was killed at the intersection of a path with the railroad tracks under similar facts to those presented here. One of the principle questions with which we are interested in the instant case is the sufficiency of the evidence to establish negligence. That matter was there elaborately discussed. Numerous authorities were cited and reviewed and the conclusion was reached and the announcement of the law proclaimed as determining the rights of parties therein fits this case like a stocking-cap and covers it as to every essential issue. *Midand Valley R. Co.* v. *Kellogg,* 106 Okla. 237, 233 Pac. 716.

We take the liberty to say that the court there announced that "to sustain the verdict we will have to presume that the employees of the company did not maintain a proper lookout, or if they did maintain proper lookout they did not attempt to stop the train in time to

keep from striking the child and we have to further presume that the train could have been stopped in the exercise of ordinary and reasonable care before striking the child." The court then announced that the verdict is based upon conjecture and that negligence cannot be inferred, but must be proven and that such negligence when proven must be the proximate cause of the injury.

So in this case there is no evidence that, as the train approached the crossing of this pathway, the child was where it could or might have been seen. The evidence is to the effect that it was not seen. That a lookout was kept. Speculation, however plausible, cannot supply a lack of evidence.

In a much more recent case, *Missouri, K. & T. R. Co.* v. *Sowards,* 165 Okla. 214, 25 Pac. 2d 641, we find the Okahoma court announced the same principles, citing some of the same authorities and reaching the same conclusions upon identical facts as in other Oklahoma cases, some of which we have already cited. It was there held that the authorities cited, such as the Wolf Case, *supra,* and Wilhelm Case, *Wilhelm* v. *M. O. & G. R. Co.,* 52 Okla. 317, 152 Pac. 1088, L. R. A. 1916C, 1029, discussed therein were binding upon the court. All these cases are binding upon us in attempting to declare the law in determination of the rights of Oklahoma citizens who have appealed to our courts in this controversy. It is conceded by all parties herein that the rights of the litigants who have invoked the aid of our courts are fixed and determined by the laws of Oklahoma, and only in so far as procedure is concerned do the laws of Arkansas prevail in the controversy. The foregoing authorities have been consistently followed by the Oklahoma courts. Some of the later cases cite the ones we have used here. *Blackwell* v. *Miller,* 181 Okla. 348, 73 Pac. 2d 852.

We suggest to those interested that some of the matters have been discussed in 112 A. L. R. 850 in an elaborate annotation. Perhaps it might be well to call attention to one other Oklahoma case, *Chicago, R. I. & P. R. Co.* v. *McCleary,* 175 Okla. 347, 53 Pac. 2d 555, in that case the Wilhelm and Kellogg Cases particularly were

cited with approval. There is found also a discussion in regard to licensees, trespassers, etc.

In conclusion, we hope it has been made clear in our discussion and statement of the differences in terminology in the respective jurisdictions of Arkansas and Oklahoma, that we have intended no adverse criticism of our sister jurisdiction. We have attempted to make clear rather the difference in the use of the words discussed so that there may not be any misunderstanding by any of the Arkansas courts or lawyers, who may have occasion to read this opinion.

Doubtless the reader has already drawn the conclusion from a consideration of the valuable announcements and declaration of the Oklahoma courts upon the proposition discussed, that there is no substantial evidence of negligence as the proximate cause of the injury and death of the child. That only by conjecture and speculation may the verdict be supported. This cannot and will not be permitted. We have deemed the case fully developed and have attempted to make very reasonable inference from the proof presented and no advantage could arise out of a new trial.

The judgment is, therefore, reversed and action dismissed.

DILLARD *v.* HARDEN.

4-5334 124 S. W. 2d 10

Opinion delivered January 23, 1939.

H. L. Veazey, for appellant.

C. T. Sims, for appellee.

SMITH, J. In a suit filed April 23, 1937, appellant, Dillard, prayed the restoration of an alleged lost deed, and from a decree denying that relief is this appeal. In an excellent opinion prepared by the chancellor denying that relief the court correctly declared the law to be that "To establish a lost deed, evidence of the execution must be clear, concise and satisfactory." The chancellor, being of the opinion that the testimony did not measure up to that high standard, denied the relief prayed

Now, while it is true, as said by the court below, that the testimony must be "clear, concise and satisfactory," it is not required that it be undisputed. It is sufficient if the testimony which we credit and accept as true shows clearly, concisely and satisfactorily that the deed sought to be restored had in fact been executed and delivered. We have many cases on the subject, which we shall not review and distinguish the conditions under which this relief was granted in some cases and denied in others.

There are conflicts in the testimony which cannot be reconciled, but, upon a consideration of this testimony in its entirety we think the following facts clearly appear and are shown to be true to our entire satisfaction.

Over a period of several years, Dillard loaned appellee, Harden, large sums of money, to secure the payment of which annual mortgages were given on several separate tracts of land the title to which was in Harden. R. D. Jones, a young inexperienced married man nineteen years old, desired to buy one of the farms owned by Harden, containing 52 acres, known as the Parsonage Place, and he applied to Dillard to assist him in its purchase. An arrangement was made whereby Harden conveyed the Parsonage Place to Jones. The deed was not

delivered to Jones by Harden, but was delivered to Dillard for Jones, who had paid Dillard $100 when the arrangement was made and the additional sum of $100.00 when the deed from Harden was delivered to Jones by Dillard.

Whether the transaction occurred in this manner is the question in the case. That it did so occur appears to us to be very conclusively shown. The undisputed testimony is to the effect that the circuit clerk produced from the court files in his office a note which had been an exhibit filed in a foreclosure proceeding brought by Dillard in January, 1929, to foreclose the last mortgage given him by Harden. Indorsed on this note were a number of credits, one under date of January 21, 1927, as follows: "Credit 52 acres of land to R. D. Jones, $1,000." Upon this fact and the effect thereof the chancellor commented in his opinion as follows: "This land, with other, was mortgaged to plaintiff by Harden for a considerable sum of money. Upon transfer of title, as is contended by plaintiff, Harden was credited with $1,000, the purchase price of the land. This credit would not have been made unless plaintiff had not felt sure that Harden had, in fact, sold the land to Jones. No substantial advantage moved to plaintiff in substituting one debtor for another where the debt was secured by the same collateral. Plaintiff would not have done this if he had not honestly believed that Harden and his wife had not conveyed a good and sufficient title to R. D. Jones."

There appears to us to be no escape from the effect of this action. Dillard had a mortgage on all of Harden's land to secure his entire debt. He did not foreclose the mortgage as to the Parsonage Place; on the contrary, he credited the note on which the foreclosure suit was based with a thousand dollars, which was the price Jones agreed to pay for this 52 acre tract. Of course, Dillard did not convey to Jones, for he did not have the title, only Harden could convey. Dillard testified that when this credit was given, Harden delivered to him a deed, signed by Harden and wife, and properly acknowledged, to Jones, which deed he delivered to Jones when the second payment of

one hundred dollars was made, leaving a balance of $800 due by Jones as purchase money.

Another fact of convincing significance is that when the deed from Harden to Jones was delivered, thereby vesting title in Jones, a mortgage on this tract of land was given by Jones to Dillard, and the land there mortgaged was described as being the same land which Harden had that day conveyed to Jones. This mortgage was placed of record a few days after its execution.

Thereafter, Jones entered into possession of the land, and remained there during the major portion of that year, when his wife died, and he conveyed his interest to R. L. Hill. That deed was never placed of record. Hill testified that his purchase from Jones was evidenced by the indorsement and transfer to him by Jones of the deed to Jones, and he was under the impression that his deed had been made by Dillard, and not by Harden. It must be remembered that the transaction was eleven years old when the witnesses testified concerning it, and the infirmity of memory accounts, in part, for the contradictions appearing in it. Jones' testimony is very positive to the effect that he burned the deed given to him by Harden, and he was equally positive that the deed received by him was signed by Harden and his wife.

We do not regard the manner of conveyance from Jones to Hill as of controlling importance. Both testified that Jones sold the land to Hill, and that Hill entered into the possession of the land under this purchase, and remained in possession of the land for one year and paid the taxes on it for two years. Neither Jones nor Hill now claims any interest in the land. They both concede the sale and conveyance by them of their respective interests. But we regard the testimony of Jones as second in importance only to that of Dillard. That Jones was a disinterested and truthful witness is expressly conceded by appellee, and Jones' testimony is very definite to the effect that when he purchased the land he received from Dillard a deed signed by Harden and Harden's wife. The mortgage given by Jones to Dillard and immediately placed of record before any question had arisen, recites the facts to be, as Dillard testified they were, that Jones

was giving the mortgage on lands which he had that day bought from Harden, and, as has been said, the controlling question in the case is whether Harden had conveyed the land to Jones.

The testimony is undisputed to the effect that Hill bought the land from Jones or or about January 1, 1928, and paid Jones $200 in cash, which was the amount Jones had paid Dillard. On January 11, 1928, Hill and wife executed to Dillard a mortgage on the same land for a consideration of $864. Hill did not record his deed from Jones, but Dillard did record his mortgage from Hill.

The only reasonable explanation of these transactions is the one offered by Dillard—that he permitted his mortgagors to sell their interests in the Parsonage Place, but in each instance he required their vendees to renew the security first given him by Harden against that land.

On October 10, 1929, Hill and wife conveyed the land to M. K. Roberts, and on the same day Roberts and wife executed to Dillard a mortgage to secure the sum of $774.48, thus continuing the policy of permitting the mortgagors to convey the land and of requiring their vendees to preserve Dillard's lien on the land for the balance due on the credit which Dillard had given Harden.

On January 21, 1932, Roberts and wife conveyed the land to Dillard by warranty deed for the recited consideration of $974.34, which deed was duly recorded. In the fall of 1936 Harden gave E. D. Wright a lease on the land, and Wright took possession thereof. Dillard negotiated a sale of the land and caused an abstract of the title thereto to be prepared, an examination of which disclosed that the deeds from Harden to Jones and from Jones to Hill were not of record. Dillard then attempted to procure a quitclaim deed from Harden and, failing to do so, brought this suit to have those deeds restored as muniments of title and to have his title quieted and confirmed.

Harden and his wife denied that they had ever executed a deed to Jones. They testified that they had reserved this Parsonage Place as their homestead, and not only denied selling the land, but denied also that they had mortgaged it. They testified that Dillard took the

acknowledgments to the mortgages to himself, and they denied acknowledging the mortgage or that they appeared before the officer whose certificate of acknowledgement appears on the mortgage.

We do not recite the testimony relating to the acknowledgements of the various mortgages from Harden and his wife to Dillard. The Honorable Patrick Henry, later and at the time of his death the Judge of that circuit, executed the certificates of acknowledgement to three of these mortgages as a Notary Public. We entertain no doubt whatever that Harden and his wife executed and acknowledged the mortgages. However, the proper time to have raised and litigated that question was in the foreclosure proceeding in the Chancery Court when the foreclosure decree was rendered pursuant to which the lands were sold except the Parsonage Place for which the credit of a thousand dollars had been given as hereinbefore recited and which, for that reason, was not included in the foreclosure decree and sale. It does not appear that any question was then made that the mortgage had not been duly acknowledged.

Harden's testimony and that of his wife to the effect that they did not execute a deed to Jones, when considered apart from the opposing testimony carries but little weight when considered in connection with Harden's subsequent conduct. That he owned the Parsonage Place at the time of the foreclosure decree is a fact which no one disputes, and that it was not included in the foreclosure decree is equally certain. Yet, without objection, he permitted Jones to take possession as owner. Hill succeeded Jones in possession, and Hill was succeeded by Roberts, who conveyed the land by warranty deed to Dillard. These parties occupied the land for ten years, during all of which time Harden made no demand for possession, or any demand for rent, nor did he subsequently pay the taxes. Harden lived in the community for two years after Jones took possession. He then removed to an adjoining county where he lived for five years when he returned to the vicinity of the land where he resided for two years when he was requested and refused to execute a quitclaim deed. It was this request for

a quit claim deed which furnished Harden with the information that there was no deed of record from him to Jones, and, in our opinion, inspired his denial that he had executed such a deed.

The court below evidently attached much importance to the statement of Dillard that he—Dillard—knew nothing about a sale by Harden to Jones until Jones approached him with a proposition to buy the land, and the failure of the testimony to show the circumstances of the execution of the deed by Harden and wife. But the testimony does show that, while the title was in Harden, Dillard had a mortgage on all the lands for its value; indeed, the thousand dollar credit and the proceeds of the foreclosure sale did not suffice to pay the mortgage debt. We regard it as unimportant who negotiated the sale to Jones from Harden. The controlling and undisputed fact is that Dillard gave credit for a thousand dollars on the note upon which his foreclosure proceeding was based. It is true also that the circumstances of the execution of the deed from Harden to Jones were not shown, but Dillard testified that Harden delivered to him a deed from Harden and wife to Jones, properly executed and acknowledged. Dillard did not remember definitely the name of the acknowledging officer, but stated his recollection, and Jones testified positively that Dillard gave him a deed to which the names of Harden and wife were signed.

The opinion of the court recites that Jones knew, "as did most of his neighbors that Dillard had been the financial backer of the Hardens for some time and as such held mortgages on the real property owned by Harden." Jones was an inexperienced buyer and evidently trusted Dillard to consummate the deal he—Jones—had made with Harden, and the delivery of the deed from Harden to Dillard for delivery to Jones was, in legal effect, a delivery to Jones.

There are certain apparent contradictions between the testimony of Dillard and Jones as to the circumstances attending the delivery of the deed by Dillard to Jones, but that may be accounted for by a consideration of the length of time which had elapsed since that event oc-

curred. The controlling question is whether Harden executed a deed to Jones, and the testimony, above recited, convinces us that he did.

Harden attempted to explain his inaction during all the years the land was being adversely held by saying that he consulted an attorney, who "Advised me to keep quiet and see what would take place, and I acted under his instructions." It does not appear when this advise was given, nor was the attorney called to corroborate Harden, but Harden admits that he left the county where the land is located, and removed, in 1929, to an adjoining county where he resided for five years, and then returned to the neighborhood from which he had removed in the Fall of 1936 and placed a tenant in possession of the land, an action he could have taken years before if he, in fact, had not sold the land and was during all these years the owner thereof.

In the case of *Jacks* v. *Wooten,* 152 Ark. 515, 238 S. W. 784, suit was brought to establish a title based upon an alleged lost deed which had never been recorded. In granting the relief prayed the court there said: "In determining whether a deed claimed to have been lost was executed the court might consider how long the parties asserting the claim had been in possession of the land, its value, whether the land had been held adversely to such claim, and all the surrounding circumstances. *Carpenter* v. *Jones,* 76 Ark. 163, 88 S. W. 871."

So, here, the long continued adverse possession of the land since the time when Dillard and Jones testified a deed from Harden was delivered strongly confirms the conclusion that such a deed was made and delivered.

In the case of *Hospital & Benevolent Ass'n.* v. *Arkansas Baptist State Convention,* 176 Ark. 946, 4 S. W. 2d 933, relief similar to that here prayed was granted, although the testimony was as sharply conflicting as in the instant case. There the secretary of the association, who signed the deed as secretary for the association, denied having signed the deed alleged to have been lost without having been recorded, but we announced our conclusion to be that the good lady—the secretary—had merely forgotten the incident, and we found the fact to

be that she had signed the deed notwithstanding her denial that she had done so.

We have the same certainty in the instant case that the deed was executed notwithstanding numerous contradictions in the testimony.

The decree of the court below must, therefore, be reversed, and it is so ordered, and the case will be remanded with directions to quiet the title of Dillard against any and all claims of title on the part of Harden and his wife.

FORT SMITH COTTON OIL COMPANY *v.* SWIFT & COMPANY.

4-5292 124 S. W. 2d 1

Opinion delivered January 23, 1939.

Hardin & Barton, for appellant.

J. W. Jamison, Warner & Warner and *Hill, Fitzhugh & Brizzolara,* for appellees.

McHANEY, J. Appellants, Lillard and Dunklin, are partners doing business under the firm name of Fort Smith Cotton Oil Company and will be hereinafter referred to as appellants. On January 25, 1936, pursuant to a contract of sale and purchase between appellants

and appellee, Swift & Company, the former loaded, at its cotton seed oil mill in Fort Smith, a tank car with cotton seed oil, which tank car was furnished for the purpose by the latter. After being loaded by appellants it was delivered to the Missouri Pacific Railroad Company to be switched to the connection with the appellee, St. Louis-San Francisco Railway Company, which latter company accepted delivery the same day and undertoook to and did transport same to Swift & Company in Chicago. It was shipped by appellants under standard form of bill of lading, which shows it was "Shippers Order," with notice to Swift & Company. It was indorsed by appellants and attached to a draft on Swift & Company which draft was paid on presentation. When the car arrived it was found to be short a net amount of 6,700 pounds, due to a leakage in transit and demand was made on appellants and appellee railway company to make good the loss to it which was stipulated by all parties to be $620.40. Payment being refused, Swift & Company sued appellants and the railway company. Trial resulted in a verdict and judgment for Swift & Company as against appellants, but in favor of the railway company on the suit against it. From the judgment against them an appeal is prosecuted by appellants, as against Swift & Company only, and there is an appeal by Swift & Company from the judgment in favor of the railway company.

In addition to the facts above stated, it was also stipulated that while said car of oil was in transit a leakage was discovered in said car at Fayette Junction and traced back to Greenland, Arkansas, only 55 miles from Fort Smith; that the leak was stopped at Fayette Junction and the car was transported on to Chicago and delivered to Swift & Company who paid the purchase price therefor and the freight thereon without knowledge of the loss of 6,700 pounds of oil therefrom. As we understand this stipulation, the leak of the oil began at Greenland, some few miles south of Fayette Junction, and was discovered and stopped at the latter place.

It appears from the record, undisputed, that tank cars are large cylindrical tanks, varying in size from 75 to 85 inches in diameter and from 25 to 30 feet long,

on railroad trucks; that they are loaded through the dome at the top in the middle of the tank; that the dome opening is closed by a cap about 15 inches in diameter which screws down over the opening, with two knobs on it which are used in tightening it with a wrench or bar. Inside the dome there is a handle working on a bracket, attached to a rod which extends to a hole in the bottom of the tank, to the bottom end of which is attached a valve which fits securely in said hole, and operates to open and close the hole by use of the handle in the dome. This rod is called the valve stem. To the opening in the bottom of the tank is attached an outlet pipe, about two feet long, and four or five inches in diameter. It is threaded at the outer end and is used in unloading the tank by screwing onto it a hose or another pipe and opening the valve by use of the handle in the dome. There is also a cap which screws on the end of the outlet pipe, called the outlet cap. It is attached to a chain which prevents its loss when unscrewed from the outlet pipe.

The evidence shows that the proper method of loading a tank car is to remove the outlet cap from the outlet pipe and then close the valve by means of the handle in the dome. If the valve is properly seated, there can be no leak. The tank is then loaded. If there is a leak in the valve, it will drain through the outlet pipe with the cap off, and the valve should be reseated to stop it. If there is no leak, then the cap is tightly screwed on to the outlet pipe with a wrench. This system is adopted to be sure there is no leak in the valve which would not immediately be ascertainable with the outlet cap screwed on, or at all if the cap stayed in place.

For a reversal of the judgment against them, appellants first contend that certain evidence on the part of the railway company and certain rebuttal evidence on behalf of Swift & Company was improperly admitted over their objections. This evidence relates largely to the proper manner or method of loading a tank car with oil and was substantially as outlined above. We think the evidence was competent and proper under the rules announced in *Blanton* v. *Missouri Pac. Rd. Co.,* 182 Ark. 543, 31 S. W. 2d 947, and *Ross* v. *Clark Co.,* 185 Ark. 1, 45

S. W. 2d 31. Moreover, we cannot consider alleged errors in the evidence introduced by the railway company, as there has been no appeal by appellant as to it.

At the conclusion of the evidence on behalf of appellee, Swift & Company, consisting of the stipulation above referred to and the uniform bill of lading, appellants moved for a directed verdict in their favor, which was denied over their objections and exceptions, and this forms the basis of the second assignment of error for a reversal of the judgment. The record discloses that the railway company made a similar motion which was denied. Thereupon it introduced evidence sufficient to take the case to the jury on the question of its liability. This evidence consisted of inspections made by the Missouri Pacific, when the car was switched to appellee, railway company; by Mr. Reeves, car inspector for the latter, shortly after it was switched and again when the train was made up in which this car traveled about 8:30 p. m. of the same date; by some of the train crew at Van Buren, six miles out of Fort Smith; by brakemen Jacques and Faust at Chester, 23 miles from Van Buren; and it was again inspected at Winslow, 11 miles north of Chester. No leak was discovered at any of these inspections. The next stop was at Fayette Junction, where the leak was discovered. The cap was off the outlet pipe and was hanging loose on the chain. Brakeman Jacques went to the roundhouse, got the hostler, Mr. Gibson, to come and stop the leak. Gibson found the dome cap screwed tightly down in place, applied his wrench to it, took it off and found the valve wide open, with the handle to the valve stem pushed upon the bracket, holding the valve open. He closed it by pushing the handle down off the bracket and immediately stopped the leak. The dome cap was replaced and the outlet cap screwed up tightly with a wrench. He found the gasket on the outlet pipe in good condition and there were no defects in the valve, but it had been left open, and when closed no more oil leaked out. At the conclusion of the evidence on behalf of the railway company, and after appellee, Swift & Company, had offered a witness in rebuttal, appellants again moved for a directed verdict which was denied. They

then put on their testimony which tended to show that the car was properly loaded and that no negligence occurred in loading. They then renewed their motion for a directed verdict which was denied.

It will be noticed that neither appellants nor the railway company stood upon their motions for directed verdicts, but went ahead and put on their testimony. In doing so, appellants waived their requests made prior to the conclusion of the evidence. The rule in this regard is well stated in *Grooms* v. *Neff Harness Co.*, 79 Ark. 401, 96 S. W. 135, on rehearing, p. 407, 96 S. W. 132 as follows: "After verdict the only method of challenging the sufficiency of the evidence is to assign in the motion for new trial, as ground therefor, that 'the verdict is not sustained by sufficient evidence.' On appeal this raises that question, and in testing the sufficiency of evidence the court must consider all the evidence, whether introduced by the plaintiff or by the defendant. So, in testing the correctness of the ruling in denying a request for peremptory instruction, regardless of the time when the request is made, this court must look to all the testimony introduced, and will not reverse the case on account of the trial court's refusal to give the request, even though the evidence was insufficient at the time the request was made, if upon the whole case there is sufficient to sustain the verdict."

So, appellants are in no position to insist now that the court erred in refusing to direct a verdict for it, if all the evidence, for all parties, makes a question for the jury.

It is next insisted that the evidence is insufficient to sustain the verdict. We cannot agree. The evidence shows that the car was delivered to appellants in good order; that they had exclusive charge of loading it; that it was delivered to the Missouri Pacific Railroad Company in good order, no leak; that it was frequently inspected by appellee railway company, at every stop, over a distance of about 60 miles, when the leak was discovered at Fayette Junction and that the same train crew traced the leakage back the next day on the return trip and found it began at or between Greenland and Fayette Junction.

The inspections made consisted of flashing a light on the dome cap to see if it was screwed down and on the outlet pipe to see that the cap was on and that there was no leak. No duty rested upon the railway company to make any more minute inspection. It was not required, in the absence of a leak at the outlet pipe, to go upon top of the tank and remove the dome cap to see if the valve was properly seated. Witnesses for appellants testified the car was properly loaded, the valve properly seated and the dome and outlet caps properly screwed down.

There was evidence to the effect that the outlet pipe cap is not intended to hold the lading, but is intended to protect the threads on the pipe to which is attached another instrumentality in unloading. Also, that these caps often come loose and drop off the outlet pipe, caused by the vibration of running freight trains.

Under these facts a question was undoubtedly made for the jury as to whether appellants or the railway company was at fault, and we are, therefore, of the opinion that the evidence was sufficient to support the verdict.

Error is, also, assigned on account of the giving and refusal to give numerous instructions, one of which is No. 3, given as follows: "You are instructed that the plaintiff is entitled to recover herein said amount of $620.40, and it is your duty to find a verdict against both or either of the defendants, as the facts warrant, for one or both of them are liable as defined by other instructions in this case."

We think this a correct declaration, and we do not understand that appellants question it, except in connection with certain instructions given at the request of the railway company. While we doubt the right of appellants to question the instructions given at the request of their co-defendant, the railway company, since appellee, Swift & Company, was not interested in the controversy as between them and since there has been no appeal by appellants against the railway company, see *Beave* v. *St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52, and *Barr* v. *Nafziger Baking Co.*, 382 Mo. 423, 41 S. W. 2d 559, still we have carefully examined the questioned instructions and find them not subject to the criticism made.

We have also examined appellant's requested instructions which were refused and find that the court properly refused them. We do not set out all these instructions and requested instructions, as to do so would unduly extend this opinion to no useful purpose. Suffice it to say that the court fully and fairly instructed the jury on the issues. This disposes of the appeal of Swift & Company against the railway company.

The judgment is affirmed.

ANDERSON *v.* STATE.

4108 124 S. W. 2d 216

Opinion delivered January 30, 1939.

Arnold Fink and *W. R. Donham,* for appellants.

Jack Holt, Attorney General, *Jno. P. Streepey,* Asst. Atty. General, for appellee.

MEHAFFY, J. The appellants, Joe Anderson and Lucille Anderson, were convicted in the Garland circuit court of murder in the first degree, and their punishment fixed at death. To reverse the judgment of the Garland circuit court, this appeal is prosecuted.

The indictment charges that the appellants, with others, entered into a conspiracy to commit the crime of robbery upon one Eldon Cooley by unlawfully, feloniously, forcibly and violently, and against his consent, taking from him his money and personal property, and that in the furtherance of their common, unlawful and felonious design, and while in the pursuance of said unlawful and common purpose and design, and while in the act of perpetrating said robbery upon said Cooley, one of said defendants did unlawfully, willfully and feloniously kill and murder the said Eldon Cooley, etc.

This indictment is under § 2969 of Pope's Digest which provides, among other things, that "willful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree."

Cooley was a collector employed by Stueart's Grocery Store. The store had several branches and it was the duty and custom of Cooley to go to each of these stores in the afternoon and evening and collect their day's receipts, together with a record of their day's sales. This was done shortly before the stores closed in the evening.

The evidence shows that appellant, Joe Anderson, and others, entered into a conspiracy to rob Cooley after he had made his collection at the last store. In furtherance of this agreement, on September 8, 1938, after Cooley had made his collections, he was held up by appellant, Joe Anderson, and Pug Dickson, and others. They took Cooley in their car, drove into the country, took the

money from Cooley, required him to walk off into the woods and undress, and then shot and killed him because, as some of them said, Cooley recognized one of them.

After the parties were arrested, some of the conspirators made and signed confessions. These confessions were read in evidence against the appellants, and Joe Anderson, the appellant, himself made a confession and, while he claimed that he did not actually kill Cooley, he admitted that he was only a few feet away when Pug Dickson, one of the conspirators, killed Cooley. The evidence shows that they required Cooley to take his clothes off so that he could not go immediately to a telephone, and it also shows that when one of them found that he was recognized by Cooley, Dickson shot him.

Appellants, in their brief, state: "On behalf of Joe Anderson, the sole question presented by this appeal is whether or not the court erred in permitting Marion Anderson, the sheriff of Garland county, to testify concerning the taking of a confession from Alfred 'Pug' Dickson and Bill Johnson, and permitting those confessions to be read to the jury by him and admitted into evidence as exhibits to his testimony, without bringing Alfred 'Pug' Dickson and Bill Johnson into court to testify personally, in view of the fact that both were confined in jail within the jurisdiction of the court, and had not refused to testify."

These confessions were not admissible as the statements of conspirators in the absence of the defendant because they were not made during the pendency of the criminal enterprise and in furtherance of its objects.

"It is thoroughly well established that when a deed is done and the criminal enterprise of the conspirators is ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirator." *Counts* v. *State,* 120 Ark. 462, 179 S. W. 662.

If these confessions, which were introduced in evidence, had been made before the criminal enterprise ended, they would have been admissible although made in the absence of defendant. They could not have been prejudicial in this case because the appellant, Joe Ander-

son, testified and admitted the conspiracy, the robbery and the killing of Cooley. It is true he said that Cooley was shot when he was a few feet away and that he had nothing to do with the shooting, but it was done in furtherance of the conspiracy and all the conspirators were guilty the same as the one that actually did the shooting.

It is well established that this court will not reverse a case for an error where the record conclusively shows that it could not have resulted in any prejudice. As to appellant, Joe Anderson, there could not possibly have been any prejudice because of this evidence, and, since his own testimony shows all the facts recited in the confessions, there was no prejudice as to Joe Anderson.

As to Lucille Anderson, the court told the jury that the confession could only be used against her for the purpose of showing that she heard the statement read and did not deny it.

The authorities are in conflict as to the admissibility of statements of this kind, but practically all agree that the entire circumstances and situation of the parties must be considered. It must, of course, be shown that the person against whom it is sought to be introduced not only heard it but understood it, and that it was made under such circumstances as required her to speak. In the instant case the conspiracy had ended, the robbery had been accomplished, the money distributed, and the parties were in jail. Lucille Anderson was in jail with her husband who doubtless had and exercised some influence over her. Besides that, we think the evidence does not show that she understood the confession, and the circumstances we do not think were such as to require her to speak.

The rule is stated by the Kentucky court as follows: "These may be stated as requisites to the admission of such evidence: (1) Did the person to be bound by the statement hear it? (2) Did he understand it? (3) Did he have an opportunity to express himself concerning it? (4) Was he called upon to act upon or reply to it? If the circumstances attending the statement were such as to show either that he did not, or, from whatever motive, probably did not intend to, commit himself at

all on the subject, then it would be doing violence to the fact, and serving a most unsafe practice, to allow inference to the contrary to be drawn from his silence. The accused in this instance was in custody, manacled, and being hurried to jail, charged with a heinous crime, justly arousing the indignation of the community. Surrounding him was a crowd of curious people, whose motives for being present may have been interpreted—not unreasonably, by one so situated as the prisoner was—as inimicable to his personal safety. Without an opportunity to consult counsel, beset by fears and misgivings, possibly stricken by a consciousness of guilt, and ignorant of a proper course to pursue, was not the natural thing for him to do to keep silent? No part of the conversation was addressed to him. He was not asked to answer. Nor was he bound to have done so, even if asked, no matter by whom. One cannot be compelled, when not offering himself as a witness in his own defense, to give evidence in court tending to incriminate himself. Much less should he be compelled to do so out of court. If silence in such case is evidence of guilt, then one charged with crime must, under penalty of himself creating most damaging evidence against himself in support of the charge, enter into a controversy of words with every idle straggler who may choose to accuse him to his face." *Merriweather* v. *Commonwealth,* 118 Ky. 870, 82 S. W. 592, 4 Ann. Cas. 1039.

"Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply, from men similarly situated." *People* v. *Courtney,* 178 Mich. 137, 144 N. W. 568.

The persons whose confessions were read in evidence were, at the time of the trial, in jail and no reason was given why they were not brought into court to testify where the appellant would have had an opportunity to cross-examine them.

We do not think that the confessions were admissible under the circumstances. There seems to be no evidence that appellant, Lucille Anderson, understood the statement and if she did she would probably have thought that her husband, who was with her, was the proper person to answer if any answer was necessary.

It follows that the judgment against Joe Anderson must be and it is, therefore, affirmed; and the judgment against Lucille Anderson is reversed and the cause remanded for a new trial.

ARKANSAS FUEL OIL COMPANY *v.* ARKANSAS PROPERTIES CORPORATION.

4-5339 124 S. W. 2d 219

Opinion delivered January 30, 1939.

Buzbee, Harrison, Buzbee & Wright and *John M. Harrison,* for appellant.

Isgrig & Robinson, for appellee.

HOLT, J. This case comes here from a judgment in favor of appellee, in an action of unlawful detainer, in which the Pulaski circuit court, Third Division, sitting as a jury, held appellee to be entitled to monthly rental increase of $87.50 from April 1, 1938, and $50 rent for the month of March, 1938, and for possession of the building in question.

The appellee, Arkansas Properties Corporation, alleged in its complaint that it was the owner of the office building, in question, and "that defendant entered into possession of office room No. 1001 in said building on the first day of August, 1937, under an agreement to pay therefor the sum of $50 per month for said offices, and on the first day of February, 1938, the defendant was duly and legally notified that, commencing March 1, 1938, its rent would be increased from $50 to $137.50 per month and defendant is still in possession of the heretofore described offices; that defendant has since the first day of February, 1938, refused and failed to pay rent therefor, although said rent was then due and has been due and payable since the first day of February, 1938, and although over three days' notice to quit and a demand in writing for possession thereof by Isgrig & Robinson, agents for the plaintiff, defendant has refused to quit such possession and still holds the same and unlawfully detains the same from the plaintiff," and further that the defendant was indebted to it in the sum of $50 rent accrued on said property for the month of February, and prayed judgment for possession of said property, for $50 rental then due and for all rents that may accrue pending the suit and for all other proper relief. Appel-

lant, Arkansas Fuel Oil Company, after denying every material allegation in the complaint, set up the following additional defense: "Defendant states that it is occupying the premises described herein under a lease, by the terms of which it has the use of said suite for a period of two years, beginning July 16, 1937, at a monthly rental of $50 per month, payable on the calendar month basis, with the privilege to defendant of renewing such lease for an additional period of two years, at the same rental. That it is ready and willing to pay to plaintiff the sum of $50 per month and that it has tendered such rentals upon said basis to plaintiff."

The case was submitted to the court under an agreed statement of facts, which are substantially as follows: Appellee brings suit to recover possession of office room No. 1001, Medical Arts Building, formerly known as National Standard Building, located in Little Rock. Appellant claims possession by reason of lease agreement with Walter Pope, Receiver. Appellee obtained title and possession to said building as result of foreclosure proceedings under a mortgage duly recorded on February 11, 1936, and executed October 27, 1935, by National Standard Life Insurance Company to Joseph W. Bailey, Jr., Trustee, in trust for First National Bank in Dallas, covering this property. On June 3, 1936, Walter Pope was appointed receiver by the Pulaski circuit court to take charge of assets of National Standard Life Insurance Company, one being the building containing the office room in question. The receiver leased suite No. 1001 in the building to appellant for a two-year period, beginning July 16, 1937, at $50 per month, with privilege of two-year renewal on the same basis. Appellant moved in prior to July 16, 1937, and the lease was confirmed by reciprocal letters of receiver and appellant on August 5, 1937. The lease was not recorded nor was it approved by the circuit court, the only authority for the receiver entering this lease agreement being his general authority as receiver. The First National Bank of Dallas and Joseph W. Bailey, Jr., Trustee, were not made parties defendant in the case out of which the receiver was appointed.

On August 4, 1937, the First National Bank of Dallas and Joseph W. Bailey, Jr., Trustee, filed a petition in Cause No. 27902, pending in Pulaski circuit court, wherein state of Arkansas, *ex rel* Carl E. Bailey, Attorney General, was plaintiff and National Standard Life Insurance Company was defendant (case out of which Walter Pope was appointed receiver), stating that the First National Bank of Dallas held a mortgage for $40,000 against the properties of National Standard Life Insurance Company in Arkansas, subject to a $200,000 mortgage due by that Insurance Company to Reconstruction Finance Corporation, and in that petition the petitioners asked permission to make the receiver a party defendant in a suit to be instituted in the Pulaski chancery court to foreclose the lien held by the said bank. Permission was granted by the court. On the same day, August 4, 1937, suit was brought in Pulaski chancery court by First National Bank of Dallas and Joseph W. Bailey, Jr., Trustee, against the National Standard Life Insurance Company, Walter Pope, Receiver, *et al.,* to foreclose the within described mortgage. In the complaint, plaintiffs prayed for appointment of a receiver to take charge of the properties covered by said mortgage. Simultaneously with the filing of this suit, the plaintiffs filed a petition to which was attached a certified copy of the order entered in cause No. 27902, ordering Walter Pope, receiver, to sequester the rents as collected from the properties covered by the mortgage to the First National Bank of Dallas, and in this same petition withdrew petition for appointment of a receiver in the Pulaski chancery court. On the same date an order was entered in Pulaski chancery court in the proceeding therein pending, taking cognizance of the order of the Pulaski circuit court as described and assuming jurisdiction to direct the disposition of funds by Walter Pope, receiver, to the same extent as if such funds had been sequestered on plaintiff's application by a receiver appointed by the chancery court.

Thereafter, on December 9, 1937, the chancery court entered a decree foreclosing the mortgage of the First National Bank in Dallas, and in the decree

Walter Pope, receiver, was ordered to turn over the funds in his hands for the payment of taxes against the properties covered by said mortgage, and to make full report of his receivership upon sale and confirmation thereof.

Thereafter, on January 7, 1938, the property was sold in accordance with the decree, and was purchased by appellee, Arkansas Properties Corporation, subject only to the mortgage to the Reconstruction Finance Corporation. The name of the building was changed to Medical Arts Building. On February 1, 1938, appellee gave appellant notice that commencing on the next rental period the rent for Suite 1001, occupied by the appellant, would be increased from $50 per month to $137.50 per month. Appellant has since that time tendered $50 per month rentals and has refused to pay more. Appellee has refused to accept said tenders. Thereupon both sides rested.

The court on April 26, 1938, rendered judgment in favor of appellee for possession of the property in question; for rent in the sum of $50 per month for March, 1938, and for rent at the rate of $137.50 per month from April 1, 1938, to date of judgment. From this judgment comes this appeal.

The appellant contends that the trial court erred in holding that the receiver was without authority to make the lease in question and also that the court erroneously held that appellee had no notice of the appellant's lease.

Under the agreed facts, as reflected by this record, the receiver, without first procuring an order from the court, by which he was appointed and for which he was acting, entered into a lease contract with appellant for the office space in question for a term of two years at a rental of $50 per month and with the option to the lessee to renew the lease for an additional two years. It is our view, and we hold that the receiver was without authority to execute the lease in question beyond the life of his receivership without first having procured an order of the court. As receiver he was an officer, or an arm, of the court appointing him and subject to its orders, and when he entered into the lease contract with appellant he did so without approval of the court and his act was voidable.

The general rule is stated in Thompson on Real Property, vol. 2, p. 166, § 1093, as follows: "A receiver has no authority to execute a lease of property placed in his hands by the court, unless authorized by the court to do so, since a receiver is simply an officer of the court subject to the court's orders." And, also, in 53 Corpus Juris, p. 161, § 204, the rule is again stated: "In accordance with the general rules relating to other contracts, a receiver ordinarily has no power, without specific authorization by the court, to let any property which he holds as receiver, although it has been held that a receiver appointed to take possession of and collect the rents which might accrue from particular property, has the power and is under a duty to rent it; nor has he any power, in the absence of such authorization, to enter into a lease as lessee, especially for a term extending beyond the duration of the receivership, and if he takes such a lease, the court is not bound to recognize any equitable right of the lessor to be paid for the unexpired term after the ending of the receivership." This court in *Smith* v. *Murphy,* 141 Ark. 410, 216 S. W. 719, said: "The general rule of law is that 'all persons dealing with receivers . . . do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court.' High on Receivers (2 Ed.), § 186."

The record further discloses that the mortgage, which was the basis for the foreclosure suit filed in this case, was duly recorded with the proper officials of Pulaski county on the 11th day of February, 1936. The foreclosure suit was filed by the mortgagee, or holder of the mortgage, the First National Bank of Dallas and Joseph W. Bailey, Jr., as Trustee, on August 4, 1937, and the lease contract was entered into between the receiver and appellant on August 5, 1937. Appellant, therefore, had notice of the rights of the mortgagee herein and when the mortgagee, the First National Bank of Dallas, foreclosed its mortgage, making the receiver a party defendant in the foreclosure suit, and appellee became the purchaser at the foreclosure sale on January 7, 1938, the lease contract entered into between the receiver and ap-

pellant on August 5, 1937, could in no way impair the rights of the purchaser of the office building in question at the foreclosure sale, which sale foreclosed all the equity, rights, title and interest of the National Standard Life Insurance Company, a part of the assets of which was the office building in question in the hands of the receiver. In the case of *Smith* v. *Murphy, supra,* this court said: "It is a well recognized principle of law that: 'The purchaser at a judicial sale has a clear right to the possession of the property sold as against all parties to the proceeding in which the sale is made, and this right the court will summarily enforce by writ of assistance, or in some appropriate manner.' "

On the whole case we hold that no errors appear and that the judgment of the trial court should not be disturbed and that the case should be affirmed. It is so ordered.

CADY *v.* GUESS.

4-5336 124 S. W. 2d 213

Opinion delivered January 30, 1939.

Charles Herman and *Arnold & Arnold,* for appellants.

Bert B. Larey, for appellee.

BAKER, J. On May 4, 1937, the plaintiffs, William R. Cady, Louis B. von Weise and Mississippi Valley Trust Company, Trustees under the will of P. D. C. Ball, deceased, and Margaret Ball Cady, in her own right, filed suit in the circuit court of Miller county against E. B. Guess. This suit was to recover judgment on two certain promissory notes dated November 24, 1930, payable to P. D. C. Ball, with interest from maturity at the rate of 6 per cent. per annum. One of the notes was for $2,500, due January 10, 1931, and one for $1,500, due January 20, 1931. The $2,500 note was credited, on June 20, 1931, with $1,000. The note is indorsed: "Without recourse on us" and is signed by Louis B. von Weise and Ella M. Jacoby. Executors under the will of P. D. C. Ball. The second note bore the same indorsement signed by the same parties. It had no payment credited thereon.

Guess answered denying every material allegation of the complaint and pleaded the statute of limitations. The plaintiffs then amended their complaint and set out in the amendment three letters written by the executors of the estate of P. D. C. Ball, deceased, and one written by Guess. The first of these letters is dated June 27, 1935, and is as follows:

"Estate of

"Mr. E. B. Guess, "July 27, 1935
"c/o Huning Mercantile Company,
"Los Lunas, New Mexico.
"Dear Sir:

"We are executors of the estate of P. D. C. Ball, deceased.

"We hold your notes dated December 3, 1930, to Mr. Ball, one for $2,500 due January 10, 1931, upon which you paid $1,000 on principal June 30, 1931, leaving an unpaid balance of $1,500, and the other note for $1,500, due January 20, 1931, with interest at 6 per cent. from date.

"We are compelled to insist that you make payment of these notes at an early date.

"Yours truly,
"Louis B. von Weise,
"Ella M. Jacoby,
"Executors, Estate of
"By" P. D. C. Ball, Deceased.

The second letter was dated August 2, 1935, and is as follows:

"August 2, 1935.

"Mr. E. B. Guess,
"Roswell, New Mexico.
"Dear Mr. Guess:

"We addressed a letter to you at Los Lunas, New Mexico, in care of the Huning Mercantile Company. The Huning Mercantile Company returned it to us and advised they thought you could be reached at Roswell.

"Therefore, we are reforwarding the letter to you and ask that you kindly let us have a reply promptly.

"Yours very truly,
"Louis V. von Weise,
"Ella M. Jacoby,
"Executors, Estate of
P. D. C. Ball, Deceased.

"By"

Both of these letters were addressed to E. B. Guess, the first in care of Huning Mercantile Company, Los Lunas, New Mexico, and the second addressed to him at Roswell, New Mexico. A letter by Mr. Guess, written from Dallas, Texas, to Miss Jacoby, is as follows:

"Hotel Adolphus
"Dallas, Texas
"August 28th, '35.

'Dear Miss Jacoby:

"Your letter 2nd reached me here and I hardly know how to answer for I'm unable to do anything on the matter at the present time. I was caught in this jam and all but squeezed to death. On top of all the other worries I had, I had a sudden heart heart attack, went to the hospital last September remained there until February. Since then all I have been able to do is to get in other people's way.

"As you know after buying this stuff from Mr. Ball the oil business went from bad to worse and I was never able to realize anything from it, as well as many other things I had.

"I think I may be able to send you $500 by October 10th and follow up with $100 a month until paid or as long as I live. I realize this is a very sorry offer but don't see how I can do any better as all of my assets have been wiped out and all I can depend on is do what I can and hope for a lucky strike.

"Wish you would kindly write me here and say how you feel regarding the above. I am

"Most sincerely,

"(Signed) E. B. Guess."

The answer to said letter was an acceptance of his proposition.

It can be of no real benefit to the parties, or counsel to set forth with minute detail such facts as were disclosed in the evidence. We think it sufficient to state our conclusions in the matter.

Miss Jacoby wrote the letters addressed to Mr. Guess, according to her testimony, and Mr. Guess wrote the one letter, to which his name was signed. Her first letter, dated July 27, 1935, and sent in care of the Huning Mercantile Company, she says, was returned to her by that company, which advised her that Mr. Guess could be found at Roswell, New Mexico. The second letter, which we have copied above, dated August 2, 1935, was written by Miss Jacoby to Mr. Guess at Roswell. All that letter stated, as will be observed from the copy above, was that the Huning Mercantile Company had returned the letter of July 27, and advised that it thought he could be reached at Roswell; that she was "reforwarding" the letter and asked for a reply. We direct attention especially to the foregoing statement in regard to this second letter written by Miss Jacoby. It certainly did not call for a reply, but it desired a response to the letter which was "reforwarded" and dated July 27. In that letter special attention is called to the two notes, their amounts, maturity dates, and interest rates, and there was an insistence that settlement be made at once.

Upon the trial of the case Miss Jacoby testified, and the effect of her testimony, as we understand it, is that she forwarded to Mr. Guess the letter written July 27 at

the time she wrote the letter of August 2nd. The principal argument made is that Miss Jacoby was not certain in regard to forwarding this letter. It is urged that her testimony in that respect is so unsatisfactory that the court was justified in finding that the letter of July 27th was not forwarded by her nor was it received by Mr. Guess, and since the court had so found the facts, these letters did not serve to toll the statute of limitations, as to these notes, for the reason that the indefinite and uncertain response made by Mr. Guess did not sufficiently identify the debts or obligations concerning which he wrote. The trial court no doubt had that idea and rendered judgment accordingly in favor of Mr. Guess.

The appellants insist that the judgment of the trial court is not only not supported by any evidence, but that it is contrary to all the evidence produced. Argument is offered by appellee that the evidence is not sufficient to show that these letters were properly addressed, stamped and posted, and that, therefore, the presumption of delivery does not obtain.

Numerous authorities are cited, some, the most interesting of which, are as follows: *Southern Engine & Boiler Works* v. *Vaughan,* 98 Ark. 388 135 S. W. 913, Ann. Cas. 1912D, 1062; *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. 2d 557.

The view we have of this case, however, makes the questions of law suggested of no great importance. True, we would have little doubt about the delivery of these letters to Mr. Guess if left solely to the testimony of Miss Jacoby. It is apparent from the foregoing letters that the appellants do not have to rely upon the legal presumption of the delivery of the letters. It is argued that Mr. Guess merely answered by his letter, written from the Adolphus Hotel, Dallas, Texas, on August 28, the letter of August 2, admittedly received by him, not the request for an answer as shown upon its face to the letter dated July 27. The letter he admits he received did not demand an answer. It merely called his attention to the fact that the message intended to reach him was the letter written July 27, and had been forwarded and a reply was re-

quested to it. The contents of Mr. Guess's letter, dated August 28, must be regarded, as an answer to the letter in which Miss Jacoby and von Weise were asking that he make settlement of the two notes, because the contents of his letter are in regard to his indebtedness, concerning which no mention was made in Miss Jacoby's letter of August 2. Unless we attribute to Mr. Guess the enviable powers of a clairvoyant, we must regard his letter as a response to the letter of July 27, written by Miss Jacoby and that the notes, or amounts mentioned therein, were the subject matters about which Mr. Guess was writing. He did not deny his indebtedness; really, he conceded it. He offered to pay $500 October 10th and follow it up with $100 until paid or "as long as I live." He then says "I realize this is a very sorry offer."

It is foolish to think that he made an offer concerning the letter above quoted, dated August 2. As soon as this letter was received Miss Jacoby again wrote Mr. Guess expressing her appreciation of his interest and she hoped he would be able to live up to his expectations and promise, advising him of the acceptance of the arrangement proposed by him as to payment and to the effect that the court would not compel action if he would make payment as promised.

Mr. Guess was present at the time of this trial. He did not take the stand or testify, and certainly in a case of this kind it may be urged the presumption is that had he testified his statements would have been against his interest. *Felton* v. *Leigh*, 48 Ark. 498, 3 S. W. 638; *Fordyce* v. *McCants*, 55 Ark. 384, 18 S. W. 371. There are many later authorities supporting this doctrine.

No argument has been offered, no explanation suggested that Mr. Guess could have done more than admit that he wrote the letter of August 28, making the offer and requesting response in regard to how the executors felt concerning his proposition of settlement. It is only argued that the proof is wholly unsatisfactory to show the receipt by him of the letter dated July 27, 1935. This correspondence, letters identifying the notes, constitute all the substantial testimony in this record. There is no

evidence that the letter of July 27 was not received. In addition to the presumption which we think obtains here, that the letter was written and properly posted, there is in effect an acknowledgment of the receipt of the letter, so the only substantial evidence is that the correspondence properly identifies the two notes sued on; that there is a sufficient and definite identification of the indebtedness acknowledged by Mr. Guess. There is his promise to pay and the promise is sufficient under the following authorities. 37 C. J., p. 1120, § 601; *Brown* v. *State Bank,* 10 Ark. 134; *Taylor* v. *Cheairs,* 181 Ark. 4, 24 S. W. 2d 852. The rule announced by one of the first and one of the last cases is the same in each. 37 C. J. 1101.

All the letters when read together identified the indebtedness and acknowledged it.

This being the only substantial evidence the court erred in not entering a judgment for the plaintiffs. The judgment of the trial court is, therefore, reversed and judgment entered here for the two notes and accrued interest.

J. S. McWilliams Auto Company *v.* Gibbons.

4-5341 124 S. W. 2d 211

Opinion delivered January 30, 1939.

J. S. Brooks and *J. S. Brooks, Jr.*, for appellant.

Byrd & Love, for appellee.

HUMPHREYS, J. This suit was commenced in the municipal court of El Dorado by appellant against appellee to recover $222.39, an alleged balance due for a second-hand automobile sold by appellant to appellee on the installment plan, it being provided in the contract of sale and purchase that the failure to pay any installment, when due, should make the entire note due and payable at the option of the vendor.

It was alleged that after paying three monthly installments appellee made default and that appellant, in the exercise of its option, has declared the entire amount of the unpaid balance due; and prayed judgment for the balance due against appellee, that the automobile be sold and the proceeds applied to the payment of the judgment, interest and cost.

A default judgment was rendered against appellee in the municipal court and the automobile ordered sold pursuant to the prayer of the complaint, from which an appeal was duly prosecuted to the circuit court of Union county, second division.

In the circuit court appellee filed an answer to the complaint, admitting that he purchased the automobile upon the installment plan and that he executed a title-retaining note evidencing the balance due, but stated that he did so upon the representation that it was in good condition, which representation was untrue; that appellant refused to place the automobile in operating condition as represented, whereupon, he returned the automobile to appellant in settlement of the debt.

The cause was submitted to a jury upon the sole issue of whether appellee returned the automobile to an authorized agent of appellant in full settlement of the balance due thereon.

The jury returned a verdict for appellee and from the judgment dismissing appellant's complaint it has duly prosecuted an appeal to this court.

Appellant contends there is no substantial testimony in the record tending to show the automobile was re-

turned to an agent authorized to accept the car in settlement of the debt.

The record reflects that Mrs. I. M. Gibbons took the automobile back to appellant and that it was accepted in settlement of the balance due on it. The following is an excerpt from her testimony relative to taking the car back and delivering same to appellant:

"Q. When you arrived at the used car lot, did you turn this car over to the first gentleman you saw, A. Well, I drove the car in the yard and I was standing by the side of it, and some fellow walked around there and he said he wasn't the fellow who had charge of it, and he went back and the other fellow told me when he come out that he had charge of the second-hand lot. Q. Is 'the other fellow' in the room now? A. Yes, sir. Q. Is he the gentleman who testified a while ago? A. Yes, sir, Mr. Roscoe. Q. Did you have any conversation with him about it? A. He asked me what he could do for me, and I says I have brought the car back, we are unable to pay for it, and he says we don't take them back, and I says, 'What will I do with it because we are unable to pay for it?; he says, 'We don't make a practice of taking them back, but I will take it back.' He says the car stood good for the payments and he could make money on it, and I says, 'Well, you are perfectly welcome to it because we can't pay any more on it.' He said he could make money on it by repairing it. Q. What did you do with the car? A. I left it sitting in the yard there. Q. With him, you left it with him? A. Yes, sir."

Upon cross-examination the following questions and answers appear in her testimony: "Q. When you brought this car back Mr. Roscoe came up to you and asked you what he could do for you? A. Yes, sir Q. And he told you he would take the car back? A. He introduced himself — he told me he would take it back. Q. And for you to forget the balance due on it? A. No, not in those words. Q. But that was the idea? A. Yes, sir. Q. Did you think Mr. Roscoe was in charge of McWilliams' business? A. He told me he had charge of the second-hand yard. Q. He said the car was worth more than you owed and we will take it for the

balance due? A. He told me that the car stood good for the balance due on it and that it could be repaired and they could make money on it."

Mr. Jay Baker testified that he was the general manager of appellant's company and that he did not give Travis Roscoe any authority to accept the car in settlement of the debt due thereon and Travis Roscoe testified that he was in charge or the manager of the used car lot, but that he had no authority to accept cars which had been sold in settlement of the balance due on them. In explaining why the car was taken back, Mr. Jay Baker said: "When he brought the car back there wasn't anything for us to do but to turn it over to the used car department." He also testified that Mr. Roscoe "looks after our used cars."

Mr. Roscoe denied that he agreed to take the car back for the indebtedness and that it was left on the lot without any permission from him.

Considering the evidence as a whole, we think the jury could well and reasonably draw the inference that appellant, through its authorized agent, received the car in payment of the debt, especially in view of the fact that the general manager said they turned it over to the used car department.

The law is well settled that a principal is liable for the acts of his agent done within the apparent scope of his authority. *Cotton* v. *Ingram,* 114 Ark. 300, 169 S. W. 967; *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79, 146 S. W. 130. The jury, of course, had a right to believe the testimony of Mrs. I. M. Gibbons with reference to what was said and done when she delivered the car and taking into consideration all that occurred, and especially the fact that the car was turned over to the used car department by Mr. Baker, who was the general manager, the jury had a right to draw the inference that Mr. Roscoe was acting within the scope of his authority when he agreed to take the car back in settlement of the debt against it. This is what the jury did as evidenced by its verdict. We, therefore, find that there is substantial evidence in the record to support the verdict.

No error appearing, the judgment is affirmed.

THE PHIPPS-REYNOLDS COMPANY *v.* MCILROY BANK & TRUST COMPANY.

4-5346 124 S. W. 2d 222

Opinion delivered January 30, 1939.

Sullins & Sullins, J. S. Jameson and *Karl Greenhaw,* for appellants.

Bernal Seamster, for appellee.

SMITH, J. J. H. Phipps and W. J. Reynolds were the president and secretary-treasurer, respectively, of The Phipps-Reynolds Company, a corporation engaged in the sawmilling and timber business. They borrowed money to conduct their operations from the McIlroy Bank & Trust Company, and on March 3, 1929, were indebted to the bank in the sum of $15,000. On that date an additional credit of $2,000 was requested and granted, making the indebtedness $17,000, which was evidenced by three notes for $5,000 each and one for $2,000. These notes, as they now read, were all due ninety days after date, all bearing interest from date at the rate of 8 per cent. per annum until due, and 10 per cent. thereafter until paid, providing that the interest shall be paid quarterly and, if not paid when due, to become principal and bear interest at 8 per cent.

Phipps and Reynolds signed these notes as president and secretary, respectively, and indorsed them in their individual capacity. They had given certain collateral security for the original debt, and gave additional collateral for the increased debt, out of which transactions certain questions arose between Phipps and the estate of Reynolds, who died December 4, 1937, pending the progress of the litigation. The court reserved decision on the question of the equities between Phipps and the Reynolds estate until "after the sale of the assets of the Phipps-Reynolds Company, and said matters are passed for final adjudication and until such sale is had and confirmed."

When the four notes above-mentioned totaling $17,000 were executed to the bank a real estate mortgage was taken on the lands owned by the Phipps-Reynolds Company, and a chattel mortgage was also given on its personal property. It was recited in the real estate mortgage: "That the foregoing conveyance shall stand as security for the payment of any extension or renewal of the whole or any part of said indebtedness, whether evidenced by indorsement on the above-mentioned obligation or by the extension of indebtedness in lieu thereof; also as security for the payment of any other liability or liabilities of the grantor already or hereafter contracted

to the said grantee until the satisfaction of this deed of trust upon the margin of the record thereof, together with interest at the rate of 8 per cent. per annum unless otherwise specified."

The chattel mortgage contains recitals of similar purport. As to the interest upon the debt, the chattel mortgage recites an existing indebtedness of $17,000, "due ninety days after date, and bearing interest from date until due at the rate of 8 per cent. per annum, payable every ninety days, and if not so paid when due, to become as principal and bear the same rate of interest."

It thus appears that there is a conflict as to the interest to be paid between the recitals of the notes and the recitals, above copied, from the two mortgages.

Certain sums were borrowed and evidenced by other notes, and there appears to be no controversy as to the amount of principal due. The controversy is over the rate of interest and the manner of its computation. Certain other questions are involved, which will be discussed and decided after we have considered this question of interest.

The court below adjudged the sum due, including interest, and decreed the foreclosure of both the real estate and the chattel mortgages, reserving, as above stated, certain questions between Phipps and the Reynolds estate, and from that decree is this appeal.

The original notes have been brought before us, and their mutilation is apparent. That there were erasures is conceded. Whether they were made before or after their delivery to the bank is the question of fact involved. It is insisted by appellants that, when delivered, the notes bore interest after maturity at 8 per cent., and that they were altered to bear 10 per cent. from that date.

It is conceded, of course, that if alterations were made after their execution and delivery to the bank, this action would render the notes void both as to principal and interest. Section 10282, Pope's Digest, provides that where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent in-

dorsers, with the proviso that when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, such party may enforce payment thereof according to its original tenor. Section 10283, Pope's Digest, provides, among others, that any alteration which changes: "(2) The sum payable, either for principal or interest; . . . is a material alteration."

It becomes necessary, first, to decide the question of fact whether the alteration was made before the delivery of the notes to the bank. Circumstances supporting that contention are (1) that it is apparent that there were erasures on the notes, (2) the recital as to the rate of interest to be paid and the manner of its computation contained in the mortgages does not comport with the recital on that subject appearing in the notes. It is argued also that when an erasure appears upon the face of a negotiable instrument, there is a presumption that it was made after delivery, and that the burden of showing the contrary rests upon the party seeking enforcement of the notes. We first consider this question of law as related to the decision of the question of fact.

There is quite a conflict in the authorities on the question, and our own cases are not entirely harmonious. We shall not review and distinguish these cases.

At §§. 108 and 109 of the chapter on Alteration of Instruments, 2 Am. Jur., pp. 670 and 671, is stated what we think is the proper rule to follow. It was there said:

"Section 108.—Presumption of Alteration After Execution.—The view is maintained by some authorities that an apparent alteration will be presumed to have been made after the execution of the instrument which appears to have been altered. It has been said that this doctrine arose from a misconception of certain early English cases which were based upon the stamp acts and were applicable only to negotiable instruments, though this has been denied, and the doctrine asserted to be founded in reason. Whatever may have been its origin, this harsh rule would seem to be unsound on principle, and is but little followed. The law never presumes fraud, and it is, moreover, not only harsh, but opposed to gen-

eral experience and modern commercial usage, to assume that all instruments are issued without erasures or blemish of any kind. Some authorities modify this rule to the extent of holding that a presumption that any alteration was made after execution arises only in cases where the circumstances are suspicious; but this attempt at an intermediate or compromise rule has been objected to as furnishing no definite rule by which to determine when the burden is upon the holder to explain the alteration, and when it is not, and as being simply an inference of fact drawn from the evidence in the case.

"Section 109.—Rule that No Presumption Arises.—Still another doctrine supported by numerous decisions, and based, it is believed, on the better reasoning, is that no presumption arises from an alteration apparent on the face of an instrument, but that the entire question of the time when such alteration was made is for the jury to consider in the light of all the evidence intrinsic and extrinsic. Theoretically, where this latter doctrine prevails, it will not be affected by the fact that the alteration is suspicious, but, in actual practice, it seems from many of the cases supporting the doctrine that the nature of the alteration as suspicious or otherwise is of no little importance."

A note to the text just quoted cites the following annotated cases: *Healey-Owens-Hartzell Co.* v. *Montevedeo Co.,* 165 Minn. 330, 206 N. W. 646, 44 A. L. R. 1238; *Tharp* v. *Jamison,* 154 Ia. 77, 134 N. W. 583, 39 L. R. A., N. S. 100; *Burgess* v. *Blake,* 128 Ala. 105, 28 So. 963, 86 Am. St. Rep. 78; *Wicker* v. *Jones,* 159 N. C. 102, 74 S. E. 801, 40 L. R. A., N. S. 69, Ann. Cas. 1914B, 1083.

An innumerable number of cases are cited in the notes to these annotated cases, and our examination of a number of those most frequently cited in others leads us to the conclusion that "no presumption arises from an alteration apparent on the face of an instrument, but that the entire question of the time when such alteration was made is for the jury to consider in the light of all the evidence intrinsic and extrinsic." The thought expressed in many of these cases, as in our own case of *Gist, Admr.,* v. *Gans,* 30 Ark. 285, is that "Persons holding

and expecting benefit from instruments have two motives not to alter them: First—If the alteration be material it avoids the instrument; and, Second—It is a criminal act." "Yet," as Judge ENGLISH said in the case just cited, "such alterations have frequently been made by persons who hoped to avoid detection and escape punishment." But the practice of making erasures, interlineations and corrections in writings of all kinds is of such common occurrence that we do not think a presumption of fraud should be indulged and declared to exist because of their presence in a writing. The question is rather one to be determined by court or jury as the case may be in the light of all the evidence intrinsic and extrinsic, unaffected by any presumption.

The officer of the bank who received the notes upon their execution and the other two officers who had occasion to handle the notes while in possession of the bank all testified that the notes had not been changed since their delivery to the bank. The only witness contradicting this testimony is Mr. Phipps, and he admitted that Reynolds handled the financial end of the corporation's business and had executed the notes for the company. Phipps was certain that the notes were to bear interest at 8 per cent. after maturity, and his reason for this belief was that "Mr. Reynolds paid the interest, and if it was 10 per cent., I judge he would have said something about it."

We conclude that the finding of the chancellor on this question of fact, to the effect that the bank had not altered the notes, is not contrary to the preponderance of the evidence.

It is insisted that the notes are usurious because of the provision for compounding interest.

Our cases are to the contrary. It was held in the case of *First National Bank* v. *Waddell*, 74 Ark. 241, 85 S. W. 417, 4 Ann. Cas. 818, to quote a headnote in that case, that "A contract between a bank and a customer, contemplating monthly debits and credits in large sums, which provided that the bank should charge the highest lawful rate of interest, and that the rate should be com-

puted monthly on the average daily debit balances, and charged in the account, was not usurious."

A headnote to the case of *Carney* v. *Matthewson,* 86 Ark. 25, 109 S. W. 1024, reads as follows: "Taking a note which bears ten per cent. interest per annum and provides that if interest be not paid annually it shall become principal and bear the same rate of interest is not such a compounding of interest as would render the note usurious."

The holding in that case was approved in the case of *Morgan* v. *Rogers,* 166 Ark. 327, 266 S. W. 273, in which case a note bearing the maximum rate of interest, to be paid semi-annually, with the proviso that if the interest was not paid annually it should become part of the principal and bear the same rate of interest, was held not usurious. It was there said: "This court has expressly held that taking a note bearing ten per cent. interest per annum and providing that, if interest be not paid annually, it shall become principal and bear the same rate of interest, is not such a compounding of interest as would render the note usurious. *Carney* v. *Matthewson,* 86 Ark. 25, 109 S. W. 1024. It might be that the installments of interest might be made so frequent or unusual as to indicate a disposition to evade the spirit of the law and to compound the interest so rapidly as thereby to secure a greater rate of interest than that allowed under the Constitution, but there is nothing in this transaction to evince such an intention."

See, also, *Chaffe & Sons* v. *Landers,* 46 Ark. 364; *Grider* v. *Driver,* 46 Ark. 50. Many cases on the subject are cited in the case of *Jones* v. *Nossaman,* 114 Kan. 886, 221 Pac. 271, 37 A. L. R. 325.

It may be, as was said by Judge HART in the case of *Morgan* v. *Rogers, supra,* that the installments of interest might be made so frequent and unusual as to indicate an intention to evade the usury law. But a bank loan with a rest period of ninety days does not appear to be unusual. Indeed, it is a matter of common knowledge that bank loans are rarely made for a longer period of time.

In the case of *Lesser-Goldman Cotton Co.* v. *Merchants' & Planters' Bank,* 182 Ark. 150, 30 S. W. 2d 215,

it was said: "Appellant also contends that it was unlawful to charge it with 8 per cent. interest compounded monthly, and in this contention we agree with appellant." It does not appear that there was any provision for the obligor in that case to be relieved of liability to pay compound interest by paying at the due date, nor does it appear that there was any agreement to pay compound interest. As a matter of fact, the opinion recites that the first advance in that case was made September 9, 1925, and the last December 3, 1925. Other advances in large amounts were made between those dates. The interest was computed to October 6, 1927. As a matter of fact, interest compounded monthly, at 8 per cent., between the first and the last of these dates, would not exceed 10 per cent. for that period of time. It would, therefore, have been more accurate in that case to have stated that charging compound interest was unauthorized, not because it was usurious, for it was not, but because there was no contract that the interest should be so computed. The question of usury was not involved in that case. Had we found there was a contract for usurious interest, no recovery of either principal or interest would have been allowed, yet we gave judgment for both principal and interest. We did not there permit interest to be compounded at 8 per cent. monthly, because there was no authority for doing so. Whether a loan intended to extend over a long period of time where interest compounded at 8 per cent. monthly would make the entire interest in excess of 10 per cent. for the time covered, is a question not presented in that case, nor in this.

We conclude that the court did not err in holding that the notes were not usurious.

It is insisted that the bank has estopped itself to charge interest at a higher rate than 8 per cent. after maturity even though the notes authorized a higher rate, and we think appellants are right in this contention. It may be said that it was the notes which evidenced the debt, and that the mortgages were mere security for its payment. But the mortgages did recite the rate of interest which would be charged, and Phipps testified that there was never any intimation that more than 8 per

cent. would be charged until after the foreclosure suit had been filed, and if it be said that this contention varies the terms of the note, it may be answered that the question we are now considering is whether it may be shown that the bank did not intend to enforce the provisions of the notes for the payment of 10 per cent., but intended to follow the provisions of the mortgages for the payment of only 8 per cent., and had, by its conduct, led the Phipps-Reynolds Company to believe that only 8 per cent. would be charged. We think the testimony establishes the fact that the Phipps-Reynolds Company was led to believe that only 8 per cent. had been or would be charged.

Five identical indorsements appear on each of the notes, which, together, evidenced the $17,000 loan. The first of these, dated 6-24-29, is that the interest was paid to 6-23-29; the second indorsement, dated 1-23-30, is that the interest was paid to 12-23-29; the third, dated 3-19-31, is that the interest was paid to 3-23-31; the fourth, dated 1-13-32, is that the interest was paid to 1-1-32; and the fifth, dated 12-1-32, is that the interest was paid to 12-1-32. A credit of $200 appears on each note under date of 12-13-35. It is from December 1, 1932, that the bank has charged and was given judgment for interest at 10 per cent.

We are reinforced in our conclusion that the Phipps-Reynolds Company was led to believe that 10 per cent. would not be charged after December 1, 1932, up to which date only 8 per cent. had been charged, by the fact that on December 1, 1932, an additional note was executed to the order of the bank by the Phipps-Reynolds Company for $4,975, which did not recite that "If interest is not paid when due, said interest to become as principal quarterly," but did provide "Interest payable 8 per cent. annually," with the proviso that if that interest was not paid when due, it should "become as principal and bear 8 per cent. interest."

It appears that the bank took an assignment or trust agreement to the Phipps-Reynolds plant in 1931, and had control thereof until a receiver was appointed in the foreclosure proceedings, during all of which time no interest was paid or intimation given that the interest would be

increased from 8 per cent. to 10 per cent. We think, if the bank had that intention when the property was taken over, the Phipps-Reynolds Company should have been advised of that fact. The receipt of this information might have caused the officers of the Phipps-Reynolds Company to bestir themselves to refinance the loan or to sell the property and pay the debt. It appears that the value of the property mortgaged, together with the various collaterals, exceeds the debt due the bank. There was testimony to the effect that the First National Bank of Fayetteville, in a suit against Reynolds and wife, which was consolidated with this case caused a writ of garnishment to be served upon appellee bank (the final disposition of which was reserved by the court below in the decree from which is this appeal), and the officers of the First National Bank were told by the cashier of appellee bank that they had caught enough assets to pay both banks. But whether this estimate of value proves to be correct or not, we think the Phipps-Reynolds Company should have been advised of the intention to increase the interest rate, and that appellee is now estopped from claiming the right to charge a higher rate of interest than 8 per cent. The decree must be modified in this respect.

There is a cross-appeal involving two items. The first relates to the compensation of $200 allowed the bank for services under its appointment as trustee in the management and protection of appellant's property. But we are unable to say that the court erred in that respect.

The second item relates to the date upon and from which a credit of $22,156.37 should be allowed. The facts in relation to this credit are as follows: Reynolds inherited certain property consisting in part of 437 shares of stock in a foreign corporation. This stock was among the collateral pledged to secure the indebtedness of Phipps-Reynolds Company to the bank, and, on October 8, 1936, the stock was sold, with the consent of Reynolds, for the sum stated above. A separate account of this transaction was entered upon the books of the bank. The court allowed credit for the proceeds of this stock from the date of the sale thereof. This action is questioned, for the reason stated by the president of appellee bank as

follows: "I did not think we had the right to take it on the Phipps-Reynolds' debt without foreclosing the mortgages and fixing his (Reynolds') personal liability."

The testimony is to the effect that Reynolds was the principal owner of the business, and furnished most of the capital and the basis of credit upon which the Phipps-Reynolds Company operated. The bank received this money and kept it in lieu of the collateral the sale of which had produced it. During all this time the bank was charging 10 per cent. interest, compounded quarterly, on a larger sum. There is no reason to believe that the bank would ever have returned this money to Reynolds until its debt was paid. The money was, therefore, in effect and in fact, a payment on the debt as of October 8, 1936, as found by the court. Had Phipps-Reynolds Company paid the debt, or had it been paid by foreclosure or otherwise, it would have been a mere matter of bookkeeping to repay Reynolds. One dollar would have replaced another. This money was in the possession of the bank, and would never have been returned by the bank to Reynolds until payment of its debt had been made, and we conclude, therefore, that the chancellor was correct in allowing credit for this money upon the date on which it was received.

Upon the whole the decree of the court appears to be correct, except, for the reasons herein stated, the interest should have been calculated at 8 per cent., and not at 10 per cent., and the cause will be remanded with directions to restate the account accordingly. The interest will be computed on all the notes at eight per cent. and will be compounded quarterly at that rate on the four notes totaling $17,000 from December 1, 1932. The costs of this appeal will be assessed against appellee.

4-5347 124 S. W. 2d 209

Opinion delivered January 10, 1939.

[redacted]

James Merritt, for appellant.

Hopson & Hopson, for appellees.

McHANEY, J. Appellant is the owner of the west one-half of the southwest one-fourth of section 8, township 12 south, range 2 west with other lands in the same section, township and range, in Desha county. Appellees are the owners of the northwest one-fourth of section 17, same township and range, and the dispute between the parties arises over the location of the boundary line between their respective lands. Appellant brought this action to settle this dispute and to enjoin appellees from removing a tenant house and outhouses in the disputed strip and from interfering with his tenants. Believing himself to be the owner appellant made certain improvements on the north side of appellees' property

and, in 1934 or 1935, put a fence far enough south to enclose said improvements. In 1938, appellees had a survey made by the county surveyor, which showed the house built by appellant to be 79 feet south of the true section line between sections 8 and 17, and 81 feet east of the line between sections 17 and 18. They tore down the fence built by appellant and put it on the line established by the surveyor. They defended on the ground that they owned all the land in the northwest one-fourth of 17, and that appellant had built his fence and improvements on their land. Trial resulted in a decree for appellees, dismissing the complaint for want of equity and dissolving the temporary injunction theretofore granted. In doing so the court found that the line established by the county surveyor between sections 8 and 17 was the correct line and that appellee's fence is on this line.

In the trial appellant made some contention that appellee Snow, was wrongfully in possession of some of his land by a fence built around the north one-half of the southeast one-fourth, section 8, owned by Snow, but the court found as to this that Snow had been in adverse possession of all that was under fence for more than seven years, which the evidence established.

This appeal involves principally a question of fact. As we understand it, neither party is claiming more land than is covered by his description. Appellant acquired title to his land in 1918 and appellees in 1924. Sometime later, appellees built a fence on their land running east and west, but not on the north line. Their land extended beyond this fence and they say they left this for wood. Appellant did not undertake to inclose his land with a fence until 1934 or 1935. Believing appellant had built his fence on their land, appellees had the survey mentioned above made which the court found to be correct and we cannot say this finding is against the preponderance of the evidence.

Appellant contends that there was an agreement to settle the boundary dispute, but if so there was no mention made of it in his complaint. No joint survey was ever made and we can find no reason to reverse the decree rendered on this account.

He also contends that he has been in possession for more than seven years and has paid the taxes for more than fifteen years under § 8921 of Pope's Digest. But appellant has not been in possession for seven years. His fence was built inclosing the land in dispute in 1934 or 1935. It is true he has paid the taxes on the west one-half of southwest one-fourth of 8 for more than fifteen years, but he has never paid any taxes on the northwest one-fourth of 17,—the land of appellees. So neither the seven nor the fifteen-year statute affords him any relief.

It is further argued that the court should have allowed him judgment for improvements. In *Marlow* v. *Adams*, 24 Ark. 109, it was held that a party in possession of lands, who fails to establish his title thereto, cannot be allowed for improvements more than the value of the rents. And in *McDonald* v. *Rankin*, 92 Ark. 173, 122 S. W. 88, it was held that at common law there could be no recovery for improvements by the possessor against the true owner; that the true owner was entitled to the improvements even against a *bona fide* possessor; but that equity adopted the doctrine requiring the value of permanent improvements placed by a *bona fide* possessor to be off-set against the rents and profits, whenever the true owner applied to equity for an accounting by the possessor of the rents and profits. In this case there is no demand by appellees for rents and profits, and appellant cannot recover for his improvements. Not having color of title to the disputed strip of land he cannot claim under the betterment statute, § 4658, Pope's Digest. See, also, *Foltz* v. *Alford*, 102 Ark. 191, 143 S. W. 905, Ann. Cas. 1914A, 236.

Affirmed.

BUCHANAN *v.* BEIRNE LUMBER COMPANY.

4-5355 124 S. W. 2d 813

Opinion delivered February 6, 1939.

[redacted]

McRae & Tompkins, for appellant.

J. H. Lookadoo, for appellee.

McHaney, J. Appellant, Dr. A. S. Buchanan, is a physician and surgeon, engaged in the practice of his profession in the City of Prescott, and is the sole owner of the Cora Donnell Hospital in said city. Appellant, Miss R. C. Miller, is a registered nurse in said hospital.

On November 15, 1935, one J. N. Henley, who was, and for sometime theretofore had been, in the employ of appellee, lumber company, as a truck driver, was very seriously and horribly injured by reason of a collision between the truck he was driving for appellee and a truck driven by appellee, Rhodes. He was taken to the above named hospital, and was there treated for a long period of time by appellants as physician and nurse, and the lumber company paid the hospital, medical and nurse bills from time to time. On December 10, 1936, Henley filed suit against appellees to recover damages in the sum of $85,000 for his injuries, alleging as negligence on the part of the lumber company that it furnished him a car with defective brakes, and that Rhodes was negligent in turning his truck to the left as he, Henley, was attempting to pass, without giving any signal that he would do so. Shortly after this suit was filed the lumber company notified Dr. Buchanan that it would not be responsible for any further bills for service rendered Henley. On June 16, 1937, while said suit was still pending, Dr. Buchanan filed a claim of lien for himself and the hospital under the provisions of act 130 of 1933, in the sum of $923, and two days later, on June 18, Miss Miller filed a claim of lien under the same act in the sum of $346 for nurse hire. Thereafter, on January 3, 1938, while said suit was pending, and without notice to appellants, the lumber company settled the damage suit with Henley for $4,000 without paying appellants' claims and without securing any release thereof from them, and secured a dismissal of said suit. Immediately on learning of the settlement and dismissal of said suit, appel-

lants filed their interventions, praying that the order of dismissal be set aside as to their claims of liens and praying judgment against appellees for said amounts. The court set aside its order of dismissal and set the case for trial. On a trial thereof and at the conclusion of all the evidence, the court instructed a verdict for appellees, on the ground that Henley assumed the risk of driving the truck with defective brakes and could not have recovered from the lumber company because of that fact, and, therefore, appellants could not recover against it despite the $4,000 settlement made by it with Henley. In other words the court required appellants to assume the burden of trying Henley's case and to establish his right to recover, and having determined from the evidence that Henley could not have recovered had he tried his case, appellants could have no satisfaction, regardless of the settlement for $4,000. The case is here on appeal.

No defense was made to the action on account of any failure of appellants to comply with all the provisions of said act 130 of 1933, in the matter of properly filing claims of lien in apt time or in giving notice thereof as provided therein. The defense was and is that in order to recover, appellants must show that the lumber company was a "tortfeasor," as defined in said act. Sub-section (4) of § 1 defines that term as "a person through whose fault or neglect a person is injured." Section 2 provides: "On compliance with the provisions of this act, a practitioner, a nurse, and a hospital and each of them shall have a lien," (a) for the value of services rendered by them to a patient, "for the relief and cure of an injury suffered through the fault or neglect of someone other than the patient," (b) "on any claim, right of action, and money to which the patient is entitled because of that injury, and to costs and attorneys' fees incurred in enforcing that lien."

Section 5 of said act reads in part as follows: "A tortfeasor and an insurer, and each of them, who has been notified, as authorized by this act, of a claim of lien against such tortfeasor or insurer by reason of an in-

jury caused by the fault or neglect of a tortfeasor, shall not, within sixty (60) days after the service of such notice, nor at any time after a copy of that notice has been recorded in the office of the clerk of the circuit court of the county in which the professional, nursing, or hospital service was rendered, pay to the patient, either directly or indirectly, any money or deliver to him, either directly or indirectly, anything of value, in settlement or part settlement of the patient's claim or right of action, without having previously

"(a) paid to the practitioner, nurse, or hospital that gave notice of such claim of lien, the amount claimed under it; or

"(b) received a written release of the claim of lien from the practitioner, nurse, or hospital that gave notice of it, except as otherwise authorized by this act.

"A tortfeasor and an insurer, and either of them, that has been notified by a practitioner, nurse, or hospital of a claim of lien under this act, and who, directly or indirectly, otherwise than as is authorized by this act, pays to the patient any money or delivers to him anything of value as a settlement or compromise of the patient's claim arising out of the injury done to him, shall be liable to such practitioner, nurse, or hospital for the money value of the service rendered by such practitioner, nurse, or hospital, in an amount not in excess of the amount to which the patient was entitled from the tortfeasor or insurer because of the injury."

If the lumber company is a "tortfeasor" within the meaning of this act, then it clearly violated the provisions of this section, because it is undisputed that it paid Henley $4,000 in settlement of his claim against it, "without having previously" paid to appellants the amount of their claims; or without having received from them a written release of the claims of lien filed by them. By so doing, it became amenable to the penalty imposed by the last quoted paragraph of said section, and that is, it became liable to appellants "for the money value of the service rendered, in an amount not in excess of the

amount to which the patient was entitled from the tortfeasor because of the injury."

We think the court misconstrued this act when it required appellants to assume the burden of proving a case of liability against appellees, after a settlement had been made, or at all. If no settlement had been made and if the case had been brought to trial, then the burden of making a case would have been on the plaintiff Henley, and if he had failed, then the lien of appellants would have failed also. But by compromising and paying $4,000 to Henley, it admitted in substance and effect that it was in the wrong, was a "tortfeasor," and cannot now be heard to say to the contrary, even though it took a release absolving it from blame. That term, as used in the act, means the alleged wrongdoer. It is a descriptive term referring to the person or corporation charged with negligence, not that the lien claimant must prove that the alleged "tortfeasor" was one in fact, where a settlement has been effected. The act clearly gives a lien to appellants "on any claim, right of action, and money to which the patient is entitled because of that injury, and to costs and attorneys' fees incurred in enforcing that lien."

Now, it may be that Henley was not legally entitled to the $4,000 paid him, but the lumber company cannot be heard to say he was not, because it voluntarily paid it to him in compromise of a claim of $85,000, and appellants cannot be compelled to litigate that question. The remedial object of the statute was to prevent the very thing that has occurred in this case. It was enacted for the very humane purpose of encouraging physicians, hospitals and nurses to extend their services and facilities to indigent persons who suffer personal injuries through the negligence of another, by providing the best security available to assure compensation for services and facilities. As we view it, there is no burden placed on industry, nor does it tend to discourage settlements. The alleged "tortfeasor" may defend the action in the courts. If there is no liability to the plaintiff, the lien claimant loses his claim for services. If the case is

compromised, all the "tortfeasor" has to do is either to pay the lien claimant, or get a written release of the lien claim from him.

The act under consideration, although more elaborate, is somewhat analogous to the attorney's lien act, same being act 293 of 1909 as amended by act 326 of 1937, digested as § 668 of Pope's Digest. In *St. L., I. M. & S. Ry. Co.* v. *Hays & Ward,* 128 Ark. 471, 195 S. W. 28, it was held, among other things, that: "The section of our statute giving the lien to an attorney is remedial in character, and must be liberally construed to effectuate the purpose sought to be accomplished by its enactment." The same thing is true here. The learned trial court gave the act a very strict and strained construction, and in doing so fell into error.

Numerous cases might be cited construing the attorney's lien act before amendment, other than the Hays & Ward Case, *supra,* some of them are *Sizer* v. *Midland Valley R. R. Co.,* 141 Ark. 369, 217 S. W. 6; *Williams* v. *New England Security Co.,* 170 Ark. 139, 278 S. W. 961; *Arkansas Foundry Co.* v. *Poe,* 181 Ark. 497, 26 S. W. 2d 584; *Warren & Saline River R. R. Co.* v. *Wilson,* 185 Ark. 1063, 50 S. W. 2d 476. In *St. L. I. M. & S. Ry. Co.* v. *Kirtley & Gulley,* 120 Ark. 389, 179 S. W. 648, it was said: "This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement, and, if they have been paid over to the client, to insist that his share be ascertained and paid to him, for the defendant is estopped from saying that with notice of the lien he parted with the entire fund." One of the differences between the two acts is, that act 130 of 1933 creates a right of lien in personal injury cases only, whereas the attorney's lien act is not so limited. See *McDonald* v. *Norton,* 123 Ark. 473, 185 S. W. 791, 1199. Both acts are quite similar in purpose. Each gives to the lien claimant or lienor an absolute lien upon the patient's or client's cause of action. As said in the Sizer Case, *supra,* with reference to the attorney's lien act, "Under it the lien which the statute gives the attorney follows the cause of action throughout without interruption and attaches to that

in which the right of action is merged." The lien so given under each act cannot be evaded by a settlement. The lienee must take notice of the lien and if he settles the lawsuit without protecting the lienor, he does so at his peril. A conclusive presumption arises in case of settlement with notice of the lien that the lienee has retained in his hands a sufficient sum to satisfy the lien. It was so held in the Kirtley & Gulley Case, *supra.*

The judgment is, therefore, reversed and the cause remanded with directions to establish and enforce the lien of appellants for the amount of their respective claims, there being no dispute about their correctness and reasonableness, and to fix a reasonable fee for appellant's attorneys, in accordance with the terms of said act. It is so ordered.

HARRIS *v.* GILMORE.

4-5357 124 S. W. 2d 810

Opinion delivered February 6, 1939.

Marsh & Marsh, for appellant.

T. P. Oliver, for appellee.

MEHAFFY, J. Appellant, Ida Harris, owned certain property in El Dorado, Arkansas. On November 16, 1937, appellant filed her complaint in Union chancery court alleging that she employed and appointed appellee, J. D. Gilmore, as her agent to look after her property, collect the rent and keep the taxes paid; that he accepted said agency, took charge of the property, and has had charge ever since that time; that he had collected the sum of $120 or some other sum unknown to the appellant, and he had never accounted to her therefor; that he assumed charge of the property with the intent to defeat her of her rights and deprive her of title; he, learning that said property had forfeited for taxes and been sold to the State of Arkansas, without advising appellant, obtained a deed from the Commissioner of State Lands, and is now claiming to be the owner.

Appellee filed answer denying that appellant ever placed the property in his hands; denied that he had ever collected any rent or that it was his duty to redeem the property from the tax sale. He admitted that he applied to the Commissioner of State Lands and paid $29.75 and received a deed on October 27, 1936; admits that he never accounted to appellant, and alleges that after he secured the deed he made improvements on the property amounting to $388.90.

The appellant, Ida Harris, testified in substance that she lived in Overton, Texas; that prior to moving there she lived at 907 Raymond Street, on lot 2, block 2, McHenry's revised addition; that she went to Texas in 1931, and came back in January, 1936, to get someone to look after her property, because her brother, who had been living on it, had died in the fall of 1935, and that she got appellee, J. D. Gilmore, to look after the property. He was to look after the property, rent it for $5 per month, and he was to receive one-half of the rent; her brother had been living in her house, and it was not rented at the time he died, and when he died she had no one to look after it, and she employed Gilmore as her

agent; after her brother died she came back and made the contract with Gilmore; she told him to pay the taxes and collect the rent; she failed to pay the taxes in 1935 and 1936, but paid them in 1934; she wrote Gilmore after she had turned the property over to him inquirin about it, but he did not answer the letter and did not tell her that the taxes were delinquent; she found that out by her daughter writing her; she wrote him a month or two after she turned the property over to him in 1936; she then wrote to C. E. Love, county clerk, and he wrote her about the taxes; when she received this letter she knew the taxes were delinquent for 1932. She then wrote to Mr. Otis Page wanting to redeem the property and received a letter from him stating that Gilmore had purchased it; that is the way she found out Gilmore had a deed; the taxes were not delinquent when she left here, but were delinquent for 1932.

Velma Goodwin testified that she lives in El Dorado; knew Ida Harris and J. D. Gilmore and heard their conversation in January, 1935, about Gilmore looking after the property; she was with Ida Harris and had started to see Gilmore and passed him, and Ida Harris called him and asked him to look after her property, rent the house, and if anything went wrong to let her know; Gilmore was to have half of the rent; Gilmore agreed to this.

J. D. Gilmore, the appellee, testified that he never had a conversation with Ida Harris about the property; did not collect any rents for her; that he put Dismuke in the house in November, 1936; that Dismuke asked who owned the house, and he told him that at present he, Gilmore, had a state deed to it; that Ida Harris used to own it, and that it was all right for him to live in it. The deed to Gilmore was introduced in evidence. Dismuke lived there quite a while. Ida Harris wrote him a letter in May, 1937, that she heard he was repairing the house.

He was asked when was the first time he knew this lot in controversy had been forfeited for taxes; he said he did not know it until he went to pay his taxes and found it was delinquent; and had to get the clerk to get it straight; she showed him where the land had gone

delinquent, and told him that if he wanted to buy it, then was the time. He wrote to Little Rock and got the deed. The first tenant he placed on the property was Roberta Sherer, who lived on it before Dismuke; Ida Harris gave her permission to move in; he told Dismuke that Ida Harris had owned the place, but he now owned a deed to it.

Dismuke testified that he approached Gilmore for permission to move into the property in November, 1936; that Gilmore told him the property belonged to Ida Harris, and that Dismuke stayed there from November to May, and the house was in such condition that he would not pay rent and Gilmore would not repair it; Gilmore told him he would have to pay rent or move out, and Dismuke made some repairs on the house himself. Gilmore told him when he moved in that it was Ida Harris' property. When he moved out Gilmore showed him the deed, but did not show it to him when he moved in.

Roberta Sherer testified that while she lived in the house in the spring of 1934 Ida Harris came and asked her if she would stay until she came back without rent; no one was with Ida Harris, but Mary Swarn was with witness; she stayed until the house got so bad she had to move out.

Mary Swarn testified that Roberta Sherer moved into the house in 1934 and stayed there until 1936.

Ida Harris testified that she was not here in 1934, and that her brother had charge of the property.

On March 30, 1938, a decree was entered as follows:

"On this the 30th day of March, 1938, this cause coming on to be heard, the same having been continued from Wednesday, March 23rd, the plaintiff being represented by N. C. Marsh, Jr., and the defendant being represented by T. P. Oliver, trial is resumed, the testimony of witnesses continued and completed, the court being well and sufficiently advised, doth decree for plaintiff for property charged with four hundred eighteen and 75/100 ($418.75) dollars improvements, less rent at five and no/100 ($5) dollars per month to date of improvements and six and no/100 ($6) dollars since the date of improvements, said property being lot two, block two,

McHenry's Revised Addition to the City of El Dorado, Union county, Arkansas, that said property be charged with improvements thereon in the sum of four hundred eighteen and 75/100 ($418.75) dollars, less rent at five and no/100 ($5) dollars per month to date of said improvements and six and no/100 ($6) dollars since the date of improvements."

Thereafter appellee filed motion for a decree *nunc pro tunc.* The court then, on June 1, 1938, entered a decree restoring the property to the appellant, but giving the appellee a lien on the property for the amount of improvements he had put on there, less the rent.

The appellant excepted and prayed an appeal to the Supreme Court, which was granted.

The appellee states that the only question involved in this case is whether or not the appellee is entitled to recover for certain improvements made on the property. He does not argue that the court erred in decreeing the property to appellant and does not appeal from that decree. The court necessarily found that appellee was the agent of appellant, and this finding is supported by a preponderance of the evidence.

Appellee relies on § 13884 of Pope's Digest which is as follows: "No purchaser of any land, town or city lot, nor any person claiming under him, shall be entitled to any compensation for any improvements which he shall make on such land, town or city lot, within two years from and after the sale thereof; for improvements made after two years from the date of sale the purchaser shall be allowed the full cash value of such improvements, and the same shall be a charge upon said land."

Appellee calls attention to a number of authorities construing this statute, some of them holding that the purchaser is entitled to recover improvements irrespective of his belief in the integrity of his tax title and regardless of color of title as reflected by his deed.

We do not review the authorities construing this statute for the reason that they have no application to the facts in this case.

In the cases referred to by counsel, there was no question of fraud or agency involved. In the instant case, the appellee was the agent of the appellant to look after the property, rent it, and pay the taxes. He ascertained that the property had forfeited for the nonpayment of taxes, and he purchased it.

We said in a recent case: "Every one, whether designated agent, trustee, servant or what not, under contract or other legal obligation to represent and act for another in any particular business or line of business or for any valuable purpose must be loyal and faithful to the interests of such other person in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to that of his principal. 'This is a rule of common sense and honesty, as well as of law.' In 21 R. C. L. 825, it is also said: 'He may not use any information that he may have acquired by reason of his employment, either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest.' See also, *Houston Rice Co.* v. *Reeves,* 179 Ark. 700, 17 S. W. 2d 884; *Dudney* v. *Wilson,* 180 Ark. 416, 21 S. W. 2d 615, where the court quoted with approval from *Trice* v. *Comstock,* 121 F. 620, 61 L. R. A. 176, the following: 'Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquired through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principal to accomplish the purpose for which the agency was established.' See, also, 2 C. J. 692," and *Lybarger* v. *Lieblong,* 186 Ark. 913, 56 S. W. 2d 760.

In the instant case it was the duty of appellee to pay the taxes, and the land forfeited for nonpayment of taxes after appellant moved to Texas, and the appellee purchased from the state. He could not have acquired any interest in the land adverse to appellant's interest, but his purchase was necessarily for the benefit of the principal, and all that he would be entitled to would be to be reimbursed in the amount he paid for the title.

"Also, the agent will not be permitted to acquire for his own use or benefit outstanding claims or liens which are held against the principal's property, and he will not be allowed, where he is employed to compromise or settle claims against his principal, to purchase the claim involved for himself and enforce them against his principal. An agent found guilty of a breach of duty in this respect will be regarded as holding his newly-acquired interests as trustee for the principal, since all rights, title, or interests inure to the benefit of the principal, and the agent may be compelled to transfer them to the latter, and to account for all benefits and profits gained thereby." 3 C. J. S., p. 13, § 140.

In the absence of the principal's knowledge and consent, an agent in charge of lands or property of the principal cannot purchase and obtain a valid tax title to such land at tax sale. 3 C. J. S. p. 14, § 140.

An agent or trustee cannot purchase the property of his principal which has been confided to his care, and if he discovers a defect in the title of his principal, he cannot use his discovery to acquire title for himself. *Rogers* v. *Lockett,* 28 Ark. 290; *Huffman* v. *Henderson Co.,* 186 Ark. 792, 56 S. W. 2d 176; *Wright* v. *Davis,* 195 Ark. 292, 111 S. W. 2d 565; *Collins* v. *Rainey,* 42 Ark. 531.

The decree of the chancery court awarding the property in controversy to the appellant is affirmed. The appellee is entitled to the amount paid for the tax title, but this is offset by the use and benefit of the property, and therefore the decree awarding judgment for improvements is reversed, and the cause of action for improvements is dismissed.

LOVETT *v.* LOVETT.

4-5356 124 S. W. 2d 831

Opinion delivered February 6, 1939.

S. W. Woods, for appellant.

W. S. Walker, John H. Shouse, J. Loyd Shouse, for appellee.

Baker, J. This suit was instituted by the appellant to procure a divorce upon the alleged grounds of personal indignities. There is a voluminous record in this case and upon a full and complete examination of it we think the appellant has established, by a preponderance of the evidence, his action against the defendant, and that he is entitled to a decree of divorce on account of personal indignities suffered. The record discloses a series of charges or allegations made by the appellee against the appellant of misconduct most of which were not even supported by her own testimony. The most serious of which, when considered in the light of all the facts developed, turn out to be perversions, if not intentional misstatements of facts. There are baseless conclusions and unjustified suspicions all of which were continuously asserted, and persistently pursued beyond all reasonable bounds, and to us it appears that the only hope of relief is a divorce making the separation permanent.

By way of explanation it may be said that appellant and appellee were hard working people and frugal in their habits. They were home-owners, and as they approached middle-age they were able to have and enjoy more than the ordinary comforts, if not luxuries of life. Their associates were people of the same type, who likewise were able to possess and enjoy the finer things of our modern civilization. They too had, by their own industry and management, accumlated their own family fortunes. Though the exigencies of the times separated the members of this prosperous community, they were

able to visit back and forth between points in the extreme west, and their old home where nearly all of them were born and reared. At this period of middle life, for nearly everyone mentioned or involved in this unusual, but sad denouement had reached that age, the appellee began to make charges of improper conduct of her husband, the appellant, and several of these married women with whom they had always associated upon equal social terms. The unfounded jealousies led on to baseless charges, so tainted with suggestions of improprieties and lustful implications as to become a general and continuous disturbing matter in family life. If appellant and appellee were alone the affected parties, there would be perhaps a modicum of reason to set out particulars. But since there are a number of women whose names appear in this record whose embarrassment by such a discussion would be inexcusable, we must refrain from setting forth details.

Let it be said as conclusive of all controversies that good women who have helped to build the family fortunes, mothers of children in their young manhood and womanhood, are not to be recklessly charged with even indiscretions. They are the salt of the earth.

We refuse to believe these baseless charges affecting so many who have always, except for those insinuations, lived untouched by rumor and gossip.

It must now be sufficient to say in this case that unless we are willing to believe that all the women with whom the appellant and appellee associated for the several years that they lived together were either immoral, or so indiscreet that their conduct took on the appearance of immorality, then we are forced to conclude that appellee's consistent and habitual accusations were wholly unjustified, that they were cruel, meant to harass and annoy and to bring about the natural results that ensued—a separation.

It follows the trial court should have granted appellant a decree of divorce.

The parties to this litigation have practically settled for themselves their property rights. The respective

properties upon which each has lived for the last two or three years are occupied and held by them as separate possessions; the appellee lives upon property in town which she says was bought by their partnership funds and which was improved by their joint labors and by funds which they had accumulated therefrom. This was conveyed to her as her individual property. The farm upon which the appellant lives was considered by them as being approximately of the same value as the city or town home, and he has had the exclusive control thereof, together with the rents and profits therefrom since the separation. It was agreed between them at one time that another or smaller farm, upon which neither lived, would be sold and the proceeds be divided. This agreement, no doubt, would have been enforced, had a decree of divorce been granted. It is, perhaps, a settlement as favorable to the appellee as she could insist upon and more than has been yielded to her by the decree of the Chancellor in which she was the successful party.

On account of the property involved, this cause is remanded to the chancery court, with directions to grant a decree of divorce to the appellant, and, further, if appellant and appellee are unable to make any other or preferred settlement as to property rights, to confirm title of each in the property occupied by them respectively and to partition, by sale, the other piece of property by the appointment of a commissioner, and after the sale and payment of expenses of this litigation not already paid, to divide equally between them proceeds therefrom.

MEYER *v.* EICHENBAUM, EXECUTOR.

4-5361 124 S. W. 2d 830

Opinion delivered February 6, 1939.

Jay M. Rowland, for appellant.

Murphy & Wood and *E. Chas. Eichenbaum,* for appellee.

BAKER, J. The appellant filed his suit in the chancery court of Garland county, seeking the construction of a will made by his father, and, upon a determination of the issues against his contentions, this appeal has been prayed.

It may be said in the beginning of our discussion of this case that apparently the appellant has assumed that it is the duty of the appellate court to explore the record and to determine from such exploration if there are errors to justify interference. Such is not the rule. The appellant has the burden, that may not be evaded, of showing that there is error, or an affirmance should follow.

In this case appellant presents a portion of paragraph seven of the will and asks for our construction or interpretation of that part of the will, without showing its connection with any other portion of it. In fact, from appellant's abstract we cannot determine whether there is anything else in the will. That portion presented is as follows:

"The trustee is specifically authorized to make a loan, or to purchase outstanding notes thereon and received the assignment thereof, upon the brick building at Chapel and Central avenues, Hot Springs, Arkansas,

of which my son-in-law, David Lockwood, is part owner, in the event that such loan is made thereon, interest notes at the rate of six (6) per cent. per annum, and payable monthly, shall be executed on such advance, one-half of the proceeds of said notes to accrue directly to my son, Harry Meyer, and the other one-half (½) of the proceeds of said note to accrue directly to my daughter, Flora Lockwood; in order to insure the prompt payment thereof, my trustee is authorized and directed to take a mortgage on said building, in accordance with the usual practice at law, said mortgage, however, shall be renewable from term to term thereof by the mortgagee at his option, and with the concurrence of the trustee."

The interpretation or construction that appellant places upon this portion of the will is that the word "proceeds," as it appears in the above-quoted portion must be taken to mean the entire amount of the notes executed as evidence of the money loaned. The rule is that in the construction of wills all parts of it must be construed together, and that construction must be given which will harmonize one part with another when susceptible of such construction. Appellee has set forth a additional portion of the will which seems to be to the effect that it was the intention of the testator to create a trust estate, and that his wife would be supported by the income or proceeds therefrom; that from this trust estate a loan was to be made upon certain property in Hot Springs, to the son-in-law of the testator and from the proceeds of this loan the wife, one of the beneficiaries in the will, was to be supported during her lifetime, and upon her death these proceeds, or income from this loan should be divided according to the provisions of the will in which division the appellant would receive 50 per cent. The appellee does not set out the whole will, but has set out that part of the same to indicate very clearly, we think, that appellant's contention, as to that portion of the will copied by him, is not the correct one. Numerous authorities are cited to show that in testamentary matters the word "proceeds" has frequently been held to indicate income or interest, and, no doubt, it is sus-

ceptible of that meaning and should have that interpretation when the context justifies it and, no doubt, only in those cases in which the context indicates a different idea or meaning, should it be given that construction or interpretation.

These remarks are not made by way of interpretation of the will or of any part of it, but more nearly by way of speculation as clearly indicating that appellant may not insist upon a particular construction or interpretation from the meager portion above copied. Some of the authorities in regard to the interpretation of the word "proceeds" in testamentary matters are as follows: Appeal of Roberts, 92 Pa. 407; Appeal of Thompson, 89 Pa. 36; *Hunt* v. *Williams,* 126 Ind. 493, 26 N. E. 177; *Browning* v. *Ashbrook's, Executor,* 175 Ky. 755, 195 S. W. 105. Many other authorities are to the same effect.

The foregoing indicate pretty clearly that the trial court may have properly given the interpretation or construction of the portion of the will in controversy, and for that reason the case should be affirmed.

It is also clear that there has been omitted by the appellant and not supplied by the appellee the larger part of the will, a stipulation as to the facts, the pleadings, nor is there set forth in this abstract, upon appeal, any statement of the effect of the decree of the trial court, except that it is against the contention of the appellant.

For all these reasons we are impelled to hold there is no error shown. Upon failure to abstract the record under rule 9, the case should be affirmed. It is, therefore, so ordered.

PATTON *v.* RANDOLPH.

4-5354 124 S. W. 2d 823

Opinion delivered February 6, 1939.

Daggett & Daggett, for appellant.

R. D. Smith and *R. D. Smith, Jr.,* for appellee.

SMITH, J. Appellee, Joseph Randolph, brought this suit to cancel a deed which he had executed to appellant, Ida E. Patton, his foster sister. In the decree, from which is this appeal, granting the relief prayed, the following findings of fact are recited.

Randolph owed Payne Brothers the sum of $513.63, which was secured by a mortgage on a forty-acre tract of land which he owned. Appellee, Randolph, became ill, and was carried to his sister's home, and while there told her that he had been unsuccessful in his attempts to borrow money to pay Payne Brothers. Appellee applied to B. C. Pouncey for a loan on the land already mortgaged to Payne Brothers, which Pouncey declined to make unless the title was in appellant, whereupon the land was conveyed to appellant by appellee for the purpose of procuring the loan. It was then orally agreed between appellant and appellee that the land should be rented by appellant and the rents applied to the payment of the

money to be advanced by Pouncey, and when that indebtedness had been paid the land should be reconveyed to appellee. In reliance upon this agreement, and the confidence he reposed in his foster sister, appellee conveyed the land to her. Rents were collected by appellant for the years 1935, 1936, 1937 and 1938, in an amount sufficient to pay Pouncey, that indebtedness being evidenced by a mortgage which appellant gave Pouncey on the land, the debt to Payne Brothers having been paid when the loan from Pouncey was obtained.

Pouncey testified that he had no intimation that the deed from appellee to appellant was not an absolute conveyance, as it purported to be. He further testified: "Later on, about two years ago, he (Randolph) came to me and asked me, 'Have I got any interest in this property?' I said: 'No, you gave Ida Patton a deed.' He said the only reason he wanted to know about it was that he wanted to get a pension, and if he owned any property he could not get it, and he was glad to know that he did not."

There was no finding, nor was there any testimony tending to show, that any fraud or improper influence was exercised upon appellee to induce him to execute the deed. He executed the deed in reliance upon his sister's promise to reconvey the land to him when she had collected enough rent to pay the debt to Payne Brothers, and that collection has been made. The land was shown to be worth about $2,000. The testimony that appellant received the deed to the land from appellee upon the condition that it should be reconveyed when the Payne Brothers debt was paid is sharply controverted, but we accept that finding of the chancellor as being sufficiently established. However, the only fraud alleged or shown was that appellant did not keep faith with her brother, and fraudulently failed to reconvey the land to him. No attempt was made to show when this fraudulent purpose was conceived.

The opinion in the case of *Holt* v. *Moore,* 37 Ark. 145, appears to be decisive of the issue here raised. It was there said: "A parol promise to reconvey, where the sale is absolute, comes within the statute of frauds. The

agreement must be in writing. Parol evidence may be introduced to show that a deed, absolute on its face, is indeed only, as between the parties, a mortgage when a subsisting debt remains to support it. But where there is no remaining debt due to the vendee, where the consideration has passed, or the obligation to pay it has been incurred and there is no obligation of the vendor to repurchase we know of no case where it has held that this option may be retained by parol agreement, any more than a right to make an original purchase at a future time. The equity doctrine for showing by parol that a deed was in fact a mortgage has never been extended so far, and indeed could not be without opening the flood gates of perjury in a country where property so often and unexpectedly increases in value with startling rapidity. Nevertheless, the use of such a promise in overreaching a weak or ignorant mind might become an element of fraud to be considered in connection with other circumstances."

The deed here in question is an ordinary warranty deed. No debt subsisted between the grantor and grantee. No fraud was practiced in procuring its execution. The acknowledgment was taken by A. L. Waring, the president of the Bank of Hughes, who knew and was known to both parties. That official testified that appellee had discussed with him the execution of the deed both before and at the time of its execution, and appellee knew perfectly well that its purpose and effect was to convey the land to his sister.

It may be said of the testimony in this case, as was said of the testimony in the case of *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848, that "There is no testimony that he acquired the title by any intentionally false or fraudulent promise, so that it could be said that a trust *ex maleficio* arose from the transaction. To create such a trust, the mere verbal promise and its breach is not sufficient. There must be some element of fraud practiced whereby the execution of the deed is induced; and in the case at bar there is not a tittle of testimony indicating that any such fraud was practiced by the hus-

band upon the wife in obtaining this deed. 3 Pomeroy, Equity Jurisprudence, § 1056."

In the case of *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910, after quoting from § 1056 of Pomeroy's Equity (the same section cited in the Spradling Case from which we have just quoted) a statement of the law to the effect that a trust *ex maleficio* occurs whenever a person acquires the legal title to land by means of an intentionally false and fraudulent verbal promise to hold the land for a certain specified purpose, and, having thus fraudulently obtained the title, retains, uses and claims the property absolutely as his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit, Justice RIDDICK added: "There must, of course, in such cases be an element of positive fraud by means of which the legal title is wrongfully acquired, for, if there was only a mere parol promise, the statute of frauds would apply."

It may be said that there is lacking here any testimony of positive fraud, by means of which the legal title was wrongfully acquired, and the testimony shows only a mere parol promise to reconvey.

In the case of *Tatge* v. *Tatge,* 34 Minn. 272, 25 N. W. 596, it was held by the Supreme Court of Minnesota, in an opinion by Judge MITCHELL, that the mere refusal to perform a verbal agreement, void under the statute because not in writing, is not fraud for which a court will declare and enforce a constructive trust. There was an additional opinion in that case, also written by Judge MITCHELL, disposing of a petition for rehearing. 26 N. W. 121. This additional opinion recited that a reargument was asked, upon the ground that the court had overlooked the point that the evidence conclusively showed that when Mrs. Tatge, the grantee in the deed attacked, made the promise to reconvey, she did not intend to fulfill it, and that this amounted to actual fraud, which constituted Mrs. Tatge a trustee *ex maleficio.* In disposing of this contention it was there said: "Now the authorities are uniform that a mere refusal to perform a verbal promise, void under the statute, is no ground for relief on the ground of fraud. This is so for the manifest rea-

son that if a party chooses to go outside of the law, and trust to the honor of another, he must take the consequence of his misplaced confidence; and, in such a case, we fail to see how it can make any difference whether the promisor did or did not at the time intend to fulfill the promises. The case is obviously different where there has been some concealment or misrepresentation of facts or of the real nature of the transaction, or some oppression, intimidation, undue influence, or the like, by means of which a party has been deceived or entrapped into making the conveyance. But, notwithstanding certain loose remarks in some of the cases, we find no well-considered case which holds that the *mere intention* not to perform will, in and of itself alone, furnish a ground for relief on the ground of fraud. Take the somewhat analogous case where goods are sold on the faith of a verbal guaranty, it has never been contended that relief should be given on the ground of fraud because the guarantor did not intend to perform his guaranty, his design being merely to induce the vendor to part with his goods, and then escape liability under cover of the statute. See 1 Lead. Cas. Eq. 358."

The case of *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88, is relied upon to sustain the decree from which is this appeal. There a trust was impressed upon lands which had been conveyed by a deed absolute in form, upon the showing made that the purpose of the deed was to create a trust for a specific purpose. There the grantors conveyed to Monroe Armstrong, their elder brother, to enable Monroe to borrow money to discharge a mortgage placed upon the lands by their ancestor. The opinion recites that "The appellees (grantors) are ignorant negroes, some of them almost imbeciles, and their testimony as to their knowledge of Monroe's intention is neither clear nor definite, but, as Monroe was the elder brother, apparently the most intelligent, and in whom they had trust and confidence, the chancellor might have reasonably concluded that they did not realize the intention of Monroe until he made a conveyance of the timber standing upon the land, . . ."

Here, there is no question about appellee's intelligence. He appears to have been as canny as he was uncandid. Notwithstanding the fact that he alleged in his complaint, and his original testimony was to the effect, that he did not know that he had executed a deed but thought he had executed a will, his deposition shows that he possessed, at least, average intelligence, and we have no doubt, as Mr. Waring testified, that appellee knew exactly what he was doing when he executed the deed, and we are convinced also that no fraud, duress or deception was practiced upon him to induce its execution. His own and other testimony in his behalf establishes only the fact that he conveyed the land to his sister in reliance upon her verbal promise to reconvey to him when his mortgage debt had been paid, and, as was said by Justice FRAUENTHAL in the case of *Spradling* v. *Spradling, supra,* this verbal promise, and its breach, is not sufficient, alone, to create a trust *ex maleficio.*

The decree of the court below, canceling the deed from appellee to appellant, must, therefore, be reversed, and the cause will be remanded with directions to dismiss the complaint as being without equity.

HILL, RECEIVER, *v.* CALDARERA.

4-5365 124 S. W. 2d 825

Opinion delivered February 6, 1939.

Barber & Henry, for appellant.

Edward Bennett, for appellee.

GRIFFIN SMITH, C. J. The question is whether a receiver for an insolvent foreign corporation is entitled to certain funds in preference to an attaching creditor.

Stipulation of counsel shows issuance to appellees of a policy of automobile liability insurance by Republic Underwriters; damages; adjudication of insolvency March 30, 1938, by a Texas district court and appointment of Curtis E. Hill as receiver; appellees' suit against Republic Underwriters, with garnishment of insurance company funds in a Little Rock bank; the bank's answer showing $502.50 on deposit; appointment (by the Pulaski circuit court, April 18, 1938) of Willis V. Lewis as ancillary receiver in Arkansas; intervention of Lewis, filed the day he was appointed; intervention (May 7, 1938) of Curtis E. Hill. It was further stipulated that claims of Arkansas creditors of Republic Underwriters amounted to $14,000.

Counsel agree that § 7608 of Pope's Digest[1] is the applicable statute, and that, in effect, garnishment is attachment. In the instant case the writ was served April 1, 1938.

Since it is the duty of a receiver to intervene where the insolvent debtor's property . . . "has, within ten days before the filing of such petition, been attached," . . . and since Hill was appointed in Texas prior to garnishment, and the appointment and intervention of Lewis were more than ten days subsequent to garnish-

[1] Pope's Digest, § 7608: "The receiver shall intervene in every case in which the property of such insolvent debtor has, within ten days before the filing of such petition, been attached, and, upon such receiver's motion, every such attachment shall be dissolved, and the attached property shall be turned over to such receiver upon the payment by the receiver of all costs which shall have accrued in the attachment suit."

ment, appellants, if they are to prevail, must look to the intervention of Hill, whose appointment predated service of the writ.

Appellants insist that . . . "in any case in which a receiver is appointed by a court of competent jurisdiction within ten days from the running of an attachment or garnishment upon the assets or funds of an insolvent, that receiver has the right to intervene" . . . and secure a dismissal of the lien.[2]

It is urged by appellants that the case at bar is ruled by *Standard Lumber Company* v. *Henry,* 189 Ark. 513, 74 S. W. 2d 226, where it was held that the attachment statute was applicable to foreign corporations.[3] It is true the opinion holds that foreign corporations are included, but it is also said that assets of such corporations were rightfully determined . . . "as belonging to the state receivership for administration and distribution by the court of this state; and, after paying cost of administration in this state, so much of the balance as may be necessary should be distributed to creditors in this state *pro rata* according to law or the rules and usages of equity courts, and any balance remaining should be paid to the domiciliary receivership."

[2] It is argued by appellants that "The statute was never intended to mean, and does not mean, that the receiver *must file his intervention within ten days from the levying of the attachment or the garnishment,* but it does mean that the receiver has the right to intervene and secure a dismissal of the lien if and provided that receivership is decreed by the court within ten days from the running of the attachment or garnishment. That this construction of the statute is a true and correct interpretation of it will clearly appear by reading § 7607, Pope's Digest, and noting that the 'petition' referred to is the petition filed by the insolvent, and in reading § 7608, the 'petition' likewise refers to the *insolvent's* petition, and not to any petition to be filed by the receiver."

[3] In the Henry Case rights of attaching creditors of an insolvent foreign corporation and a receiver appointed in this state were involved. A part of the opinion is: "Neither can we agree that as a sequence of this view the assets of a foreign corporation in the hands of a state receiver must pass from this state to the state of the domicile of the foreign corporation for administration and distribution. It is well settled by authority that a foreign receivership can not divest the possession and control of property situated in this state

In the Henry Case the first writ of garnishment was served May 11. A second writ was served May 15; and on May 16 the ancillary receiver was appointed. Inasmuch as the opinion does not show when the receiver intervened, we must assume that the question was not controlling.

Clearly, the Arkansas statute authorizes a receiver to intervene in all cases where property of the insolvent debtor has been attached, if such action is taken within ten days following the filing of the insolvency petition. If the petition contemplated by the statute is the petition filed in the Texas district court, appellants are correct in their contention that the actions of Hill and Lewis relate back to March 30, 1938, and the attached fund should be released.

This construction, however, is not sustained by the cases. The rule seems to be that where citizens of a state, who are creditors of a non-resident, or a foreign corporation, have instituted proceedings in attachment, and have acquired liens upon property in the state of their residence, receivers appointed in the domiciliary state will not be allowed to deprive such creditors of their rights, and the courts will protect the lien acquired by their own citizens, in preference to the claim or right asserted by the foreign receiver.[4] We have held that, under our laws, creditors of this state can sue out orders of attachment and writs of garnishment against a non-resident or a foreign corporation, and cause the same to be levied upon property in this state, and subject the same to sale, and . . . "No receiver of the non-resident or foreign corporation appointed in another state can defend the attachment by garnishment levied or served before he acquired possession, by virtue of rights acquired solely by his appointment and qualification. No consideration of comity will induce the courts to

as against the rights of the citizen creditors of this state. No rule of comity is breached by enforcing our own laws in preference to the laws of other states. *Choctaw C. & M. Co.* v. *Williams-Echols Dry Goods Co.*, 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569, and authorities there cited."

[4] High on Receivers, Third Edition, § 47.

prefer him to the creditors; but they will enforce the claims of our own citizens in preference to the orders of the courts of another state."[5]

It is said in 53 Corpus Juris, § 675, that an ancillary receivership . . . "is not a mere continuance of or incident to a suit in which a primary receiver is appointed; the two proceedings are independent, and the original and ancillary receivers are to be treated as different legal persons."

In *Standard Bonded Warehouse Co.* v. *Cooper and Griffin, Inc.*, 30 F. 2d 842, in opinion written by Judge HAYES of the district court for the western district of North Carolina, there is the following declaration of the law: "The defendant contends that the appointment of the ancillary receivers by this court on the 10th of October, 1928, had the effect of recognizing the appointment of the receivers by the district court of South Carolina, . . . and that, when these ancillary receivers were appointed here, this appointment had the effect of dating back and taking effect as of August 25th; but the court is of the opinion that the lien acquired by the plaintiff by virtue of his attachment could not be divested by any such method."

It is our view that the lien secured under the garnishment was not divested by intervention of the appellants, more than ten days having elapsed between creation of the lien and intervention of the receivers, or either of them.

In dealing with the rights of appellees, the litigation will be treated as though the petition mentioned in the statute was filed when the ancillary receiver Lewis was

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[5] *Choctaw Coal & Mining Co.* v. *Williams-Echols Dry Goods Co.*, 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569; *Holbrook* v. *Ford*, 153 Ill. 633, 39 N. E. 1091, 27 L. R. A. 324, 46 Am. St. Rep. 917; *Humphreys* v. *Hopkins*, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76; *Catlin* v. *Wilcox Silver Plate Co.*, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; *Zacher* v. *Fidelity Trust & S. V. Co.*, 106 Fed. Rep. 593; *Taylor* v. *Columbian Ins. Co.*, 14 Allen 353; *Hunt* v. *Columbian Insurance Co.*, 55 Me. 290, 92 Am. Rep. 592; *Gilman* v. *Ketcham*, 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899; *Willitts* v. *Wait*, 25 N. Y. 577; *Smead* v. *Chandler*, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353, 23 R. C. L., p. 144, § 153.

appointed; at which time the right to have the garnishment proceedings dismissed had been lost.

Affirmed.

SMITH, J., dissents.

UNITED STATES OF AMERICA *v.* MOORE.

4-5348 124 S. W. 2d 807

Opinion delivered February 6, 1939.

Golden W. Bell, Clinton R. Barry, Duke Frederick and *John E. Harris,* for appellant.

Minor Pipkin, Robert L. Rogers and *Osro Cobb,* for appellees.

HOLT, J. Annie Moore, appellee, began this action in the Polk chancery court against Olen R. Wood, administrator, with the will annexed, of the Estate of T. A. Beck, deceased, for the recovery of certain property in his hands as such administrator. Appellee's claim to said property was based upon an alleged oral gift to her by the said T. A. Beck, shortly before his death,

and which he held as legatee under the will of his wife, Lizzie Beck, who pre-deceased him by five days. The administrator interposed a general denial of all allegations in appellee's complaint, and appellant, United States of America, intervened in the suit claiming the property on the ground that it was designated as the sole beneficiary under the last will and testament of T. A. Beck, deceased, and under its terms intervener claims to be the equitable owner of the property set out in appellee's complaint, and of which the said T. A. Beck died seized and possessed subject only to his debts.

T. A. Beck and Lizzie Beck were husband and wife, T. A. Beck being the older by several years. No children were born to their marriage and neither had been married before, hence they died childless. The nearest of kin to each at the time of their deaths were certain nieces, appellee being the niece of T. A. Beck. In 1912, T. A. Beck executed a will giving all his property at his death to his wife, Lizzie, in fee. In 1930, Lizzie Beck made her will leaving her property to her husband as sole legatee in fee. In 1935, both executed codicils to their wills providing that if any of the property so willed to the other remained in his, or her, hands unused or unexpended at the time of the death of the other, such property should be paid over and delivered to the United States Government to be expended in such manner as the laws of the Government provided. Lizzie Beck died on the 27th day of January, 1937, and T. A. Beck died five days later. Trial of the cause resulted in a decree in favor of appellee from which appellant has appealed to this court. The administrator took no appeal.

The material portions of the will of Lizzie Beck are: . . . "I do give, devise and bequeath to my husband, T. A. Beck, all the rest and residue of my estate, both real and personal, of whatsoever kind wheresoever located of which I may die seized and possessed for his own proper use and benefit and to be owned, controlled and disposed of by him as he may desire to do", and in the codicil: . . . "I further will and direct that at the death of my said husband, T. A. Beck, that whatever of

my estate of every kind and nature which shall remain unused or unexpended by him, shall be paid over and delivered to the Government of the United States to be expended by the United States in any way or manner authorized by the laws of the United States."

Appellant very earnestly insists here that the trial court erred in two respects: 1. In refusing to hold that the will of Lizzie Beck, as modified by the codicil thereto, restricted the use of the property of T. A. Beck, which passed to him as beneficiary thereunder, to his own needs and did not give him unrestricted power to dispose of any of said property for any other purpose. 2. In refusing to hold that T. A. Beck was without power or authority to make a gift of any of such property to appellee or to anyone else and that no valid gift was made.

The view that we take of this case makes it necessary for us to consider the first assignment only. This case clearly turns upon the construction and interpretation of the above provisions of the will of Lizzie Beck. We think the comparatively recent case of *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. 2d 287, controls here. In that case the testator in 1896 willed all of his property in fee to his wife (they having no children), as his sole beneficiary, the will providing: "I give, devise and bequeath to my beloved wife, Jean H. Coffman, all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my death." In 1923, he added the following codicil to his will: "It is my will that all property left by me to my wife which has not been used or expended by her during her lifetime be donated and turned over to the City Hospital of Little Rock as a memorial to her and to me and to be used by the management of said hospital in such manner as they may deem to the best interest of same." It will be noted that these provisions in the Coffman will are almost identical with those above set out in the will of Lizzie Beck in the instant case. We think that there can be no material difference in their interpretation and the effect that should

be given them. The reasoning in the Lenon Case, *supra,* is so applicable to the instant case that we shall quote liberally from it.

Beginning on page 462 in the opinion, this court said: "We are all agreed that by the original will of Judge Coffman, his widow, Jean H. Coffman, would have acquired fee simple title to all his property, had he not later executed the above codicil. We are also agreed that the codicil did not limit her power to use, expend, sell, convey or otherwise dispose of the property in her lifetime left her by his will. The difficulty of the writer has been to determine what effect the codicil had on the property left by him which had 'not been used or expended by her.' The majority hold that while the estate conveyed to her in the original will was the fee, the effect of the codicil was to convert the fee originally granted into a life estate with full power of disposition, and that, if any part of the estate devised to her remained unused or unexpended at her death, it thereupon passed as directed in the codicil. Some courts hold that a life estate, coupled with unlimited power of disposition, is equivalent to a fee simple title. The great weight of authority, however, including this court, supports the rule that a life estate may be created, coupled with power of disposition, and that such power does not change the life estate into a fee for the reason that the power of disposition is not in itself an estate, but is an authority so to do derived from the will. See 17 R. C. L., p. 624, § 13. We so held in *Archer* v. *Palmer,* 112 Ark. 527, 166 S. W. 99, Ann. Cas. 1916B, 573, even though the power of disposition might defeat the rights of a remainderman. See, also, *State* v. *Gaughan,* 124 Ark. 548, 187 S. W. 918; *Galloway* v. *Sewell,* 162 Ark. 627, 258 S. W. 655; *Reddin* v. *Cottrell,* 178 Ark. 1178, 13 S. W. 2d 813. We have many times held that there can be no limitation over after a fee in a will for the reason, as stated in *Moody* v. *Walker,* 3 Ark. 147, that 'if a legatee possesses the absolute right of property, he certainly has the power of disposing of it in any way he may think proper, and therefore he might defeat the devise or

limitation over.' See also *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S. 1028, 11 Ann. Cas. 343; *Davis* v. *Sparks,* 135 Ark. 412, 205 S. W. 803; *Fies* v. *Feist,* 145 Ark. 351, 224 S. W. 633; *Letzkus* v. *Nothwang,* 170 Ark. 403, 279 S. W. 1006; *Combs* v. *Combs,* 172 Ark. 1073, 219 S. W. 818; *Payne* v. *Hart,* 178 Ark. 100, 9 S. W. 2d 1059; *First Nat. Bank* v. *Marre,* 183 Ark. 699 38 S. W. 2d 14. But here there has been no attempted limitation over after a fee. The codicil operates only on such property of his as may not have been 'used or expended' by her. If there is no such property, the codicil is ineffective. The codicil does not attempt to control her in any disposition of such property during her lifetime, but is, in the view of the majority, a disposition of such of his property as may remain unused or unexpended at her death. The rule announced in the above-cited cases, as to a limitation over after a fee given, has no application here.

"The general rule relative to the construction of a will and a codicil is stated in 28 R. C. L., p. 199 as follows: 'It is the well-settled general rule that a will and codicil are to be regarded as a single and entire instrument for the purpose of determining the testamentary intention and disposition of the testator, and both instruments together will be construed as if they had been executed at the time of the making of the codicil. They will not, however, be considered as a single instrument where a manifest intention requires otherwise. The construction of the provisions contained in a will and codicil may be different from that which would be given to the same provisions all embodied in a will. This is due to the fact that the mere taking of a codicil gives rise to the inference of a change in intention, and such an inference does not arise in the case of a will standing by itself. When a will and codicil are inconsistent in their provisions, the codicil, being the latest expression of the testator's desires, is to be given precedence.'

"This court follows the general rule above stated. In *Gibbons* v. *Ward,* 115 Ark. 184, 171 S. W. 90, we said: 'A codicil is in legal effect a republication of the will, and the whole is to be construed together as if executed at the

date of the codicil.' This was quoted with approval in *Rogers* v. *Agricola*, 176 Ark. 287, 3 S. W. 2d 26. . . . The will and the codicil are to be construed together to ascertain the intention of the testator. If the codicil is in conflict with the will, the codicil governs. We have many times held that, where the provisions of a will are in conflict, the last provision is controlling.''

We think it clear, therefore, that Lizzie Beck, when her will is considered from its four corners, intended that her husband should enjoy the full use and benefit of all of her property during his lifetime and that he had the power to use, expend, sell, convey, or dispose of the property just so long, in doing so, as it was for his own personal use and benefit, and that at his death any property, remaining unused and unexpended by T. A. Beck for his own use and benefit, must be paid over and delivered to the appellant, United States of America. We hold, therefore, that the effect of the will and codicil is to limit in T. A. Beck a life estate, and not an estate in fee, and that all of said property remaining unused and unexpended at his death reverted to appellant. It necessarily follows that any attempt by T. A. Beck to give away the property in question would be void, and of no effect as against the rights of appellant.

Here we have two, childless, old people who, no doubt, held strong feelings of gratitude toward a Government which had been most generous to them, and i was not unnatural—if unusual—for them to want to r turn to their benefactor whatever of their estate, made up largely of pension money, remained unused and unexpended at their deaths. We conclude, therefore, that the court erred in its construction and interpretation of the will, and the cause is accordingly reversed and remanded with instructions to the court to enter a decree directing the delivery of said remaining property to the appellant after all debts have been paid, and with the costs of this appeal assessed against appellant.

MEHAFFY, J., dissents.

CASH *v.* THE HOME INSURANCE COMPANY OF NEW YORK.

4-5364 125 S. W. 2d 99

Opinion delivered February 6, 1939.

P. L. Smith, for appellant.

Verne McMillen, O. A. Featherston and *James I. Teague,* for appellee.

HOLT, J. Appellant brings this appeal from an adverse decision of the Pike circuit court, sitting as a jury, on his claim for $279.25 growing out of an automobile fire insurance contract with appellee.

The material parts of appellant's complaint are: "The plaintiff states, that a policy of insurance was issued against his Ford truck, serial and motor number 18900275, October 3, 1936, and a premium paid by the said plaintiff for one year against loss by fire and other mishaps. That, on February 11, 1937, the said truck was almost completely destroyed by fire. That, plaintiff demanded of the defendant $280.00, the interest he claimed to have in said truck, and threatened to file suit unless the said amount was paid. That, on or about August 25, 1937, the plaintiff and defendant comprised the said claim, and

defendant agreed to pay appellant $279.25. That defendant has failed to settle the said amount as agreed."

To this complaint, appellee made general denial and in addition set up as a defense that: "This cause of action is founded upon a certain insurance policy issued October 3, 1936, for one year, and that in accordance with its terms a loss and damage agreement in the sum of $279.25 was signed by the plaintiff, R. W. Cash, with this defendant. That under the terms and conditions of the policy, the defendant delivered to the Universal Credit Company this sum of money in full payment of the loss and damage under this policy. That the terms of the loss payable clause in said policy is as follows: 'Loss, if any, to be adjusted with the purchaser, assured, though to be paid, subject to all the conditions of this insurance, only to the Universal Credit Company for the account of all interests'."

The record reflects that appellant, R. W. Cash, purchased a Ford truck from the Nashville Motor Company on October 3, 1936, upon a monthly payment plan, financed by the Universal Credit Company, $200.00 cash was paid on the purchase price of $680.00 and a note in the sum of $480.00, to be paid in twelve monthly installments of $40.00 each, was given by appellant. The truck was partly destroyed by fire on February 11, 1937, and at that time two payments had been made and there was a balance then due on the note of $400.00. At the time the truck was purchased, it was insured with appellee, Home Insurance Company, in the amount of $480.00, any fire loss to be paid to the Universal Credit Company, which was the purchaser of the note in question. The insurance policy provides: "Loss, if any, to be adjusted with the purchaser, assured, though to be paid, subject to all the conditions of this insurance, only to the Universal Credit Company, for the account of all interests." The record further discloses that the Universal Credit Company, about six months after the fire and when the truck seemed to have been abandoned by appellant, took charge of it and delivered it to the Nashville Motor Company, which paid them $125.00 for it. This sum of

$125.00, the Universal Credit Company applied on the note of appellant, Cash, and about the same time appellee paid the Universal Credit Company $275.00 additional, and sometime later $4.25 to appellant, which paid in full the balance of $400.00 due the credit company on the note in question and a balance over of $4.25 to Cash.

After the damage to the truck by fire, appellant proceeded in an attempt to make settlement of his loss with appellee, Insurance Company. In the process of the attempted settlement, certain letters passed between the parties, which we deem it unnecessary to abstract here. This correspondence, however, resulted in a loss and damage agreement being entered into and signed by the parties to this litigation and is as follows: "Loss and/or Damage Agreement. The undersigned hereby expressly agrees that the total net loss and/or damage occurring on or about the 11th day of February, 1937, and for which claim is made, as set forth in the undersigned's signed Statement of Loss, dated August 30, 1937, to automobile covered by the above policy is $279.-25. The sole purpose of this instrument is to fix and evidence the total amount for which claim is made. This instrument is, and is intended to be, binding as to the total amount of loss and/or damage said to have occurred. This instrument is not an acceptance of liability by the Company, does not commit the Company to payment of said claim and does not in any sense waive any of the conditions or provisions of the policy of said Company. Furthermore, upon, in the event, and in consideration of the payment of the above amount by Home Insurance Company, the undersigned hereby releases and discharges Home Insurance Company from any and all liability under its policy for said loss and/or damage, and the undersigned further agrees to hold Home Insurance Company, its successors or assigns, free and harmless from further claim for the loss described. Furthermore, upon, in the event, and in consideration of the payment of the above amount by Home Insurance Company, th undersigned hereby subrogates the said Company to all rights and causes of action that said undersigned has

against any person, persons, or Company whomsoever for damages arising to said automobile, and the undersigned agrees to execute any document required by said Company in the prosecution of said rights, and the company is hereby authorized and empowered to sue, compromise or settle in the undersigned's name or otherwise. In testimony whereof the undersigned has hereunto executed this instrument and set his hand and seal this 18 day of September, 1937. R. W. Cash, Assured, Antoine, Ark., Witnesses: Guy D. Babcock, Antoine, Ark., Mrs. W. H. Holt, Antoine, Ark. Examined and approved. J. P. M."

The trial court made the following findings of fact and conclusions of law: "On October 3, 1936, the defendant, Home Insurance Company of N. Y., issued to plaintiff its policy of insurance covering loss by fire to a 1935 model Ford truck for a period of one year. When this policy was issued the Universal Credit Company held a lien against the truck in the sum of $480.00, and the policy provided that any loss thereunder should be adjusted with the plaintiff though payable only to the Universal Credit Company, and liability under the policy was limited to $480.00, the amount of the lien held by the Universal Credit Company. On February 11, 1937, the truck was almost completely destroyed by fire. Defendant waived filing of proof of loss and an adjuster representing defendant was unable to locate plaintiff for some time. On July 6, 1937, $275.00 was paid to the Universal Credit Company by the defendant on said loss, and on October 5, 1937, an additional $4.25 was paid the Universal Credit Company. Plaintiff, through his attorney, wrote defendant in July and August, 1937, demanding $280.00 be paid him above the indebtedness due the Universal Credit Company, and the defendant, through its adjuster, agreed to pay $279.25 under the policy. In pursuance of this agreement the plaintiff on September 18, 1937, executed a loss and damage agreement wherein he agreed that the total net loss or damage to the truck amounted to $279.25. Thereafter, on October 5, 1937, defendant paid the $4.25 balance al-

ready referred to under this agreement. At this time and at the time of the fire plaintiff was still indebted to the Universal Credit Company in the sum of $400.00. In March, 1938, plaintiff brought this suit and contends that the offer to settle made by him in July and August, 1937, amounted to a compromise of a disputed claim and that defendant accepted the offer to pay him $279.25 exclusive of the interest of the Universal Credit Company, and, having accepted his offer, are bound by it even though there might be no merit to such claim. I cannot concur in this contention. While it is true that $275.00 was paid to the Universal Credit Company on the loss before any adjustment was made with the plaintiff, the offer to settle made by plaintiff must be viewed in the light of the provisions of the policy and the loss and damage agreement which was executed by plaintiff on September 18, 1937, after the alleged offer to compromise had been made. Under the terms of the policy the loss was payable only to the Universal Credit Company and was limited to $480.00, the amount of their lien. Under the loss and damage agreement executed by plaintiff, he agreed that the total net loss or damage to the truck was $279.25. This amount has been paid to the Universal Credit Company at a time when the plaintiff was still indebted to them in the sum of $400.00. It, therefore, appears that the liability of defendant under the policy has been fully determined without dispute, having been agreed to by the plaintiff and paid to the party entitled to receive it. Judgment will be entered for the defendant and the complaint of plaintiff will be dismissed."

Appellant very earnestly insists that the judgment of the trial court is contrary to the law and the evidence in this case. To this contention, we cannot agree. We think that the insurance company, appellee, had the right, under its insurance contract with appellant, to make settlement with the Universal Credit Company, holder of the note, as its interest appeared. This court has many times held that a mortgagee under a mortgage clause in an insurance policy, has a vested interest, and in *In-*

surance Underwriters' Agency v. *Pride,* 173 Ark. 1016, 294 S. W. 19, said: "We think a mortgagee or lienholder acquires a vested and enforceable right under an ordinary loss-payable clause as his interest may appear in an insurance policy which cannot be destroyed by a settlement or adjustment between the insurer and the insured."

We also hold that the loss and damage agreement entered into by the appellant and the appellee in this case is clear and unambiguous in its terms, is binding on the parties, and is a complete settlement of any and all rights of appellant growing out of the insurance contract with appellee in this case. This agreement clearly recites that the total net loss and damage is $279.25 and further states, "This instrument is, and is intended to be, binding as to the total amount of loss and damage said to have occurred."

We, therefore, conclude that the judgment of the trial court, sitting as a jury, and to which we must give the same force and effect that we would to a jury's verdict, is supported by substantial evidence and should not be disturbed. Accordingly, the judgment is affirmed.

WILSON *v.* WHITWORTH.

4-5366 125 S. W. 2d 112

Opinion delivered February 13, 1939.

C. L. Polk, Jr., and *J. R. Long,* for appellant.
K. T. Sutton, for appellee.

MEHAFFY, J. This action was instituted by the appellant to recover certain property held under mortgage. On October 31, 1936, the appellee, Melvin E. Whitworth, applied to the appellant to borrow $150. He executed a promissory note for $259.11, and on the same day to secure the payment of said note, he executed a chattel mortgage conveying a Plymouth automobile and certain household goods. He had paid on the note $64.80. Before the appellant would lend the money he required appellee to take a policy of insurance for $3,500, the annual premium on which was $84.07. In addition to this premium, appellee was charged with $3.30 for insurance on his automobile, $4.50 service fee, and $12.24 discount. The insurance premium and other charges added to the $150, amounted to $259.11.

Suit was originally filed in the municipal court. The case was appealed to the circuit court, and the appellee filed an answer charging that the contract was usurious.

Porter Wilson, the lender, testified as to the loan and the charges and the amount paid. It appeared, however, from his testimony that he knew nothing about the facts except what he learned from the record. His agent, Mr. Vollman, made the contract with appellee, but Vollman did not testify. One of the requirements when loans were made was that the applicant take out life insurance, and the insurance must be taken out in the Pyramid Life

Insurance Company. Mr. Wilson, the lender, was an agent for the life insurance company. When Wilson was asked how much he got of the $84.70 premium, appellant objected, and the objection was sustained. The witness answered, however, that he could not see where that would make any difference. When objection was made to this testimony, witness was asked how much Mr. Vollman got of the premium, and the witness answered that that was immaterial and objection was made by appellant's attorney, and was sustained. Mr. Wilson testified, however, that he did not make a loan, unless the applicant took out life insurance. That he let Mr. Whitworth have $150 and took his note for $259.11. It also appears from the evidence that the appellant took out insurance on the automobile included in the mortgage, and this, of course, was charged to appellee. The record does not disclose why Mr. Vollman who made the arrangements with Mr. Whitworth did not testify. While appellant charged $3.30 for automobile insurance, the insurance policy on the automobile was not introduced, and appears to have been missing from the files. When asked what was the meaning of the $12.24 charged as discount, appellant said it was a charge to take care of the loan.

Appellee, Whitworth, testified that the note and mortgage were both blank when he signed them; that he did not understand that he was to pay all the charges or amounts that he is now charged with. He only got $150 and gave a note and mortgage for $259.11. Appellee testified that he did not know what the amount would be when he signed the blank note; that he had paid $64.80 and owed $85.20 which he was willing to pay. When appellee was asked if he had figured the interest to see how much he was charged for the loan, objection was made, and sustained. Witness, also, testified that when he learned the facts he offered the check back and did not want to take the insurance, but that the lender refused to take it back.

Witness was corroborated in his statements about the loan by his father, J. F. Whitworth.

Appellee testified that he worked for the Chicago Mill & Lumber Company in West Helena, where he lived; that he had worked for this company about eight years, and that he received 22 cents an hour; worked on an average from five to eight hours a day. The evidence shows that the appellant made an investigation to learn about appellee's moral character and financial standing, and he, of course, learned these facts.

Each party requested the court to direct a verdict in his favor. The court then directed the jury to find for the defendant, which it did, and judgment was entered for the defendant. The case is here on appeal.

Under our constitution, all contracts for a greater rate of interest than 10 per centum per annum are void as to principal and interest. Article 19, § 13, Constitution of the state of Arkansas.

In this case the appellee desired to borrow $150, and applied to Mr. Wilson, who was in the business of lending money. Mr. Wilson was also agent of the Pyramid Life Insurance Company and required all applicants for loans to take life insurance in his company. Before he would lend $150 to appellee, he required him to take a life insurance policy for $3,500. In addition to this he collected interest and made several other charges and took a note for $259.11, secured by mortgage on personal property. Whitworth, appellee, was earning 22 cents an hour and working on an average of five to eight hours a day. He had been in the employ of the same company for several years.

This court has many times held that collateral contracts entered into contemporaneously with a contract for the lending and borrowing of money, where the collateral agreement is in itself lawful and made in good faith, will not invalidate the contract for the loan of money as usurious, although its effect might be to exact more from the borrower than the sum which would accrue to the lender from a legal rate of interest. But it was recently said, in referring to the above section of the constitution:

"This constitutional inhibition cannot be avoided by any trick or devise, and the courts will closely scrutinize every suspicious transaction in order to ascertain its real nature; and if it appears that the contract is merely one for the loan of money with the intention on the part of the lender to exact more than the lawful rate of interest, the contract will be declared usurious and void." *Hogan* v. *Thompson,* 186 Ark. 497, 54 S. W. 2d 303; *Ellenbogen* v. *Griffey,* 55 Ark. 268, 18 S. W. 126; *Reeve* v. *Ladies' Building Ass'n,* 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129; *Dickerson-Reed, etc., Co.* v. *Stroupe,* 169 Ark. 277, 275 S. W. 520; *Hershey* v. *Luce,* 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

The lender in the instant case, of course, knew that a man employed to labor for 22 cents an hour could not possibly earn enough to make a living for his family and pay the premium on $3,500 insurance. The charges that appellee was compelled to pay to get $150 amounted to more than 70 per cent., and as the Kentucky court said: "The statute must be rendered a mere dead letter, or such contracts must be overhaled. In the language of Lord Mansfield on a like occasion, it may be truly said, 'it is impossible to wink so hard as not to see,' what was expected by this contract—that its *end* was more *interest* on the money advanced than the law authorized." *Heytle* v. *Archibald Logan,* 1, A. K. Marsh (Ky.) 529.

It is not necessary for both parties to intend that an unlawful rate of interest shall be charged, but if the lender alone charges or receives more than is lawful, the contract is void. In discussing this question, Judge MITCHELL of the Minnesota Supreme Court, speaking for the court, said:

"There are some loose statements in the text-books, and perhaps some judicial authority, to the effect that to render a contract usurious both parties must be cognizant of the fact constituting usury, and must have a common purpose to evade the law. But it seems to us that it would be contrary both to the language and policy of the usury law to hold any such doctrine, as thus broadly

stated. These laws are enacted to protect the weak and necessitous from oppression. The borrower is not *particeps criminis* with the lender, whatever his knowledge or intention may be. The lender alone is the violator of the law, and against him alone are its penalties enacted. It would be indeed strange if the only party who could violate the law had intentionally done so, and could escape its penalty because by some device or deception he had so deceived the borrower as to conceal from him the fact that he was taking usury." *Lukens* v. *Hazlett,* 37 Minn. 441, 35 S. W. 265.

This court, in an opinion by the late Chief Justice HART, approved the rule announced by the Minnesota Supreme Court and several other courts, and stated: "We are of the opinion that the principles announced in these cases are sound and should control here. Therefore, we think the transaction was merely a colorable device to cover usury and should not be upheld." *Doyle* v. *American Loan Co.,* 185 Ark. 233, 46 S. W. 2d 803.

"This court has uniformly recognized that borrowing and lending money is indispensable to constitute usury; but that, no matter what the form of the contract may be, no device or shift intended to evade the usury laws will be upheld. The court has also recognized that, while an exhorbitant price will not of itself constitute usury, yet it is a circumstance to be considered in determining whether the transaction was a *bona fide* sale of property or was intended for a cover for usury. It has been frequently judicially stated that one of the most usual forms of usury is a pretended sale of goods or other property." *Home Bldg. & Savings Ass'n* v. *Shotwell,* 183 Ark. 750, 38 S. W. 2d 552.

The rules herein announced have been approved by this court many times. *Jones* v. *Phillippe,* 135 Ark. 578, 206 S. W. 40; *Garvin* v. *Linton,* 62 Ark. 370, 35 S. W. 430, 37 S. W. 569.

We think the facts in this case show conclusively that it was the intention of the lender to charge and receive more than the lawful rate of interest. When Mr. Wilson was testifying, he was asked on cross-examina-

tion how much of the insurance premium he received. He said it was immaterial and his attorney objected to the question, which objection was sustained. It must be remembered that Mr. Wilson was the agent of the insurance company, and it is a matter of common knowledge that the agent gets a considerable portion of the first premium on an insurance policy. In this case, however, we do not know the amount, because the lender declined to answer, but the facts are sufficient to show that the lender was charging and was to receive more than the lawful rate of interest.

If there was any question of fact in this case, this was settled by the finding of the trial judge. Where each party requests a peremptory instruction, the finding of the trial court is as binding as the verdict of the jury.

The judgment of the circuit court is affirmed.

SMITH, C. J., and HUMPHREYS, J., concur; SMITH, J., dissents.

HIGH *v.* STATE.

Criminal 4092 120 S. W. 2d 24

Opinion delivered September 26, 1938.

Chas. A. Walls, for appellant.

Jack Holt, Attorney General and *John P. Streepey,* Assistant, for appellee.

McHaney, J. Appellant was charged by information with murder in the first degree for the killing of his wife on December 9, 1937, by shooting her with a pistol. Trial to a jury resulted in a verdict of guilty of manslaughter and his punishment fixed at seven years imprisonment in the State penitentiary, on which judgment was accordingly entered.

For a reversal of the judgment, appellant argues three general grounds, as follows: (1) that the court erred in refusing to give six requested instructions; (2) erred in a remark made when a certain negro witness was called to testify for appellant; and (3) erred in permitting a news photographer to take court room pictures, including appellant, in the jury's presence.

(1) Instructions one, two and three requested by appellant and refused by the court relate to his responsibility for the crime charged, if, at the time, he was temporarily insane, as set out in request No. one, and if bereft of reason on account of drunkenness, as set out in No. two, and a combination of both as set out in No. three. Instruction No. one would have told the jury that if they believed beyond a reasonable doubt that at the time he shot and killed the deceased "he was temporarily so deranged on one or more of his mental or moral faculties that it actually rendered him incapable distin-

guishing between right and wrong with respect to the act he was committing, . . . then you will acquit him on the ground of temporary insanity." No. two would have told the jury that if they should find, or have a reasonable doubt about it, that appellant was intoxicated at the time; that his mind "was bereft of reason by the recent use of intoxicating liquors" so that, at the time, his reason was destroyed and that he had no knowledge of what he was doing and did not know right from wrong; and that he killed deceased while in such mental condition, he should be acquitted. As stated above, number three was an attempted combination of one and two. We think no error was committed in refusing said requested instructions. It may be stated that there is no evidence in this record of any temporary insanity of appellant except such as may have been caused by intoxication. So, requested instruction number one was abstract. As to number two, it may be said in this connection, the court read to the jury as instruction 1A, given on the court's own motion, § 2931 of Pope's Digest, as follows: "Drunkenness shall not be an excuse of any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense, in which case the person so causing said drunkenness, for such evil purpose, shall be considered principal, and suffer the same punishment as would have been inflicted on the person committing the offense if he had been possessed of sound reason and discretion."

We assume that the fact of appellant's intoxication or drunkenness on the occasion of this killing was established by the evidence, as also the fact that he had been drinking more or less heavily for a number of years. The fact remains, however, and is undisputed, that he voluntarily got drunk on this occasion and purchased the liquor himself "which produced his temporary besotted and unconscious condition," as said in *Bennett* v. *State,* 161 Ark. 496, 257 S. W. 372, where the court used this language: "The testimony of the appellant shows that he 'voluntarily drank the dope' which produced his tem-

porary besotted and unconscious condition. No effort is made to prove that the appellant, at the time of the killing, was afflicted with any disease of the mind, either permanent, temporary, or periodical, such as delirium tremens, mania a potu, or dipsomania. *Casat* v. *State,* 40 Ark. 511. It appears that the killing was the result of reckless, wanton, and careless driving of his automobile, while the appellant was unconscious, as the result of beastly intoxication caused by his own voluntary drinking. Voluntary drunkenness was no excuse for the crime. The court did not err in refusing appellant's prayer for instruction. See *Bowen* v. *State,* 100 Ark. 232, 140 S. W. 28."

Again, in the later case of *Weakley* v. *State,* 168 Ark. 1087, 273 S. W. 374, this language is used: "Mr. Bishop says: 'A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime. The intention to drink may fully supply the place of malice aforethought so that, if one voluntarily becomes too drunk to know what he is about and then with a deadly weapon kills another, he does murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder.' Bishop's New Criminal Law, p. 296, § 401. This is the doctrine applied by us in *Byrd* v. *State,* 76 Ark. 286, 88 S. W. 974, where we said: 'But no specific intent to kill is necessary to constitute the crime of murder in the second degree under our statute, and the law is that the intention to drink may fully supply the place of malice aforethought, so that if one voluntarily becomes too drunk to know what he is about and then without provocation assaults and beats another to death, he does murder the same as if he was sober'." Such is the situation here. There is no proof that appellant was mentally diseased, either temporarily or permanently, and mere voluntary drunkenness is no defense.

Moreover, appellant was not convicted of murder, but of manslaughter which does not require any specific intent to kill, and even though it could he said to be error

to refuse said instructions, it would not be prejudicial, and would not, therefore, be reversible.

Requested instructions four, five and six would have submitted to the jury the question of an accidental killing. As we view the record there is no substantial evidence that the killing was accidental,—that the gun was fired accidentally in a scuffle over it between him and his wife. We do not review the evidence, as it could serve no useful purpose. There being no evidence to support said instructions, the court correctly refused to give them.

(2) As to this assignment, we have some doubt. When a witness, George Jackson, Jr., was called to testify, counsel for appellant asked him if he had been sworn, to which he replied that he had not. Whereupon the court interjected this remark: "It doesn't make much difference whether he is sworn or not. However, let him be sworn." An examination of the testimony given by this witness reveals the fact that it relates only to appellant's drunken condition on the evening shortly prior to the tragedy and to his drunkenness on previous occasions, a fact which we have assumed to be established by the evidence, and the apparent reflection on this witness by the court's remark, no doubt made facetiously, because the witness was at that time serving a sentence on the county farm for some misdemeanor and had served another previously, and the remark, although improper, could not have been prejudicial to appellant.

(3) We think the matter of permitting a news photographer to take a picture or pictures of the court room and those in it rested in the sound discretion of the trial court. Appellant's counsel objected to the taking of a picture of the court room or of appellant. Whereupon the court said: "I have already told him he could take the picture, but no one is required to have his or her picture taken, and the taking of the picture has nothing whatever to do with the trial," and the objection was overruled, with exceptions. Under the ruling of the court, appellant was not required to be in the picture. It was not shown to the jury, and, if published in the

newspapers, it did not reach the jury because the papers were excluded from them.

We find no error, and the judgment is accordingly affirmed.

SUTTON *v.* STATE.

4102 122 S. W 2d 617

Opinion delivered November 14, 1938.

Robert J. Brown, Jr., for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant Attorney General, for appellee.

SMITH, J. Appellant was indicted for the crime of rape, alleged to have been committed upon the person of Dorothy Sutton, who was his daughter, "a female person under the age of sixteen years." Upon his trial he

was convicted of carnal abuse, and given a sentence of twenty-one years in the penitentiary, from which judgment is this appeal.

It has been held that an indictment for rape will support a conviction for carnal abuse, *Henson* v. *State,* 76 Ark. 267, 88 S. W. 965, or an assault with intent to commit rape. *Green* v. *State,* 91 Ark. 562, 121 S. W. 949.

For the reversal of this judgment it is insisted (1) that error was committed in excluding certain testimony and (2) that it was error to refuse to grant a new trial on account of the recantation by Dorothy of her testimony that her father had carnally known her.

The excluded testimony was to this effect. Witnesses offered to testify that appellant's wife—Dorothy's mother—had said that she would be rid of appellant if she had to "frame up" on him and send him to the electric chair.

In the case of *Jenkins* v. *State,* 191 Ark. 625, 87 S. W. 2d 78, the husband of the defendant was permitted to testify that defendant gave capsules supposed to contain quinine to their children, from the effects of which the children died during the night. We reversed the judgment of conviction in that case on account of the admission of this testimony, for the reason, there stated, that under the common law neither spouse was a competent witness against the other in any kind of case except insofar as that inhibition had been relaxed by statute. The reason which prevents one's spouse from testifying against the other also inhibits favorable testimony in his behalf by his spouse.

The admission of this testimony of the husband against the wife in the Jenkins Case was sought to be justified under the provisions of § 3125, Crawford & Moses' Digest (§ 3959, Pope's Digest), which reads as follows: "In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either." But we held that children were not "property" within the meaning of this statute. In

this connection, it may be said that act 320 of the Acts of 1937, p. 1218, may not be invoked, as it applies only to civil actions.

Upon the remand of the Jenkins Case, *supra,* for a new trial, she was again convicted, and that judgment was reversed because, at the second trial, reference was made to the incompetent testimony admitted at the former trial. *Jenkins* v. *State,* 193 Ark. 842, 103 S. W. 2d 37.

It is true appellant did not offer to call his wife as a witness, but he did propose to prove her statements tending to corroborate his defense. This was testimony which the wife could not have denied had it been admitted. Statements between husband and wife, overheard by other parties, may be used in evidence, and so also may statements of either spouse which are *res gestae. Bibb* v. *State,* 83 Tex. Cr. R., 616, 205 S. W. 135. But the excluded testimony was not of that character.

At § 1192, vol. 3, Wharton's Criminal Evidence, (11th Ed.), p. 2045, it is said: "The rule of exclusion also applies irrespective of the kind of testimony given by the witness. Even the declaration of the accused's spouse to a third person with reference to the accused's guilt should not be received against the accused where it was not made in his or her presence or by his or her authority, although the rule is different if the declaration was made in his or her presence. However, *res gestae* declarations of husband and wife are admissible for or against each other, even though each is incompetent to testify."

We conclude, therefore, that it was not error to exclude the testimony as to what appellant's wife had said about his guilt.

Attached to the motion for a new trial was the following affidavit:

"Exhibit A.

"Affidavit.

"Statement of Dorothy Sutton, wherein she retracts and recants the testimony given by her in circuit court

in the trial of her father, David Garland Sutton, on the 12th and 13th days of May, 1938, on a charge of rape:

"My name is Dorothy Sutton. I am 13 years old and will be 14 the 8th day of next August. I testified at my father's trial that he had raped me; but this is not true.

"He never did have anything to do with me that way. I hurt myself riding my cousin Junior Henry's bicycle and this is the reason that the doctor found something the matter with me. (This being a ruptured hymen.)

"I am making this statement because I want to. Nobody has made me do it, or threatened me to get me to do it, or promised me anything for doing it.

"Dorothy Sutton."

This writing bears upon its face the conclusive evidence that Dorothy herself did not write this statement, although she signed it. Quite obviously it was dictated by some other person. Nor did she appear before the judge for his examination of her, on hearing this motion, as to the time when, place where, or circumstances under which the affidavit was made.

The case of *Roath* v. *State,* 185 Ark. 1039, 50 S. W. 2d 985, is cited and relied upon as authority authorizing and requiring the granting of a new trial. In that case it was said: "In considering the recantation made by Mrs. Griffin of her testimony in the case at bar, it may be said that it is the better rule that the recantation of testimony of a material witness made after the trial and verdict is not sufficient to authorize the setting aside of the verdict and granting of a new trial where the verdict is justified on other testimony than that of the recanting witness, and in such cases we have consistently refused to reverse for a new trial. *Osborne* v. *State,* 96 Ark. 400, 132 S. W. 210; *Brown* v. *State,* 143 Ark. 523, 222 S. W. 377; *Little* v. *State,* 161 Ark. 245, 255 S. W. 892. However it is equally well settled in cases where the material evidence upon which a verdict is grounded, and without which it would not have been justified, is given by a wit-

ness who subsequently repudiates this testimony, a new trial ought to be granted. *Bussey* v. *State,* 69 Ark. 545, 64 S. W. 268; *Shropshire* v. *State,* 86 Ark. 481, 111 S. W. 470; *Meyers* v. *State,* 111 Ark. 399, 163 S. W. 1177, L. R. A. 1915C, 302, Ann. Cas. 1916A, 933."

It is true in this case, as it was true in the Roath case, *supra,* that a conviction would not have been had without the retracted testimony, but there was manifested in the Roath Case no purpose to modify or change the rule regarding the duty of the trial judge in passing upon the effect to be given the retraction.

In the three cases first cited in the quotation from that opinion the judgments were affirmed notwithstanding the retraction; in the last three cases there cited the judgments of conviction were reversed on that account.

In the first of these last three cases—the Bussey case—Judge RIDDICK said: "The circumstances under which she made this written retraction of her former testimony are such as to raise the belief that the retraction, and not the testimony, is true, ..."

In the second of those cases—the Shropshire Case—one of the state's witnesses swore to defendant's guilt under a misapprehension that defendant's brother was on trial. In holding that this newly-discovered evidence required the granting of a new trial it was there said: "If any issue of fact had been made on it, or his affidavit had been in conflict with any of the established facts of the case, or had been made under circumstances throwing suspicion upon it, then the circuit judge should be sustained in disregarding it."

In the third of those cases—the Myers Case—the question was more elaborately considered than in either of the other cases. The prosecutrix and other witnesses in that case appeared in open court at the hearing of the motion for a new trial. It was there made to appear —and we found the fact to be—that the prosecutrix had testified under coercion, and that she had voluntarily retracted her false testimony.

In the Roath Case itself the facts were that subsequent to that trial, and within the time allowed for filing a motion for a new trial, the recanting witness was placed on trial for the same crime. In her trial, where she was subjected to examination and cross-examination, she repudiated the testimony given by her at Roath's trial, and stated that she had been coerced by the officers while in jail into giving the false testimony at his trial, and that it was false. The original testimony of this witness may or may not have been given under duress, but her recanting testimony was entirely voluntary, and, as stated in the opinion in the Roath Case, "her recantation presents such a state of case that makes us believe that a grave injustice might be wrought by suffering the judgment based on her evidence to be sustained, and that the ends of justice would best be served by a new trial."

As has been stated, there was nothing in the opinion in the Roath Case impairing the authority of the first three cases there cited in the quotation from that opinion, the latest of which is *Little* v. *State,* 161 Ark. 245, 255 S. W. 892. This Little Case, *supra,* reviewed a large number of our cases and cases from other jurisdictions on the subject, and we there quoted with approval from the case of *People* v. *Shilitano,* 218 N. Y. 161, 112 N. E. 733, L. R. A. 1916 F, 1044, as follows: " 'In determining the weight to be given to the statements of these witnesses affirming the guilt of the defendant and recanting their testimony, we must endeavor to discern the motives which actuated them. If, upon examination, it should appear that their testimony upon the trial was given without any motive to falsify, and that their statements recanting their testimony were prompted by corrupt or unworthy motives, but little weight should be given to the recanting statements. There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.' "

A large discretion abides in the trial judge in granting or in refusing to grant a new trial on account of

newly-discovered evidence, and we review and reverse his action in that behalf only where it is made to appear that this discretion has been abused. *Clayton* v. *State*, 186 Ark. 713, 55 S. W. 2d 88.

In view of the fact that the recanting witness was not brought into court for examination as to the circumstances relating to her recantation, and that no showing was made that this action was voluntary on her part, we are unable to say that the trial judge so far abused his discretion that the judgment must be reversed on that account.

As no error appears the judgment must be affirmed, and it is so ordered.

SMITH *v.* MISSOURI PACIFIC TRANSPORTATION COMPANY.

4-5285 122 S. W. 2d 176

Opinion delivered December 5, 1938.

H. U. Williamson and *Fred M. Pickens*, for appellant.

Claude M. Erwin, Jr., House, Moses & Holmes, Eugene R. Warren and *T. J. Gentry, Jr.*, for appellee.

GRIFFIN SMITH, C. J. We determine whether the trial court erred in instructing the jury that a release executed by appellant was binding.

The controversy is referable to injuries sustained by appellant when a bus in which she was a passenger left

the highway while attempting to pass a road grader and came to a stop at a sharp angle. Appellant, 72 years of age, was thrown to the floor and testified that she was rendered unconscious. She was taken to the home of a niece, Mrs. W. A. Greer, near Searcy. Her physician testified she was suffering from injuries to her left arm, left chest, back, and knees; also, that she had a nervous condition, and coughed.

The accident occurred November 21, 1936—Saturday. D. E. White, adjuster for appellee, called on Mrs. Smith that evening, and found her in bed. Mrs. Greer testified that White told appellant he would pay her $25 in settlement of any claim for damages. In response to this offer appellant replied that she did not feel like settling that night; that she did not know what she wanted to do, and preferred to waid. As to White's conduct, Mrs. Greer said: "He just asked me to let him know the next day. He thought probably she would be feeling better by morning and would feel like making a settlement. [On Monday] we wrote him a note—I wrote it. [Appellant] knew I was going to write it. I told her I was fixing to write it, and what she told me to put in the letter, you know."

"Q. Did she tell you what to put in the letter? A. Yes, she told what she agreed to do—[that] she would settle for $30. Mr. White came back Monday and paid her. I signed the release for her—she made her mark."

On cross-examination Mrs. Greer testified that the settlement was made Monday night after dark, and appellant "was not [suffering] as bad as she was Saturday night, but of course she wasn't over it."

Questions asked by the court brought responses from Mrs. Greer confirmatory: that she addressed and mailed the letter to White informing him that appellant was ready to "talk settlement"; that they (witness and appellant) had not discussed the injuries very much "because we didn't know just how it was going to turn out"; that at the time White returned he had not received the letter. Witness thought she knew what the release was, and thought appellant understood it.

It is alleged, and there is testimony, that White told appellant and Mrs. Greer $25 was all he was authorized to pay; that this sum was the maximum allowed by the company for such injuries, and if an increased amount should be paid he would be liable for the difference. This, in substance, is the only charge of fraud upon which appellant relies.

The trial court, after hearing Mrs. Greer, White, and appellant, and other witnesses, instructed that the release was binding. This conclusion was correct. *St. Louis, I. M. & S. Ry Co.* v. *Campbell,* 85 Ark. 592, 109 S. W. 539; *The Gus Blass Company* v. *Tharp,* 194 Ark. 255, 106 S. W. 2d 608; *Crockett* v. *Missouri Pacific Railroad Co.,* 179 Ark. 527, 16 S. W. 2d 989; *Kansas City Southern Railway Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 2d 123, and cases there cited.

A case in point from another jurisdiction is *Morris* v. *Seaboard Air Line Railway,* 23 Georgia App. 554, 99 S. E. 133.

In the Morris Case the Georgia court said: "In the case under review we are unable to see any circumstance to take the release out of the general rule. The release signed by the plaintiff was a binding contract by which he took the chances as to future development of the injuries. No circumstances of undue influence or overreaching are shown. So far as appears from the petition, he acted freely and voluntarily in making the settlement. The consideration was a valuable and legal one, though small, and the smallness of the consideration cannot by itself furnish ground for cancellation of the release. Under any other rule than that here announced, no one could ever make a settlement and take a release with the assurance that it would not be attacked and set aside on the statement of the person who executed it that when he signed it he was mistaken as to the extent of his injuries as thereafter developed."

The judgment is affirmed.

Opinion delivered January 9, 1939.

W. F. Reeves, for appellant.

Jack Holt, Attorney General, and *Jno. P. Streepey,* Assistant Attorney General, for appellee.

SMITH, J. Ernest Wallace, Denver Herrington, and appellant, DeWitt Morris, were charged jointly with the crime of grand larceny, alleged to have been committed by stealing two heifers, the property of Bill Mann. All were convicted, Morris has appealed.

For the reversal of the judgment it is insisted that there was no testimony connecting appellant with the commission of the crime except that of Ernest Wallace, an admitted accomplice, and a confession which had been improperly extorted from appellant himself and which was inadmissible for that reason.

The defendants are all young men, in their early twenties, and it is undisputed that, together, they loaded into appellant's truck the heifers belonging to Mann. That the heifers were being stolen appears certain. Appellant's defense was that the heifers were loaded into his truck under an agreement with his co-defendants to purchase them, and that he did not suspect they were being stolen. Appellant was examined and cross-examined at great length upon this feature of the case, and

his story was one which evidently carried no conviction or raised any reasonable doubt as to its truth. The heifers were placed in a barn one night and loaded into the truck the next night. Appellant testified that he agreed to pay 3½ cents per pound for the heifers, and an estimate of their weight made the purchase price from $10 to $10.50. Appellant testified that he paid no part of the purchase money. His associates testified that he paid $5 the night the heifers were placed in the truck, and $3 the next day. The heifers were to be carried to Springfield, Missouri, for sale. As the truck was being driven from the barn, one of the heifers escaped after the rope with which it had been tied broke. It was later found with the rope around its horns. The other heifer was unloaded and tied to a tree. Appellant testified that he released this heifer the next day. It has never been seen since.

Barnett, the sheriff of the county, testified that defendant, Wallace, confessed the crime, and told the part each defendant played in its commission, and that appellant, Morris, voluntarily made a statement, in which he admitted having made a payment of $5 and $3, as stated by Wallace.

Appellant admitted making statements in the office of the sheriff of Boone county after his arrest, and later in the same place to the prosecuting attorney, the effect of which was to admit his guilt; but he testified that he made these statements after being whipped in the sheriff's office by Bill Murphy, a man known to him. The sheriff of Boone county denied that appellant had been whipped in his office, or at any other place, while a prisoner in that county. Aside from the positive testimony of the sheriff as to whether appellant had been whipped, and thus induced to confess, the extended cross-examination of appellant upon this question makes it very doubtful whether he had been whipped.

The court gave over appellant's objection and exception an instruction numbered 4 reading as follows: "You are further instructed that the alleged confessions of the defendants in order to be competent must have been freely and voluntarily made, without duress or promise

of leniency; and the jury should consider all the circumstances surrounding the defendants at the time the alleged confessions were made and give to said confessions such weight as you think proper under the circumstances."

The court, also, gave at the request of appellant instructions numbered 2 and 3 on the subject of the alleged confession reading as follows:

"No. 2. You are instructed that before you can consider a confession of a defendant against him in the trial of the cases wherein he is being tried, you must find that the confession was made without fear, threats, intimidation, or promise of reward or leniency, and that the statements made in such confession were true. If you find that any confession relied upon by the state was not true, or that it was obtained by threats, fear, intimidation, or hope of leniency or reward, then you will be authorized to wholly disregard such confession and not consider it in arriving at your verdict; or if you have a reasonable doubt of the truth of such confession, or that it was not made freely and voluntarily, you should give the defendant the benefit of such doubt in the consideration thereof.

"No. 3. I instruct you that in this case you can only consider under any circumstances, any confession that might have been made after the crime, if any, was committed, and made in the absence of other defendants, only against the particular defendant whom you may find that made such voluntary confession, and that you cannot consider such confession against any other defendant in the case who was not present when the same was made."

These instructions correctly and fully declared the law as to the conditions under which alleged confessions are admissible and as to the manner in which they should be weighed and considered.

Appellant's own confession, if voluntarily made, was ample corroboration of the testimony of his alleged accomplice, and the jury was fully and properly instructed as to the corroboration of the testimony of an accomplice necessary and sufficient to sustain a conviction.

There appears to be no error in the record, and the corroboration of the alleged accomplice meets the requirements of the law.

The judgment must, therefore, be affirmed, and it is so ordered.

JAMISON *v.* SPIVEY.

4-5344 125 S. W. 2d 453

Opinion delivered January 30, 1939.

Martin & Wootton and *Verne McMillen,* for appellant.

Leo P. McLaughlin and *Richard M. Ryan,* for appellee.

GRIFFIN SMITH, C. J. We determine whether judgment shall stand on a verdict to compensate personal injuries appellee claims she sustained December 20, 1937.

Twenty-three errors are assigned. Those urged are: (1) That because of appellee's contributory negligence a verdict should have been instructed for defendant. (2) That defendant's cause was prejudiced through the court's refusal to give requested instruction No. 3.[1] (3) That the verdict and judgment are grossly excessive.

Appellee alleges she was injured while proceeding south on Cedar street in Hot Springs, occasioned when a truck owned by appellant backed out of a driveway. It was estimated that repairs to appellee's car would cost $37.50. Both the truck and appellee's car were moving slowly—perhaps seven or eight miles per hour—when the impact occurred. Appellee's car was pushed "forward and over" about eighteen inches or two feet. Appellee was driving. Her husband occupied the front seat with her and testified that the thrust of the collision forced him against appellee, and that she, in turn, was "knocked against the left-hand door." Appellee claims to have been stunned; that "everything turned black," and she "had no recollection of anything," but thought the glass "coming in all over me" restored consciousness.[2]

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[1] "You are instructed that if you find under the evidence in this case that the injury and damage complained of was the result of an accident which was unforeseen by the parties, plaintiff and defendant, and could not be reasonably foreseen by them, then your verdict will be for the defendant."

[2] Although appellee testified that when the collision occurred "everything turned black," and that she had no recollection of anything, her husband testified: "After I was pinned up against Mrs. Spivey I asked her to get out, and she said she couldn't, and she kind of hesitated, I thought. I don't know whether she fainted or not, but finally she opened the door and some one helped her out."

Mr. Spivey also testified that his wife fell from a street car and hurt one of her knees. Asked if both knees were not swollen, he said: "I don't know whether both of her knees are swollen, or not, because I never noticed; but I know one of them has been swollen. . . . She used a cane back on the farm to walk back and forth, but in the house she never used any cane."

Testifying as to medical attention after the accident, Mr. Spivey said: "Dr. Randolph is the man we got after—what's-his-name?—didn't come." "Q. Did he tell you she had a very high blood pres-

A verdict signed by nine of the jurors allowed compensation of $6,500. The court found this sum excessive and ordered a reduction of $1,500; or, in the alternative, a new trial if the remittitur were not entered within five days. This conditional order[3] was set aside and judgment entered on the verdict. By certiorari there was brought to this court an order entered almost five months later amending the orders of June 20 and June 29.[4] The amended order shows that in the absence of appellant and his attorneys, and without notice to them, one of appellee's attorneys consented to the remittitur.

The accident occurred in circumstances which presented a question of fact for the jury. Appellee and her

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sure? A. He never told me anything. Q. Do you know whether he told your wife that, or not? A. I don't know."

Appellee testified: "I had no trouble [before the accident] in walking. I carried this cane for protection, for fear I would fall. My knee bothered me some. It bothers me now and is worse since the accident." Asked if she and her husband, after the accident, stated to bystanders that neither was hurt, she replied: "I said it this way: 'I am not hurt now as I feel.' . . . I says, 'I don't know what tomorrow may bring forth.'"

[3] The court's order was: "The order entered herein on June 20, 1938, granting the defendant a new trial, is hereby set aside for the reason that the plaintiff has not offered to remit the sum of $1,500, and the defendant has not filed or offered to file and enter of record a release of all errors that may have occurred at the trial."

Section 1538 of Pope's Digest was declared invalid insofar as it curtailed the appellate jurisdiction of the Supreme Court. *St. Louis & N. A. R. Co.* v. *Mathis*, 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85.

[4] Trial court's action November 7, 1938: "The orders of the court, made on June 20 and June 29, 1938, are hereby amended to show that on June 23, 1938, the plaintiff, Mrs. Jennie T. Spivey, by Richard M. Ryan, one of her attorneys, appeared before the trial judge and orally offered to file a remittitur in the sum of $1,500, but at said time neither the defendant nor his attorney was present and neither was notified either before or subsequent to said time of such tender. And it is further ordered by the court that said record be amended to show that after the court had made an order suggesting that the judgment was excessive in the sum of $1,500, that the defendant nor his attorneys offered to file and enter of record a release of all errors that may have occurred at the trial." [NOTE—It will be observed that this order states that plaintiff's counsel appeared before "the trial judge," as distinguished from the trial court].

husband testified that as the truck backed into the street it was observed. Appellee says she constantly sounded her car horn; that the truck stopped, then started again, and that she thought the driver heard her signals and stopped on that account. From this and other evidence the jury was warranted in finding that appellant's driver was negligent.

Suit was filed January 7, 1938, alleging that . . . "the plaintiff suffered a severe and permanent injury in the region of the lumbar portion of her back; also an injury to the back of her spine near the base of her head."

At the time the complaint was filed appellee had not been told by any physician what her injuries were. The evidence indicates that perhaps Dr. Garrett was called by appellee or her sister the day of the accident. Thereafter Dr. Bowman was in attendance. January 9, 1938, Dr. Randolph was called. None of the physicians found any bruises, abrasions, cuts, contusions, or other demonstrable injuries. Dr. Randolph testified: "Of course there seemed to be quite a few sensitive spots along the spine and the lower part of the neck, and she was sore through the abdomen and chest."

Appellee had formerly weighed 230 pounds, but at the time of the accident was somewhat lighter. In response to a hypothetical question directed by attorneys for plaintiff, Dr. Randolph answered that concurrence of the conditions enumerated could have caused the injuries complained of. Included in the question was a statement that appellee had been thrown to the floor of the car. There was no testimony supporting this assumption. However, no objection was interposed.

Appellee's blood pressure was from 230 over 110 to 250 over 125. December 26, 1937, Dr. Ellis examined appellee. Appellee told the physician she had not been bruised and that her condition was probably due to shock. At the time of Dr. Bowman's visit appellee did not complain of injury to her back or spine.

The following is from Dr. Randolph's cross-examination:

"Q. Did you, yourself, in your examination, find anything in particular that caused the injuries from which

she suffered? A. Only subjective symptoms from the patient herself. Q. In other words, when you say 'subjective,' you mean only symptoms she tells you she suffered. A. Yes. Q. But your examinations have not revealed any injury in any form from which she was suffering? A. No."

It should be remembered Dr. Randolph was appellee's witness—her physician—the one upon whom she principally relied for professional support of her claim of injury. There was uncontradicted medical evidence that high blood pressure would not be attributed to an accident such as appellee experienced. On the contrary, it was testified that traumatic conditions (injuries or wounds) tend to produce low blood pressure.

Although appellee vigorously denied that she was in any manner afflicted prior to the accident, there is this testimony: "Q. What do you mean by nerve tonic? A. Aromatic spirits of ammonia. That is my medicine."

It seems certain, in the light of facts presented, that the collision between appellee's car and appellant's truck was not severe. The car door on the right side was bent in, its glass was broken, and some other damage was done; and yet, the car was not moved more than two feet. Ordinarily an impact throws passengers in the direction from which the force proceeds. For example, when head-on collisions occur, occupants of front seats are thrown against or through the windshield. Appellee's husband, however, says that in the instant case the rule of physics was reversed, and he was thrown or pushed to the left against his wife.

It was agreed, prior to trial, that X-ray pictures did not show injuries. In spite of this agreement, Dr. Randolph (without fault on the part of appellee's attorneys) stated: "All I base my stuff on is the X-ray." Asked if he saw the X-ray, the doctor replied: "No. It wouldn't have done any good for me to see it, because I can't read it."

We have grave doubts that the evidence is sufficient to sustain a recovery of more than nominal damages. This doubt, however, is resolved in favor of appellee by allowing a new trial—a trial to be had in circumstances

free from the prejudice recognized by the trial court, as reflected in its finding that the verdict was excessive. It is our view that after deducting $1,500, the amount is still grossly excessive.

In *Singer Manufacturing Company* v. *Rogers,* 70 Ark. 385, 67 S. W. 75, and 68 S. W. 153, Mr. Justice RIDDICK, speaking for an undivided court, said: "Even where there may be some conflict in the evidence, a new trial will be granted where the verdict is so clearly and palpably against the weight of evidence as to shock the sense of justice of a reasonable person; and the evidence here, we think, calls for the application of that rule."

In *Catlett* v. *St. Louis, I. M. & S. Railway Company,* 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254, we said: "The test is as follows: 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?" It was then said that the legal sufficiency of testimony to support a verdict "is not a question of fact nor one of law and fact, but is a question of law upon which this court must pass."

In the view that we have taken it becomes unnecessary to discuss the other assignments of errors.

We reverse the judgment, and remand the cause for a new trial.

HUMPHREYS and MEHAFFY, JJ., dissent.

BEASLEY *v.* COMBS, JUDGE.

4-5450 125 S. W. 2d 806

Opinion delivered February 6, 1939.

Duty & Duty and *Vol T. Lindsey,* for petitioner.

Earl Blansett, for respondent.

HUMPHREYS, J. This is a petition to this court for a writ of prohibition against the Benton circuit court and the judge thereof to prevent said court from entertaining an appeal from an order of the county court of Benton county made and entered on September 21, 1938, which order is as follows:

"In the County Court of
Benton County, Arkansas

"In the Matter of the Debt of
Benton County, Arkansas, due
December 7, 1924.

"Order Declaring the Indebtedness of Benton County, Arkansas, Outstanding at the Time of the Adoption of Amendment No. 10 to the Constitution of the State of Arkansas.

"This court having made a thorough investigation of the indebtedness of this county, existing on the 7th day of December, 1924, being the day when Amendment No. 10 to the Constitution of the State of Arkansas went

into effect, finds that said indebtedness of said county on that day amounted to the sum of forty thousand, forty dollars and 24/100 dollars ($40,040.24), all of which is still outstanding; and the clerk of this court is directed to publish for one insertion in some newspaper issued and having a *bona fide* circulation in this county, a copy of this order, to the end that any person who desires to question the correctness of the finding here made may bring suit for that purpose within thirty (30) days after such publication.

"This 21 day of Sept., 1938.

"Fred Berry, County Judge."

On the same date a notice of the order issued by the county court was published in the manner and for the time required in the Benton County Democrat, a weekly newspaper of general and *bona fide* circulation in Benton county. The notice is as follows:

"Notice

"In the County Court of Benton county, Arkansas

"In the matter of the debt of Benton county, Arkansas, due December 7, 1924.

"Order declaring the indebtedness of Benton county, Arkansas, outstanding at the time of the adoption of amendment No. 10 to the Constitution of the State of Arkansas.

"This court, having made a thorough investigation of the indebtedness of this county, existing on the 7th day of December, 1924, being the day when amendment No. 10 to the Constitution of the State of Arkansas went into effect, finds that said indebtedness of said county on that day amounted to the sum of forty thousand, forty dollars and twenty-four cents ($40,040.24), all of which is still outstanding; and the clerk of this court is directed to publish for one insertion in some newspaper issued and having a *bona fide* circulation in this county, a copy of this order, to the end that any person who desires to question the correctness of the finding here made may bring suit for that purpose within thirty (30) days after such publication.

"This 21st day of September, 1938.

"Fred Berry,

"County Judge."

The certificate of the publication of the notice of said order is as follows:

"I, G. L. Lindsey, do solemnly swear that I am the publisher of the Benton County Democrat; that the same is a weekly newspaper of general and *bona fide* circulation in Benton county, Arkansas, and I do also solemnly swear that the annexed advertisement was inserted 1 consecutive weeks in the Benton County Democrat, Bentonville, Arkansas, beginning on the 22 day of Sept., 1938.

"G. L. Lindsey,

"Publisher.

"Sworn to and subscribed before me this 21 day of Nov., 1938.

"Bess Pace, County Clerk."

On the 10th day of December, 1938, W. L. Marley, a citizen and taxpayer of Benton county, filed in the county court of Benton county an affidavit for appeal from said order which is as follows:

"In the county court of Benton county, Arkansas.

"In the Matter of the Debt of Benton county, Arkansas, due December 7, 1924.

"Affidavit for Appeal

"Comes now W. L. Marley, citizen and taxpayer of Benton county, Arkansas, and prays an appeal from this court and from its order, judgment and finding on the 21st day of September, 1938, to the circuit court of Benton county, Arkansas, and for cause states: That he as such taxpayer and citizen is aggrieved by said order, judgment and finding so made by said court; that said appeal is not taken for the purpose of delay, but that justice may be done him.

"(Signed) W. L. Marley

"Subscribed and sworn to before me this, the 10th day of December, 1938.

"(Signed) Bess Pace, County Clerk."

An appeal bond in due form was filed in the county court.

On the 10th day of December, 1938, the circuit clerk granted an appeal from said order to the circuit court of said county.

On the 17th day of December, 1938, Fred Berry, as county judge and representative of the county, appeared specially in the circuit court of Benton county for the sole purpose of moving to quash the appeal on the ground that the only remedy open to W. L. Marley as citizen and taxpayer to question the order of the court of date September 21, 1938, finding that the outstanding indebtedness against the county on December 7, 1924, was to bring a suit in the chancery court of said county within thirty days after the order and publication of the notice thereof in accordance with Enabling Act No. 210 of the Acts of the General Assembly of 1925 to review the correctness of the finding of the county court that on December 7, 1924, the county owed or had an outstanding indebtedness against it of $40,040.24.

The motion was overruled over the objection and exception of Fred Berry as the representative of said county and the cause was set down for hearing on December 26, 1938, whereupon application was made to this court for a writ of prohibition to prevent the circuit court and the judge thereof from entertaining said appeal and proceeding with the cause.

A response to the application for the writ of prohibition was filed and the issue joined by the petition and the response thereto is whether W. L. Marley, as a citizen and taxpayer, had a right to appeal from the order of the county court to the circuit court of date September 21, 1938, finding that said county was indebted in the sum of $40,040.24 of date December 7, 1924, or whether his exclusive and only remedy was to bring a suit in the chancery court of said county within thirty days after the publication of the notice of said order in the Benton County Democrat to review the correctness of the finding of the county court that said county was indebted in said sum on December 7, 1924. No suit was filed in the chancery court to review the correctness of the finding of the county court that the county was indebted in said sum on December 7, 1924. The appeal from the county

court order to the circuit court by W. L. Marley as citizen and taxpayer was taken within six months after the order of the county court was made and entered of record.

The order of the county court finding the amount of the said indebtedness against said county was made pursuant to Enabling Act No. 210 of the Acts of the General Assembly of 1925 for Amendment No. 10 of the Constitution of 1874.

In so far as applicable to the issue involved Amendment No. 11 (Now No. 10) to the Constitution is as follows:

"The fiscal affairs of counties . . . shall be conducted on a sound financial basis . . . Provided, however, to secure funds to pay indebtedness outstanding at the time of the adoption of this amendment, counties . . . may issue interest-bearing certificates of indebtedness or bonds with interest coupons." Adopted Oct. 7, 1924, effective 60 days after date of adoption.

The Enabling Act No. 210 of the General Assembly of 1925 of said amendment in so far as applicable to the issue involved herein, is as follows:

"Section 1. The county court of any county . . . may issue bonds for the purpose of funding the indebtedness of such county . . . outstanding at the time of the adoption of Amendment No. 11 to the Constitution. . . . Before the issue of any county . . . bonds under this act, the county court shall by order entered upon its records, declare the total amount of such indebtedness. . . . Such order of the county court shall be published immediately for one insertion in some newspaper published in the county, . . . and any property owner who is dissatisfied may, by suit in the chancery court of the county, brought within thirty days after the publication of such order, . . . have a review of the correctness of the finding made in such order; . . . but if no such suit is brought within thirty days, such finding shall be conclusive of the total amount of such indebtedness, and not open to further attack, and if said suit is brought the adjudication shall settle the question

and appeal therefrom must be taken and perfected within thirty days. . . ."

It is contended by respondent that act 210 of the Acts of the General Assembly of 1925 is unconstitutional because it contravenes Art. 7, § 33, of the Constitution of 1874 which, in part, is as follows:

"Appeals from all judgments of county courts . . . may be taken to the circuit court under such restrictions and regulations as may be prescribed by law."

Also that the act is in conflict with Pope's Digest, § 2913, which is as follows:

"Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court, at any time within six months after the rendition of the same. . . ."

As stated above, the order made by the county judge was made pursuant to and in accordance with Enabling Act No. 210 of the Acts of 1925 for Amendment No. 11 (Now No. 10) to the Constitution of 1874.

It was an order made under a statute which provided a special proceeding and remedy whereby an aggrieved taxpayer or property owner might question the correctness of the order by bringing the suit in the chancery court within thirty days from the publication of the notice of the finding of the county court as to the indebtedness of the county on December 7, 1924, the effective date of Amendment No. 11 to the Constitution of 1874. The order in question had no relation whatever to judgments of county courts from which appeals might be taken under Art. 7, § 33, of the Constitution of 1874 and the Enabling Act of said section of the Constitution providing an appeal shall be granted as a matter of right to the circuit court from all final judgments of the county court at any time within six months after the rendition of same.

Enabling Act No. 210 of the Acts of the General Assembly of 1925 is a special statutory proceeding for carrying out the purpose of amendment No. 10 to the Constitution of 1874 and makes ample provision for the protection of aggrieved taxpayers, property owners or citizens. It is provided in said act that such citizens and

property-owners may proceed in chancery to review the finding of the county judge relative to the amount of indebtedness existing against a county on the effective date of Amendment no. 10 to the Constitution and does not conflict with Art. 7, § 33, of the Constitution providing for appeals from all judgments of county courts which have reference and relate to judgments of a general character and not to final orders of county courts making findings and entering orders under the provisions of a special act.

We do not think act No. 210 of the Acts of 1925 is unconstitutional and void. We think said Enabling Act operates in a different field entirely from Art. 7, § 33, of the Constitution and Enabling Act thereto. The former relates to special orders made under special proceedings and the other to general judgments rendered by county courts. We think the case of *Dowell* v. *Slaughter,* 185 Ark. 918, 50 S. W. 2d 572, is controlling in the case here as the effect of the decision was to construe said Enabling Act as being the only and exclusive remedy available to citizens, property owners and taxpayers. It was, also, decided in that case that the act was not unconstitutional as being arbitrary and unreasonable and inadequate to afford the property owners ample protection.

The temporary writ of prohibition granted in this case is, therefore, on this application made permanent.

GRIFFIN SMITH, C. J., MEHAFFY and BAKER, JJ. dissent.

GRIFFIN SMITH, C. J. (dissenting). Amendment No. 10 to the Constitution, which directs that financial affairs of counties shall be conducted on a sound financial basis, has been construed many times by this court.

At the time the amendment was proposed, and when it was adopted, some of the counties were on a so-called "scrip" basis, and their warrants were depreciated. To afford such counties a means by which this floating indebtedness could be retired, a provision was inserted in Amendment No. 10 authorizing issuance of interest-bearing certificates of indebtedness, or bonds, . . . "to

secure funds to pay indebtedness outstanding at the time of the adoption of this amendment.'"[1]

Determination of indebtedness of Benton county existing as of December 7, 1924, was made by the county court (Judge Berry sitting) September 21, 1938—almost fourteen years after accrual of the right to fund the indebtedness.

The enabling act of 1925 is copied in the majority opinion. Under authority of this measure, there was, in the instant case, publication of the county court's finding that the 1924 indebtedness was $40,040.24. Act 210 provides that any dissatisfied property-owner may, by suit in chancery court, brought within thirty days after publication of notice that there has been a county court finding of indebtedness, . . . "have a review of the correctness of the finding made in such order; . . . but if no such suit is brought within thirty days, such finding shall be conclusive of the total amount of such indebtedness, and not open to further attack."

Article 7, § 33, of the Constitution, allows appeals to the circuit court from all judgments of the county court, to be taken under such restrictions and regulations as may be prescribed by law.

The general statute adopted pursuant to the constitutional right appears as § 2913 of Pope's Digest, the limitation being six months.

No suit was filed in chancery court to question correctness of the Benton County Court order, but in December, following publication of the notice, W. L. Marley prayed and was granted an appeal to the circuit court. The cause was set for hearing December 22, after motion to quash the appeal had been overruled.

This court granted temporary prohibition. By the majority opinion it is held that the writ shall be permanent.

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[1] In *Matheny* v. *Independence County*, 169 Ark. 925, 277 S. W. 22, the term "outstanding at the time of this amendment" was construed. In the same opinion it was said: "It is evident that the framers of [Amendment No. 10] intended that thereafter counties, cities, and towns, should confine their expenses for any fiscal year to the revenues for that year."

Respondent contends that Act 210 is void because it attempts to substitute the chancery court for the circuit court as the tribunal in which correctness of the county court judgment is to be determined. Petitioner replies with citations of opinions of this court which apparently uphold constitutionality of Act 210. The majority opinion holds that the Dowell-Slaughter Case[2] is controlling. The proceedings in that case, however, were in chancery court. Validity of Act 210 was not questioned on the ground that it denied the right of appeal to the circuit court. In the opinion it is said:

"Inasmuch as the complaint concedes that the suit was not brought within the time limited by the act, the validity of the bond sale depends upon the validity of the act, for, if this suit must be brought within thirty days after the publication of the court order, and not thereafter, the instant suit was not brought within that time, and the demurrer was properly sustained for that reason, if the act itself is valid. For reversal of the decree of the court sustaining the demurrer, it is insisted that, under the allegations of the complaint, the county court was without jurisdiction to make the order, that there was no authority to issue bonds unless there was an outstanding indebtedness on December 7, 1924, and, as the complaint alleged there was no indebtedness as of that date, the truth of which allegation the demurrer confessed, there was no authority to issue bonds, and the action of the county court was *coram non judice,* and is open to the attack here made upon it. We do not concur in this view. The county court had the jurisdiction conferred by the amendment and the enabling act passed pursuant thereto to issue bonds to discharge the indebtedness named, and the court was required to find, before exercising this jurisdiction, that there was such debt, and the amount thereof, and, having made that finding, to publish notice thereof, to the end that the property-owners who were dissatisfied with such finding might have a review of the correctness of it made in the chancery court. . . .

[2] 185 Ark. 918, 50 S. W. 2d 572.

"It is finally insisted that if the statute be construed as we have construed it, it is unconstitutional as being arbitrary and unreasonable and inadequate to afford the property-owners an opportunity to resist the proceedings . . . As it appears from the allegations of the complaint that this proceeding to question the order of the county court was not begun within the time limited by law for that purpose, and no ground for avoidance was shown, the right to proceed was properly raised by demurrer."

Although the opinion discusses effect of failure to proceed in the chancery court within thirty days, and holds that such failure bars such inquiry at a later date, it does not say that the right of appeal to the circuit court is lost; nor was the question directly raised by the pleadings. The decision is that where the complaining party adopts the chancery court as a forum, he is bound by that court's finding that the complaint was not filed within thirty days.

I think effect of the opinion, and of the opinion in *Stranahan, Harris & Oatis, Inc.* v. *Van Buren County,*[3] is to say that Act 210 is a limitation upon the time for questioning correctness of the county court finding of the amount of indebtedness or the time within which suit may be filed, but the Act does not, nor can it, take from the circuit court a jurisdiction conferred by the Constitution.

In the Dowell-Slaughter Case the demurrer admitted there was no indebtedness existing December 7, 1924, yet the opinion holds that the county court had jurisdiction to make the order selling $65,000 worth of bonds.

In the case at bar the circuit court's jurisdiction on appeal is definitely fixed; but, under authority of the Dowell-Slaughter Case, petitioners would have the right to demur.

Since the limitation of six months on appeals from the county court to circuit court was fixed by the General Assembly, under a discretion as to time conferred by the Constitution, it was within the legislative power to

[3] 175 Ark. 678, 300 S. W. 382.

say that a failure of complaining parties to file suit in chancery court within thirty days would foreclose inquiry at a subsequent date; or, expressed differently, the legislature had a right to say that a finding by the county court, notice of which was given by publication, would become conclusive unless challenged within thirty days.

Respondent's second petition is that no indebtedness existed as of December 7, 1924; that a judicial finding to that effect is shown of record, and that the determination made by Judge Berry September 21, 1938, was *res judicata.*

My construction of the majority opinion is that it only holds that no appeal can be taken from the order of September 21. Other judgments by the county court affecting the issue (all in 1938) were: October 24, order for issuance of bonds; November 15, order directing the treasurer to set up a "Bond and Debt Retirement Account," and to place to the credit thereof $40,120.91 realized from the sale of bonds, and "that said sum remain in said account until further orders of this court with reference to paying said debts and of transfer to other accounts for the purpose of paying said indebtedness"; November 16, order transferring money from Bond and Debt Retirement Account to county general fund, and to "pay warrants drawn on the above-named fund out of the county general account."

I do not understand that the majority opinion prohibits the circuit court from entertaining an appeal from the order directing sale of the bonds, or from the other orders mentioned, each of which, under innumerable decisions of this court, has the effect of a judgment, from which appeal may be taken within six months.

The most serious question is respondent's allegation that the county court's 1938 finding that the mentioned indebtedness existed in 1924 is *res judicata.* I think it was.

Attached to the response—and we must assume that this information was before the court, inasmuch as certified copies of the records in question are presented with the response of the then circuit judge—is a certificate of the county and probate clerk for Benton county, authen-

ticating certain exhibits, including those numbered 4, 5, 6, 7, and 8.

Exhibit 4 is the report of the county treasurer for the fourth quarter of 1924. Various items are identified. The cash balance of all funds on hand at the close of the preceding quarter (September 30, 1924) was $24,689.41. Quarterly receipts increased this item to $29,640.03. Expenditures were $14,515.19 for the quarterly period, leaving a balance of $15,124.84. To this report is attached the certificate of County Judge W. R. Edwards: "By the court examined, found correct in full, and in due form of law. Said report is therefore approved and in all things confirmed by the court."

Exhibit 5, copied from Record Book "X" at page 510, is as follows: "On this fifth day of January, 1925, the county clerk and county treasurer of Benton county . . . are hereby ordered by the court to make and file with this court on or before the first Monday in February, 1925, a sworn statement of the financial condition of Benton county, as the same existed on the first day of January, 1925. Said statement to be made to show the amount of money in the treasury . . . to the credit of each fund on said day; the amount of outstanding warrants [drawn] on each fund, and the amount of unadjusted claims pending in the county court."

Receipt of the report is noted, . . . "which report is in words and figures as follows: [Balance to the credit of] county general fund, $961.12; circuit court, $2,957.01; jail, overdrawn, $329.65; county home, $860.77; justices of the peace, $1,006.21; officers' salaries, $578.98; bridges, $7,835.85 highway improvement, $414.42, total of balances, $14,614.35."

Indebtedness was: "Outstanding general revenue scrip, $13,117.75; circuit court, $1,944.18; jail, $315.31; county home, $179.95; justices of the peace, $334.57; officers' salaries, none; bridges, none; highway improvement, $337.09; total, $16,328.87."

Disregarding the jail item of $329.65 shown on the exhibit "in red," and presumably an overdraft, the excess of warrants outstanding; over balances, was $1.714-

.52. The unadjusted claims are not shown in this report, but inasmuch as the court's order directed that they be determined and listed in the report, it must be presumed there were no such claims—although such presumption is no doubt erroneous.

There was this judicial finding: "Said report is by the court examined, approved, and ordered spread of record."

In Record "Z," at page 252, there appears an order "In the Matter of the Building of the New Court House." The order is exhibit 7 to the response herein, and is:

"On this 29th day of October, 1927, a day of the October term, the court makes a further investigation of the fiscal affairs of Benton county to determine whether the contract made by the commissioners with Messinger & Dalton for the building of the proposed court house should be approved, and finds from the previous assessment of real and personal property of the county, and the taxes collected therein, and the general county revenue received from all other sources, and from the amounts heretofore required to be expended for the necessary expenses in the administration of the affairs of the county, and upon a reasonable estimate of the probable receipts and expenditures necessary to administer the affairs of the county in the fiscal year beginning the second Monday in November, 1927, and the following years, from 1928 to 1947, inclusive, *that the county is now out of debt,* and that there will be annually a margin left to meet the annual payments of $10,000 for construction of the courthouse, as provided by the appropriation of $200,000 made by the quorum court of the county in December, 1926, after the indispensable governmental expenses of running the county are deducted from the total revenues to be annually levied and collected. W. R. Edwards, County Judge."

Exhibit No. 8 is a transcript of the proceedings of the quorum court, December 1, 1926. A committee had been appointed to examine the condition of the old courthouse and to make recommendations. The report recited that a suitable building could be erected . . .

"for approximately $200,000, to be appropriated and paid in twenty annual installmants out of the five mill tax levies authorized by law to be made for general county purposes, leaving a balance thereof sufficient to take care of the general county expenses; that the county court will get out of debt from levies already made for the fiscal year 1927, and [we] earnestly recommend that a new courthouse be built."

I am unable to construe these orders, judgments, and reports, in a manner different from what their language imports.

Disregarding the order of January, 1925—which seemingly does not take into account "unadjusted claims" pending—we have before us a definite judicial finding of the county court, made in pursuance of a specific purpose (issuance of bonds), that on October 29, 1927, the county *"is now out of debt."* Upon this judgment purchasers of courthouse bonds relied, and the bonds were sold after this solemn judgment had been rendered, from which no appeal was taken. At the expiration of six months it became final; and, in my opinion, neither Amendment No. 10 nor Act 210 was intended as a relief measure in circumstances such as we are dealing with. It is true the determination of county obligations—or, rather, a lack of obligations—was not made pursuant to Act 210, followed by publication in a newspaper. But there was no necessity for the performance of a useless task.

In *Stahl* v. *Sibeck*[4] we said:

" . . . Here the county court is attempting to set aside its previous order solemnly adjudicating the indebtedness of Pulaski county as of October 7, 1924, on the ground that the court made a mistake in the amount of the indebtedness, in the very teeth of the provisions of § 1 of the enabling act, No. 210 of 1925, p. 608. This section of the act provides that: 'The county court shall, by order entered upon its records, declare the total amount of such indebtedness.' . . . The order of the county court in 1925 found that the county was indebted

[4] 183 Ark. 1143, 40 S. W. 2d 442.

in the sum of $350,000. No person brought any suit to review the finding within the time limited, and it thereupon became 'conclusive of the total amount of such indebtedness, and not open to further attack,' and is *res judicata.*"

Provision in Act 210 for publication of the county court's finding of indebtedness, upon which it is proposed to predicate a bond issue, is for the benefit of taxpayers. It is difficult to understand why a judgment finding that there was no indebtedness, even though no publication in a newspaper was made, is not conclusive of the facts recited when the period for appeal has expired. Certainly no taxpayer's rights were impaired through failure of the county court to cause publication of its judgment that no indebtedness existed.

Since the circuit court, under the Constitution, has jurisdiction to entertain appeals from the county court, prohibition has been improperly granted, and the writ should be quashed.

VANDOVER, RECEIVER *v.* THE LUMBER UNDERWRITERS

4-5345 126 S. W. 2d. 105

Opinion delivered March 6, 1939.

G. B. Oliver, Jr., for appellant.

Gaughan, Sifford, Godwin & Gaughan, Daniel V. Howell and *E. L. Hollaway,* for appellee.

GRIFFIN SMITH, C. J. In May, 1933, J. W. Armstrong, as receiver for First National Bank of Corning, Arkansas, filed suit against The Lumber Underwriters, the Manufacturing Lumbermen's Underwriters, the Lumbermen's Underwriting Alliance, and "the unknown participating members of The Lumber Underwriters."

It was alleged that in January, 1931, the comptroller of the currency for the United States declared First National Bank to be insolvent; that February 21, 1931, a 100 per cent. assessment was levied against stockholders; that The Lumber Underwriters was a partnership and that certain assets belonging to said partnership were invested in stock of First National Bank; that, in evidence of such investment, 400 shares of stock of the par value of $25 per share were issued to The Lumber Underwriters; that although notice of the assessment was duly given, it had not been paid; that The Lumber Underwriters entered into contracts with Manufacturing Lumbermen's Underwriters and Lumbermen's Underwriting

Alliance;[1] that "The Lumber Underwriters" was a name selected by the unknown participating members whom it was sought to make defendants; that such members had banded themselves together as partners to do a reciprocal insurance business;[2] that assets of The Lumber Underwriters constituted a trust fund in the hands of an attorney-in-fact, held for the payment of all obligations of the subscribers at the exchange; and that, although due diligence had been exercised, plaintiff was unable to identify and locate the unknown participating members.

It was further alleged that records of The Lumber Underwriters were in possession of the three underwriting exchanges, mentioned *supra,* with offices in Kansas City, Missouri. There was a prayer that such defendants be required to produce their books of accounts and records, to the end that plaintiff might discover the names and addresses of all persons who interchanged insurance agreements among themselves under the name, "The Lumber Underwriters," and that such persons be made parties defendants to the suit, or to other suits if necessary, to effectuate collection of the stock assessment. There was a further prayer for judgment against each of the defendants for $10,000, with interest, etc.

Armstrong resigned as receiver of First National Bank, and the appellant Ewell Vandover succeeded him. There was an order by the court that the cause be revived in Vandover's name.

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[1] It was alleged that all of the assets of The Lumber Underwriters were transferred to Kansas City, but since appellant has abandoned its suit against the Lumbermen's Underwriting Alliance and the Manufacturing Lumbermen's Underwriters, this allegation is unimportant.

[2] Act 152 of 1915 now appears as §§ 7806 to 7819 of Pope's Digest. It provides that "Individuals, partnerships, and corporations of this state hereby designated subscribers, are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations, of other states and countries; providing indemnity among themselves for any loss which may be insured against under other provisions of the laws, excepting life insurance."

Motions, amendments, demurrers, answers, etc., were filed from time to time.

The record shows that The Lumber Underwriters was organized under authority of Act 152 of 1915, and that A. B. Banks & Company was appointed attorney.[3] In 1928-'29, an examiner for the Board of Insurance Commissioners for Texas made investigations in Arkansas. He recommended that the permit of The Lumber Underwriters to do business in Texas be cancelled, and this was done. Later, in consequence of a written agreement relating to a reserve fund, the cancellation was withdrawn. Under the agreement, stocks aggregating $250,000 in value were placed in escrow. It is in evidence that in 1928 The Lumber Underwriters gave its check to A. B. Banks & Company for $152,512.25 in payment of stocks, the contention being that by this transaction The Lumber Underwriters acquired ownership of the 400 shares of First National Bank stock, against which the assessment was made. There is convincing evidence that The Lumber Underwriters gave its receipt to First National Bank for the stock. The receipt is dated September 17, 1928.

It is not seriously denied that First National Bank was in a failing condition in 1928. A. B. Banks & Company was invited to take over management of the institution. Stock was either given to the Banks Company, or it was transferred for an insignificant consideration. However, the Banks Company, as a condition to its participation, required a guaranty of $35,000. This was evidenced by two notes—one for $25,000, and one for $10,000. These notes were good, the makers being men of considerable means. The guaranty was that the trans-

[3] The first paragraph in the power of attorney is: "The offices of A. B. Banks & Company of Little Rock, Arkansas, having been selected as a place at which to reciprocally exchange indemnity, such offices being designated The Lumber Underwriters, we, as subscribers at such Lumber Underwriters, appoint said A. B. Banks & Company of Little Rock, Arkansas, the survivors or survivor of them, jointly and severally, attorney for us in our name, place and stead, to exchange indemnity with subscribers at said Lumber Underwriters."

ferred stock, at the end of three years, would be worth 110 per cent. of par.

First National Bank did not prosper under the reorganization. April 13, 1929, an agreement was made whereby Corning Bank & Trust Company assumed deposit liabilities of First National Bank. Obligations due First National were assigned to Corning Bank & Trust Company. The latter closed November 18, 1930, and was reorganized in 1931 as *The* Corning Bank & Trust Company. Directors of Corning Bank & Trust Company declined to take over First National Bank until A. B. Banks & Company had executed a release, or waiver, of the guaranty of $35,000 previously exacted. In addition, A. B. Banks & Company agreed to pay deficiencies, after liquidation of assets, completion of collections, etc., if deficiencies existed, not exceeding $37,500. Appellant contends that stock assessments were included in the assets guaranteed.

H. R. Hampton, J. M. Silliman, and J. W. Trieschmann succeeded A. B. Banks & Company as attorneys-in-fact for The Lumber Underwriters. December 4, 1930, they entered into contract with Lumbermen's Underwriting Alliance, and with Manufacturing Lumbermen's Underwriters, whereby the two exchanges, domiciled in Kansas City, assumed the unexpired terms of all policies issued by The Lumber Underwriters, "thus terminating liability of The Lumber Underwriters." Details of the contract are not essential here.

June 4, 1934, appellant was given a list containing the names of the defendants formerly referred to as unknown. August 15, 1934, an amendment to the complaint was filed, in which judgment was asked against the newly-named defendants.

Service upon all of the defendants was attempted through summons left with the Insurance Commissioner of Arkansas. Appellant concedes that as to the foreign exchanges, judgment cannot be rendered on such service. They had not done business in this state, nor had they been licensed in Arkansas. Service on The Lumber

Underwriters would have been good [4] had the suit been one to enforce a policy obligation, or a liability growing out of an insurance contract. But such attempted service did not give jurisdiction of the person of the defendants where the demand, as in the case at bar, was one predicated upon a statute imposing liability against holders of stock in an insolvent bank.

In Cooley's Briefs on Insurance, vol. 1, p. 70, the author quotes with approval from 58 Central Law Journal, p. 323, where it was said: "The term 'inter-insurance' is applied to that system of insurance whereby several individuals, partnerships, and corporations, underwrite each other's risks against loss by fire or other hazard, through an attorney-in-fact, common to all, under an agreement that each underwriter acts separately, and severally, and not jointly with any other." Judge Cooley then says that associations of this character may usually be sued in the name of the association, and that "Under the inter-insurance system of insurance, each member is liable for his proportionate share of the insurance granted by policy, and a member sustaining a loss could proceed in a single chancery suit to secure a decree for the aggregate liability of the subscribers and to fix the separate liability of each subscriber, or could proceed in an action at law against the combined members, the method of enforcing the liability being but a procedural matter, over which the legislature of each state has control."

Section 3 of Act 152 of 1915, which now appears as § 7807 of Pope's Digest, provides that subscribers to reciprocal or inter-insurance shall, through their attorney [in fact], file with the insurance commissioner a declaration, verified by oath; and concurrently, such at-

[4] *Lewelling* v. *Manufacturing Wood Workers Underpriters*, 140 Ark. 124, 215 S. W. 258. This suit was brought in the Howard Circuit Court to recover on a fire insurance policy. Summons was served on the Insurance Commissioner. A. J. Neimeyer Lumber Company, a domestic corporation doing a lumber business at Little Rock, appeared in the suit solely for the purpose of moving to dismiss for want of party defendant. The court sustained the motion and dismissed the complaint. The action was reversed.

torney shall file with the commissioner an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificate of authority provided for in § 10 of the Act, "service of process may be had upon the insurance commissioner in all suits in this state *arising out of such policies, contracts, or agreements,* which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney."

The power of attorney executed by members of The Lumber Underwriters contained a provision for appointment of an advisory committee consisting of five or more subscribers.[5] Act 152 does not, by express language, authorize such a committee, and the committee's authority, of course, would be subservient to that of the attorney-in-fact, who in the Act is referred to merely as an attorney, agent, or other representative.

In the Lewelling Case, cited in the fourth footnote of this opinion, Mr. Justice HART discussed Act 152 and stated that "it provides for service of process upon the insurance commissioner *in all suits in this state arising out of policies issued by the association.*" It appears that the writer of the opinion, and this court in adopting it, had in mind the construction contended for by appellees in the instant case: that is, process served on the insurance commissioner gave jurisdiction of the person of the exchange, and it gave jurisdiction of the person of the exchange members in a suit to require ratable contribution in instances where the demand was predicated upon "such policies, contracts, or agreements." The words "contracts or agreements" are to be read in connection with "policies"—contracts or agreements relating to policies.

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[5] The section referred to contained this additional provision: "In choosing said committee, the attorney is authorized to ask subscribers whom they desire to serve as such committee, and the requisite number selected by the largest number of subscribers shall constitute such committee. Said committee shall have power to fill vacancies and shall serve until their successors are chosen."

Another section of Act 152 is: "Except as herein provided, no law of this state relating to insurance shall apply to the exchange of such indemnity contracts."

It is our view that service upon the insurance commissioner in a suit other than one arising out of a policy, or a contract or agreement relating thereto, is not authorized by the statute. There was no service upon the attorneys-in-fact who succeeded A. B. Banks & Company.

The chancellor found that the power of attorney under which the Banks Company acted in transferring First National Bank stock to The Lumber Underwriters specifically set forth the authority conferred; that, according to the written terms, the power was strictly limited "to the use and purposes [therein] expressed, and to no other purpose;" that there was no evidence of authority having been conferred upon the Banks Company by members of the exchange to purchase the stock, nor was it shown that at the time or thereafter such members knew that the transfer had been made, and "Under the specific terms of the power of attorney, Banks & Company did not possess any right or authority to purchase this stock for defendants."

We concur in this finding.

As to the "unknown defendants" who were treated by appellant as partners, they were served with process only to the extent that they could be reached by the summons directed to the insurance commissioner, and that was unavailing.

In the Lewelling Case it was said: "The power of attorney not only designated the building, street number, and city in which the office of the association was situated, but it also designated the name under which such association made its contracts. Therefore, we are of the opinion that when all provisions of the statute are considered, it meant to designate a name under which the association should do business and to provide the person upon whom service should be had in all suits involving the validity of policies of insurance and contracts of the association. . . . We think, however, the object of this clause was to provide a method for a subscriber

suing on a policy to enforce the proportionate liability against his fellow-subscribers in the event that the reserve fund on deposit was not sufficient to pay the loss, the liability of each subscriber being individual and not joint."

Sections 1240 and 1241 of Pope's Digest authorize discovery where a person or corporation is liable jointly or severally with others by the same contract. In such action the plaintiff shall state that he does not believe the parties to the contract who are known have property sufficient to satisfy the claim.

Appellant undertook to subject three known defendants to its demand: The Lumber Underwriters, the Manufacturing Lumbermen's Underwriters, and the Lumbermen's Underwriting Alliance. It was insisted that the two last-named defendants were trustees holding large sums of money to which The Lumber Underwriters was entitled. There was an allegation that The Lumber Underwriters did not have property sufficient to satisfy plaintiff's demands. Such allegation, however, was not made with respect to the other known defendants, but in effect the contrary was asserted. It is true there was no attempt to hold the Manufacturing Lumbermen's Underwriters and the Lumbermen's Underwriting Alliance with The Lumber Underwriters on the same contract; yet, if the two Missouri exchanges had been compelled to repay The Lumber Underwriters to the extent of the so-called trust fund, and liability of The Lumber Underwriters to appellant had been established, the known defendant (as to whom liability was alleged on the same contract with the unknown defendants) would have had ample property to discharge the obligation. It follows that the discovery statute was not applicable under allegations of the complaint, and the statute of limitations was not suspended as to such unknowns. We do not pass upon the proposition whether, if allegations had been sufficient as to the known defendants, the statute of limitations would have been suspended as to the unknown defendants when the suit was filed, assuming proper service on the known defendants.

In *Hospelhorn, Receiver* v. *Burke,* 196 Ark. 1028, 120 S. W. 2d 705, the court quoted with approval from *Nebraska National Bank* v. *Walsh,* 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301. The Hospelhorn suit was one against Mrs. Burke to enforce collection of an assessment on stock it was alleged she owned in an insolvent Maryland bank. The question was whether the action was for a penalty, and therefore barred by the two-year statute of limitation, or a statutory liability attaching to a contractual obligation not in writing. The opinion referred to that part of the Nebraska National Bank Case where Mr. Justice Wood said: "Having reached the conclusion that this is a statutory liability and not a penalty, the statute of limitations would be that applicable to 'all actions founded upon any contract or liability, expressed or implied, not in writing,' for before the form of action was abolished *debt* was the proper action for enforcing a statutory liability of the kind under consideration."[6]

Effect of the Hospelhorn Case was to hold that a suit to enforce liability upon a bank stock assessment must be brought within three years, and not thereafter, and we so hold.

The chancellor properly dismissed appellant's complaint, and his action is in all respects affirmed.

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[6] *Hughes* v. *Kelly,* 95 Ark. 327, 129 S. W. 784; *McDonald* v. *Mueller,* 123 Ark. 226, 183 S. W. 751; *Magale* v. *Fromby,* 132 Ark. 289, 201 S. W. 278; *Love* v. *Couch,* 181 Ark. 994, 28 S. W. 2d 1067. *Contra* see *McClain* v. *Rankin,* 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. U. S. 702, 3 Ann. Cas. 500.

DANIELS *v.* MOORE.

4-5258 125 S. W. 2d. 456

Opinion delivered February 6, 1939.

Coulter & Coulter, S. E. Gilliam, James H. Nobles, Jr., and *J. R. Wilson,* for appellant.

Robert C. Knox, for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Union county, second division, rendered on the 12th day of January, 1938, dismissing the complaint of appellants for the want of equity and quieting and confirming the title to the northeast quarter of the southwest quarter, section 26, township 18 south, range 17 west, including all of the oil, gas and other minerals thereunder, in fee simple absolute in appellees, Lizzie Moore, A. B. Moore, J. W. Moore, W. F. Moore, Elizabeth Sloan and Neil Sloan, as the widow and heirs of J. B. Moore, deceased, against the claims of appellants, Mattie Daniels and John Daniels or either of them.

The issues joined in the pleadings were, first, whether a warranty deed executed to said 40-acre tract of land from Mattie Daniels to J. B. Moore, deceased, of date November 23, 1923, was intended as a mortgage although in form a deed; second, and if a deed whether appellants had acquired the title back to said 40-acre tract by adverse possession; and, third, whether appellants were estopped by laches from claiming the instrument to be a mortgage although in form a deed.

The record reflects that on September 12, 1918, John Daniels purchased from Jackson McCorvey said 40 acres of land, together with 120 acres adjoining same. A vendor's lien was retained in the deed for $1,500 to secure the purchase price.

John Daniels acquired 80 acres of land in section 24, giving him in all 240 acres of land in sections 24 and 26.

On October 1, 1920, appellants mortgaged all the land they owned, or 240 acres in the two sections, to the Federal Land Bank in St. Louis. McCorvey satisfied his lien on the 160-acre tract so that the Federal Land Bank would have the first mortgage thereon. McCorvey then took a second mortgage on the entire 240 acres in sections 24 and 26 to secure the balance due him for purchase money on the 160-acre tract and took notes from appellants for the purchase money. These notes were subsequently bought by the First National Bank of Junction City, Arkansas.

John Daniels then borrowed some money from the First National Bank of Huttig, Arkansas, and to secure same executed a mortgage on his crops and live stock. The chattel mortgage was lost when John Daniels turned warehouse receipts for his cotton in the fall of 1920 over to the Huttig bank, but in January following he procured these receipts from said bank for the purpose of selling the cotton and accounting to the bank for the proceeds. He sold the cotton, but failed to pay the bank the proceeds thereof and left the country. The chattels pledged in the mortgage had also been disposed of by him when leaving. The Huttig bank, in order to protect itself, prevailed upon the Junction City bank to foreclose under its power in the mortgage on the 240 acres of land and at the sale of the property purchased same for sufficient to pay the Junction City bank and also the indebtedness due the Huttig bank, and the trustee in the mortgage made the Huttig bank a deed to the property for the 240-acre tract of land. This deed, through mistake, recited that the mortgage was owned by the Huttig bank, instead of the Junction City bank.

John Daniels was indicted for disposing of the mortgaged property and was arrested in California and

brought back to Arkansas and placed in the Union county jail.

While he was in jail on May 11, 1921, he executed a mineral deed to J. B. Moore on the 240 acres of land and on the following day conveyed all of the land to Mattie Daniels, his wife, reciting in the deed that it was subject to a deed previously executed to J. B. Moore.

It appears that in June, 1922, Mattie Daniels executed to J. B. Moore a deed to the 40 acres in controversy here. This deed was lost and on November 29, 1923, Mattie Daniels executed another deed for said 40-acre tract to J. B. Moore which contained a recitation that it was given in lieu of a former deed executed by the vendor about June, 1922.

There is testimony in the record, introduced by appellants, tending to show that the mineral deed executed on May 11, 1921, by John and Mattie Daniels to J. B. Moore was executed and delivered to J. B. Moore to secure an attorney's fee of $100 for representing him in the criminal charge against him and for bringing a suit to set aside the sale of the lands under the foreclosure proceeding of the Junction City bank at which foreclosure sale the Huttig bank bought the lands, and that the two deeds executed by Mattie Daniels to the 40-acre tract in question herein were executed by her in substitution for the mineral deed to secure said $100 fee.

John Daniels plead guilty to the criminal charge and through the efforts of J. B. Moore was pardoned and J. B. Moore brought a suit for the appellants herein to set aside the mortgage foreclosure aforesaid. The suit to set aside the mortgage foreclosure was later compromised. During the pendency of the suit appellants herein and J. B. Moore entered into a contract with the Atlantic Producing Company and J. W. Olvey for the sale of an oil and gas lease upon the entire 240 acres of land. Prior to the foreclosure sale appellants had sold one-half of the minerals on 40 acres of said land described as northeast quarter of the southwest quarter, section 26, township 18 south, range 17 west to W. B. Johnson, and W. B. Johnson joined with the appellants and J. B. Moore in making the contract and leases with the Atlantic Produc-

ing Company and Olvey. These leases were attached to an escrow agreement, which agreement reflected that the total consideration for the leases was $3,000. Under the terms of the escrow agreement J. B. Moore was to be paid $500 for his mineral interest in the 40-acre tract in question and $1,250 for his mineral interest in the other 200 acres and he allowed appellants to use the $1,250 in making the settlement with the Huttig bank.

A compromise was effected in the suit J. B. Moore had brought to set aside the foreclosure sale and the two banks received $3,000, $2,100 being paid in cash and appellants gave the Huttig bank a mortgage to secure the balance of $900.

The 40 acres involved in this suit was conveyed by a quitclaim deed by the Huttig bank to J. B. Moore and this 40-acre tract was not included in the mortgage appellants executed to the Huttig bank to secure the $900 balance they owed it.

The money received with which the claim of the banks was settled was a part of that received by appellants from the lease to the Atlantic Producing Company.

The 40-acre tract in controversy was the middle 40 John Daniels bought from Jackson McCorvey. When John Daniels bought this land he moved in a house on one of the other 40's and has since lived upon the 160-acre tract. The 40 acres in controversy was included within the fences upon this homestead and some five or six acres of said 40 were cultivated by John Daniels. John Daniels made no improvements upon it further than keeping up the fences. After making the warranty deed to J. B. Moore on November 29, 1923, by Mattie Daniels, J. B. Moore in his lifetime paid the taxes thereon until his death on September 11, 1926, and thereafter the taxes were paid by the Moore heirs until the institution of this suit. After the deed was executed to J. B. Moore to said 40-acre tract the Daniels continued to pay the taxes on the other 200 acres they owned.

When J. B. Moore died one of his sons, W. F. Moore, administered upon his estate and his three sons went to El Dorado for the purpose of looking into his affairs. They had conversations with John Daniels at that time

and several conversations afterwards relative to the 40-acre tract in controversy and were told by him that they conveyed a one-half interest by mineral deed to J. B. Moore, their father, to 240 acres, and later the warranty deed for the 40 acres in controversy to him also in payment for representing him in lawsuits. They also testified that it was agreed between them and him that he would take care of the 40-acre tract in controversy and keep the fences up around it and prevent people from cutting the timber on it for the use of six or seven acres which were in cultivation on it.

John Daniels denied that he made such statements to them or any such arrangement with them, but that he informed them at that time that both instruments were given to secure the $100 fee he owed J. B. Moore and that the fee was afterwards paid.

Witnesses who resided in the community where the 40-acre tract was located testified pro and con relative to whose property it was. Some of them testified that it was generally understood to be the property of appellants and others that it was understood to be the property of J. B. Moore or the Moore heirs. Other witnesses testified that Daniels cut and sold timber off of the 40-acre tract for his own use and benefit and others that he informed them that the land belonged to J. B. Moore and that he had no right to sell timber off of it.

There are other circumstances revealed in the record tending to show that the mineral and warranty deeds were intended as mortgages and other circumstances tending to show that they were both intended to be absolute deeds. It would extend this opinion to great length to set out all the evidence introduced in the case. After a very careful reading of the record we are unable to say that the chancellor's finding and decree is contrary to a preponderance of the evidence. This suit was not brought during the lifetime of J. B. Moore and not until about eleven years after he died. It could have been brought within his lifetime as well as a long time after he died. If it had been brought in his lifetime his lips would not have been sealed by death so that he could not

testify relative to the original transactions. By waiting for more than fifteen years to bring this suit the Moore heirs have been deprived of his testimony.

We do not think this evidence is of that clearness required under the law to say that a deed absolute upon its face was intended to be a mortgage. The rule relative to the character of the evidence required to prove that a deed in form was intended as a mortgage was recently re-announced and re-affirmed in the case of *Burns* v. *Fielder, ante,* p. 85; 122 S. W. 2d 160, in the following language:

"The evidence necessary to impeach the solemn recitation of the deed must be clear and convincing. . . . such evidence must be so clear that reasonable minds will have no doubt that such an agrement was executed. It must be so convincing that serious argument cannot be urged against it by reasonable people.

". . . Business transactions must have finality. Conveyances must not be exposed to the caprice of parol, nor explained away by less than that quantum of evidence which essentially attains the dignity of clarity, impressing conviction."

We do not think the record in this case meets that requirement.

There is also a general rule to the effect that the retention of the possession of vendors after the execution and delivery of a deed is presumed to be in subordination of the title conveyed and the statute of limitations will not begin to run until notice of the hostility of their claim is actually given to the grantee. This rule was well stated in the case of *City of Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541. We do not think this presumption was overcome by a preponderance of the evidence. During the period the 40-acre tract was occupied by appellants the trial court had a right under the record in this case to find that appellants' possession of the 40-acre tract after the execution of the deed was attributable to their tenancy and not to their ownership or claim of ownership. We are also of opinion that even if the findings and decree of the trial court were not sustained

by a preponderance of the evidence under the rule announced above that appellant should be denied a recovery on account of their inexcusable delay in bringing their suit. The first deed to the 40-acre tract was executed in 1922 and the second in 1923 and according to appellants' contention the debt was paid in 1926. This suit was not filed until September 25, 1937, more than fifteen years after the execution of the deed and more than eleven years after the time when appellants claimed that J. B. Moore was paid for his services. J. B. Moore died in 1926 and appellees herein have been deprived of his testimony as to the true nature of the original transactions and because of appellants' delay it has, of course, become difficult for the Moores to prove just what the original transactions were. On account of this unnecessary delay and the loss of the testimony of J. B. Moore who might speak relative to the original transactions the doctrine of laches should be applied, and for that reason as well as the findings and decree of the chancellor should be affirmed, which is accordingly done.

HOLT, J., dissents.

TERRAL *v.* SIRATT.

4-5358 125 S. W. 2d. 451

Opinion delivered February 13, 1939.

Tom J. Terral and *Alonzo D. Camp,* for appellant.

Elmer Schoggen, for appellee.

HUMPHREYS, J. On April 20, 1934, appellant herein recovered a judgment against Guy A. Thompson, trustee of the Missouri Pacific Railroad Company of $22,500 for his client, appellee herein, on account of personal injuries to his client, in the United States district court of the western district of Arkansas, El Dorado division.

Under a reorganization proceeding against said railroad company in the United States district court for the eastern judicial district for Missouri this judgment or claim, filed in said court was given priority as operating expenses of the trustee, and he, as trustee of said railroad company, was directed to pay said claim or judgment to H. C. Siratt, appellee herein, which then amounted to $27,900 including interest plus $200.05 cost.

Appellant herein was claiming an interest in said judgment and lien thereon and parties to whom he had assigned certain interests in the judgments were claiming interests therein, and parties to whom appellee herein had assigned certain interests in the judgment were claiming interests therein, and certain physicians were claiming liens thereon, so Guy A. Thompson, trustee for the Missouri Pacific Railroad Company, debtor, filed a bill of interpleader in the chancery court of Pulaski county making all the claimants to interests in the judgment parties defendant and depositing the amount of the judgment, interest and cost in the registry of the court, alleging that he, as trustee, was unable to determine the amount, if any, due each claimant out of the judgment, and praying that said defendant be required to answer and establish their respective claims.

Various interventions and responses were filed and among them interventions of appellant and appellee herein were filed together with the responses to each others' intervention.

All interventions were adjudicated and settled except the issues joined between appellant and appellee

herein growing out of their respective interventions and responses which were later heard and determined by the trial court, resulting in a finding and decree in favor of appellant to the effect that appellee owed appellant $912.50 for one-half of all the expenses appellant had paid and incurred in prosecuting appellee's suit for damages against said trustee for said railroad company, and for $700 appellant loaned appellee during the pendency and trial of the damage suit. The interventions of appellant and appellee and their responses filed by each joined issue between them as to whether appellant loaned appellee $2,641.50 or only $700 during the pendency and trial of the damage suit, and whether, under the contract of employment, appellee owed appellant $912.50 or any part thereof for one-half of the cost including witness fees of experts who testified in the trial of the case for appellee.

The testimony introduced responsive to these issues is very voluminous and in sharp conflict. The court in the trial *de novo* of the case on appeal has carefully read and analyzed the evidence and have concluded that the finding of the chancery court on each issue is not contrary to a clear preponderance of the evidence. It could serve no useful purpose as a precedent to set out herein the substance of the testimony of each witness and to do so would extend this opinion to an unusual length.

It may be said in passing that no receipts, except perhaps one or two, and no canceled checks were introduced by appellant showing loans made by him to appellee. Appellant testified that he took no receipts for actual money except one or two, and appellee and his wife testified that they never received any money unless they receipted for it.

After the testimony was closed, and on the following morning before the case was submitted appellant introduced six or seven sheets taken from a book he said he kept himself showing the amounts he loaned appellee, and the dates thereof, over the objection of appellee, but the book out of which the sheets were taken was not

introduced. The book itself would have been the best evidence as to original entries and should have been introduced if relied upon as original entries of the items claimed to have been loaned. The sheets were nothing more than memoranda which appellant might have used to refresh his memory in testifying, and could not have been used as original entries either as original testimony or testimony in corroboration of the statements of appellant. The transactions testified to covered a long period of time, some six or seven years, and without the aid of a book showing original entries of the amounts loaned and the dates thereof, and without the aid of canceled checks or receipts the record discloses nothing more than the recollection or memory of appellant and appellee as to the various amounts loaned. In this condition of the record, as stated above, a majority of the court have concluded that the finding and decree of the chancellor is not contrary to the weight of the evidence.

Mr. Justice Mehaffy and the writer are of opinion that a preponderance of the testimony reflects that appellant loaned appellee $2,641.50.

No error appearing the judgment is affirmed on appeal and cross-appeal.

LYLE *v.* RELIANCE LIFE INSURANCE COMPANY OF PITTSBURG, PA.

4-5368 124 S. W. 2d. 958

Opinion delivered February 13, 1939.

M. Danaher and *Palmer Danaher,* for appellant.

Coleman & Gantt, for appellee.

GRIFFIN SMITH, C. J. Appellant sued on a policy of insurance which entitled him to $25 per week if stated conditions concurred. Coverage was against loss "resulting directly and independently of any and all other causes from sickness or diseases . . . which sickness or disease shall wholly disable the insured and necessitate treatment by a legally qualified physician."

It was alleged that the plaintiff was totally disabled for nine days from March 20, 1936. Also, that he was "not necessarily confined to his home, but was totally disabled and prevented from performing many substantial duties pertaining to his occupation from March 29, 1936, for a period of 50 weeks and five days."

The court directed a verdict for $32.14, upon which judgment was rendered. This amount had been tendered by the insurance company before suit. The direction precluded recovery for the 50 weeks and five days.

Testimony of Dr. Cunningham was that Lyle came to him in February, 1936; that he had nephritis, with

blood pressure from 170 to 200,[1] and "at the beginning the patient suffered quite a lot from rheumatism." Lyle was advised to have his teeth extracted, which he did. Sometimes the suffering from rheumatism was severe; at other times the pain was not so great. Lyle was told to stay in bed several hours during each day. This the patient did for a while, but finally broke the rule. It was Dr. Cunningham's opinion that Lyle's acts in working every day, without taking the prescribed rest, were detrimental to his health.

Appellant testified that following confinement to his bed from March 20 to 29, his condition for a year was such that he was not able to work . . . "but I had to work, except at times I was out and could not work at all."[2]

On cross-examination appellant testified that for ten years he had been a grocery salesman, going from town to town seeing customers. He said: "I am working on a salary of $275 a month and furnish my own car and expenses . . . I am doing part of the same work I did before my sickness, but not all of it. The territory has been cut a little—some few accounts have been cut off of my territory. I go to Jefferson, Lincoln, and Desha counties, and worked Lonoke county near England for

[1] Plaintiff's age was 45 years; his weight, 203 pounds; his height, six feet. Prior to the sickness complained of, plaintiff's weight had been 260 pounds.

[2] In detail, appellant testified: "There was never a time I didn't have pain somewhere about my body—and it is still that way now. My back hurts and my neck hurts all the time. I didn't feel like working. I was nervous and just couldn't—just did not feel like working like our men worked. . . . I did the best I could to rest three hours a day as instructed by the doctor. I wouldn't leave home until late in the morning and get back early in the afternoon and lie down and rest. I still do that a part of the time, but I am just not in position to rest every day like I should, because I have so much work to do in order to get my pay; I just have to do it, whether I feel like it or not. . . . At one time Dr. Cunningham told me to go to Memphis and go through the clinic, and I went there and stayed two or three days. I also went to Hot Springs and consulted Dr. Wade. . . . I still take medicine all the time. . . . Dr. Wade told me the only thing in the world that would do me any good was to rest and stay on a diet. I have stayed on that diet pretty well. . . ."

a while. The change in my work is that I do not go to Lonoke county, and there are some of the accounts in my other territory that I do not call on any more. I leave home around eight o'clock in the morning or a little after and go down to Cook & Sons' [place of business] and get instructions about prices. I travel my territory alone. I usually call on three or four little towns a day and get home about five or six o'clock. It is the same line of work I did before March, 1936. My disease has disabled me from performing my work as I should."

"Q. Has your work for Cook & Sons during this period been satisfactory to them? A. I have an idea it has."

Two decisions of this court[3] are relied upon by appellant as authority for reversal of the directed verdict. We do not think the facts in those cases and in the instant case are similar. In the Aetna Case the plaintiff Martin was afflicted with diabetes. He was a contractor, and prior to the illness complained of . . . "had performed not only supervision and direction of his contracting work, but had made a regular hand in the execution of his business, working from 12 to 15 hours daily." Subsequent to contracting diabetes . . . "he was able to give but little attention to his business." It was further shown that Martin's business, due to neglect occasioned by his illness, had greatly depreciated in value.

Testimony in the Sams Case was that the plaintiff was suffering from a dilated heart, arterio-sclerosis, and other maladies. A physician testified: "A man in Sam's condition can't meet work that requires labor of any kind." A neighbor testified: "I never saw Sams [who was a farmer] at work on his farm; he would just be out looking around."[4]

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[3] *Aetna Life Insurance Company* v. *Martin*, 192 Ark. 860, 96 S. W. 2d 327; *The Sovereign Camp W. O. W.* v. *Sams*, 194 Ark. 557, 108 S. W. 2d 1089.

[4] Other testimony on behalf of the appellee Sams was: "He should not do any work requiring the least exertion."—Dr. McCollum. "He can't hold out to do anything very long. At times he was helping haul hay, and while I was pitching it to him he would give out. Would haul a load of hay and the next day he would help me plow

In *Aetna Life Insurance Co.* v. *Person,* 188 Ark. 864, 67 S. W. 2d 1007, we said: "The general object of contracts similar to that involved in this case is to give to the insured indemnity for the loss of time because of a disability which prevents the prosecution of his business, and the evident purpose is to provide a means of living during the time the insured is unable to engage in any gainful occupation. As we have stated, disability exists within the meaning of the contract when the assured is able to accomplish only some of the duties essential to the prosecution of his business, and where he is able to perform only occasional acts."

The question is, Was appellant wholly disabled? We do not find any evidence to show that he was. By his own admissions he continued to work, and he drew the same salary throughout the period of so-called disability. It is not in the record that his employers complained. On the contrary, appellant "had an idea" they were satisfied with his services.

The word "disability" is synonymous with incapacity. As used in the workmen's compensation statutes of most of the states, disability means loss of earning power.[5]

The evidence shows that appellant's work was attended by physical inconvenience, considerable danger of aggravating the condition, and that there was physical pain in connection with the rheumatism of which he complained. Yet, the fact remains that he continued to work and that his earning power was not decreased. In these circumstances the trial judge did not err in instructing a verdict.

Affirmed.

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and would have to quit before night because he gave out. He has been in bed practically ever since. He has tried to help on the farm within the last thirty days, but he can't hold out."—J. E. Freeman.

[5] Ballentine's Law Dictionary, p. 378; 28 R. C. L. 819.

4119 126 S. W. 2d. 110

Opinion delivered March 13, 1939.

[redacted]

Reinberger & Reinberger and *E. D. Dupree, Jr.,* for appellant.

Jack Holt, Attorney General, *Jno. P. Streepy,* Asst. Atty. General, for appellee.

MEHAFFY, J. The appellant was convicted in the Jefferson circuit court of the crime of murder in the second degree and his punishment fixed at imprisonment in the state penitentiary for 21 years. The case is here on appeal.

Mrs. Mildred Seifert, a sister of Henry Jones, the man that was killed, testified that she operated a restaurant and also rented out rooms; her brother, Henry Jones and his wife occupied rooms there, as did the appellant, Earnest Decker; Decker was indebted to her in the sum of $15.05 which she had requested him to pay; on the night preceding the killing she saw Decker in front of her place and told him she needed the money; he said he did not have any money and did not know when he would have; later on that night about 11 or 11:30 the appellant came into witness' place and asked who had been in his room and taken his clothes; she told him it was probably her mother; that she told them to get the clothes and hold them for the rent, as Decker was going to move; they had some words about the clothes and debt and appellant told her she could keep the clothes, but nothing else, and he further said that if he had seen anyone coming out of the room with his clothes, that would be the last room they would ever come out of, and said there was going to be

trouble; they then had some words about how much of his clothes they would hold and finally appellant walked away; she heard someone knocking at Mrs. Jones' door the next morning and calling for Ollie; when she told him Ollie was out appellant told her that when she was dressed he wanted to see her a few minutes; later Mrs. Jones came upstairs with her sick baby, and when she found out that appellant had been there she sent for her husband, Henry Jones; her husband went to appellant's room at the request of witness, and was not at that time carrying anything; he came back later and got the suitcase containing appellant's clothes and carried them to appellant's room; the suitcase contained everything except appellant's overcoat and suit; the next thing she heard was someone calling Henry, and Mrs. Jones going down to the room; about this time she heard one shot fired; she ran out, met Mrs. Jones coming from the room crying, and went to the door and met appellant and another man and also a lady whom she did not know; witness asked Decker why he killed Henry and Decker said Jones tried to kill him; she called him a liar as Jones had left the room with nothing in his hand but the suitcase. Witness stated that her brother was 27 years old and weighed about 185 pounds; when she entered the room Jones was lying on the floor with his feet near the front door and his head near the door to the closet; she did not see a gun in the room and did not look for one; appellant never refused to pay his debt, but said he did not have the money; he did not always pay her when he had money; on one occasion stated to her that he would not give her his last two or three dollars and go around broke.

There were several other witnesses who testified, corroborating Mrs. Seifert.

The appellant testified that he lived at Pine Bluff in a rooming house, renting from Mrs. Seifert; he never had any dealings with any other person about renting the room; he was a painter and decorator by trade, but on August 7 was hired as a special police officer; he had known the deceased four or five years; he roomed with Mrs. Seifert and took his meals at her restaurant and at

one time owed her between $40 and $45. On August 7 he owed her about $10. On that date Henry Jones came into his room and asked if he had sent for him and told him Mildred said that he had; upon being told that witness had not asked for him, Jones left and returned in about five minutes bringing two suitcases that had been carried out of his room together with practically all of his clothes and some other objects; he talked to Mrs. Jones about these articles earlier in the morning; she asked him if he wanted the suitcases and he said he would get them later; witness stated that when Jones entered his room he asked what were all the things he was telling about his wife and witness denied it; Jones then cursed him and accused him of talking about Mrs. Seifert; witness told him that his (Jones) wife had always been a friend to him and he did not want to have any trouble; that Jones' wife was probably mad because the witness and Jones had been "honky-tonking" around and coming in late; witness then told Jones to leave the room, but instead of that Jones stepped to the dresser and grabbed a pistol, cursing him, and said he would kill witness with his own gun; witness then jumped up and grabbed Jones and in the scuffle he was trying to twist the gun out of Jones' hand, and when he practically had it out of Jones' hand, Jones jerked back, stepped into one of the suitcases, fell back, and the gun went off; that at the time the door to the room was shut, having been closed by Jones when he came in with the suitcases; that the first time Jones came, nothing out of the way was said, and when he came the second time witness did not know he was mad; he did smell the odor of whiskey on Jones' breath, and from what Jones said thought he must have been mad on the second trip, but witness said he could not have gotten away without being shot or injured; that Jones was between him and the door; this was his room; he had rented it, but not from Jones; that he had no dealings with Jones; Mrs. Jones, the mother of deceased, and also his wife, assaulted witness after the killing; he stated that Jones threatened to kill him.

On cross-examination he stated that he had done nothing to Mrs. Jones to cause Mr. Jones to get mad,

and Jones had no reason for killing him; that he did owe Mrs. Seifert some money and that she had ordered him to leave; that he called the sheriff on August 7 and asked if there was a way for him to get his clothes without paying the bill; he also called the prosecuting attorney and was told the best thing to do was to pay the bill; he had known Jones some time; Jones was about 27 years old, and the witness was 35; when in good health weighed about 150 and 160, but at the time of the shooting weighed only about 140; before the shooting he had done Jones no harm, was not mad at him when he brought the clothes in. Witness identified on a picture where he was standing when Jones came in and pointed out where the gun was lying on the dresser; that when Jones started toward him with the gun he ducked, grabbed it and grabbed Jones by the wrist. Witness was then handed the gun and told to turn it around and attempt to shoot himself as he said Jones was shot. He stated that he grabbed Jones and Jones stumbled over a suitcase and the gun went off; he denied that he told Mr. Voris that he caught Mr. Jones' wrist with one hand and the elbow with the other and twisted the gun up against him and fired.

It would serve no useful purpose to set out the testimony in detail. The only question argued by appellant is the court's refusal to give the following instruction requested by appellant:

"You are instructed that if you find from the evidence the defendant actually thought of the circumstances and appearances by which he was surrounded at the time of the killing; and that he honestly, and without fault or carelessness, believed he was in danger of losing his life or of receiving bodily harm at the hands of the deceased and that it was necessary to shoot the deceased in order to prevent such harm to himself, and that he fired the fatal shot for this purpose, the accused must be acquitted, although the jury may now believe from the evidence that the accused was mistaken in his conclusions as to the danger to himself and that in fact there was no danger threatening him, and no necessity for shooting the deceased; that the jury must judge the danger from the

standpoint of the defendant under all of the circumstances of the case as shown by the evidence, and not from the standpoint of the jury."

There are two reasons why it was not error for the court to refuse to give this instruction. The first is that there was no testimony tending to prove the facts set forth in the instruction. Appellant himself testified that Jones stepped back into a suitcase and fell back and the gun went off; that appellant and Jones were in a scuffle and he was trying to take the gun away from Jones.

The court gave of his own motion an instruction based on the evidence, which is as follows:

"If you believe from the evidence in this case that the deceased attacked the defendant with a pistol and that the defendant, acting in good faith and without fault or carelessness on his part, honestly believed that he was in danger of losing his life or of receiving some great bodily harm at the hands of the deceased, and that he then grappled with the deceased and that in a struggle over the possession of the pistol it was discharged and the deceased thereby killed, then the defendant would be entitled to an acquittal."

The instructions given by the court correctly stated the law to the jury, and were as favorable to appellant as he had any right to ask.

The judgment is affirmed.

DICKINSON *v.* MCKENZIE.

4-5405 126 S. W. 2d. 95

Opinion delivered March 13, 1939.

W. R. Thrasher and *G. R. Haynie,* for appellant.

H. H. McKenzie and *McRae & Tompkins,* for appellee.

HOLT, J. Appellant, Layman Dickinson, and appellee, H. H. McKenzie, on September 12, 1936, entered into a written agreement under the terms of which appellee agreed to sell to appellant 538.08 acres of land in Nevada county, Arkansas, for $3 per acre, reserving all pine timber eight inches and over at the stump. $200 was paid as earnest money and the balance was to be paid on or before January 10, 1937. On January 9, 1937, appellee executed a deed to appellant in compliance with the agreement, reserving therein the pine timber with the right, for one year, from the date of the deed, to cut and remove said timber. In June, 1937, it became apparent that the timber could not be removed within the time limit, so on June 19, 1937, an option was agreed to and signed by appellant giving appellee a year's extension from January 9, 1938, to January 9, 1939.

The material provisions of this option are as follows: "I give and grant to the said H. H. McKenzie the option

of extending the time for another year from January 9, 1938, on payment to me of $100 at any time on or before January 9, 1938, should he care to exercise the option, and on payment to me of the $100 in cash at any time on or before January 9, 1938, the said H. H. McKenzie shall have until January 9, 1939, to cut and remove said timber." After January 9, 1938, appellant contended that appellee had failed to pay or tender to him the $100 for appellee's right to the extension in question according to the terms of the option agreement, and accordingly declared appellee's right to the option forfeited, and thereafter refused to accept the $100 tendered by appellee for said extension.

Thereupon appellee filed this suit, alleging in his complaint, among other things, the following: "That prior to the 10th day of January, 1938, plaintiff had prepared the necessary papers and a valid check for the $100 payable to defendant and sought to deliver same to him, but by various pretenses said defendant evaded plaintiff, but agreed that he would meet plaintiff on Saturday, the 15th day of January, 1938, and close said contract, thereby lulling plaintiff into the belief that he would accept said tender and execute said extension. That on said day plaintiff tendered said sum to defendant, but he refused to accept same, and claimed the time to make same had expired. That plaintiff was at all times on and after the 9th day of January, 1938, and is now, ready, able and willing to pay said $100, and sought to do so, but was wrongfully prevented from doing so by defendant wrongfully evading plaintiff and absenting himself for the fraudulent purpose of claiming that said option had expired. That defendant is now estopped to claim that said option has expired."

Appellee also tendered into court the sum of $100 and prayed that appellant be required to specifically perform said option, that he be enjoined and restrained from cutting and removing any part of the timber specified, and that he, appellee, be given one year from the termination of the litigation in which to cut and remove said timber. Appellant filed a demurrer and answer to the complaint. In his answer he specifically

denied every material allegation in the complaint except that he admitted the execution of the contract of September 12, 1936, the execution of the deed in question by appellee on January 9, 1937, and the execution of the option agreement dated June 19, 1937, signed by appellant only.

The material facts, as reflected by the record, substantially are: January 9, 1938, fell on a Sunday. Appellant is a traveling salesman and was usually out of the city except at night. On January 7, 1938, appellee prepared the option extension agreement in question, but did not see appellant that day but on Sunday night, the 9th, at about seven o'clock, he called appellant on the 'phone and told him that he had missed him on the Saturday before and that he then had the papers and check ready to close the extension and that appellant replied to him over the telephone in these words: "Why, Horace, don't worry, this is Sunday and it is not convenient. I will be here all next week and we can attend to it next week." On Monday, January 10, 1938, appellee called several times at the office of the Logan Grocery Company, where appellant worked, but each time was advised that appellant had not returned from his territory, and subsequently 'phoned for appellant three times and finally talked to him over the 'phone and told him that he, appellee, had the $100 ready and papers to be signed by appellant. Appellant advised appellee that he was tired, having worked his orders, and "Don't worry, Horace, we will fix that up Saturday." The record further reflects that on Saturday, January 15th, appellee met appellant on the street about 11:30 a.m. and told him he would like to get the papers signed and that he would get Miss Hitt, a notary, and go out to appellant's house to get his wife's signature. Appellant advised against this, saying that he might not be at home. Appellee met appellant two or three times the same afternoon and on their last meeting appellant said to him: "The mails were open, you could have sent me the check. You did not pay it in time and I feel that it is my timber." Appellant testified that appellee did not tell him that he had

a check for him for $100; that money was never mentioned from June 19, 1937, until January 15, 1938.

He further testified that appellee never told him in the conversations he had with him that he wanted to get the extension closed up; that he, appellant, did not know what appellee wanted with him; that he did not say except that he had some papers he wanted to fix up; that he said nothing to mislead appellee or to keep him from paying the $100.

Gus McCaskill testified that he was in the Logan Grocery Company building on January 10th when appellee talked to appellant on the 'phone and that he heard appellant's part of the conversation distinctly, he not being more than thirty feet away. He heard appellant say, "Horace, (meaning appellee) don't worry about that I will attend to that Saturday." Appellant denied that he made any such statement over the 'phone.

Sam Logan testified that he is connected with the Logan Grocery Company, and that appellant had been employed by the company for nineteen years. Appellee, on the afternoon of January 10, 1938, made several 'phone calls to the grocery company inquiring if appellant were in the office. He, Logan, answered the 'phone once. Appellee asked if appellant were there and that he told him he had not come in but should be there in a few minutes. Appellee is Logan's wife's nephew. Appellee further testified that he went by to see if appellant had come in for he was anxious to get it closed up that day. That was the date of the expiration of the option. He did not go to appellant's house that night because appellant refused to see him. Appellant put the date off and set the date himself as to when he would close it. Appellee further testified that if he had known appellant was trying to defraud him and would not sign the extension he would have sent it by registered mail, and told appellant when asked why he did not mail it to him, that with our relationship and the trust appellant had in him, appellant would think appellee a plain fool if he registered a letter with a $100 money order in it to him. Appellee thought he should have closed the deal that day. There is other evidence in the case, which we do not deem it necessary to set out.

On this record the court, among other things, found as follows: "The court further finds that prior to the 10th day of January, 1938, the plaintiff had prepared the necessary papers and a valid check for $100, payable to the defendant, Layman Dickinson, and sought to deliver the same to him but by various pretenses evaded plaintiff but agreed that he would meet the plaintiff on Saturday the 15th day of January, 1938, and close said contract, thereby lulling the plaintiff into the belief that he would accept said tender and execute said extension. That on said day the plaintiff tendered said sum to defendant, Layman Dickinson, but he refused to accept said tender and claimed the time to make the same had expired. The court further finds that plaintiff was at all times on and after the 9th day of January, 1938, and is now ready, able and willing to pay said $100, and sought to do so, but was wrongfully prevented from doing so by defendant, Layman Dickinson, wrongfully evading plaintiff and absenting himself for the fraudulent purpose of claiming that said option had expired; that defendant is now estopped to claim that said option has expired;" that appellee had paid the sum of $100 into the registry of the court for appellant, that appellee is entitled to judgment and decreed that appellee have one year from the date the judgment became final to cut and remove the pine timber in question, that the clerk of the court pay the $100 in the registry of the court to appellant, and that appellant be permanently enjoined and restrained for the period of one year from interfering with appellee in cutting and removing said timber. From this judgment of the trial court comes this appeal.

It is earnestly contended by appellant that the chancery court had no jurisdiction and that its judgment awarding specific performance and injunctive relief is erroneous. To this contention we cannot agree. It will be remembered that the consideration mentioned in the deed executed on January 9, 1937, for the 538.08 acres of land in question was $3 per acre and in addition the reservation to the appellee, McKenzie, of all the eight inch, or over, pine timber of the approximate value of $2,000, provided the timber were removed within a year from

the date of the deed, and that the option agreement of June 19, 1937, was but an agreement upon the payment by appellee to appellant of $100 additional on or before January 9, 1938, to give appellee a year's additional time from January 9, 1938, within which to cut and remove the timber.

We hold that equity had jurisdiction to enforce specific performance of the contract in question and to grant the injunctive relief prayed for. In *Dollar* v. *Knight,* 145 Ark. 522, 224 S. W. 983, this court states the rule as follows: "Where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case. It is as much a matter of course for courts of equity to decree a specific performance of a contract for the conveyance of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach." And in 25 R. C. L., p. 271, § 72, the author says: "In the case of real estate specific performance is decreed almost as a matter of course when the contract has been properly established and is unobjectionable in any of its features which address themselves to the chancellor's discretion. Under such circumstances the vendee is entitled to have the contract specifically enforced irrespective of his right to recover damages for its breach. In other words, where the land is the subject-matter of the agreement, the jurisdiction of equity does not depend upon the existence of special facts showing the inadequacy of a legal remedy in the particular case, but the presumption arises that damages will not constitute an adequate remedy. Damages are not regarded as the equivalent of the specific relief because the exact counterpart of any particular piece of real estate does not exist anywhere else in the world."

The contract in the instant case need not be binding upon both appellant and appellee. It being an option contract, it is sufficient if it is binding upon appellant alone and may be specifically enforced as to him. In *Meyer* v. *Jenkins,* 80 Ark. 209, 96 S. W. 991, this court said: "It is true that Jenkins does not agree to pur-

chase; that was left optionary with him. He had, under the contract, which is set out in the statement of facts, the right to purchase at the expiration of his lease, if he chose to do so. A contract of that kind which by its terms is binding on one of the parties only may be specifically enforced against that party, although the remedy cannot be granted to him against the other party. Pomeroy, Specific Performance, § 169; Waterman on Specific Performance, § 200."

Also in *Watts* v. *Kellar,* 56 Fed., 1, on the question as to whether or not a contract will be specifically enforced where the right to specific enforcement is not mutual, the court said: "The want of mutuality of right to a specific performance of a contract, which sometimes precludes its enforcement in equity, has no application to an option contract of the character we are considering. The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells. In the absence of an agreement to the contrary, each party to a contract to buy or sell land may have it specifically enforced against the other, but the very purpose of an optional contract of this nature is to extinguish this mutuality of right, and vest in one of the parties the privilege of determining whether the contract shall be vitalized and enforced. An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damages as of any value. The modern, and we think the sound, doctrine is that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the makers an obligation to perform them specifically, which equity will enforce."

It is next contended by appellant that the chancellor's decision is against the weight of the evidence. We cannot agree. After a careful consideration of this entire record, we have reached the conclusion that the findings of the chancellor are not against a preponderance of the evidence, and that the evidence supports appellee's contention that he was ready, able and willing to carry out the terms of the option agreement in question and did all that was required of him in attempting to pay to appellant the $100 for the extension of time before January 9, 1938, and that he was prevented from doing so solely by the conduct of appellant. In *Townes* v. *Oklahoma Mill Company,* 85 Ark. 596, 109 S. W. 548, this court said: "It is an elementary principle, needing no citation of authority in support, that there is no breach of contract where performance is prevented by the conduct of the other party. The party whose own conduct prevents performance of a contract cannot complain of non-performance."

In James on Option Contracts, § 923, p. 455, the author says: "If the failure to make a timely election arises from the inequitable conduct of the optioner, and the optionee is free from fault, equity disregards time as essential * * *. The effect of such conduct, it is said, waives the timeliness of the tender and estops the optionor from taking advantage of his own wrongful conduct." Again this court in *Kampman* v. *Kampman,* 98 Ark. 328, 135 S. W. 935, said: "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,* 77 Ark. 168, 90 S. W. 1000, 'a condition may be waived by acts as well as by express release.' "

On the whole record we conclude that the findings of the chancellor are correct, and the decree is accordingly affirmed.

KEESHAN *v.* HAYS.

4-5393 126 S. W. 2d. 105

Opinion delivered March 13, 1939.

Brewer & Cracraft, for appellant.

John C. Sheffield, for appellee.

GRIFFIN SMITH, C. J. Appellant, who are partners, question two of several judgments rendered in consequence of personal injuries and property damage sustained when an ambulance owned by appellants, and an automobile owned by Ed Blair, collided.

Blair, with others, was in his car when the accident occurred. Mrs. Blair was driving. Jury verdicts resulted in judgments for $2,000 in favor of Ed Blair, and $2,500 for his wife. Damage to the automobile was $350. Medical and hospital bills, and services of physicians incident to treatment of the Blairs, amounted to $275, leaving $1,375, and $2,500, to compensate injuries sustained by husband and wife, respectively. It is not contended that the injuries were permanent.

Appellants urge a failure of appellees to establish by proper proof—that is, by substantial evidence—that the injuries were sufficient to justify the amounts awarded.

Unless, in a given case, the judgment is so large as to attest that considerations other than appropriate evidence induced the verdict—such, for instance, as excess sympathy, prejudice, a response to passionate appeal, inflammatory argument, and the like—and unless we can say that no jury, free from improper inducement, would reach the conclusion that is challenged, this court does

not direct a remittitur; or, in the alternative, reverse for retrial.

Applying this rule to the appeal before us, the judgments must be affirmed. It is so ordered.

HIRSCH AND SCHUMAN *v.* DABBS AND MIVELAZ.

4-5373 and 5-5401 126 S. W. 2d. 116

Opinion delivered March 6, 1939.

George W. Dodd, for appellants.

Geo. F. Youmans and *Roy Gean,* for appellees.

SMITH, J. The state of Arkansas brought suit in the Sebastian chancery court, Fort Smith District, for the confirmation of title to numerous town lots and tracts of land which had been forfeited and certified to the state for the nonpayment of taxes. The suit was begun under authority conferred by act 119 of the Acts of 1935, p. 318. Section 6 of this act reads as follows:

"Section 6. Any person, firm, corporation, or improvement district claiming any interest in any tract or parcel of land adverse to the state shall have the right to be made a party to the suit, and, if made a party, the claims of any such person, firm, corporation, or improvement district shall be adjudicated, If any person, firm, corporation or improvement district sets up the defense that the sale to the state was void for any cause, such person, firm, corporation or improvement district shall tender to the clerk of the court the amount of taxes, penalty and costs for which the land was forfeited to the state, plus the amount which would have accrued as taxes thereon had the land remained on the tax books at the valuation at which it was assessed immediately prior to the forfeiture, provided, that there shall be credited on the amount due, any taxes that may have been paid on the land after it was forfeited to the state.

"In case any person, firm, corporation or improvement district so made a party defendant to the proceed-

ing as hereinabove provided, shall establish a valid defense, a decree of the court shall be rendered in favor of such defendant, with respect to the tract so affected and shall quiet the title thereto in such defendant, free from any claim of the state therein, upon payment by said defendant of the total amount of taxes, penalty and costs as hereinabove mentioned."

Two lots in the city of Fort Smith, which are the subject-matter of this litigation, were involved in this confirmation suit, it being alleged that said lots had been sold to the state in 1934 for the non-payment of the taxes due thereon for the year 1933. Appellees, respective owners of the two lots here in question, filed an intervention, pursuant to the authority of § 6 of this act 119, above copied, and alleged that the sale of their lots was void for numerous reasons. They made the tender required by § 6, and the sum tendered was deposited with the clerk of the court, subject to the order of the court, and they prayed that their title be quieted.

Appellant J. B. Hirsch had purchased both lots from the state, and received a separate deed for each lot, and it was prayed that Hirsch be made a party defendant. This was done, and Hirsch filed an answer to each intervention, denying the invalidity of the forfeiture and sale to the state. The same issues are involved, and arise out of facts identical in each intervention, and we will discuss the cases as if there were only one case.

The court held the sale of the lots void for various reasons and granted the interveners the relief prayed, and from that decree is this appeal.

The court made numerous findings of fact, in each of which it was declared that the sale was void for the reasons there stated.

One of the findings was that the sale was void for the reason that the county clerk had not posted up in or about his office the delinquent list of lands for one year. This requirement appears in § 10084, Crawford & Moses' Digest, and it had been held that failure to comply with it invalidated the tax sale. *Tedford* v. *Emison,* 182 Ark. 1054, 34 S. W. 2d 214.

But when the sale here in question was made, this requirement was not in effect. Section 10084, Crawford & Moses' Digest, was amended by act 250 of the acts of 1933. This amendatory act re-enacted § 10084, Crawford & Moses' Digest, by omitting the last sentence thereof, which reads as follows: "He (the county clerk) shall also keep posted up in or about his office such delinquent list for one year." The effect of this amendment of § 10084, Crawford & Moses' Digest, by § 5 of act 250 was to dispense with this requirement, and as that duty is not now imposed and was not required when the tax sale was had, non-compliance therewith does not now operate, and has not, since the passage of act 250, operated to invalidate tax sales on that account.

Act 250 of the acts of 1933 was not published in the printed acts of 1933. Under that number appears the notation: "Held unconstitutional by the Supreme Court." This was an error on the part of the secretary of state in omitting to include act 250 in the acts of 1933 as published.

This act 250 contains provisions fixing the fees of various county officers, and that portion of the act was held unconstitutional in the case of *Smith* v. *Cole,* and *Brown* v. *Pennix,* 187 Ark. 471, 61 S. W. 2d 55, for the reason that it violated the inhibition of amendment No. 14 to the constitution against passing local laws, but it was said in that case that "the fact that §§ 5 and 6 of act 250 of 1933 are general in their nature and valid will not validate local and special provisions in § 2 of the same act." See, also, *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. 2d 476.

Sections 5 and 6 of this act 250 amended § § 10084 and 10085, Crawford & Moses' Digest, respectively, and that portion of the act was upheld in the case of *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909, it being the opinion of the court that these § § 5 and 6 were separable from the remainder of the act, which fixed fees and salaries. Section 5 of act 250 was, therefore, valid legislation, as was also § 6, and, as we have stated, the effect of § 5 was to eliminate the requirement contained in § 10084, Craw-

ford & Moses' Digest that the county clerk post and keep posted up in and about his office such delinquent list for one year.

Other findings of the court holding that the tax sale was invalid are to the following effect: No proper certificate of delinquency was filed by the collector with the county clerk; nor was the certificate which was filed, filed within the time required by law; nor was the list of delinquent lands entered upon the record within the time and manner required by law. The court further found that the clerk had failed to attach to the tax books the warrant required by law authorizing and directing the collector to make collection of the taxes entered upon the tax books.

There was read into the record a certificate as follows:

"State of Arkansas, County of Sebastian. I, Earl Dawson, county clerk within and for the county and state aforesaid, do hereby certify that a notice of the filing of the foregoing list of real estate returned delinquent for the year 1933 was published in the Southwest-Times Record Company, a newspaper of said county and district. The first notice of the delinquent land sale was published on 9th day of November, 1934, and the second notice on the 16th day of November, 1934, as the law requires.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said office this 22nd day of November, 1934."

Following this reading the clerk was asked: "Q. Is the notice actually set out in that record" and he answered: "A. No, sir."

It is uncertain to what document or record this question and answer related. There does not appear to have been any other record of the "List of Real Estate Returned Delinquent for the Year 1933." If this delinquent list had not been entered upon a permanent record, usually referred to as the record of lands returned delinquent, the sale was void for that reason. If this was the record, and not merely the delinquent list filed

by the collector with the county clerk, the entry therein was not sufficient, for the reason that the record was not made until November 22, 1934, which was subsequent to the date of sale, the sale having been made November 19, 1934.

Section 10082, Crawford & Moses' Digest, required the collector to file the list of delinquent lands, duly verified, with the county clerk by the second Monday in May, and it was held essential to the validity of the sale of these lands that the list be filed on or before that date. *Boyd* v. *Gardner,* 84 Ark. 567, 106 S. W. 942; *Ramsey* v. *Long Bell Lumber Co.,* 195 Ark. 528, 112 S. W. 2d 951. The county clerk was required to compare this delinquent list with the tax book and the record of tax receipts. Section 10084 required the county clerk to publish the list of delinquent lands as corrected, and by § 10085 it was required that "The clerk of the county court shall record said list and notice in a book to be kept by him for the purpose," and shall certify at the foot of the record the newspaper in which the list was published, and the date of publication, and for what length of time the same was published before the second Monday in June next ensuing. These statutes were construed as requiring that not only should this record be made, but that it must be made before the day of sale, and that if not made, or not made until after the day of sale, the sale was invalidated. *Magness* v. *Harris,* 80 Ark. 583, 98 S. W. 362.

The insistence is, not that these requirements were met, but, that they have been dispensed with by act 250 of the 1933 regular session of the General Assembly, and by act 16 passed at the special session thereof (Acts Special Session 1933, page 61), and that it is not now required that the clerk shall certify anything more than to state in what newspaper the notice of delinquent lands was published, and that it is not required that this certificate shall be made before the sale.

It becomes necessary, therefore, to consider in what respect the law as it appears in Crawford & Moses' Di-

gest, *supra,* has been changed by subsequent legislation, as applied to the record in this case.

As we have said, § 5 of act 250 amended § 10084, Crawford & Moses' Digest, by eliminating the requirement that the delinquent list as published shall be posted in the clerk's office.

Section 6 of act 250 amends § 10085, Crawford & Moses' Digest. This amendatory section is not found in the published acts of 1933, but is set out in the opinion in the case of *Union Bank & Trust Co.* v. *Horne,* 195 Ark. 481, 113 S. W. 2d 1091, except, as there published, there is omitted the last paragraph of that section which reads as follows: "The list of delinquent lands recorded as provided in § 5 hereof shall have attached thereto, by the county clerk, a certificate at the foot of said record, stating in what newspaper said notice of delinquent land sale was published, and the dates of publication, and such record, so certified, shall be evidence of the facts in said list and certificate contained."

The portion of this amendatory § 6, copied in the opinion in the case of *Union Bank & Trust Co.* v. *Horne, supra,* provides that "There shall be published once weekly for two weeks between the second Monday in May and the second Monday in June, in each year, ..., a notice to the effect that the delinquent lands, tracts, lots or parts of lots so entered in said delinquent land book will be sold, ... Said notice of sale of delinquent real estate for taxes shall occupy a space of not more than six inches double column in each publication . . ."

This amendatory § 6 then provides that "Said notice shall be in substance as follows: 'NOTICE OF DELINQUENT TAX SALE. The lands and lots and parts of lots returned delinquent in ..... county for the year 19....., together with the taxes and penalties charged thereon agreeable to law, are contained and described in a list or record on file in the office of the clerk of the county court; . . .'" Thereafter follows the last paragraph of the amendatory § 6, copied above, which

was omitted from the opinion in the case of *Union Bank & Trust Co.* v. *Horne, supra.*

We perceive, in this amendatory legislation, no intention to dispense with the requirement that a permanent record be made and kept of lands returned delinquent, nor as to the time of making such record, that is, prior to the sale.

The effect of this amendatory § 6 is to make such a record more important than ever; indeed, under this amendatory section, such a record becomes indispensable. This amendatory section dispenses with the necessity of publishing the list and description of the delinquent lands. A six-inch, double column notice advises that delinquent lands will be sold, but does not describe the land to be sold. That information cannot be obtained from the published notice, but can only be had by examining the permanent record in which the delinquent list of lands has been copied. If the continued keeping of that record is not required, then there was no permanent record where anyone might look to ascertain what lands were returned delinquent. The notice for which the act provides refers to the record where the delinquent lands are described, and the last paragraph of this § 6 requires that a certificate be made at the foot of that record stating in what newspaper the notice was published.

Act 16 of the Special Session of 1933 changes the time for collecting taxes, and permits their payment in installments, and amends act 250 to conform to this change in time for payment and for certifying delinquency in payment of taxes. Later legislation affecting time of payment need not be here considered.

Section 5 of this act 16 amends § 6 of act 250 by providing the time and manner of publication of "Notice of delinquent land sale," and provision is made for the publication of "A notice to the effect that the delinquent lands, tracts, lots or parts of lots so entered in said delinquent land book will be sold . . ." But this act 16 also dispenses with the necessity of describing the lands to be sold by providing that "Said notice of sale of delinquent real estate for taxes shall occupy a space of not

more than six inches, double column in each publication." Then follows the form of this notice, which, without describing the lands to be sold, recites that these lands "are contained and described in a list or record on file in the office of the clerk of the county court; . . ." Thereafter follows a paragraph identical with the last paragraph of § 6 of act 250, above copied.

We conclude, therefore, that the requirement of § 10085, Crawford & Moses' Digest, that the clerk of the county court shall record said list and notice in a book to be kept by him for that purpose, has not been dispensed with, and as that requirement was not complied with, the tax sale was void for that reason.

The court also found that the clerk had failed to comply with the requirements of § 10016, Crawford & Moses' Digest, that "The clerk of the county court of each county shall, on or before the first Monday in January in each year, make out and deliver the tax-books of his county to the collector, with his warrant thereunto attached, under his hand and the seal of his office, authorizing said collector to collect such taxes." This section of Crawford & Moses' Digest was amended by § 3 of act 16, *supra,* the amendment being to the effect that the clerk shall deliver the tax-books to the collector on or before the third Monday in February, instead of on or before the first Monday in January. The provision that he shall do so, with his warrant thereto attached, was unchanged. It has been held that the failure of the clerk to attach his warrant to the tax-books avoids the sale. *Stade* v. *Berg,* 182 Ark. 118, 30 S. W. 2d 211; *Keith* v. *Freeman,* 43 Ark. 296; *Hooker* v. *Southwestern Improvement Association,* 105 Ark. 99, 150 S. W. 398.

In the Stade Case, *supra,* the tax books were delivered with warrant attached, but not until January 22, and this delay was held to have invalidated the tax sale.

The court below found that the warrant had not been attached to the tax books; and that finding does not appear to be contrary to a preponderance of the evidence, and the sale must be held invalid for that reason.

There is a companion case to the one we have just discussed, which may be disposed of in this opinion, this being case No. 5401.

Three lots belonging to different owners were embraced in this confirmation suit, but those owners did not intervene until after the confirmation decree had been rendered. A lot belonging to one of these owners had been sold in 1931 for the taxes of 1930. Two other lots had been sold in 1933 for the taxes of 1932, and those sales had been confirmed.

In this act 119 of the acts of 1935 there appears a provision in § 9 thereof that "The owner of any lands embraced in the decree may, within one year from its rendition, have the same set aside insofar as it relates to the land of the petitioner by filing a verified motion in the chancery court that such person had no knowledge of the pendency of the suit, and setting up a meritorious defense to the complaint upon which the decree was rendered. The chancellor shall hear such defense according to the provisions of this act as though it had been presented at the term in which it was originally set for trial."

The owners appeared within a year of the date of the confirmation decree and moved to set it aside as to their lots, upon the allegations that they had no knowledge of the pendency of the confirmation suit and had a meritorious defense to the complaint upon which the decree was rendered. Those lots had been sold by the state, and the purchaser from the state was made a party defendant. The act, as appears from the portion above copied, allows one year in which this showing might be made.

These parties attacked the sales under which their lots had been sold to the state upon numerous grounds, several of which were sustained by the court, and upon this showing of a meritorious defense against the confirmation decree, that decree was vacated and their title was quieted upon their tendering the sum required by the act. This second and separate appeal which we are now discussing was prosecuted from that decree.

The sale of the lot in 1931 for the 1930 taxes was made before § 10084, Crawford & Moses' Digest, was amended by act 250 of the session of 1933, and § 10084, Crawford & Moses' Digest, was in full force and effect when the sale for the taxes was made in the year 1931. It was, therefore, required, under the law as it existed at the time the sale for the 1930 taxes was made, that ". . . the clerk shall also keep posted up in and about his office such delinquent list for one year." The testimony shows that this was not done, and the sale in 1931 was void for that reason. There was a showing in the case of the sales for both years that the clerk had failed to attach his warrant authorizing the collector to collect the taxes, and both sales were void for that reason.

The court was, therefore, warranted in finding, in this second case, that there was a meritorious defense within the meaning of § 9 of act 119 of 1935 and in vacating the confirmation decree for that reason. Section 6 of act 119 makes a showing that the tax sale was invalid a valid defense against the confirmation of the sale; and § 9 of the act provides that in a proceeding brought pursuant to its provisions "The chancellor shall hear such defense according to the provisions of this act as though it had been presented at the term in which it was originally set for trial." It appears, therefore, that the invalidity of the tax sale is a meritorious or valid defense against confirmation as well, within one year after, as before the rendition of the decree of confirmation.

We conclude, therefore, that the decrees in both cases Nos. 5373 and 5401 are correct, and both are, therefore, affirmed.

HOLT, J., disqualified and not participating.

THE PRODUCERS GRAVEL & SAND COMPANY, INC., *v.* JONES.
(substituted appellee)

4-5390 126 S. W. 2d. 99

Opinion delivered March 13, 1939.

Ned Stewart and *Shaver, Shaver & Williams,* for appellant.

Ward Martin, Sam T. & Tom Poe and *C. E. Johnson,* for appellee.

BAKER, J. Although the record on this appeal is somewhat extensive, and the briefs are voluminous in addition to an elaboration by oral argument, the issues are few and clearly presented.

Three plaintiffs sued The Producers Gravel and Sand Company and the superintendent and manager of the company for damages arising out of injuries caused by a

truck, upon which they were riding, turning off, or leaving the highway and running into a ditch-bank, whereby serious injuries were sustained by each plaintiff. All the suits were consolidated for trial below and on appeal. The material allegations in each complaint were essentially alike except in the descriptions of the injuries sustained. Jim McCuller, who was the driver of the truck at the time of the accident, was named in the suits as a joint defendant with the others. Since the suits as to McCullers were dismissed and no issue is involved in such dismissal, all that part of the complaints in regard to McCuller will be disregarded.

It was alleged in the complaints that The Producers Gravel and Sand Company, a Louisiana corporation, owned and operated a gravel and sand pit three miles north of Wilton in Little River county.

Defendant Ross was alleged to have been in complete charge and control of the corporation and all its operations.

It was further alleged in the complaint that on March 10, 1937, and prior thereto, plaintiffs were employed by the defendant corporation as workmen at its gravel and sand pit near Wilton, on Little River; that in the early morning the defendant corporation furnished to the plaintiffs, and other workmen employed by it, an automobile truck to transport such workmen from Wilton, in Little River county, to the gravel and sand pit, and from the pit to Wilton at the end of each day's work; that this automobile truck was also used to haul and transport equipment and material in and about the gravel and sand pit.

It was further pleaded that it was the duty of the defendants to use ordinary care to furnish a reasonably safe automobile truck to transport plaintiff from Wilton to the gravel and sand pit on Little River and return, and to exercise ordinary care to keep the automobile truck in reasonably safe condition and repair.

In addition to these matters facts are stated showing that while driving at a speed of not exceeding twenty-five miles an hour, on return from the gravel and sand

pit to Wilton, the truck turned to the right, ran off the road into a ditch and into the bank on the far side of the ditch, causing the injuries complained of.

The answer filed was a general denial and a plea of assumption of risk. From verdicts in favor of each of the plaintiffs and consequent judgments this appeal comes. Appellants present only two issues. The first is, they argue that the testimony is insufficient to show or establish negligence. The second is that the plaintiffs assumed the risks. Our discussion of these propositions will, no doubt, tend to show that the distinction between the two issues, as set forth, is somewhat artificial. That is to say, neither one of the said issues, under the facts in this case, may be properly presented without a discussion to some extent, at least, of the other.

Many of the most essential and material facts are undisputed, but even as to these undisputed matters, counsel for the appellants and for the appellees arrive at wholly different conclusions. Contradictory announcements are found in regard to the same matters.

We shall attempt in some measure, at least, to state what we think are the undisputed facts.

The appellant for several years had been operating this gravel and sand pit on Little River, about three miles north of Wilton, having twenty or more employees who lived at Wilton and who went back and forth from their homes to the pit and from the pit to their homes. At least two of the plaintiffs testified that they had been so employed since 1930. In the early operation of this gravel and sand pit Mr. Ross operated an Essex car or automobile of which he was the driver and he picked up the employees in the mornings, took them to their place of work and returned with them in the afternoons after the day's work was completed. Later a truck was supplied which was used to haul the employees back and forth from their homes to the place of employment, or from the pit to their homes, some one of the employees acting as the driver. Finally the particular truck upon which the three plaintiffs were riding, at the time of the accident, was bought as a second-hand truck and sup-

plied or furnished and was constantly used for a year or two prior to the date of the wreck. This truck was used not only by the men employed at the gravel pit for this transportation, but on the grounds in and about the gravel pit when necessary to haul or move any particular bits or parts of machinery or other supplies. The truck had grown old, was somewhat delapidated and was an object of humorous ridicule by the men who rode back and forth upon it, and one of the plaintiffs in this case seemed to have been habitually accustomed to making humorous, and somewhat caustic remarks about the truck, its condition and appearance. On different occasions when some part would wear out or give away the company would supply new parts and would direct some one of the employees to make the necessary repairs. At least this seems to have happened two or three times when new universal joints were supplied and installed upon the truck. The company furnished necessary oil and gasoline for its operation. There is no evidence that Mr. Ross, the manager, or any other employee selected any particular one to drive the truck or control its operation. The evidence is ample, however, to show that the truck was generally driven by the employee of the defendant company who operated the hoisting machine at the gravel pit. We think the evidence also tends to show that the employees had some part in the selection of the driver as they complained and insisted among themselves that one driver who had perhaps driven faster than they thought was safe and he ceased in the rendition of that service to them, and at that time Jim McCuller, who was then operating the hoisting machine, assumed the position of driver of the truck and continued operating the truck until the date of the wreck. It is not contended that anybody rode upon this truck back and forth except employees of the defendant company, or that anybody drove it except one of those who was likewise employed, in going back and forth, as were the others upon these morning and afternoon trips. One or two witnesses testified directly that Mr. Ross told them to ride the truck back and forth, and several witnesses testified that on occasions when the time might be changed at which the

employees would go to work, Mr. Ross would personally see and notify different members of the crew so that they would be able to meet the truck and be picked up at the proper time to be carried to the place of employment. The appellants argue most seriously that there was no contract or agreement on their part to furnish or supply the truck; that they were under no legal duty or obligation, by reason of employment, to operate this truck, to carry or haul the employees back and forth, but that the furnishing of the truck was a mere license or a permission granted on the part of appellants to the employees to use the truck and that they accepted it in the condition in which they found it; that there was consequently no duty or obligation to maintain, inspect or repair the truck; that it was there so the men might use it as they did, when and how they chose, that no one controlled them in their use of the truck, directing them how to drive it, or otherwise, that its condition was apparent and that those who used it were charged with the knowledge of its condition and that consequently they assumed the risk.

A short time before this accident occurred, perhaps a few weeks or months, one of the employees had been sent by Mr. Ross to pick up and haul some boards with it and upon his return from the trip he had an accident, when it suddenly turned to the right and ran off the road, but without doing any particular damage or harm to him or the truck. He reported this accident to Mr. Ross, explained to him that the truck would not turn to the left by reason of some defect and that this occasioned this accident; that he and Mr. Ross both manipulated the truck so as to get it back on the road and that the condition of the truck at that time was explained to Mr. Ross to the effect that something was wrong with the steering mechanism which caused it to hang or stick and prevented its proper operation, causing the accident to happen.

Even though we should agree with appellants' contention that they were under no legal obligation to furnish or supply a truck upon which the employees could ride back and forth, we do not think it necessarily follows that since the appellants did undertake to furnish said truck

appellants owed no duty or obligation of inspection, repair or maintenance of the truck furnished. Nor do we think that because of the fact that neither the corporation nor Mr. Ross undertook to designate, select, or appoint anyone as the driver of the truck, while it was so used by the employees in going back and forth to their work, that fact makes any particular difference.

While the appellees' alleged negligence on behalf of the driver when they filed their suit, that part of the suit was dismissed and plaintiffs did not rely upon any negligence or misconduct of the driver of the truck at the time the accident and injuries complained of. They did rely upon the defective condition of the steering mechanism of the truck, which defect, under the undisputed evidence was known to Mr. Ross, who had sole managerial control of the plan and its operations. We do not mean that Mr. Ross thoroughly understood and comprehended every particular detail of this defective mechanism, but he knew that it had locked; that the truck had left the highway once before, because an employee could not turn the steering wheel. He knew whether it had been inspected and, if so, at what time and the results of such inspections, but there is no evidence that it had ever been inspected from and after the time it had been bought and furnished to the men and they began using it and the company began furnishing oil and gasoline for its use.

The evidence offered in this case by some of the witnesses, that Mr. Ross had directed them to ride the truck, that he had notified them on different occasions at what time the truck would go out, or that they would begin work, so that the men would know when to expect the truck, the fact that essential parts had been supplied for repairs necessary for its operation; that the company for years had furnished gasoline and oil, are evidentiary facts properly submitted to the jury to determine the implied contract or obligation on the part of the appellants to supply transportation. This question of implied contract or obligation to furnish transportation to the men so employed by the appellants was properly submitted to the jury and determined adversely to the con-

tention made by appellants. Certainly it may not be correctly said that fair-minded men might not differ as to the effect of these facts as determining the relation of employer and employee. The matter was, therefore, properly submitted to the jury.

The duty or obligation arising out of the conduct of the parties is, no doubt, as binding as if there were an express agreement to the same effect. It is argued, however, in this case that the employees were paid from the time they reached the plant, by the hour, until the hour at which they were ready to leave the plant. That is their pay was measured only by the number of hours in which they were actually engaged in work and did not include the time consumed by the men in going to and from the plant. While that fact is undisputed, it, in itself, does not determine that the operation of the truck was as much, if not more for the benefit of the employer than for the employees. Certainly the employer was interested in having the men go to work on time and to continue until the regulation quitting hour. There was no statute or rule, so far as we are advised, fixing or determining these matters. So it was a matter of contract, or obligation between the parties, fixed and determined by long continued custom and acquiescence, if not agreement.

These statements are made with reference more particularly to what is shown by the conduct of the parties than by the facts arising out of testimony showing, at least, some form of agreement or obligation, and the appellees are entitled to insist upon the most favorable statement of the issues in their favor to sustain the judgments rendered. We think it was not improperly urged that under the conditions permitting the employees to ride home from work and to ride from their homes back and to the place of employment, that the master owed a duty or obligation to exercise ordinary care to furnish reasonably safe transportation. This case is not one of first impression.

It was held in the case of *St. Louis-San Francisco Ry. Co.* v. *Barron,* 166 Ark. 641, 267 S. W. 582, that under a

custom permitting the employees to ride home from work, an employee riding home on the employer's engine was entitled to be treated as an employee rather than a bare licensee or trespasser. It was insisted in that case, as in the one at bar, that Barron was at most a bare licensee; that there was no duty or obligation owing to him by the railroad company and for that reason the evidence was not legally sufficient to sustain a verdict.

We think it might be said the identical questions were presented as a defense in that case, as have been urged upon this appeal, and the Supreme Court rejected that defense under the facts there stated. In that case the court said, among other things:

" . . . and we are therefore at liberty to look to the general principles of the law as announced by our own court in determining what the character of that relationship was. According to our decisions, appellee was, under the facts shown, neither a bare licensee nor a trespasser, but was an employee within the line of his duty in being transported from his place of work to his home."

The court there cited as applicable authority the following cases: *Arkadelphia Lbr. Co.* v. *Smith,* 78 Ark. 505, 95 S. W. 800; *St. L. I. M. & So. Ry. Co.* v. *Harmon,* 85 Ark. 503, 109 S. W. 295; *St. L. I. M. & So. Ry. Co.* v. *Wiggam,* 98 Ark. 259, 135 S. W. 889; *Chicago, R. I. & Pac. Ry. Co.* v. *Smith,* 115 Ark. 473, 172 S. W. 829; *Boyle-Farrell Land Co.* v. *Haynes,* 161 Ark. 183, 256 S. W. 43.

The court, in further discussing this very question, makes this statement in regard to the facts and the effect thereof:

"According to the evidence adduced, it was, at the time of appellee's injury and for a long time prior thereto, the general custom for employees to ride on the engines from their places of work to their homes. This was done by the direction of the superior agents of the company in charge at Muskogee. This custom became, impliedly, an element of the contract between the company and its servants at that place, and appellee was entitled to the privilege as a part of his contract."

The court also announced as an applicable rule the following: "Appellee at that time, pursuant to that custom, had the right, under his contract, to ride, and was entitled to the same protection as that afforded to a passenger."

This proposition, that is, the relation of the employer and employee and the duty and obligation of the employer to the employees, was a matter properly submitted to the jury and was determined by the jury adversely to the contention of the appellants, to the effect that there was, at least, the implied duty and obligation to exercise ordinary care to provide reasonably safe transportation.

The late Mr. Justice BATTLE announced with the approval of this court the following:

"While appellee was going home after his day's labor was done, he was still in the service of appellant. He was traveling in a hand car furnished by appellant, according to their implied contract; and the duties of the one to the other for the day, as master and servant, were not fully discharged. (Citing authorities) . . ." *Arkadelphia Lumber Co.* v. *Smith, supra.*

It was contended in that case, by the attorneys representing the appellant, that the hand car furnished the employees was furnished at their request and for their convenience before the employment had begun and after it had ended. That contention was decided by Mr. Justice BATTLE contrary to the contention made, and in support of the propositions appellees present here. This court made the same distinction that appellees insist upon under almost identical facts in the case of *Boyle-Farrell Land Co.* v. *Haynes, supra.* So we think it beyond dispute that since it has been determined and conclusively settled under the facts in this case that there was the implied obligation, at least, to transport these men to their places of employment, and home again after the day's work had ended, it was also a part of the employment, and there was a duty to exercise ordinary care to furnish safe transportation. This seems to be not only in accordance with our own decisions, but supported by the great weight of authority. 39 C. J. 272.

The notes and citations set out supporting the last citation are from different jurisdictions, including the Supreme Court of the United States, and proclaim this humane doctrine.

Appellants urge finally and most strongly that the appellees assumed the risks arising out of transportation upon this truck. While the argument made is forceful, it is unique in one respect and that is that the truck was old, so battered, so delapidated, so apparently unfit for use in the manner in which it was used that this court should hold, as a matter of law, that the appellees assumed the risks of riding thereon. In making this argument the appellants make the following statement:

"In the case at bar, appellees and other employees, with almost continuous regularity rode this old and notoriously dilapidated truck twice a day, covering a period of several years, and as a matter of law, they are charged with notice and knowledge of its condition by and through constant and almost daily observation and contact with it. The proof is undisputed that the truck was only used occasionally about the plant and transportation of material, and that no report was ever made to appellants of any defects in the truck or request made for any repairs or other or better means of conveyance, and the proof is not only undisputed, but is also conclusive that the appellees and other employees riding the truck had a far better opportunity to observe and had a superior knowledge of the condition of the truck than did the appellants."

Appellants cite many authorities to support their contention that the appellees assumed the risks. We have examined each of these authorities and must confess that while they have furnished interesting reading, we fail to see that they are applicable to the facts which are not substantially in dispute in this case. We have just quoted above what the appellants say about the truck, and most of the facts that they point out are matters of course, observable to any one who might have seen the truck, and the strongest conclusion that might be drawn from this statement is that because the truck was old and battered it should have been deemed unsafe. It is true

that if this accident had arisen out of, or by reason of any of these several matters mentioned as being so apparent and patent as to be readily observed by anyone, the argument would be considered in the light of the authorities presented, but the facts in this case are quite different. We have already stated facts showing that the steering mechanism of this car was unsafe, that Mr. Ross knew of this fact. Witnesses who examined the truck immediately after the accident say that one end of the draglink was disconnected. This draglink has been described as a part of the mechanism that connects the lower end of the steering shaft to the front wheels, so as to enable the driver to guide the machine. When the accident occurred one end of this draglink, as stated above, was loose. Some witnesses testify that it came off the truck and was found the next morning on the highway about thirty feet north of the point at which the car left the highway. It is undisputed, however, that this draglink was an essential part of the steering mechanism and without it being properly connected, the driver had no control over the truck or means of guiding it. It is undisputed that this steering mechanism was seriously defective. This fact was not only specially pleaded but positively established by the evidence. This draglink is down under the car, hidden and concealed from any casual or ordinary observation. Its defective condition could have been determined by any proper inspection and none was made in this case. Neither one of the three men injured had ever owned a car or truck, nor had ever driven one. Neither one knew what the draglink was or its importance in the operation of a car. The risk arising, therefore, out of the defective draglink was not an ordinary one, but so far as the evidence in this case discloses there was a concealed, rather than a patent defect, one easily discoverable, according to the evidence, by any ordinary inspection, one that Mr. Ross knew about, and, of course, under the facts and circumstances, his knowledge was information possessed by his company.

No duty rested upon the servant to inspect appliances furnished by the master. The relative duties and

obligations of master and servant are not unfamiliar to people generally. Those who may desire further discussion of these matters are cited to such well known authorities as *L. R. M. R. & T. Ry. Co.* v. *Leverett, Admr.*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; *Chicago, R. I. & Pac. Ry. Co.* v. *Smith,* 107 Ark. 512, 156 S. W. 166.

These citations are typical examples of numerous authorities with which our reports are replete.

The evidence tends to establish the positive negligence of the master and a lack of knowledge of that negligence on the part of the employees who were injured. The court, under such circumstances, could not properly declare as a matter of law that the servants had assumed these risks incident to their employment. The matter of assumption of risks was submitted to the jury under correct instructions and determined in favor of appellees.

Appellants argue error in instructions given, but as we have just stated the principal alleged error was that the court should have directed a verdict for appellants and not given any other instructions.

We have shown that appellants' contentions are not supported by the weight of authority, but are contrary or opposed to long established rules which must govern and control in situations of this kind. We have examined instructions given, those modified and given as modified, and those refused by the trial court, and we find no substantial error.

There is no contention that the judgments are disproportionate to the injuries and damages sustained.

The judgments are, therefore, affirmed.

MORRIS *v.* STATE.

4117 126 S. W. 2d. 93

Opinion delivered March 13, 1939.

J. M. Jackson, for appellant.

Jack Holt, Attorney General, *Jno. P. Streepy,* Asst. *Atty. General,* for appellee.

HUMPHREYS, J. Information was filed in the circuit court of Polk county, Arkansas, by the prosecuting attorney on the 19th day of October, 1938, against A. C. Morris, charging him with the crime of grand larceny in three separate counts with unlawfully, and feloniously stealing, taking, driving and carrying away four head of cattle, the property of Gerald Ridings, and five head of cattle, the property of Teresa Ridings, and one red cow (heifer), the property of Mrs. Janie Ridings, on the 26th day of May, 1938, with the felonious intent to deprive each owner of his property, against the peace and dignity of the State of Arkansas.

Appellant was arraigned on said charges on the 25th day of October, 1938, and pleaded not guilty, whereupon, he filed a motion for a continuance in due form on account

of the absence of one of his witnesses, Clyde McBride. Testimony was introduced by appellant and on behalf of the state and the motion was overruled, over the objection and exception of appellant. The testimony taken before the judge on the motion has been omitted from the record.

The cause then proceeded to a trial upon the information, testimony and instructions of the court resulting in the following verdicts:

"We, the jury, find the defendant guilty on the first count, and fix his punishment at one year in the penitentiary. We, the jury, find the defendant guilty on the second count, and fix his punishment at one year in the penitentiary. We, the jury, find the defendant guilty on the third count, and fix his punishment at one year in the penitentiary. G. R. Price, Foreman."

Judgments were rendered in accordance with the several verdicts returned, from which is this appeal.

At the conclusion of the testimony appellant requested the court to direct a verdict acquitting and discharging him, which request was denied over appellant's objection and exception.

Appellant's first assignment of error is that the court overruled his motion for a continuance. As stated above the motion was in proper form and shows that Clyde McBride was subpoenaed on the 22nd of October, and the trial was begun on the 25th of October. The testimony shows that Clyde McBride was a non-resident of the state of Arkansas, living at Jafry, Oklahoma. The motion for a continuance states that if the case were continued by the court appellant would be able to have the absent witness present. Since it was not stated in the motion how he would obtain the presence of the absent witness if the cause were continued and since the testimony taken before the court on this question does not appear in the record, the testimony was insufficient to show that the court abused his discretion in not granting a continuance. The question of granting or refusing a motion for a continuance is a matter in the sound judicial discretion of the trial court and a reversal can only be had where it is

shown by the record that the refusal to grant a continuance was an arbitrary abuse of discretion. *Gallaher* v. *State,* 78 Ark. 299, 95 S. W. 463; *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946; *Smith* v. *State,* 192 Ark. 967, 96 S. W. 2d 1; *Martin* v. *State,* 194 Ark. 711, 109 S. W. 676. Reference is made to the following cases to support the rule that the trial court's discretion in refusing a continuance in a criminal case on account of the absence of non-resident witnesses is not an arbitrary abuse of his discretion. *Turner* v. *State,* 135 Ark. 381, 205 S. W. 659; *Freeman* v. *State,* 150 Ark. 387, 234 S. W. 267; *Hays* v. *State,* 156 Ark. 179, 245 S. W. 309.

Appellant's second assignment of error is that the evidence is insufficient to sustain the conviction and that the court should have given appellant's requested instruction to acquit and discharge him. The argument is that all witnesses testifying against appellant except the sheriff were accomplices in the crimes and that there was no corroboration of their testimony except in so far as these accomplices corroborated each other. The testimony of these accomplices was to the effect that Atley Self, Dale Warren and appellant drove the cattle in question off the range from the Vaught place in Oklahoma over into Arkansas to the Crock Warren farm where the cattle were placed in Warren's barn; that all of the cattle were branded with an "R" and were on the night after being driven over the line loaded in a truck owned and operated by J. R. Bell and that appellant and J. R. Bell started off with them to Memphis for the purpose of disposing of them and that they were arrested a short distance after leaving the Crock Warren farm and the cattle were taken under the direction of the sheriff to the home of Gerald Ridings, his mother and sister and turned into their pasture after they identified the cattle as being owned by said parties.

Appellant testified that he was employed by Crock Warren to take the cattle to Memphis and sell them for him and was to receive $55 for that service; that he engaged J. R. Bell to haul them in his truck and agreed to pay him out of the proceeds of the cattle $45 for his serv-

ices. The jury did not accept his explanation of being in possession of these stolen cattle. The undisputed proof shows by persons who were not accomplices in the crime that the cattle had been stolen. The possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction either of larceny or of receiving stolen property. It was a matter for the jury to determine the reasonableness and sufficiency of the explanation given by appellant of his possession of the stolen property. *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833, and cases cited therein; *Bowser* v. *State,* 194 Ark. 182, 106 S. W. 2d 176. We think the fact that appellant was in possession of recently stolen property was sufficient corroboration of the testimony of appellant's accomplices to sustain the conviction.

Moreover, appellant is not in a position to raise the question as to the insufficiency of the evidence on the ground that the testimony of the accomplices were not corroborated. It is provided by § 4017 of Pope's Digest that: "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; . . ."

Appellant did not request an instruction under this statute, but he contented himself with requesting an instructed verdict on the whole case. If appellant had desired an instruction under the statute it was his duty to have made such a request and as he failed to do so it is now too late to complain on the appeal of his case. *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50.

Appellant's last assignment of error is that the court erred in instructing the jury and in refusing to give certain instructions requested by him. The objections to the instructions given by the court were in gross and such an objection is not sufficient to successfully attack them as being erroneous. We have looked to them, however, and find that the instructions given were in the usual form for larceny cases and find no error in any of them. The instructions which were refused by the court at the

request of appellant were fully covered by the instructions which were given by the court to the jury.

No error appearing, the judgments are affirmed.

THE FEDERAL LAND BANK OF ST. LOUIS *v.* COTTRELL.

4-5369 126 S. W. 2d. 279

Opinion delivered February 13, 1939.

G. V. Head, J. R. Crocker, John M. Rose and *Mahoney & Yocum,* for appellants.

C. M. Martin, Don McLeod and *J. R. Wilson,* for appellees.

SMITH, J. William D. Cottrell owned a 160-acre tract of land in Union county, on which he resided as his homestead. On July 1, 1922, he executed a mortgage on the land, in which his wife joined, to secure the payment of a loan of $1,200, which he had obtained from the Federal Land Bank of St. Louis. Cottrell died July 21, 1929, and was survived by Ida, his wife, and seven children. The widow died October 17, 1933, survived by the seven children.

Default was made in meeting payments of principal and interest and of taxes, and on January 27, 1936, the bank filed suit to foreclose the mortgage, making the children of Cottrell parties, and a *lis pendens* notice was filed the same day. A foreclosure decree was rendered July 14, 1936, and the report of sale made pursuant thereto was confirmed October 15, 1936. The amount due the bank at the time of the foreclosure decree was $1,429.55, exclusive of the costs. This finding is not questioned. The bank became the purchaser at the commissioner's sale made pursuant to the above decree upon a bid $60 less than the debt. After receiving the commissioner's deed, which had been duly approved, the bank, on March 8, 1937, sold the land to J. M. Bishop, retaining one-half of the royalty in minerals.

On June 29, 1937, the heirs of the mortgagors filed suit to vacate the decree of foreclosure, the sale had thereunder, and all proceedings had with reference thereto, and prayed that they be allowed to pay the amount due under the mortgage, and to cancel all deeds executed by reason of the foreclosure proceeding, and to quiet and confirm their title, and from a decree granting the relief prayed is this appeal.

A number of questions are discussed in the respective briefs of opposing counsel which we find unnecessary to consider and decide. The most important question in the case is the one of fact whether Marie Cot-

trell, a daughter of the mortgagors, had been served with summons. It was alleged that Flois Primm Cottrell, the wife of Espie Cottrell, who was a son of the mortgagors, had not been served with process, and that proper defense had not been made for Alvin and Annis Cottrell, minor children of the mortgagors.

Disposing of these contentions in inverse order, it may be said that the court made the specific finding that the heirs, "and each of them, were of legal age prior to January 27, 1936," the date on which the foreclosure suit was filed. This finding of fact is very clearly established. Alvin was 21 years of age on January 12, 1936, which was 15 days prior to the filing of the foreclosure suit, and Annis, a daughter, was 18 years old on September 16, 1935, which was more than four months prior to the filing of the foreclosure suit. It is argued that Annis' right of homestead had not been foreclosed, because that right would continue until she was 21 years old, and could not be foreclosed until she had attained the age of 21 years.

We do not think so. We know of no case in which it has ever been held that the right to foreclose a mortgage on a homestead executed by a mortgagor who subsequently died and left minor children is postponed until such child or children shall attain the age of 21. The mortgage foreclosed was not executed by Annis, but by her father and mother. It was, however, said in *Shapard* v. *Mixon,* 122 Ark. 530, 184 S. W. 399, "there can be no doubt of the power of a girl over the age of eighteen, and under twenty-one, to convey her interest in the homestead derived from a deceased parent." But, as we have just said, the mortgage foreclosed was not executed by Annis, but by her father and mother, and the interest which she inherited was taken subject to the mortgage, and the right to foreclose the mortgage upon default cannot be postponed because of the fact that Annis was not 21 years old. Citation of authority upon this proposition appears unnecessary.

Section 6215, Pope's Digest, reads as follows: "Males of the age of twenty-one years, and females of

the age of eighteen years, shall be considered of full age for all purposes, and, until those ages are attained, they shall be considered minors." As Alvin and Annis were both of full age when the suit was filed, it was unnecessary to appoint a guardian *ad litem* to represent them, although one was appointed, who filed answer as such, the sufficiency of which, to put in issue all the allegations of the complaint in the original foreclosure suit, is not questioned. The complaint filed in the foreclosure suit had alleged the minority of Alvin and Annis, and that admission was made in the answer filed in this proceeding, but an amendment to this answer was filed in which that admission was withdrawn, and it was then alleged that Alvin and Annis were in fact of legal age at the time the foreclosure suit was filed.

Flois Primm Cottrell, the wife of Espie Cottrell, was not made a party to the suit, and was not served with process, but it was not essential that she should be. She did not marry Espie until February 22, 1936, or nearly a month after the filing of the foreclosure suit and the *lis pendens* notice.

At § 91 of the chapter *Lis Pendens,* 38 C. J., p. 54, it is said: "The doctrine of *lis pendens* applies as a general rule to all persons acquiring an interest in the subject of litigation during the pendency thereof, whether by purchase or otherwise, including corporations, whether public or private. The doctrine is not confined to purchasers."

In the case of *Hobbs* v. *Lenon,* 191 Ark. 509, 87 S. W. 2d 6, devisees of mortgaged lands attacked the decree foreclosing the mortgage upon the ground that they had not been made parties to the foreclosure proceeding. It was there said: "The record here shows that the devise to appellants was made during the pendency of the foreclosure suit against the lands devised. The general rule is that whoever acquires the subject-matter of the suit *pendente lite* takes subject to the decree or judgment which may be rendered in such suit."

It was not essential that Mrs. Espie Cottrell be made a party, as any interest she may have acquired in

the land by virtue of her marriage to one of the heirs was acquired after the suit, and *lis pendens* notice had been filed, and she took that interest subject to the final determination of that cause. If it were essential to make every person a party who acquires an interest in the subject-matter of litigation, during its progress, litigation would be interminable.

The most serious question in the case is the one of fact whether Marie Cottrell, one of the daughters of the mortgagors, was served with process in the case. The testimony upon this issue is in irreconcilable conflict. The chancellor found Marie had not been served, and upon that finding granted the relief prayed.

We do not concur in this finding of fact. Testimony was offered to the effect that during all the time between the issuance of the summons and the date of its return as served Marie Cottrell was not in Union county, but was, in fact, in the state of Texas, where she was employed with others by a portrait company. The members of this party all testified that Marie continued with them in this service in the state of Texas from a date prior to the issuance of the summons until March 28. The date of the sheriff's return on the summons was March 10. The testimony of some of the members of this party taking portrait orders was that Marie Cottrell returned to Union county March 21, but all stated that she did not return prior to that date, and Marie Cottrell testified that she did not return to Union county, her home, where the foreclosure suit was pending, until March 28, and that she was never served and could not have been served in Union county, as she was absent from that county at the time of the alleged service. Members of Marie's family gave testimony to the same effect.

Opposed to this testimony was that of J. M. Bishop, his wife and daughter, to the effect that Marie Cottrell was in their home in Union county on March 8. This testimony of Bishop and the members of his family is weakened by a consideration of Bishop's interest in the matter, as it was he who purchased the land from the bank after the bank had received the commissioner's deed.

It is the testimony of the deputy sheriff who made the return which convinces us that he did serve the summons as was shown by his return. Except for a period of two years this officer had been connected with the sheriff's office since 1921, and during that time had been sheriff himself, and he was thoroughly familiar with service of process. He testified that he went to the Cottrell home to serve the summons, and was told that Marie was in Texas. He returned the second time to his home to complete the service. Certain of the heirs were not found by the officer, and he made a *non est* return as to them. The officer testified that he had no distinct recollection of serving Marie, but he was very positive in his statement that he had never made a return of service unless the service had been had, and that if he had not served Marie he would have made a *non est* return as to her as he did in the case of two other heirs whom he failed to find. Service upon these two was had by the publication of a warning order.

It must be remembered that this is an attack upon a decree which recites personal service upon Marie, and while it is permissible to show that recital to be false, this showing must be made by something more than a mere preponderance of the evidence. It is not required that the showing be made beyond a reasonable doubt, but it is required that such testimony be clear and convincing. In the chapter on Process, 50 C. J., p. 578, § 301, it is said: "In view of the evidentiary weight accorded to a return of process, and of the presumptions in its favor, clear, unequivocal and convincing evidence is required to negative the return and overcome its statements and recitals; and a mere preponderance of the evidence in favor of one contradicting a return is ordinarily insufficient. Proof beyond a doubt, however, is not necessary." Subjected to this test, we conclude the testimony to the effect that Marie was not served is insufficient to establish that fact.

Moreover, there is no contention that the debt secured by the mortgage was not due and unpaid when the foreclosure decree was rendered, but it is contended

only that Marie Cottrell has the right to redeem, because she was not served with process. The recent case of *Sweet* v. *Nix, ante* p. 284, 122 S. W. 2d 538, is against that contention. There a decree of foreclosure was rendered at a time when all the heirs of the deceased mortgagor were minors. The sufficiency of the service upon them was questioned, and the right to redeem was claimed upon the ground that the minors had not been properly served in the foreclosure suit. In that case, as in this, the bill to redeem was filed after the expiration of the term of court at which the foreclosure decree had been rendered. It was there said: "Not only is there no valid defense shown to the foreclosure action, but none is attempted to be alleged or stated in the complaint herein. Numerous cases might be cited to the effect that failure to allege a meritorious defense to an action in which the judgment or decree sought to be set aside was rendered is fatal to the action. Some of the later cases are: *H. G. Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308; *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *Adams* v. *Mitchell,* 189 Ark. 696, 74 S. W. 2d 969. In the last cited case it was held that before a defendant may question the service upon which a judgment was rendered he must show the existence of a defense to the suit which terminated in the judgment."

In stating the reason for this rule it was said: ". . . Courts should not be required to do vain and useless things, and it would be a vain and useless thing to set aside a judgment to which there was no defense and the same result would necessarily follow on a new trial."

Here, as there, a new trial could result only in a decree of foreclosure, and upon the authority of the case from which we have just quoted a reversal to permit a redemption must be denied here, as was done there.

In this connection, it may be said that the discovery of oil on nearby land has given the land here mortgaged a value it did not previously have, and, further, that Espie Cottrell, who apparently represented all heirs, was given the opportunity to buy the land from the bank for

himself, or for all the heirs, upon the same terms which Bishop accepted.

The decree of the court below will, therefore, be reversed, and the cause remanded, with directions to dismiss the proceeding to vacate the foreclosure decree and to cancel the deeds from the commissioner to the bank and from the bank to Bishop.

SEBASTIAN BRIDGE DISTRICT *v.* STATE REFUNDING BOARD.

4-5351 124 S. W. 2d. 960

Opinion delivered February 13, 1939.

James B. McDonough and *Fred S. Armstrong,* for appellant.

Jack Holt, Attorney General and *Leffel Gentry,* Ass't Att'y General, for appellee.

GRIFFIN SMITH, C. J. Sebastian Bridge District sought by mandamus to compel the Treasurer of State, the Auditor of State, and the Bond Refunding Board, to pay its 1938 bond and interest maturities and to refund $1,075 in interest paid by the district April 1, 1938—a total of $45,150. Fagan Bourland, individually and as a taxpayer, and McLoud Sicard, as an owner of bonds, joined in the complaint.

The defendants filed a demurrer, and also answered. In the answer it was alleged that unexpended funds appropriated by Act No. 10 of the Extraordinary Session of 1938 were insufficient to meet the demands made.

The improvement district was organized in 1913 to construct a free highway bridge across the Arkansas river at Fort Smith. Bonds aggregating $1,075,000 in three issues were sold. Principal and interest amounted to $1,458,575, all of which has been paid by the assessed taxpayers except an amount equal to the maturities and interest in question.

Two relief measures were enacted by the 1938 Extraordinary Session of the General Assembly, the purpose in each instance being to extend assistance to bridge improvement districts in those cases where the bridges formed a part of the state highway system. These measures were Acts 9 and 10, approved April 1.

Act No. 9 amended Act No. 183 of 1935 by increasing from $1.50 to $3 the tax on motor vehicles and trailers in the course of delivery from manufacturer to dealer. Under the original Act, revenues from this source were deposited in the state treasury and treated as other motor vehicle license funds. By Act No. 9 it was directed that collections be credited to a new account designated "Bridge Bond Retirement Fund," to be paid to boards of commissioners of bridge improvement districts on order of the State Comptroller. The Comptroller was instructed to procure from such districts, not later than November 1 of each *calendar* year, the amount of interest and maturities accruing on bonds of the respective dis-

tricts "falling due in said calendar year."[1] An appropriation of $150,000 was made for the year ending June 30, 1939, "for the purpose of paying interest and maturities on the bonds of bridge improvement districts coming under the provisions of this Act."

Act No. 10 directed the State Highway Commission, the State Refunding Board, "or any other appropriate body," to ascertain the amount of "outstanding principal and interest for the year 1938 [due] by the several bridge improvement districts in the state; and [to] pay all such principal and interest, when due; provided, however, any of the bridge improvement districts may elect to be paid its part of said fund to apply on past-due bonds."

An appropriation of $300,000 was made from the State Highway Fund, the Toll Bridge Refunding Bond Redemption Account, the Refunding Certificates of Indebtedness Redemption Account, and the Funding Note Redemption Account[2] . . . "or so much thereof as

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[1] An additional provision in Act No. 9 is: 'If there be not a sufficient sum in the state treasury to the credit of the Bridge Bond Retirement Fund to pay all maturities and interest, . . . then the State Comptroller shall apportion said fund pro rata. . . . If any district so desires and so indicates by its board of commissioners, it may use the money paid to it for any year for the retirement of past-due bonded indebtedness."

[2] The three accounts in the Highway Fund from which the $300,000 appropriation made in Act No. 10 is taken were created by Act No. 11 of the Extraordinary Session of 1934, approved February 12. The State Highway Fund was to receive the gross toll bridge collections, 92.3 per cent. of the net gasoline tax; all net automobile license fees, and "all other net highway revenues." By "net" was meant the gross collections less cost of collection (toll bridge collections excepted) and certain allowable deductions, notably unpaid checks. All gross collections (other than from toll bridges) went into the unapportioned fund.

With respect to the Highway and Toll Bridge Refunding Bond Redemption Account, it was provided that "Whenever, in any fiscal year, there shall be funds in excess of the amount necessary to pay principal and interest falling due in such year, such excess fund shall be applied by the Refunding Board in the purchase of State Highway Refunding Bonds, Series A and B, and State Toll Bridge Refunding Bonds, Series A and B, and DeValls Bluff Bridge Refunding Bonds, at the lowest price submitted."

is necessary to pay the maturities of principal and interest of bridge improvement district bonds." The same bridges and obligations of the same districts are treated by Acts 9 and 10.

By § 3-A of Act 10 it is declared that . . . "bridges as defined in this Act are integral parts of the state highway system, and the indebtedness due on account of the construction of said bridges is hereby declared to be a just debt of the state."[3]

Vouchers and warrants issued against the appropriation made by Act No. 10 amount to $299,850.87. Included in these figures is a voucher in favor of Sebastian Bridge District for $14,765.80.

There was no default of Sebastian Bridge District as to either principal or interest prior to 1938. The voucher for $14,765.80 issued by the state was the difference between 1938 maturies of $44,075.00[4] and cash on hand of

As to the Refunding Certificates of Indebtedness Redemption Account, it is directed that . . . "any balance [of highway funds] remaining after provision has been made for the next semi-annual interest payments to accrue, shall be deposited" . . . to this special account . . . annually after 1936 in the ratio of one-eighth per cent., "pledged for the payment or redemption of the principal and interest of Refunding Certificates of Indebtedness" issued under provisions of §§ 11 and 12 of Act 11. Section 12 of Act 11 authorizes issuance of Refunding Certificates of Indebtedness in exchange for outstanding certificates of indebtedness issued under authority of Act No. 8 of 1928, and Act 85 of 1931. These two Acts deal with debts of municipal improvement districts in those cases where the streets are continuations of highways.

The Funding Note Redemption Account, after 1936, should, under Act 11 of 1934, receive 1.3 per cent. of highway revenues for payment of principal on funding notes issued to contractors. [While the term "and interest" is used in the statute, as a matter of fact, funds are set aside in the State Highway Fund six months in advance for the payment of interest on the Funding Notes, Refunding Certificates of Indebtedness, Road District Refunding Bonds, series A and B, Highway and Toll Bridge Refunding Bonds, series A and B, and DeValls Bluff Bridge Refunding Bonds.]

[3] The emergency clause of Act No. 10 finds that real estate within the bridge improvement districts is "unjustly burdened with an annual tax"; that such owners of real property "also contribute to highway funds by paying the high gasoline tax," etc.

[4] The voucher issued by the state ($14,765.80) did not include payment of $1,075 made by the district April 1, 1938.

$29,309.20 standing to the district's credit after deduction of the aggregate of outstanding accounts other than bonds and interest had been made.

Appellants insist that the 1938 legislation was for the benefit of taxpayers of the various districts; that by terms of the two Acts, which should be read together, the state assumed bond and interest obligations of 1938, and that the action whereby the district was in effect charged with its net cash balance was arbitrary, and contrary to the purpose of the General Assembly.

Nine bridge districts, under the construction given by the State Comptroller and apparently concurred in by the Bond Refunding Board and Treasurer of State, were affected by the legislation. That an understanding may be had of the manner in which the measures have been administered, it is necessary to show the bases upon which payments were made by the state, and condition of the districts.

Two bridges were constructed by the Broadway-Main Street District. Available records indicate that cost of the Broadway bridge (in Little Rock) was 44½ per cent. of the total expenditures. Total bond maturities, inclusive of principal and interest, formed the basis for computing the relief to which the district would be entitled by reason of the fact that the Broadway bridge is a continuation of state highways, while the Main street bridge is not so classified. The amount so found as aid to which the district was entitled was $53,561.31. Cash on hand and with the chancery clerk was $132,344. Forty-four and one-half per cent. of this sum would be $58,-893.08. The state paid 44½ per cent. of the 1938 maturities without reference to the available cash. Otherwise expressed, no deductions were made.

The Yell and Pope county district had maturities of $16,818.75 for 1938. Cash on hand and in the hands of special collectors was $3,969.38. The state paid the district $16,818.75, making no deduction for available cash.

Bridge Improvement District No. 1 of Independence county (there were two bridge districts in Independence county) had no principal maturities in 1938, but owned

$830 in interest. Available cash was $108.84. Payment by the state did not include a deduction equal to the available cash.

Independence County Bridge District had 1938 principal and interest maturities of $11,525. Cash on hand and with the chancery clerk was $11,923.87. The state's payment was $11,525.

Lee County Bridge District No. 2 had bonds and interest of $11,950 in 1938, and $19,395.83 of defaults. The district's available cash was $5,024.20. State payment was $26,321.63, the available cash having been deducted.

Conway County Bridge District had principal and interest of $3,192.50 maturing in 1938 and default principal and interest of $18,316.67. Cash on hand and with the chancery clerk was $523.85. Accounts payable (other than bonds) was $287.62, the net cash being $236.22. State payment was $21,272.95, the net cash having been deducted.

Jefferson County Bridge District had principal and interest maturities of $54,287.50 in 1938, and default principal and interest brought forward from other years amounting to $96,693.75. Cash on hand and due from the chancery clerk was $24,579.30. There were outstanding notes of $7,431.16. After allowing for payment of the notes and small current obligations, it was assumed that the net cash was $17,148.14. State payment was $133,-833.11, the so-called "net cash" having been deducted.

Whelen Bridge District[5] had no principal or interest maturities for 1938. Default bonds and interest amounted to $21,774.60. Miscellaneous bills payable amounted to $50. Cash available was $902.28. This cash balance was treated as a "net" of $852.28 and was deducted from $21,774.60 and a state payment of $20,922.32 was made.

The quoted figures show that as to Pulaski county (Broadway-Main Street District) $58,893.08 cash apportionable was not deducted by the state in determining the amount the district was entitled to. In the Yell and Pope County District $3,969.38 was left with the commission-

[5] The Whelen District constructed a bridge over the Little Missouri river, which separates Clark and Nevada counties. The bridge is a part of Highway No. 53, near the town of Whelen Springs.

ers. The small balance of $108.84 held by District No. 1 of Independence was not charged against bond and interest payments, while in the other Independence county district the state paid $11,525 while at the same time the district had a cash balance of $11,923.87—a sum exceeding by $398.87 the entire bond and interest maturities.

In other districts the cash on hand or available was deducted.

It is urged by appellants that Acts 9 and 10 contemplated only that bonds and interest maturing in 1938 should be paid, and that the state's action, through its ministerial or executive officers in paying accruals of other years, was an illegal diversion of funds appropriated for a specific purpose. Appellees insist that for purposes of the instant suit it is immaterial whether the fund was properly or improperly disbursed; that it is gone, and that mandamus does not lie to compel an officer to do an impossible thing.

We think it is significant that Act No. 9 directs the State Comptroller to ascertain, before November 1, 1938, the total amount of interest and maturities of bonds of the several districts. This determination shall be made for "each *calendar* year," and the report so required is for calendar years. The intent, therefore, was that the same duty should recur with respect to years succeeding 1938. But the appropriation of $150,000 was made "for the year ending June 30, 1939." This is the close of the state's fiscal year. The purpose, then, must have been to make available this appropriation of $150,000 for the payment of bonds and interest accruing during the 1938 calendar year, but as to any surplus thereof, it should be carried forward for use in 1939 and prorated to the districts.

It is our view that the language in Act No. 10 pledging the state to pay "all such principal and interest, when due," was expressive of the legislative intent to assume the 1938 bond obligations, and the fact that some of the districts had funds on hand is immaterial.

Since the relief asked by appellants does not involve an additional taking of revenues appropriated by Act No. 10, drawn from three accounts in the highway fund

pledged by Act 11 of 1934, we do not determine whether the appropriation made by Act 10 is violative of the contracts promulgated by Act 11 of 1934, the obligations of which cannot be impaired.

Revenues arising under Act 183 of 1935, as amended in 1938 by Act No. 9, were not, by any express language, included in the provisions of the 1934 refunding law. They are, therefore, available, to the extent of any unimpaired balance collected during 1938, for the payment of warrants to which any bridge district may be legally entitled.

Since taxpayers of the Fort Smith area have paid more than fourteen hundred thousand dollars for a public bridge, and since Acts 9 and 10 were obviously intended as measures of relief to property owners, we think all bonds and interest maturing in 1938 should have been paid by the state.

In approving payment of bond and interest defaults occurring prior to 1938, the State Comptroller apparently took the view that when the obligations were carried over from one year to another without suit by bondholders to foreclose the liens, there was an implied understanding, or an agreement, for an extension of time. Under this construction it might be said that the accruals were payments falling due in 1938.

We reverse the judgment and remand the cause with directions that mandamus issue commanding the Treasurer of State to pay (to the extent of funds accruing to the Bridge Bond Retirement Fund from collections made in 1938) a sum not to exceed $29,309.20, which is the amount we find to be due in addition to the item represented by outstanding voucher for $14,765.80. This relief does not extend to recovery of $1,075 paid by the district as interest April 1, 1938. It is so ordered.

SMITH, J., dissents.

STEVENS *v.* ARKANSAS POWER & LIGHT COMPANY.

4-5371 124 S. W. 2d. 972

Opinion delivered February 13, 1939.

John S. Mosby, for appellant.

Coleman & Fraley, for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Poinsett county by appellee against appellant to recover $541.38, for current and service furnished under a written contract entered into on April 20, 1935, and a supplemental agreement under date of September 7, 1935, reducing the rates, for operating a shingle mill at Lepanto. The rates specified in the written contract were:

"50c per hp per month connected; 30 first 60 kwh per hp connected at 2½c per kwh; 30 next 120 kwh per hp connected at 2c per kwh; Excess kwh at 1½c per kwh."

Appellant filed an answer denying the material allegations of the complaint and a cross-complaint, in substance, to the effect that he entered into a verbal contract with appellant to purchase from it a 50-horse power electric motor for $400, payable $100 cash and $25 per month, to operate a shingle mill at Lepanto and to pay for electric service or current at $4 for each 10 hours days' operation; that he dismantled his equipment designed for steam power, and appellee installed said electric motor; that thereafter, on the first day of each month, in violation of the terms of the oral agreement, appellant charged him rates in excess of $4 for each 10 hour days' operation over appellant's numerous protests; that appellant used the electric current until the motor ceased, and instead of repairing the motor appellee removed same, and by reason of the failure to repair same and the removal thereof, appellant was required to install steam engine to operate his shingle mill at the expense of $100 for a boiler, $125 for a steam engine, $40 for a smoke stack, $15 for steam pipes, $10 for water pump, $50 for brick, $75 for labor in the installation thereof, and at a loss of $500 in profits while installing same; that he paid $125 on the motor which he is entitled to recover; that under the oral contract appellant operated the motor sixty 10-hour days, and is indebted to appellee in the sum of $240 which he tendered, and it refused to accept; that appellant has paid appellee a total of $111.95, leaving a balance due of $128.05 which he tenders and offers to pay; that on account of the breach of the oral contract appellant is entitled to recover $915 damages and appellee $128.05 for current.

The record reflects that the terms of the contract for the purchase and installation of the motor and prices to be paid for current were talked over between appellant and W. H. Howze, the representative of appellee, several times before the motor was installed and connected with current, with the understanding that a written contract should be entered into and signed by the parties covering the terms agreed upon.

W. H. Howze testified the contract, as written, provided rates to be charged were the rates agreed upon

between the parties and appellant testified that he signed the written contract under the representation by W. H. Howze, that the technical words specifying the rate charged meant that the charge for current would not exceed $4 per day for each 10-hour day of operation. The rate for current specified and set up in the written contract is in the following words:

"50c per hp per month connected; 30 first 60 kwh per hp connected at 2½c per kwh; 30 next 120 kwh per hp connected at 2c per kwh; Excess kwh at 1½c per kwh."

There is no dispute that the motor was installed and current connected a few days before the written contract was executed, and that it was operated and not disconnected until in November, 1935, when it was struck by lightning.

The original bills or accounts were rendered under the terms of the written contract, two of which charges were paid by appellant under protest, but subsequently the rate was reduced one-half and the bill rendered in keeping with the reduction, showing a balance due for current in the sum of $541.38, for which amount this suit is brought.

Two letters were written demanding settlement for current on that basis which were ignored and not answered by appellant.

There is no dispute that appellant agreed to pay $400 for the motor, $100 cash and $25 per month for the unpaid purchase money which was evidenced by promissory notes.

Appellant paid $100 cash and one note, and under protest made two payments on the current furnished, as per charge under the written contract.

Appellant admitted signing the written contract, but testified that a copy was not delivered back to him, and for that reason was not a completed contract, and for the further reason that the technical words relating to prices of current were explained to him to mean that the charge for current was to be $4 per day for each 10-hour days' operation. Appellant testified to his ver-

sion of the oral contract, but admitted that the oral contract was talked over and agreed upon before the written contract was executed.

When appellant refused to pay for current and the motor was injured by lightning, appellee repossessed it by consent of appellant.

The written contract contained a provision that "this agreement supersedes all prior agreements between the company (appellee) and consumer for services mentioned herein," and the contract introduced in evidence was signed by appellant and appellee. Four copies of the contract were made including the original, but it seems that the company kept all of them and failed to return a copy to appellant. Cause was submitted to a jury upon instruction of the court resulting in a verdict and judgment against appellant for $416.28, from which is this appeal.

Appellant only asked one instruction which is as follows:

"You are instructed that the alleged written agreement sued upon and introduced in evidence is of no validity for the reason that at the time A. Stevens signed same, it had not been signed and accepted by the duly authorized agent of the company, and that since it was signed by the agent of the company, if it was signed by that agent; there was no execution or delivery to the defendant, as the evidence was undisputed that there were four copies, one being retained by the general office, two being retained by the local office, and no copy delivered to the defendant in this case," 'which request of the defendant was denied by the court, to which ruling of the court the defendant at the time excepted, and asked that his exceptions be noted of record, which was done.'

The court refused to give the instruction over appellant's objection. Appellant's argument is there was not a complete written contract, because he was not furnished a copy of it after the company had approved and signed it. There is no question that the contract was approved and signed by the company after it had been signed by the appellant. There is nothing in the contract

to the effect that it should not be a completed contract until a copy was delivered back to appellant. There is a provision in the contract that it should not be effective until approved and signed by the company. This was done, and we think became a completed contract when approved and signed by the company. It had already been approved and signed by the appellant. The court was, therefore, correct in assuming, as a matter of law, that the contract was complete when both parties approved and signed it; and was correct in refusing to give appellant's requested instruction.

Appellant also argues that the written contract was void on account of fraud practiced upon him. No fraud was alleged in the cross-complaint of appellant. It is true that appellant testified that he signed the contract because of the explanation of W. H. Howze relative to the technical words used in same as meaning that the rate for current would not exceed $4 per 10-hour day for operation, but this was not an attempt on his part to void the contract for fraud and responsive to any allegation of fraud, for none was alleged, but for the purpose of showing that he was to pay $4 per day for current for each 10-hour days' operation and to reduce appellee's recovery to that amount.

At the conclusion of the evidence the trial court, over the objection and exceptions of appellant, summed up the case as follows:

"The plaintiff in this case, The Arkansas Power & Light Company, sues the defendant, A. Stevens, for the purchase price of electric current that the plaintiff says that they furnished to defendant in accordance with the rates set out in the written contract herein introduced in evidence and the supplemental contract, and they say that the defendant owes to them at this time the sum of $541.38, which they say is due them by reason of electricity furnished under the contract offered in evidence and the supplemental deduction in rate. The defendant admits that he signed said contract, but denies that he owes them the said sum of $541.38 for the current used. He says that the electric motor mentioned in the written

contract was sold to him under the representation that it would not use in excess of $4 for each 10-hour day, and he says he relied on such representation and would not have bought said motor except for such representation, and that such representation was false, and in truth and in fact it used in excess of $4 worth of current for each 10-hour day, and he says he has surrendered said motor back to the plaintiff, and asked for a credit on any sum that the jury may find he owes plaintiff the amount that he has paid on the purchase price of said motor, which is admitted by all parties to be the sum of $125."

Following the summation of the case the court, over the objection of appellant, gave the following instruction to the jury:

"If you find from the evidence in this case that the plaintiff did represent to the defendant as an inducement to get him to purchase said electric motor that the said electric motor would not use current in excess of $4 per day for each 10-hour day, and further find that such representation was false, and that the defendant believed such representation to be true, relied upon the same and purchased said motor on account of said representation, then you are told that he would be entitled to rescind the contract for the purchase of said motor and recover back from the plaintiff the amount that he had paid on said purchase price, which is the sum of $125. Otherwise, he would not be entitled to recover anything from the plaintiff by reason of the purchase of said motor. So in this case your verdict will be for the plaintiff for such sums as you may find from the evidence in this case that the defendant owes to the plaintiff for electric current used in accordance with the rate fixed in the written contract and the supplemental contract less the credit of $125, if you should find that the purchase of the motor was induced by fraud in accordance with the above instructions. If you find that it was not induced by fraud, then the plaintiff would be entitled to recover the full amount of such current used, with no credits deducted therefrom."

We find no error either in the summation of the case by the trial court nor the instruction given by him relative to the issue as to the amount appellee should recover, if any, under the written contract as to rates for current. Especially is it a correct instruction in view of the fact that the oral contract contended for by appellant and all the terms thereof merged in the written contract under the provisions in the written contract. In other words, as we view the case, and as the trial court viewed it, there was no oral contract under the law and admissible evidence, covering rates for current used in the operation of the shingle mill.

No error appearing, the judgment is affirmed.

WALDRON MANUFACTURING CORPORATION *v.* KINCANNON, JUDGE.

4-5447 124 S. W. 2d. 968

Opinion delivered February 13, 1939.

Bates & Poe and *Pryor & Pryor,* for petitioner.

Ward Martin, Sam T. & Tom Poe and *Evans & Evans,* for respondent.

HOLT, J. Petitioners, Waldron Manufacturing Corporation, with its only office and place of business in Scott county, Arkansas, and E. L. Mock, also a resident and citizen of Waldron, Scott county, Arkansas, appeared specially in the Logan circuit court, southern district, and filed their motion to quash the service upon E. L. Mock on the ground that said service was served upon the said E. L. Mock on Sunday, contrary to the statute. This motion was overruled, and this action is brought in this court for a writ prohibiting the Logan circuit court and the judge thereof from proceeding further in the premises.

The petition is as follows: "Come now the above named petitioners, and each of them, and allege and show to the court that on the 30th day of October, 1938, the same being Sunday, one Earl Neely filed in the Logan circuit court, southern district, a complaint for alleged personal injuries alleged to have resulted from an accident which is alleged to have occurred on the 18th day of April, 1936, at Waldron, Scott county, Arkansas, against the above-named petitioners, and that said complaint has been since the date of filing and is now pending in the court aforesaid; that purported service of summons was had upon the petitioner, E. L. Mock, on the 30th day of October, 1938, said day being Sunday, in the southern district of Logan county while said Mock was passing through by automobile the said southern district of Logan county; that purported service of summons was thereafter had on petitioner, Waldron Manufacturing Corporation, on the 4th day of November, 1938, in Scott county, Arkansas; that at the time said suit was filed and purported service had upon the petitioner, E. L. Mock, and when the purported service was had upon the petitioner, Waldron Manufacturing Corporation, the said Earl Neely and both of the petitioners were residents of

Scott county, Arkansas, where they had all been such residents for a period of years, and none of said parties were residents nor did they have a place of business in the southern district of Logan county; that said Earl Neely could have at any time either prior to Sunday, October 30, 1938, or on any day thereafter obtained valid service of summons on either of the petitioners herein. Petitioners state that the purported service of summons on the petitioner, E. L. Mock, on Sunday was invalid, illegal and of no effect, and the exception permitting service on Sunday, as provided for in § 1345 of Pope's Digest of the Statutes of Arkansas, was not available where the plaintiff sought to obtain service on defendants who both resided in a neighboring county and in the county where the plaintiff resided and where service could be had on any week day either prior to or subsequent to Sunday.

This plaintiff was further prevented from obtaining legal service on Sunday and coming within the exception mentioned in the statute by reason of the fact that at the time this suit was filed in the Logan circuit court, southern district thereof, a suit involving the same cause of action was pending between the plaintiff, Earl Neely, and the defendant, Waldron Manufacturing Corporation, and no attempt had even been made to make petitioner, E. L. Mock, a party to that suit, although service could be had upon the said Mock at any time should the plaintiff have so desired. This suit pending in the Waldron circuit court was not dismissed until this suit was filed in the Logan circuit court, southern district thereof. Furthermore, as the record attached to this petiiton shows, the said Earl Neely is a near relative of petitioner, E. L. Mock.

The complaint filed in the Logan circuit court, southern district thereof, was prepared by one of the attorneys for the said Neely, on Saturday preceding the Sunday on which service was had. Petitioners state that the said E. L. Mock was inveigled and tricked into passing through the southern district of Logan county, Arkansas, for the purpose of

obtaining service upon him; that on the 21st day of November, 1938, the petitioners herein, without entering their appearance in the Logan circuit court, southern district, appeared specially and filed in said court a motion to quash the purported service of summons upon these petitioners, and said motions were heard by the court and evidence taken on the 20th day of December, 1938. Said motions to quash were overruled and denied by the court over the objections and exceptions of petitioners, and said court and the judge thereof, the Honorable J. O. Kincannon, has assumed to take jurisdiction of the claimed cause of action of the said Earl Neely against these petitioners, and has set said cause for trial in the circuit court of Logan county, southern district thereof, and that unless prohibited by order of this court will proceed with the trial of the cause of the said Earl Neely against these petitioners. That by reason of the matters and things herein set forth, (the record and evidence taken at the hearing, where the facts are undisputed), said court is wholly without jurisdiction of these petitioners or either of them. That a complete transcript of the proceedings in the Logan circuit court, southern district thereof, including the evidence taken at the hearing aforementioned, is attached hereto and made a part of this petition. That notice has been given to all of the interested parties that this petition would be filed on this date. Wherefore, premises considered, petitioners pray that a temporary writ of prohibition be issued against the Logan circuit court, southern district, and the Honorable J. O. Kincannon, the judge thereof, prohibiting said court and said judge from further proceeding in the case of Earl Neely v. Waldron Manufacturing Corporation and E. L. Mock until the further order of this court; that upon final hearing of this petition said writ of prohibition be made permanent and perpetual and that petitioners have all other proper relief." This petition was properly sworn to and verified by one of the attorneys for petitioners.

The complaint, upon the filing of which the service of summons in question was had, was filed on the 30th day

of October, 1938, on a Sunday. It is a suit for personal injuries alleged to have been sustained on the 18th day of April, 1936, at Waldron, Arkansas, in the plant of petitioner, Waldron Manufacturing Corporation. It is alleged that E. L. Mock, petitioner, was the fellow-servant whose negligence caused the accident and that he is a resident of Scott county, Arkansas. The summons was served on E. L. Mock on October 30, 1938, Sunday, in the southern district of Logan county, Arkansas. The affidavit of one of the attorneys for the plaintiff on which the right to the service of summons is based, was made and filed with the clerk of the Logan circuit court on the 30th day of October, 1938, Sunday, and is as follows: "Chas. I. Evans on oath states that he is agent and attorney for Earl Neely; that service may not be had upon the defendant, E. L. Mock, after today in the southern district of Logan county, Arkansas, so far as affiant knows and believes." Both petitioners appeared specially and filed separate motions to quash the summons and the service thereof, which motions were overruled by the court on the 20th day of December, 1938.

The facts as disclosed by the record, substantially are: E. L. Mock, one of the petitioners, has lived 20 years at Waldron, Scott county, Arkansas, and is now a resident of that place. He was served with summons on Sunday, the 30th day of October, 1938, about a mile south of Booneville, Arkansas, while he was returning from a visit to his wife's daughter at Ratcliff, Arkansas. He went from Waldron to Ratcliff by the way of Greenwood, Arkansas, but returned by way of Booneville, Arkansas, and had never before made the trip by the way of Booneville. His wife is about a third or fourth cousin of the plaintiff, Earl Neely. He had not talked to Earl Neely about the case. His wife had talked to Neely about a week before the Sunday in question. Earl Neely lives in Waldron, Scott county, Arkansas, and has for a great number of years. Earl Neely could have gotten service on petitioner, E. L. Mock, any day in the past year or more in Scott county, Arkansas, where they both resided.

Miss Ruth Lyman, deputy circuit clerk at Booneville, testified that she issued the summons on request of one

of plaintiff's attorneys and docketed the case, that the affidavit was made by Mr. Evans before her and that he told her Mr. Mock was at Ratcliff and he thought he might get service on him as he came through Booneville.

Mr. Evans testified that he is one of the attorneys for the plaintiff and caused the complaint to be filed in the case and summons to be issued; that he had information that Mr. Mock would be visiting Ratcliff on the next day; that Mr. Neely gave him the information that Mr. Mock was going over to Ratcliff; that he got Miss Lyman to file the papers, got the process and an officer and they caught Mr. Mock about a mile and a half south of Booneville. Mr. Earl Neely testified that he learned of Mock's intended trip on Saturday from Neely's little girl and that he so advised Mr. Evans. He testified that at the time of the service in question on Sunday that he had a suit pending at Waldron, Arkansas, against the Waldron Manufacturing Corporation but not against Mr. Mock upon the same cause of action; that Mrs. Mock was a second cousin to his mother; that he had not planned to take his suit any certain place; that he was in a car running along behind the Mocks.

Mr. Burnett testified that he is an official of the Waldron Manufacturing Corporation and that this company does no business in Logan county; that their place of business is at Waldron.

On this state of the record, petitioners earnestly insist that the service of summons so had on Sunday is void and of no effect and that the writ of prohibition should be granted.

As a general rule, service of summons on Sunday is void and of no effect. Our statute forbids the execution of process on Sunday except in special cases and in cases of urgent necessity. As was said in a very early case of this court, that of *Haines et al* v. *McCormick,* 5 Ark. 663, "This principle is founded upon the moral sentiment of a Christian people, which all just governments respect and obey." Again it has been said: "The Christian Sabbath is wisely recognized by law as a 'day of rest' to be devoted to religious contemplation and observance, free from secular disturbance. And, to aid in securing it

against desecration, statutes have been enacted." *Chaney* v. *Stacy,* 247 Ky. 520, 57 S. W. 2d 530. This court said in *Rosenbaum* v. *State,* 131 Ark. 251, 199 S. W. 388, L. R. A. 1918B, 1109: "The history of the origin of the Sabbath and of the legislation which has been enacted to preserve and perpetuate Sunday or the Christian Sabbath as a civil institution is a subject upon which volumes have been written, but the above brief resume sets forth the salient features that are indispensible for the correct interpretation of the meaning of the words 'necessity, comfort or charity' as used in the act under review. Christ in expounding what he and those of the Christian faith believed to be the divine law as contained in the Fourth Commandment, did not specifically designate the labor which it was lawful to perform on the Sabbath day as works of necessity, comfort or charity. Yet a critical analysis of his examples and precepts illustrating the character of deeds that might lawfully be done on the Sabbath day demonstrates clearly that it was only such labor as might be properly classed as that of daily necessity, comfort or charity." Unless, therefore, the service in the instant case comes within the exception provided for in § 1345 of Pope's Digest, it must be declared void and of no effect. Section 1345 is as follows: "A summons, subpoena, notice, order of arrest or of injunction may be issued on any holiday, except Sunday, and on Sunday where the officer having the process believes, or an affidavit of the plaintiff or some other person is made to the effect that affiant believes, that the process can not be executed after such holiday." Respondents insist that they have brought themselves within the terms of this section and that, therefore, the service must be held good. To this contention of respondents, we can not agree.

It will be noted from reading the affidavit of one of the attorneys for the plaintiff that it does not state "that the process can not be executed after such holiday", as required by the statute, but contents itself by saying "that service may not be had upon the defendant, E. L. Mock, after today in the southern district of Logan county, Arkansas." We hold that the Legislature meant by the above section 1345 of Pope's Digest, that in order

to permit the service of the process on Sunday the said process or service could not be had anywhere within the State of Arkansas after such Sunday. The undisputed facts in this case show that all of the parties to this case, including E. L. Mock, were residents of Waldron, Scott county, Arkansas, and had been such residents for a great many years and well known to each other, none of them living in Logan county. Service could have been had on E. L. Mock at any time in Scott county, or elsewhere in the State of Arkansas, this being a transitory action, wherever he might be found and suit filed against him and the petitioner, Waldron Manufacturing Corporation, on any day except Sunday. The affidavit in question says that service may not be had upon E. L. Mock after today (which was Sunday) in the southern district of Logan county, Arkansas. It does not say that service could not have been had on Mock in any other of the seventy-four counties of this state. There is no necessity that Mock should be sued in the southern district of Logan county, Arkansas. There is no evidence reflected by this record to the effect that E. L. Mock was putting himself beyond the jurisdiction of the courts of this state. The affidavit in question does not say that service could not be had on the defendant Mock on any other day, but it does say that service could not be had on Mock on any other day in the southern district of Logan county. The necessity contemplated by the statute is not shown in this case. We are of the opinion that the affidavit in question is not sufficient and falls short of the requirements of the statute.

We have carefully examined the Kentucky case of *Chaney* v. *Stacy,* 247 Ky. 520, 57 S. W. 2d 530, relied upon by respondents, and we are of the opinion that it does not control here.

Respondents have filed a petition seeking the right to have the officer's return corrected to speak the truth and show that he received the affidavit in question when the summons was given him for service on defendant Mock and that it was returned and filed with the clerk by him after the summons was served. We may test the return as being actually amended in the respect sought,

yet when so amended, we hold that there remains absent any showing of necessity for the service of the writ on Sunday.

We conclude, therefore, that the writ of prohibition asked for should be granted, and it is so ordered.

HUMPHREYS and MEHAFFY, JJ., dissent.

COULTER *v.* DODGE, CHANCELLOR.

4-5461. 125 S. W. 2d. 115

Opinion delivered February 13, 1939.

Will G. Akers, for petitioner.

Bradley & Patten, for respondent.

SMITH, J. Without stating how this case arose, it will suffice to say that the question presented for our decision is whether the proposed amendment to the Constitution, submitted at the last General Election November 8, 1938, as proposed amendment to the Constitution No. 24, was legally submitted at that election. It is not questioned that a sufficient vote for the amendment was cast to adopt it under the decision in the case of *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865. The question presented is whether the requirements of the Constitution in regard to amendments proposed by the General Assembly were sufficiently complied with to authorize the submission of the amendment to the electorate.

There are no controverted or disputed questions of fact in the case. There is a stipulation as to the facts, which we have verified by an examination of the journals of the Senate and of the House of the 1937 session of the General Assembly.

The facts are that on January 15, 1937, Joint Resolution No. 1 was introduced in the Senate. It was spread at length on the Senate Journal. The resolution was read the first time, the rules were suspended, and the resolution was read the second time and referred to the Senate Committee on Constitutional Amendments.

We copy from the published journal of the Senate, pages 106 and 107, the following recitals there found:

"SENATE JOINT RESOLUTION No. 1

"By Senator Norrell.

"A resolution to submit an amendment to the Constitution, to provide that the judge of the chancery court of each county shall preside over the probate court of such county; providing for the trial of all probate court matters before the judge of said court, and for appeals from probate courts to the Supreme Court of Arkansas; and authorizing the legislature to provide for a clerk for the probate court, or to consolidate chancery and probate courts; amending §§ 19, 34 and 35 of Art. VII of the Constitution.

"Be It Enacted by the House of Representatives of the State of Arkansas and the Senate of the State of Arkansas, a majority of all the members elected to each House agreeing thereto, that the following be, and the same is hereby, proposed as an amendment to the Constitution of the State of Arkansas, to-wit:

"Section 1. Section 34 of Art. VII of the Constitution is hereby amended to read as follows:

" 'Section 34. In each county the judge of the court having jurisdiction in the matters of equity shall be 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 courts of probate, or may be hereafter prescribed by law. The judge of the probate court shall try all issues of law and of fact arising in causes or proceedings within the jurisdiction of said court, and therein pending. The regular terms of the courts of probate shall be held at such times as is now or may hereafter be prescribed by law; and the General Assembly may provide for the consolidation of chancery and probate courts.'

"Section 2. Section 35 of Art. VII of the Constitution of Arkansas is hereby amended to read as follows:

" 'Section 35. Appeals may be taken from judgments and orders of courts of probate to the Supreme Court; and until otherwise provided by the General Assembly, shall be taken in the same manner as appeals from courts of chancery and subject to the same regulations and restrictions.'

"Section 3. Section 19 of Art. VII of the Constitution of Arkansas is hereby amended to read as follows:

" 'Section 19. The clerks of the circuit courts shall be elected by the qualified electors of the several counties for the term of two years, and shall be ex-officio clerks of the county and probate courts and recorder, provided that in any county having a population exceeding fifteen thousand inhabitants, as shown by the last Federal census, there shall be elected then a county clerk, in like

manner as the clerk of the circuit court, and in such case the county clerk shall be ex-officio clerk of the probate court of such county until otherwise provided by the General Assembly.'

"Section 4. The provisions of the Constitution of the State of Arkansas in conflict with this amendment are hereby repealed in so far as they are in conflict herewith; and this amendment shall take effect on the first day of January next following its adoption.

"(Signed) W. F. Norrell."

"Senate Joint Resolution No. 1 was read the first time, rules suepended, and read second time and referred to Committee on Constitutional Amendments."

On January 25 the Senate Committee on Constitutional Amendments reported the resolution back to the Senate, with the recommendation that it "do pass." On January 26 the resolution was called up for its third reading and final passage by the Senate. Again it was spread at length on the Senate Journal. It was placed on third reading and final passage. The roll was called by the secretary of the Senate and the yeas and nays were duly entered on the Senate Journal. There were 30 yeas and 1 nay. Four members of the Senate failed to vote. The resolution was declared adopted and was ordered transmitted to the House of Representatives.

On the same day, January 26, the secretary of the Senate, appearing before the bar of the House of Representatives, read to that body his official message transmitting to it Senate Joint Resolution No. 1, together with other measures which had been adopted by the Senate. That portion of this message dealing with Senate Joint Resolution No. 1 reads as follows:

"The sergeant-at-arms announced a message from the Senate, whereupon the secretary of the Senate appeared within the bar of the House and read the following communication:

"FIFTY-FIRST GENERAL
"ASSEMBLY
"ARKANSAS SENATE

"Little Rock, Arkansas,
"January 26, 1937.

"Mr. Speaker: I am instructed by the Senate to inform your honorable body of the passage of Senate Joint Resolution No. 1 by Senator Norrell, the same being a resolution to submit an amendment to the Constitution to provide that the judge of the chancery court of each county shall preside over the probate court of such county; providing for the trial of all probate matters before the judge of said court, and for appeals from the probate court to the Supreme Court of Arkansas; and authorizing the legislature to provide for a clerk for the probate court, or to consolidate chancery and probate courts; amending §§ 19, 34, 35 of Art. VII of the Constitution."

The secretary of the Senate duly delivered the resolution to the House, but neither the resolution nor the proposal embodied therein was spread at length on the House Journal.

On the same day of its receipt by the House the resolution was read for the first time in the House, the rules were suspended and the resolution was read the second time and it was then referred to the House Committee on Constitutional Amendments.

The descriptive reference which the House Journal makes to the resolution reads as follows:

"SENATE JOINT RESOLUTION No. 1
"By Senator Norrell.

"A resolution to submit an amendment to the Constitution, to provide that the judge of the chancery court of each county shall preside over the probate court of such county; providing for the trial of all probate court matters before the judge of said court, and for appeals from probate courts to the Supreme Court of Arkansas; and authorizing the legislature to provide for a clerk for the probate court, or to consolidate chancery and probate

courts; amending §§ 19, 34 and 35 of Art. VII of the Constitution.

"Was read the first time, the rules were suspended, and read the second time and referred to Committee on Constitutional Amendments."

Neither the resolution nor the proposal embodied in it was spread at length on the House Journal, there being entered only the synopsis thereof above quoted.

On February 19 the House Committee on Constitutional Amendments reported the resolution back to the House, with the recommendation that it "do pass." On February 23 the resolution was read the third time in the House, and placed on its final passage. The clerk of the House called the roll, and duly entered the yeas and nays on the journal. The vote was : Yeas 60; nays 20; not voting 19. The resolution was duly declared adopted by the House. A motion to reconsider the vote by which the resolution was adopted, and to lay that motion on the table, was passed, and the motion was accordingly laid on the table, but here again there was a failure to spread the resolution at length on the journal of the House.

On February 24 the clerk of the House returned the resolution to the Senate with the following message:

"The sergeant-at-arms announced a message from the House, whereupon the chief clerk appeared within the bar of the Senate and read the following communication:

"Little Rock, Arkansas,
"February 24, 1937.

"Mr. President: I am instructed by the House of Representatives to inform your honorable body of the passage of Senate Joint Resolution No. 1 by Senator Norrell, the same being a joint resolution to submit an amendment to the Constitution, to provide that the judge of the chancery court of each county shall preside over the probate court of such county; providing for the trial of all probate court matters before the judge of said court, and for appeals from the probate court, to provide a clerk for the probate court, or to consolidate the chan-

cery and probate courts, amending §§ 19, 34, and 35 of Art. VII of the Constitution.

"And I herewith return the same.

Respectfully submitted,

"(Signed) A. M. Ledbetter, Jr.

"Chief Clerk."

This message was spread upon the journal of the Senate, but the resolution to which it referred was not again entered upon the Senate Journal.

On February 26 the Committee on Enrolled Bills of the Senate reported to the Senate that it had compared the enrolled copy of Senate Joint Resolution No. 1 with the original, and that it found the same correctly enrolled, and on the same day the Committee on Enrolled Bills reported to the Senate that it had on that day delivered to the Governor for his action Senate Joint Resolution No. 1, and on February 27 the Governor reported to the Senate that he had approved the resolution.

It may be first said that the Governor had no duty to perform in connection with the authorization of the submission of the amendment, and his action thereon in approving the amendment added nothing to, and subtracted nothing from, the validity of the legislative action. *Mitchell* v. *Hopper,* 153 Ark. 515, 241 S. W. 10.

The insistence is that the failure of the House of Representatives to enter at length the resolution upon the Journal of that body is a fatal defect in the proceedings, for the reason that the Constitution requires this entry at length upon the journals of both the Senate and the House.

Let it be remembered that we are considering now only proposals to amend the Constitution submitted by the General Assembly. An entirely different procedure is applicable to amendments proposed under the Initiative and Referendum Amendment No. 7.

Section 22 of Art. XIX of the Constitution provides the manner in which proposals to amend the Constitution may be submitted to the people by the General Assembly. It reads as follows:

"Section 22. Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each House, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the state for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately."

This section of the Constitution was analyzed and construed in the case of *McAdams* v. *Henley,* 169 Ark. 97, 273 S. W. 355, 41 A. L. R. 629, where the conflicting authorities and the different rules of construction were reviewed and discussed, and it would be a work of supererogation to review a question so thoroughly considered in that opinion by the late Chief Justice McCulloch.

That opinion points out that in proposing amendments to the Constitution the General Assembly acts, not in its legislative capacity, but in the nature of a constitutional convention proposing amendments for action by the electorate. It was there pointed out that in proposing amendments to the Constitution something more was required than in passing ordinary legislation. Ordinary bills, in their passage through the General Assembly, may be identified by title and number, but not so with constitutional amendments. It is required that the latter be entered upon the journals of both the Senate and the House, as was there said, but that language must be construed with reference to the facts to which it was there applied.

There the facts were that a joint resolution proposing a constitutional amendment was passed in the Sen-

ate, but it was materially amended in the House, and was returned to the Senate as amended, and the Senate Journal did not reflect what action was taken by the Senate in regard to the House amendment.

Upon this state of the record Judge McCulloch said: "The real question is whether the omission from the Senate journals of the House amendment and the substantial differences between the amendment entered on the journal of the Senate and the one submitted to the people renders the adoption by the people ineffectual." The amendment submitted to the people was, in fact, the Senate resolution, as amended by the House. In other words, it was essential that the journals of both the House and Senate show definitely and certainly what amendment had been approved for submission, and that both the House and the Senate had concurred in the submission of the same amendment, and that the journals of the two Houses, when read together, make this fact definite and certain.

No such question is presented here. The resolution was properly entered upon the journal of the Senate, and the resolution was passed by the House without amendment of any kind, material or otherwise. Had the House amended the Senate resolution, as was done in the case of *McAdams* v. *Henley,* supra, then it would have been necessary for the House to enter the resolution, as amended, *in extenso,* upon the journal of the House, and if the Senate concurred in the amendment made by the House, it would also have been necessary for the Senate to again enter upon its journal the amended resolution, thus showing its concurrence therein. That was not done in the McAdams case, *supra,* and for that reason it was held, in answering the question above copied, which Judge McCulloch had propounded, that the submission of the amendment was not authorized and its adoption by the people was ineffectual.

The opinion in the McAdams case, *supra,* does say: "Our conclusion is that the proposal of an amendment to the Constitution is void unless the amendment is entered *in extenso* on the journals of each of the two houses

of the General Assembly, and that a mere identifying reference by title or otherwise is insufficient." But, as we have said, that language is to be construed with reference to the facts to which it was applied. The Senate Journal in that case reflecting the final action by the Senate recites only that "Senate General Resolution No. 9, by Norfleet and Caldwell, was read the third time and placed on its final passage." The resolution had then been amended in, and returned by, the House to the Senate, and this identifying reference to the resolution as "Senate Joint Resolution No. 9, by Norfleet and Caldwell," was insufficient. It did not reflect the Senate concurrence in the House amendment, as the resolution submitted by Norfleet and Caldwell did not meet the approval of the House, but had been amended by it.

But, after using the language above copied, Judge McCulloch immediately proceeded to say: "We do not mean to hold that it is essential to the validity of a constitutional amendment that the entire proposal as it may be affected by amendments adding or subtracting language in the course of its progress through the two houses must be spread upon the journal of either house at the same place or at the same time. Different parts of the journals of the respective houses may, if connected up so that the whole of the amendment as finally adopted by both houses, appears upon the journal of each house, be treated as sufficient to make a complete record; but we do hold that where any substantial part of the amendment is omitted entirely from the journal of either one of the houses, even though it appears on the journal of the other house, it renders the proposal invalid. By way of illustration, we might take the journal of the House in this instance, which shows that the original resolution as introduced in the Senate was spread at large upon the journal, and there were certain amendments which were also separately spread on the journal. Now, if the House had adopted the amendment by a yea and nay vote spread on the record without actually re-entering the amended resolution, that would have been sufficient, because the original Senate resolution and the House amendment are connected together, so that it is in effect

a complete entry of the whole amendment as adopted by the House. But when we come to the Senate Journal, we find nothing there but the entry of the original resolution. If the journal of the Senate had contained a recital of the House amendments and a corrected copy of the same was entered on the journal, an adoption of the amendment would have shown the whole of the resolution that the Senate adopted, and it would have been unnecessary to re-enter the original resolution as amended. The two entries, in other words, would have been sufficient; but, as the journal entry now stands, there is no disclosure whatever on the Senate journal of the House amendment, therefore the Constitution has not been complied with. Nor do we mean to say that a compliance with this provision must be absolutely literal. On the contrary, we say that the omission of an immaterial portion of an amendment—one not affecting its meaning or interpretation—would not affect its validity. It is only a substantial omission from the record which is fatal, and not merely immaterial words which do not affect the real meaning of the proposal. It is easily seen that the House amendments are substantial, and that the omission of them from the journal is an important departure from the text of the proposal as amended by the House."

When the journals of the two houses are read together in the instant case, it is made certain that both houses passed the same amendment. The journal of the House did not identify the Senate resolution to which it gave approval merely by reference to its title or number. On the contrary, there was entered upon the House journal a synopsis of the resolution which identifies it beyond the possibility of controversy as to whether the House was assenting to the Senate resolution. Had the House amended the Senate resolution in any particular, we would have presented the question involved in the McAdams Case, and in that event, it would have been essential, as held in that case, to enter the resolution as finally passed *in extenso* upon the journals of both houses.

We conclude, therefore, that the instant case is distinguishable, under the facts, from the McAdams Case,

and that it should be held in the instant case that the submission to the people of Senate Joint Resolution No. 1 was properly authorized.

There remains only the question presented as to when the amendment becomes effective. The amendment recites that it "shall take effect on the first day of January next following its adoption."

In the case of *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22, a proposed amendment, which provided that it should take effect and be in operation sixty days after its passage and adoption by the people of the state, received a majority vote of the electors at the general election held October 7, 1924, which was at that time the date fixed by law for the submission of constitutional amendments to the electors for approval or rejection. That amendment, like the one here under consideration, was proposed by the General Assembly. It was there held that the amendment was adopted on the date of the election, but did not take effect until sixty days thereafter (December 7, 1924), for the reason that the amendment so provided.

Upon the authority of this Matheny Case, we hold that the amendment was adopted at the general election held November 8, 1938, and, as the amendment provided that it shall be effective the first day of January next following its adoption, we hold that the amendment is now in effect and has been since January 1, 1939.

The prayer for a writ of prohibition will be denied.

MEHAFFY, J., concurs.

MEHAFFY, J. (concurring) The facts are stated fully in the majority opinion, and I concur fully in the conclusion reached, holding that the amendment is now in effect and has been since January 1, 1939. As stated by the majority opinion, the insistence is that the failure of the House of Representatives to enter at length the resolution upon the journal body is a fatal defect in the proceeding, for the reason that the constitution requires this entry at length upon the journals of both the Senate and House.

The Constitution provides the manner in which amendments may be submitted by the General Assembly. Section 22 of art. 19 provides that either branch of the General Assembly at a regular session thereof may propose amendments to this constitution, and if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the ayes and nays, etc.

The question is, what is the meaning of the word "entered". It is the contention of appellants that it means "spread at length". We think that not only the weight of authority, but reason also is to the effect that "entered", used in the provision of the constitution, does not mean "spread at length".

In the case of *Boyd* v. *Olcott*, 102 Ore. 327, 202 Pac. 431, the Supreme Court of Oregon decided this question. It is stated by that court:

"If the resolution is written out in full in the journal, it is, of course, entered in the journal, and so, too, when the journal contains a record sufficient to identify a given resolution it is entered in the journal within the meaning of the word "entered" as that word is naturally and popularly understood; but, nevertheless, the authorities are divided upon the question as to whether or not the word "entered", when found standing alone, requires recording in full *in extenso*, at length, or is satisfied if the journal contains references sufficient for identification. 6 R. C. L. 29. After a careful examination of many authorities discussing the subject, it is our conclusion that a great majority of the reported judicial decisions, when read and analyzed in the light of the facts upon which they are based, support the rule that an identifying reference is a full compliance with a constitution requiring that a resolution be "entered in" the journal. See 12 C. J. 692; Ex Parte Ming, 42 Nev. 472, 181 Pac. 319, 6 A. L. R. 1216. The following are a few of the many reported decisions holding that an identifying reference satisfies the requirements of a constitution worded like our constitution:

Ex Parte Ming, 42 Nev. 472, 181 Pac. 319, 6 A. L. R. 1216; *Oakland Paving Co.* v. *Tompkins,* 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17; *Thomason* v. *Ashworth,* 73 Cal. 73, 14 Pac. 615; Constitutional Prohibitory Amendment, 24 Kan. 700; *Cudihee* v. *Phelps,* 76 Wash. 314, 136 Pac. 367; *Gottstein* v. *Lister,* 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; *State ex rel. Adams* v. *Herreid,* 10 S. D. 109, 72 N. W. 93; *Worman* v. *Hagan,* 78 Md. 152, 27 Atl. 716, 21 L. R. A. 716; In re Senate File, 25 Neb. 864, 41 N. W. 981; *Lee* v. *Price,* 54 Utah 474; 181 Pac. 948; *West* v. *State,* 50 Fla. 154, 39 So. 412."

In the same opinion the Oregon court also said:

"When the constitution, as a whole, is taken by its four corners and examined as an entirety, and Article 17 is read in connection with the remainder of the instrument, it will become obvious that the conclusion that the words "entered in" as used in Article 17 are satisfied when the entry consists of an identifying reference, and that they do not mandatorily compel an entry in full, is the only conclusion which can be reasonably drawn."

If a bookkeeper is required to enter a promissory note on his ledger, he does not copy the note in full; no person would expect him to do that; and all that he is required to do is to enter an identifying reference. A court should not close its eyes and refuse to believe what every intelligent person believes.

The Utah Court said, in the case of *Lee* v. *Price, et al.,* 54 Utah 474, 181 Pac. 948: "The only purpose of entering a proposed amendment upon the journals is to keep a record that will be sufficiently certain to identify the proposition to be submitted to the people, and that the identical amendment proposed shall be the one voted upon by the electors. In the instant case it is conceded that the proposed amendment was submitted to the people and adopted by an overwhelming majority of the electors voting thereon. In our opinion it would do violence to both the spirit and letter of the law to hold that the formal entry on the legislative journals is subject to some technical criticism, and that therefore the

amendment should be declared void and invalid and the expressed will of the people thwarted. In the opinion in the "Prohibitory Amendment Cases," 24 Kan. 499, Mr. Justice Brewer, who thereafter served with distinction as a member of the Supreme Court of the United States, brushed aside all sophistry and all technicalities, and discussed the question under consideration in these clear and forceful words: "It is a proposition to amend the Constitution in the nature of a criminal proceeding, in which the opponents of change stand as defendants in a criminal action, entitled to avail themselves of any technical error or mere verbal mistake; or is it rather a civil proceeding, in which those omissions and errors which work no wrong to substantial rights are to be disregarded? Unhesitatingly, we affirm the latter. . . ."

In the same opinion, it is also said: "This is a government by the people, and, whenever the clear voice of the people is heard, Legislatures and courts must obey. True, a popular vote without previous legislative sanction must be disregarded. There is no certainty that all who could would take part in such a vote, or that they who did, all realize that it was a final action. It lacks the sanction of law, is a disregard of constitutional methods and limitations, and should be taken as a request for a change, rather than as a change itself. But, notwithstanding, this, legislative action is simply a determination to submit the question to popular decision. It is in no sense final. No number of legislatures, and no amount of legislative action, can change the fundamental law. This was made by the people, who alone can change it. The action of the Legislature in respect to constitutional changes is something like the action of a committee of the Legislature in respect to the legislative disposition of a bill. It presents, it recommends, but it does not decide. And who ever thought of declaring a law invalid by reason of any irregularities in the proceedings of the committee which first passed upon it? It is the legislative action which is considered in determining whether the law had been constitutionally passed; and it is the popular action which

is principally to be considered in determining whether a constitutional amendment has been adopted."

The Supreme Court of Washington, in the case of *Cudihee* v. *Phelps,* 76 Wash. 314, 136 Pac. 367, had this identical question before it, and cited many authorities to sustain the proposition that the word "enter" did not mean copy or enter at length or enter in full, but simply meant a brief, identifying reference, and among other things, that court said:

"We find that the entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word and of the phrase in which it occurs might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute in all these and like cases the word 'copy' or the phrase 'enter at large', for the word 'enter' we are conscious at once that a great change has been made. Indeed the mere fact that the qualifying words 'at large', 'at length', 'in full', do so often accompany the word 'enter' is proof that all feel that it is not a synonym of the word 'copy'. . . . This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have been apprehended that it might be made to appear that the proposal was duly passed, although lacking the requisite majority, and so it was required that the yeas and nays be entered. But, however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other. As to preserving the identity of the amendment proposed, there is no greater difficulty in this matter than with reference to bills." There are very many authorities on this question, but it would serve no useful purpose to review them here. Many of them are referred to in the cases we have cited. There is some conflict in the authorities, but in my opin-

ion, the overwhelming weight of authority supports the rule here announced.

If the makers of the Constitution had intended that the resolution and amendment should be spread at length or copied in full, they would have said so. When the whole Constitution is considered, we think there can be no doubt about this question.

In art. 5, § 22 of the Constitution, it is provided that every bill shall be read at length in each house, and § 23 of art. 5 of the Constitution provides that no law shall be revived, amended or the provisions thereof extended, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length.

It is said in 11 Am. Jur. p. 638: "On the other hand, the rule has been laid down that after ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state constitution or the legality of a new constitution; and unless the courts are satisfied that the constitution has been violated in the submission of a proposed amendment, they should uphold it. The view is taken that substance is more important than form, and that the will of the legislature lawfully expressed in proposing an amendment and the will of the people expressed at the proper time and in the proper manner in ratifying such amendment ought not to be lightly disregarded."

The majority opinion discusses the case of *McAdams* v. *Henley,* 169 Ark. 97, 273 S. W. 355, 41 A. L. R. 629, where the opinion was delivered by the late Chief Justice McCullough. That case is easily distinguished from the present. It appears from the facts in that case that one house passed a measure, sent it to the other house where it was amended. The house where the measure originated never did agree to the amendment, and the other house nover did agree to the original measure without the amendment. It, therefore, clearly appears that the measure passed by one house was different from the measure passed by the other house. No one

contends that either house may submit a constitutional amendment to be voted on by the people, but the identical measure must be passed by both houses, and in the case above referred to, this was not done and for that reason the Legislature had not adopted the proposed amendment, and there was no occasion to decide any other question in that case. We have always held that before a measure becomes effective, whether a bill or proposed constitutional amendment, both houses must pass the same measure. So it is not necessary in this case to overrule the case of *McAdams* v. *Henley*. It is true the question before the court here was discussed in that opinion, but if the opinion is wrong, or that discussion of this question was wrong, the case should be overruled.

I agree with Judge Scott of the Colorado Supreme Court in his dissenting opinion in the case of *Van Kleeck* v. *Ramer*, 62 Colo. 4, 156 Pac. 1108, in which he said: "It may be answered that the people are not always swift to correct a wrong by means of constitutional amendment, it was a long, difficult, and bitter struggle to so secure the initiative and referendum amendment. The people, like the mills of the gods, grind slow, but they sometimes find it necessary to grind exceedingly fine.

"Precedents that find support in sound reason, and tend to promote justice, are strongly persuasive and generally to be followed; but precedents not so supported, or when for any cause the reason for the rule has ceased to exist, obstruct progress, and should be discarded as being both unjust and dangerous. The tendency of courts to so generally rely on case law, regardless of existing reasons that may appeal from righteous judgment, is fast becoming a menace to our government.

"I may be permitted to suggest, for the consideration of courts and judges who feel impelled to sacrifice their sense of reason and justice upon the alter of the Golden Calf of precedent, the quaint philosophy of Sam Walter Foss, in the following lines:"

Judge Scott then quoted a poem by Sam Walter Foss. A portion of that poem reads:

"For thus such reverence is lent
To well-established precedent.
A moral lesson this might teach,
Were I ordained and called to preach.

"For men are prone to go it blind
Along the calf-paths of the mind,
And toil away from sun to sun
To do what other men have done.

"They follow in the beaten track,
And out and in, and forth and back,
And still their devious course pursue
To keep the path that others do."

The doctrine of *stare decisis* does not prevent a re-examination of any question, and a correction of the previously declared law is found erroneous. I think that a great majority of the recent decisions are to the effect that if a case has been decided wrong, it should be promptly overruled, unless it has become a rule of property. When it has become a rule of property, it should then be overruled, if erroneous, unless the overruling would be more harmful than following the erroneous decision.

I think when any measure has been fairly submitted to the people and they have voted on it, adopted it, the measure should be upheld; unless there has been some violation of a provision of the constitution, and I think there has not in this case.

I, therefore, agree with the majority that the amendment was adopted on November 8, 1938, and became effective January 1, 1939.

MISSOURI PACIFIC RAILROAD COMPANY *v.* DAVIS.

4-5340 125 S. W. 2d. 785

Opinion delivered February 20, 1939.

T. B. Pryor and *Daggett & Daggett,* for appellant.
Mark B. Grimes and *W. J. Dungan,* for appellee.

SMITH, J. G. M. Davis and his son, Clarence Davis, a man twenty-four years of age, were engaged in the joint enterprise of shipping and selling watermelons. On August 3, 1937, they drove a truck load of melons, with Clarence at the wheel, through the town of McCrory, on their way to the city of Wynne. They were traveling on highway 64, a paved road, when they came to a crossing over the tracks of the appellant railroad company between the hours of 9 and 10 o'clock a. m. The highway makes a large S turn but crosses the track at nearly a

right angle. Pictures of the crossing indicate that the track is about two feet above the land over which it runs. As the truck drove upon the crossing a fast passenger train of eight or ten coaches approached from the east, going towards McCrory. The train was running at a speed of 70 to 72 miles per hour. There was a strip of woods south of the track and about 600 feet east of the crossing which prevented the driver of the truck from seeing the train for more than 800 feet until the truck was within 100 feet of the crossing. At a point 50 feet from the crossing the truck driver had a clear view of the railroad track to the east for a distance of 2,500 feet. The track was straight. The woods which obstructed the view of the train also obstructed the view of the truck as it approached the crossing. A collision between the train and the truck occurred at the crossing, and both Davis and his son were seriously injured. They each sued for the sum of $3,000 and recovered judgments to compensate their injuries, from which is this appeal.

Davis and his son both testified that the speed of the truck was reduced to from 5 to 10 miles per hour as they approached the crossing. They had seen a freight train switching in McCrory as they passed through that town. They saw smoke, which proved to have been in McCrory, and they were looking in that direction to see if a train was approaching from the west, the direction of McCrory. They did not see the train until it was upon them, and the rear end of their truck was struck by the train. The front wheels of the truck and the cab had crossed the track when the collision occurred. No signal was given by blowing the whistle or ringing the bell as the train approached, until just before the collision, when two short sharp blasts of the whistle were blown. In this statement plaintiffs were corroborated by the testimony of a boy who was a passenger on the train and a man who had stopped his car about a quarter of a mile from the crossing to put water in the radiator of his car. There was no reduction in the speed of the train until after the collision. The emergency brake was applied as the collision occurred, but the train ran, according to some of the witnesses, about seven or eight times the

length of the train before it stopped. The fireman gave the distance at 14 times the length of the train.

The engineer and fireman testified that after the application of the emergency brake the engine rocked with such violence that they feared the train would be derailed and wrecked, but it finally stopped, after one of the wheels of the engine had run off the rail, and that the engine almost turned over.

A Mr. T. A. Smith, who lived in Forrest City, testified that he was riding in his automobile with his 16-year old granddaughter a short distance behind the truck. Before he saw the train he heard it whistle for the crossing about a quarter of a mile from the crossing, and he also heard the bell ringing. As he approached the crossing he was about 15 feet behind the truck, and he stopped his car about 100 or 150 feet from the crossing, and he supposed the truck was also about to stop, as it slowed down to almost a snail's pace, as the witness expressed it, but the truck drove on at a speed of about one or two miles per hour over the crossing. The young lady also testified that she heard the train whistle for the crossing, and heard the bell ringing, and in other respects corroborated the testimony of her grandfather. They were both very positive that the train first whistled for the crossing, and very soon thereafter again whistled, just as the collision was about to occur.

In view of this conflict in the testimony, we must assume that the jury found that no signals for the crossing were given by the train, and that the whistle was only blown just as the collision occurred, and that the railroad company was negligent in the operation of the train.

The engineer and fireman both testified that they were in their respective places, the engineer on the right side of the cab and the fireman on the left. The engineer testified that on account of the size and length of the engine he did not see the truck until it was within about 50 feet of the track. The truck approached the crossing from the south, or the fireman's side, and the fireman testified that he saw the truck as soon as the engine passed the woods which obstructed his vision to the south. He was in a better position to discover the truck and per-

sons approaching the crossing than was the engineer. The fireman further testified that the truck was reducing its speed as it approached the crossing, and that he thought the truck would stop and had done so. When he saw that the truck was about to cross in front of the train there was nothing he could do except warn the engineer, and this he did by jumping from his seat to that of the engineer, who immediately blew two short blasts of the whistle and applied the emergency brake.

The testimony shows that both the engineer and the fireman were thoroughly familiar with this crossing, as were also Mr. Davis and his son.

We have, therefore, a case in which it appears that the jury found that there was negligence on the part of the railroad company in the failure to give warning of the approach of the train to the crossing; but it appears to be utterly unreasonable to say that this negligence was comparable to that of the plaintiffs, or that the jury was warranted in finding that the plaintiff's negligence was of less degree than that of the railroad company.

Contributory negligence is no longer an absolute defense in actions of this character. Under our Comparative Negligence statute (§ 11153, Pope's Digest) there may be a recovery, notwithstanding the negligence of the person injured, if that negligence is of less degree than that of the operatives of the train.

We have held in numerous cases that it is the duty of the jury to weigh and compare the evidence and determine the relative degrees of negligence, and, that ordinarily, the finding of the jury is conclusive of the issue as to the degrees of negligence. But, as was said by Chief Justice McCulloch in the case of *St. Louis-San Francisco Railway Co.* v. *Horn,* 168 Ark. 191, 269 S. W. 576, cases may arise in which the question becomes one of the legal sufficiency of the testimony to support the finding made, and that this is a question of law for the court.

These questions were thoroughly considered and discussed in the opinion by Kenyon, Circuit Judge, in the case of *Bradley* v. *Missouri Pacific Railroad Co.,* 288 Fed. 484, which arose out of a collision between a train and

an automobile in the city of Prescott, this state. The excess of the plaintiffs' negligence over that of the railway company appears to us to be much greater in this case than in that one. In that case, as in this, "Evidence was introduced as to the negligence of the railroad company in failing to whistle or ring the bell and in running the train at a high rate of speed approaching this crossing." After quoting our Comparative Negligence statute, Judge KENYON said: ". . . and (the statute) does not attempt to take from the court the right, where no other inference can be drawn from the evidence by reasonable men, to decide as a question of law that the evidence of negligence on the part of decedent equaled or exceeded that of the railroad company."

This was the view expressed by Judge McCULLOCH in the Horn Case, *supra.*

What Judge KENYON said of the conduct of the party killed in that case is equally applicable here. He said: "The only reasonable inference that can be drawn from their conduct is that they did not look, or, if they did and saw the train, deliberately took the chance of beating it over the crossing. If the former, they were guilty of gross negligence—if the latter, gross recklessness. If parties driving automobiles persist in gambling with death at railroad crossings, their estates should not be augmented by damages if death wins. Care, not chance, is the requisite at railroad crossings."

It is inconceivable that a heavy train, traveling 70 to 72 miles per hour, could have been proceeding noiselessly, even though the whistle was not sounded or the bell rung. The truck was being driven over a paved highway. The grade of the crossing was almost negligible, but the truck was being driven up, and not down, this grade, whatever it may have been, and no one places Davis' speed at more than 10 miles per hour, and the witnesses who placed it that high said "From 5 to 10 miles per hour." A mere glance to the east would have revealed the approach of the train in ample time to have stopped the truck, and the only excuse offered for not looking in that direction was that smoke was seen to the

west, but the undisputed testimony is that this smoke was in McCrory, three miles west of the crossing.

Under these circumstances, it is not merely to split hairs, it is to trifle with the testimony, to say that the jury was warranted in finding that the negligence of the plaintiffs was of less degree than that of the railroad company. In our opinion, the trial court should have told the jury, as a matter of law, that the negligence of the plaintiffs was not of less degree than that of the railroad company.

It is insisted, however, that, notwithstanding the degree of the plaintiffs' negligence, they were entitled to recover under the doctrine of discovered peril, and that issue was submitted to the jury under an instruction numbered 5, to which many objections were made, reading as follows: "You are instructed if you find from a preponderance of the evidence in this case that as said train was approaching said crossing from the east traveling west the attention of the plaintiff was attracted to the west by smoke down the railroad track to the west so that the plaintiff thought that a train might be coming from the west towards said crossing and caused the plaintiff to look down the railroad track to the west as he approached and passed over said crossing in said truck, and the said employees of the defendants in charge of running and operating the engine of said train, saw and knew that the plaintiff was approaching and about to cross said tracks, and that he was in peril of being struck by the engine they were operating, if you find from a preponderance of the evidence the plaintiff was in such peril, and that the said employees in charge of the engine of said train failed to exercise ordinary care to avoid striking him after discovering his peril, if you find they did fail to do so, and that said conduct on the part of said employees in charge of the engine of said train, if you find they were guilty of such conduct, was the cause of the injuries to the plaintiff, then you should find for the plaintiff against the defendants."

Upon this issue the court charged the jury in another instruction numbered 7, reading as follows: "You are instructed that the servants of the defendant engaged in

the operation of the train had the right to assume that the plaintiffs in approaching the crossing, would act in response to the dictates of ordinary prudence and the instinct of self-preservation and would, in fact, stop before placing themselves in peril; and you are further instructed that the duty of the engineer and fireman to take precautions to avoid striking the plaintiffs arose only when they discovered, or should, by the exercise of reasonable care, have discovered the peril in which the plaintiffs were about to place themselves."

Does the testimony warrant the submission of that issue to the jury, and is it sufficient to sustain the finding that there was negligence after the discovery of the peril?

The undisputed testimony shows that a lookout was being kept by both the engineer and the fireman, and the presence of the truck was discovered as soon as the train had passed the timber. The fireman saw the truck approaching the crossing, but all the testimony is to the effect that the speed of the truck was being reduced, and the fireman had the right, as the court told the jury, to assume that the driver "would act in response to the dictates of ordinary prudence and the instinct of self-preservation and would, in fact, stop before placing themselves in peril," and to rely upon that assumption until, in the exercise of reasonable care, he was aware, or should have been aware, that the truck would not stop. The very instant this discovery was made, and we think there was no testimony to support a finding that it could have been sooner made, the fireman jumped from his seat to warn the engineer, who had sole control of the movement of the train and was the only person who could do anything at all, and the engineer immediately did all that was possible. He first blew the warning whistle, and then applied the emergency brake, with such force that he came near wrecking the train and imperiling the lives and safety of the passengers on it.

A short but a perceptible interval of time was required for the fireman to warn the engineer, who first blew the whistle and then applied the air. The undis-

puted testimony was to the effect that "It would take at least a second, or more, probably a second and a half, for the air that escapes from the brake cylinders to permit the pistons to force the shoes against the wheels of the car; it would take possibly a second and a half, possibly two seconds, for you to notice it." And during that time the train was moving 102 feet each second.

The first witness called by the plaintiffs was the engineer, who testified that a train such as his, going 70 miles per hour, could be stopped in 2,500 feet; and that while traveling 500 feet he could slow his train from 70 miles to 50 miles per hour, and in 800 feet he could slow it down to 40 miles per hour, and in 1,000 feet he could slow it down to probably 25 or 30 miles per hour. There was an emergency stop in this case, and the engineer came near wrecking his train, and did derail a wheel of the engine. There is no reason to believe that he could have stopped the train quicker than he did, or that he could have reduced its speed sufficiently to enable the truck to cross the track in safety, after discovering its peril.

Under these circumstances, we think there was no testimony to support the finding that due care had not been used after the discovery of the peril, and in view of the physical fact established to an undisputed certainty that at a point 50 feet south of the crossing the plaintiffs, or either of them, could have seen the train a distance of 2,500 feet, had they looked east, we feel constrained to hold that there is no liability in this case.

The judgments of the court below must, therefore, be reversed, unless we are to hold that railroads are insurers against the carelessness or recklessness of persons crossing railroad tracks, and as the cases appear to have been fully developed they will be dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

COOPER *v.* HOME OWNERS' LOAN CORPORATION.

4-5382 126 S. W. 2d. 112

Opinion delivered February 20, 1939.

Malcolm Garner and *John L. Sullivan,* for appellant.

Sam A. Rorex, Eugene A. Matthews, S. Lasker Ehrman and *Herschell Bricker,* for appellee.

HOLT, J. Appellant brings this appeal from an adverse ruling of the Pulaski chancery court. The facts as presented by record, substantially, are: On May 4, 1932, appellant, together with her then husband, John D. Cooper, purchased as tenants by the entirety lot 22 in block 2 of Fleming & Bradford's Addition to the city of Little Rock, Arkansas, from S. M. Dent, Trustee of Home Realty Corporation, bankrupt. The consideration was $1,700, of which $800 was paid in cash and the balance was represented by a lien note in the principal sum of $900 with interest at 7 per cent. and payable in monthly installments of $25. The deed retained a vendor's lien to secure the unpaid purchase money. The monthly payments were made to and including June, 1933, and a payment of $15 was made in July, 1933. On December 15, 1933, appellant was committed to the Arkansas State Hospital for Nervous Diseases and was an inmate on

April 6, 1934. On this latter date, John D. Cooper, husband of appellant, secured a loan from the Home Owners' Loan Corporation, appellee, to refinance the indebtedness in the sum of $745.91 due S. M. Dent, trustee of the Home Realty Corporation, and in evidence thereof executed a note in the sum of $842.62, with interest thereon at 5 per cent. and to secure the payment thereof executed a mortgage to appellee to cover the above described property. The name Mary Ella Cooper is also signed to the note and mortgage in question.

It is agreed, however, that her name on the instruments in question cannot bind her for the reason that she was insane at the time of their execution. The appellee delivered to S. M. Dent, trustee, bonds of the face value of $725, with accrued interest of $7.61, in full payment of the original lien held by Dent, and a check in the sum of $13.30. The balance of $96.71 consisted of taxes, insurance, abstract bill, and incidental expenses in connection with the closing of the loan. At the time appellee paid the amount due Dent on his vendor's lien, Dent's right to foreclose his lien had matured. Subsequent thereto appellant, Mary Cooper, was declared sane and default having been made in the payment due the Home Owners' Loan Corporation, foreclosure was begun in the Pulaski chancery court. Neither the appellant nor her husband paid any taxes on the land from the date of the execution of the mortgage to Home Owners' Loan Corporation. The trial court held that the mortgage in favor of appellee was void as to appellant, Mary Cooper, but that it was in full force and effect as to John D. Cooper, former husband of appellant, and decreed an equitable subrogation in favor of the Home Owners' Loan Corporation for the amount due it together with taxes paid subsequent to the execution of the mortgage. The sale was held under the terms of the decree and property purchased by appellee. The court confirmed the sale, but subsequently set aside the confirmation.

Upon this state of the record, appellant earnestly insists here that the appellee, Home Owners' Loan Corporation, acted as a mere volunteer in paying the ven-

dor's lien held by S. M. Dent, and thereby acquired no right or interest in the property in question by virtue of having satisfied the vendor's lien held by S. M. Dent, trustee, or under the note and mortgage executed to it by John D. Cooper, husband of appellant. To this contention we cannot agree. It is our view that the only question involved on this appeal is whether the Home Owners' Loan Corporation, appellee, is entitled to equitable subrogation to the rights of the original lien holder, S. M. Dent, trustee, and to the right to foreclose its lien on the property.

We are of the opinion under the facts as reflected by this record that the Home Owners' Loan Corporation is entitled to subrogation and does have the right to foreclose its lien on the property. The undisputed facts show that on May 4, 1932, appellant and her husband acquired by deed an estate by the entirety in the property in question from S. M. Dent, trustee in bankruptcy for the Home Realty Corporation, and that Dent retained a vendor's lien for the unpaid purchase money. At this time appellant was sane, and there can be no question as to the validity of this original lien held by Dent. The appellee, Home Owners' Loan Corporation, was formed for the purpose of relieving distressed home owners by amortization and refinancing of existing indebtedness. In *Pennell* v. *Home Owners' Loan Corporation,* 21 F. Sup. 497, the court said: "The Home Owners' Loan Corporation was created by authority of the act of June 13, 1933, as amended, 12 USCA, § 1461 *et seq.,* to engage in the business of loaning money and refinancing mortgages on real estate, a business that private corporations and individuals commonly engage in. The principal purpose of the act, as was recited therein, was to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, and to extend relief to owners of homes occupied by those who were unable to amortize their debts elsewhere." John D. Cooper, husband of appellant at the time, negotiated with appellee and secured the loan in question in the sum of $842.62, and this money was used

in payment of the original vendor's lien held by S. M. Dent, as trustee for the Home Realty Corporation, and since said deed to Cooper and wife (appellant) retained a lien on said property, we hold that appellee is clearly entitled to be subrogated to the rights of Dent under said lien and to a foreclosure thereof. One who liquidates a lien on behalf of another under such circumstances as reflected by this record cannot be said to be a volunteer.

Our court is committed to the rule that one who pays a debt at the instance of the debtor is not a volunteer. If when the payment was made he manifested an intention to keep the prior lien alive for his protection, he will be deemed in equity a purchaser of the incumbrance. This court in *Rodman, et al,* v. *Sanders, Admr.*, 44 Ark. 504, laid down the rule that one who advances money to pay off an incumbrance on land such as a vendor's lien at the owner's instance is not a volunteer. In *Stephenson* v. *Grant,* 168 Ark. 927, 271 S. W. 974, according to the facts there were two liens of record when the mortgage was executed by the owner to Mrs. Gaddis. Frielander & Oliven Company had sold a 40-acre tract to Turner Grant on March 2, 1918, reserving a lien on the land to secure the balance of the purchase money. On the 1st day of April, 1919, Grant and his wife executed a second mortgage to W. H. Stephenson to secure an indebtedness in the sum of $400, evidenced by a promissory note in said sum, and to secure future advances, subject to Frielander & Oliven Company's lien for the balance of the purchase money. Grant made application to the cashier of the Merchants & Planters Bank of Eudora for a loan of $1,000 with which to pay the existing liens and to build a house on the land. The bank did not want to make a long time loan, and the cashier of the bank secured a loan for Grant with Mrs. Gaddis as mortgagee. Grant and his wife executed four notes in the sum of $250 each, and to secure the same executed a mortgage on the land to Mrs. Gaddis. The mortgage was recorded, and a release deed was executed by Frielander & Oliven Company and placed of record. The cashier of the bank assured Mrs. Gaddis she would have a first lien on the land, and tes-

tified that it was his understanding that Mrs. Gaddis was getting a first lien on the land.

Notwithstanding the fact that the Stephenson mortgage was of record, the Chicot chancery court decreed a subrogation in favor of Mrs. Gaddis to the extent of the first lien of Frielander & Oliven Company and for taxes subsequently paid, holding that Stephenson's rights were not prejudiced by such subrogation. We quote from *Stephenson* v. *Grant, supra,* as follows: "The rule of law applicable to cases of this kind is well stated in a foot-note on page 473 of 37 Cyc. It is as follows: 'One who advances money to pay off an incumbrance on realty, at the instance either of the owner of the property or the holder of the incumbrance, either on the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and, in the event the new security is, for any reason, not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior incumbrancer under the security held by him, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit.' In discussing the equitable doctrine of subrogation, it is said in 37 Cyc., p. 365, that 'its basis is a doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice;' and, at page 371, that 'generally, where it is equitable that a person, not a mere stranger, intermeddler, or volunteer, furnishing money to pay a debt should be substituted for and in the place of the creditor, such person will be so substituted.' " In this case the court held that Mrs. Gaddis was not a volunteer and cited *Rodman, et al,* v. *Sanders, Adm., supra.* The principals of equitable subrogation are discussed at length in the case of *Marks, et al,* v. *Baum Building Co., et al,* 73 Okla. 264, 175 Pac. 818.

The doctrine of subrogation has been further discussed in the case of *Home Owners' Loan Corporation* v.

Collins, et al, 120 N. J. Eq. 266, 184 Atl. 621, as follows: "Generally when the person advancing the money to pay the old debt takes a new mortgage and the old lien is canceled, there is no subrogation, because the acceptance of the new security evidences an agreement and an intention by the new creditor to rely thereon rather than on the old and because, upon the cancellation of the old lien, nothing remains to be the object of subrogation. But where, through fraud or mistake, the new security turns out to be defective, there frequently arises a third kind of subrogation. It does not depend upon the subrogatee having been a surety or having had an interest in the property to protect, and it does not depend upon agreement that he would be subrogated to the rights of the old creditor. It grows rather from an agreement or understanding that he would obtain a security of a particular kind and from his failure, through fraud or mistake, to obtain such security." In *Southern Cotton Oil Company* v. *Napoleon Hill Cotton Company,* 108 Ark. 555, 158 S. W. 1082, 46 L. R. A. N. S. 1049, this court quoted with approval *Rodman* v. *Sanders, supra,* and said: "Subrogation, in its literal and equitable significance, is the demanding of something under the right of another, to which right the claimant is entitled for the purposes of justice to be substituted in place of the original holder. Its phases are various, but it preserves its characteristic features throughout. It is the machinery by which equity of one man is worked out through the legal rights of another. It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked wherever justice and good conscience demand its application in opposition to the technical rules of law, which liberate securities with the extinguishment of the original debt.

This equity arises when one not primarily bound to pay a debt, or remove an incumbrance, nevertheless does so; either from his legal obligation, as in the case of a surety, or to protect his own secondary right; or upon the request of the original debtor, and upon the faith that, as against the debtor, the person paying will have the same

sureties for reimbursement as the creditor had for payment. And this equity need not rest upon any formal contract or written instrument. Like the vendor's lien for purchase money, it is a creation of a court of equity from the circumstances.''

The theory of equitable assignment, as laid down by Pomeroy is: 'In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection. The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party for his own benefit; such a person is in no true sense a mere stranger and volunteer.' Pomeroy, Equity Juris., vol. 3, § 1212.''

On this record we hold that the Home Owners' Loan Corporation, appellee, in good faith liquidated an existing valid lien on the property in question, was in no sense a volunteer in so doing, and is entitled to equitable subrogation and to foreclose its lien thus created.

We are of the opinion, however, that appellant should be given an opportunity to redeem this property by paying to appellee the amount due it under its lien, this right, however, not to extend beyond 90 days from the date of this opinion. As thus modified the judgment of the court below is affirmed.

ROTHROCK *v.* WALKER.

4-5386 125 S. W. 2d. 459

Opinion delivered February 20, 1939.

O. E. and *Earl N. Williams,* for appellant.

Clifton Wade and *G. T. Sullins,* for appellee.

MEHAFFY, J. Henry B. Walker was circuit clerk of Washington county during the year 1936, and J. H. McIlroy and Fanny Walker were sureties on his official bond. Walker went out of office January 1, 1937, but had not made a final settlement with the county court for his 1936 accounts. The reason alleged by him for not having done so is that at that time there was a question as to what law governed and to what emolument and fees the clerk of Washington county was entitled. It is alleged that at that time there were suits pending in the chancery court of Washington county involving these questions. These suits had been filed at the request of the auditorial department of the state, and the litigation was being conducted by the prosecuting attorney.

An audit was made which showed that Walker had collected $10,770.02, for which he should account. No-

tice was served upon Walker and his bondsmen on March 17, 1938, notifying them that the balance due the county and state and their agencies for the year 1936 was $5,-142.22, based on the local salary act of 1921. They were notified that unless this balance was paid within 15 days or cause shown why same should not be done, judgment would be entered against them for said sum and execution issued thereupon.

An audit was filed with the county clerk in March, 1938, showing that Walker, circuit clerk, was indebted to Washington county, state of Arkansas, and improvement districts in the total sum of $2,247.22. On April 4, 1938, the court found that Walker and his sureties were indebted to the county, state and their agencies based on the local salary act of 1921, in a total sum of $5,142.22. That this balance was ascertained by the court before said notice was given; that more than 15 days had elapsed since that time and said sum had not been paid, and no reason given why judgment should not be entered, and judgment was entered accordingly.

It is alleged by the county judge that the audit referred to of $2,247.22 was based upon an opinion of the attorney general. Walker and sureties on his bond moved to dismiss, alleging that the county court had no jurisdiction. An appeal was prosecuted to the circuit court.

On August 29, 1938, I. R. Rothrock, as a citizen, taxpayer, and county judge, filed an intervention in which he stated that he did not believe it was to the best interest of the county for the case to be settled and dismissed upon the payment of $900 in full settlement of the county's share of receipts of the circuit clerk's office for 1936. The intervention is alleged to have been filed for the reason that the county judge was advised that the prosecuting attorney had entered into an agreement with Walker and his sureties to settle his case for $900.

A motion to strike the intervention was filed by Walker and sustained by the court.

The following is the intervention filed by County Judge I. R. Rothrock:

"Comes I. R. Rothrock, as a citizen, taxpayer, and County Judge of Washington county, and intervenes and

asks to be made a party to this case, and for causes, states:

"1. That he is the duly elected, qualified and acting County Judge of Washington county, Arkansas, and a citizen and taxpayer thereof.

"2. That he does not believe it is to the best interests of Washington county or the citizens thereof for this case to be settled and dismissed upon payment of Nine Hundred ($900) Dollars, in full settlement of the county's share of receipts of the circuit clerk's office for the year 1936 in the sum of $10,770.02. That the auditor's report shows an indebtedness to the county of $2,247.22, after allowing him $5,000 salary for himself and $2,500 for his deputies, and the judgment herein is for $5,142.22 based upon a salary of $3,420.

"Wherefore, intervener prays that he be made a party plaintiff to this cause and that same proceed to trial in his name as County Judge, a citizen and taxpayer of Washington County."

Appellant states that the first question to be settled in this case involves the right of the prosecuting attorney to dismiss a case of this kind, a case in the circuit court, on appeal from the judgment of the county court rendered under authority of § 13946 of Pope's Digest, which case was being conducted in the circuit court by special counsel employed by the county, the prosecuting attorney not being attorney of record for the county, and not having been requested by the county judge to represent the county; but on the contrary, having entered into an agreement to settle the case over the objection of the county judge.

Section 13946 of Pope's Digest reads as follows:

"When any balance shall be found against any clerk, sheriff, collector, coroner, constable or other officer for moneys accruing to the county treasury, and the same shall not be paid within the time prescribed by law, it shall be lawful for the county court, fifteen days' notice being given to such delinquents and their securities, to render judgment against delinquents and their securities for the amount of all moneys ascertained to be due the county, and issue execution therefor."

Section 10889 of Pope's Digest reads as follows: "Each prosecuting attorney shall reside in the judicial circuit for which he may be elected, and shall commence and prosecute actions, both civil and criminal, in which the state or any county in his circuit may be concerned."

Section 10890 of Pope's Digest provides that the prosecuting attorney shall defend all suits brought against the state or any county in his circuit, prosecute all forfeited recognizances accruing to the state in any county of his circuit.

Section 10891 provides that the prosecuting attorney shall give his opinion to any sheriff, constable, justice of the peace or county court, if required, on any question of law in any criminal case or other matter in which the state or county is concerned, pending before said officer.

It is true, as argued by appellant, that the prosecuting attorney was not the attorney of record in the suit in the county court, but the evidence does not show that he had any notice of the action of the county court and no notice of the judgment against Walker and his sureties. The evidence does not show that the county court or county judge called on him for any advice or opinion. This case in the county court was begun by serving notice on Walker and his sureties, none of whom seems to have appeared in the county court, and judgment was entered by the county court against Walker and his bondsmen without notice, so far as the evidence shows, to the prosecuting attorney. Walker and the sureties on his bond appealed this case to the circuit court. In the meantime there were suits pending in the chancery court against Walker and the sureties on his bond, and when this case reached the circuit court the prosecuting attorney assumed charge and entered into an agreement to settle not only the case in the circuit court, but the cases in the chancery court.

Mr. Bryan Sims, chief accountant for the State Comptroller's office in charge of the county audit division of the auditorial department of the state of Arkansas, agreed to and approved the agreement to settle made by the prosecuting attorney, and gave his reasons for approving and agreeing to the settlement.

We think the only question involved in this case is whether the prosecuting attorney had a right to settle the four cases, and we think it wholly immaterial as to what law is valid or whether any of them are repealed, because the prosecuting attorney doubtless took all these things into consideration in arriving at a settlement, and no doubt Mr. Sims did too. So that if the prosecuting attorney had authority to make the settlement, the county judge or taxpayer could not interfere with or prevent making the settlement. If he did not have authority to make it, then of course it would make no difference what law was in effect at that time as to fees or salary.

In the case of *Oats* v. *Smith*, 194 Ark. 812, 109 S. W. 2d 955, the questions involved were practically the same as the ones here involved. The court there said that the appellant, in his capacity as county judge and as taxpayer, filed an intervention alleging that the proposed settlement by the prosecuting attorney was an improvident settlement and that after an investigation he had concluded that the county could recover a very much larger sum, and he asked the court to reject the settlement and proceed to trial, praying that the attorney employed by him be enrolled as attorney for the court to prosecute the suit to a conclusion. It was said there that the trial court heard the evidence of J. B. Sims and others over the objections of appellant, tending to show that the settlement was fair and equitable, and that in his opinion the settlement was to the best interest of the county. The trial court held that the prosecuting attorney had authority to compromise the case, and this was approved by this court in the above case. The court discussed and construed act 146 of the acts of the General Assembly of 1933, and it would serve no useful purpose to discuss the act here.

It is true in this case that the suit against Walker and his sureties in the county court was not brought by the prosecuting attorney, but as we have already said, the evidence does not show that the prosecuting attorney's attention was ever called to it until it reached the circuit court.

Appellant contends, however, that notwithstanding the provisions of the section with reference to the prosecuting attorney, still where the county is interested, and when in the judgment of the county court the best interests of the county require it, it may employ special counsel to represent the county.

The first case to which attention is called is *Oglesby* v. *Ft. Smith District,* 119 Ark. 567, 179 S. W. 178, 1199. This was a suit where the special attorney employed by the county court presented a claim for legal services. His claim was disallowed, and on appeal to this court the judgment of the circuit court was affirmed, and while a majority of the judges voted to affirm it, they did so for different reasons. It is true that the opinion said in that case: "We think the county court has power to employ additional counsel when in his judgment the interests of the county are of sufficient importance to demand it, or, in cases where the prosecuting attorney neglects or refuses to perform the duties imposed upon him by statute, or, where his other duties are of such character that he does not have time to properly represent the county. We are of the opinion, however, that the power of the court to employ additional counsel does not give the right, under the guise of such employment, to take the case out of the hands of the prosecuting attorney and confide its management to other attorneys without consultation with the prosecuting attorney, or for the purpose of furthering the private interests of the county judge."

There is no evidence in the instant case that the prosecuting attorney neglected or refused to perform his duty, and as stated in the case cited, the county court did not have the right to take the case out of the hands of the prosecuting attorney and confide its management to other attorneys.

The next case relied on by appellant is *Leathem* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, Ann. Cas. 1917D 438. This case did not involve the employment of special counsel, but involved the validity of a contract made by the county court employing expert accountants.

The next case relied on is *Spence & Dudley* v. *Clay County,* 122 Ark. 157, 182 S. W. 573. But the court said in that case: "The present case is manifestly one where the prosecuting attorney could not represent the county and where the county court would be empowered to employ other counsel to represent the county and protect its interest. Greene and Clay counties are in the same judicial district and have the same prosecuting attorney; obviously the prosecuting attorney could not represent both counties and would not be required to make a choice of which county he would represent. Therefore the county court was authorized to employ other counsel to represent the county."

Appellant next relies on the case of *Buchanan* v. *Farmer,* 122 Ark. 562, 184 S. W. 33. That case was where an act of the Legislature had been passed providing that two-thirds of the salaries of the judge and prosecuting attorney should be paid by Garland county. Farmer was employed by the county court to represent Garland county. The opinion states that the prosecuting attorney was not asked to represent Garland county and did not do so; but the court said that it might be fairly inferred that the prosecuting attorney had time to have brought this suit had he been requested by the county court to do so, and it also said that in a case where the prosecuting attorney was unable to attend to the business of the county, or in a case where the interests of the county in some particular suit is of such magnitude and importance as to demand of the county court the employment of special counsel, this court has recognized the right of the county court to do so. In this case the court held that he did not have the right to employ special counsel, and it reversed the case and dismissed the claim of appellee.

The next case relied on is *Sumpter* v. *Buchanan,* 128 Ark. 498, 194 S. W. 27, and the court again held that under the circumstances in that case the county court did not have the right to employ special counsel.

In the case of *Pulaski County* v. *Shofner,* 192 Ark. 471, 92 S. W. 2d 217, there was involved the question of the county furnishing a library to the prosecuting attorney, and the prosecuting attorney was of course, directly interested in the case.

"As a judicial or *quasi* judicial officer a prosecuting attorney has a certain discretion as to when, whom and against whom to proceed. Unless otherwise provided by law, all suits on behalf of the state should be brought by the prosecuting attorney in the name of the state." 18 C. J. 1316.

"It is the duty of the district attorney to appear for any county in his district, in all matters in which it may be a party or interested, in the district court of his district. . . . A willful neglect of this duty would be a misdemeanor, and render him liable to indictment, fine and imprisonment." *Clark & Grant* v. *Lyon County,* 37 Iowa 469. In the same case, the court further said:

"The duty thus positively enjoined upon the district attorney must, of necessity, be accompanied with the right to do the thing required. If it is a positive duty, resting upon the district attorney to appear in the district court for the respective counties in his district, it is just as much a duty for the board of supervisors and the court to permit him to appear when he desires to do so. And a refusal to allow him to appear denies him a legal right."

The settlement in this case seems to have been fair, and Mr. Sims, who was not interested, had made a thorough examination of the facts, and approved the settlement. The prosecuting attorney, who is a state officer, had made a thorough investigation, and in his judgment the settlement was fair.

Under the authority of *Oats* v. *Smith,* 194 Ark. 812, 109 S. W. 2d 955, the judgment of the circuit court is affirmed.

HANCOCK *v.* HANCOCK.

4-5378 125 S. W. 2d. 104

Opinion delivered February 20. 1939.

Partlow & Bradley, for appellant.

J. G. Waskom and *H. P. Maddox,* for appellee.

HUMPHREYS, J. This is an appeal from the chancery court of Poinsett county dismissing a petition in *habeas corpus* for the custody of a child under fourteen years of age by its mother against its stepmother who had the custody of the child as guardian by appointment of the clerk of the probate court of said county either before or after the confirmation of the appointment by the probate court, on the ground that the chancery court was without jurisdiction to try the cause.

The petition alleged that appellant was the mother of the child and after the final separation of appellant and the father of the child she resided in Memphis, Tennessee, and kept the child; that in January, 1933, the father of the child married appellee and early in 1934 he obtained custody of the child who lived with him and appellee in Marked Tree, Poinsett county, Arkansas, until the father died on July 5, 1938, and thereafter with appellee; that on July 8, 1938, appellee applied for and was granted letters of guardianship of both the person and property of the child by the probate clerk of said county and the approval of the appointment was set down for hearing in the probate court on August 18, 1938; that this petition for a writ of *habeas corpus* was filed in the chancery court

of said county on the 17th day of August, 1938, and on said date the writ was issued and delivered to the sheriff and served upon appellee on the 18th day of August, 1938, before the time for trial in the probate court.

In addition to the allegations set out above it was alleged that appellant was a proper person to have the custody of her child and was able to support and care for him. It was also alleged that appellant did not have an adequate remedy at law.

A motion to dismiss the petition was also filed by appellee specifically alleging: "That the probate court of Poinsett county, Arkansas, having appointed defendant herein as guardian of the person and estate of the said minor child, this court has no jurisdiction of the cause of action, if any, stated, in plaintiff's petition."

Appellee also filed a response to the petition for a writ of *habeas corpus* denying that appellant was a proper person to have the custody of her child and attached thereto a copy of the divorce decree showing that the father obtained a divorce from appellant on the ground of adultery.

The only question arising on this appeal is whether the chancery court had jurisdiction of the cause of action. The cause was dismissed for the want of jurisdiction because the matter of the appointment of a guardian for the person of the child was pending in the probate court.

In this state, the law is that a mother after the death of a father, becomes the natural guardian of the children and is entitled to their custody. Section 6220 of Pope's Digest is as follows: "In all cases not otherwise provided for by law, the father while living, and after his death, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian of their children, and have the custody and care of their persons, education and estates; and, when such estate is not derived from the person acting guardian, such parent shall give security and account as other guardians."

This section governs the right of a mother to the custody of her child in the event the father dies, whether she is a resident of the state or not, provided of course,

the child is within the jurisdiction of the court. In other words, if a father who has the custody of a child in this state dies, the mother is entitled to the custody thereof, if a fit person, whether she resides in this state or not, under the statute quoted above.

It is true that the probate court has power under § 6202 of Pope's Digest to appoint guardians for minors and possess the control and superintendence of them, but this does not mean that the probate court may appoint a third party guardian of a minor if the mother under the provisions of § 6220 is entitled to the custody thereof. A nonresident mother would have no right to ask that a probate court appoint her guardian for her child. The probate court is prohibited from appointing a nonresident of this state either a guardian or curator by § 6121 of Pope's Digest, which reads as follows: "No person other than a resident of this state shall be appointed a guardian or curator, and if, after his appointment, any guardian or curator remove from this state, his appointment shall be revoked and proceedings had as in other cases of revocation."

It follows that a nonresident mother could not obtain custody of her child in a probate court. If a nonresident mother is a fit person and has a right to the custody of her child her remedy would be elsewhere and not in the probate court. In the case of *Bowles* v. *Dixon,* 32 Ark. 92, a *habeas corpus* proceeding was filed in the chancery court by the father to recover the custody of his children against Elizabeth E. Bowles. An answer to the petition was filed by William W. Bowles setting out that he was the lawful and duly appointed guardian of the minors mentioned in the petition, appointed as such by the probate court of Chicot county and as such claimed the custody of said minors, and pleaded that the chancery court had no jurisdiction of the subject matter of the suit.

On the trial it was shown that John Dixon was the father of the children and that William Bowles had been appointed guardian of said minor children by the probate court and this court said:

"Whether the order of the probate court appointing appellant guardian of the minors, on his own application, was regular, or erroneous, is not a question before us in this case.

"By statute, as well as by common law, the father (unless incompetent or unfit) is the natural guardian, and entitled to the custody, care and education of his minor children. . . . That the court below, sitting in chancery, had jurisdiction to take the minors from the custody of the appellant, their statute guardian, and deliver them into the custody and care of appellee, the father and natural guardian, we think there can be no well founded doubt."

Our conclusion is that the chancery court erred in dismissing the petition for writ of *habeas corpus* for the want of jurisdiction to try the cause. The defense interposed by appellee that she had been appointed guardian of the child by the probate court was no defense to the action of appellant for the custody of her child if a fit person to have the custody and control thereof. The chancery court should have heard the case on its merits as to whether the mother was a fit person to have the custody and control of her child.

On account of the error indicated, the decree dismissing the petition is reversed and the cause is remanded to the trial court to hear the case on its merits.

PILES *v.* CLINE.

4-5384 125 S. W. 2d 129

Opinion delivered February 20, 1939.

J. N. Fortner, W. A. Bates and *Donald Poe,* for appellant.

Hardin & Barton, for appellee.

SMITH, J. This appeal involves the construction of the seventh paragraph of the last will and testament of T. J. Olive. This paragraph reads as follows: "Seventh: I give to my wife, Maggie E. Olive, (four certain lots, which are described by metes and bounds). I also give my wife, Maggie E. Olive, all the notes, moneys, bonds or any other property that I may have at the time of my death. She to have all to do with as she sees fit and upon the death of my wife it is my desire that whatever property that she may have that came to her through me shall be given to my children above, for them to have it in equal parts. And I hereby appoint my wife, Maggie Olive,

to be the sole executrix of my last will, and direct that she shall serve without bond."

In the first paragraph of the will the testator directed that ". . . all my just debts shall be paid, and that the legacies hereinafter given shall, after the payment of my debts, be paid out of my estate."

By paragraph two of the will the testator gave and bequeathed a certain tract of land to his son, W. A. Olive. By paragraph three a tract of land is given to his daughter, Belle Black. Paragraph four gives a tract of land to Maxie William, a daughter. Paragraph five gives a tract of land to R. H. Olive, a son, who is also forgiven the payment of a note for $221 due the testator. Paragraph six gives a tract of land to J. R. Olive, a son, who is also forgiven the payment of a note due his father.

It is, after making these specific bequests, contained in paragraphs 2, 3, 4, 5, and 6, to his children, that the remainder of the testator's property is devised to his wife.

The testimony shows that the testator had accumulated a considerable estate, the accumulation of himself and his family. He had not inherited any property, nor had his wife, and she owned no property when she married the testator. The value of the personal property of the testator, as shown by the appraisement thereof, was $8,798.65, which was all included in paragraph seven, copied above. This paragraph gave the widow four pieces of residential property, including the testator's home, and the value thereof was greater than the value of the personal property.

The widow qualified as executrix of the estate, and the value of the personal property increased, under her administration, to $9,775.30, including $5,311.85 cash on hand. The property devised in paragraph seven was of much greater value than all the property devised to all the children.

The testimony shows that the testator had been married prior to his marriage to Maggie. He had married young, and five children had been born to that marriage. When his first wife died the oldest child was eleven years of age and the youngest was less than one year old.

Shortly after the death of his first wife the testator married Maggie, who was then only seventeen years old, and who survived him. He and Maggie had been married fifty years at the time of his death, and no children had been born to them. The family life was extremely pleasant. The stepchildren loved their stepmother the same as if she had been their own mother, and she loved and cared for them as if they were her own children. The relationship between the stepchildren and stepmother was such that acquaintances in later life did not know Maggie was not the mother of the children. The confidence of the testator in his wife was unlimited. Mrs. Olive's next of kin were two half-brothers and a half-sister, but her relationship with them was not cordial or intimate, and long periods of time would elapse without their seeing each other.

The attorney who drew the will testified that Mrs. Olive understood that she had been given only a life estate, and that she never claimed any other interest, and that she expressed the purpose of saving as much of the estate as possible for the children of the testator. Evidently she regarded these children as her own.

The will was executed March 5, 1935, at which time both the testator and his wife had reached an advanced age. The testator died June 14, 1936, and his widow died September 7, 1937. Upon the death of the widow her half brothers and half sister claimed as heirs at law of the widow all the testator's estate undisposed of by the widow at the time of her death.

The chancellor construed the will as a devise to the widow in fee, and from that decree is this appeal.

If we were permitted to consider the testimony above recited in the construction of the will, there could be no possibility of a doubt as to the conclusion to be reached. But, as was said in the case of *Ellsworth* v. *Arkansas National Bank, Trustee,* 194 Ark. 1032, 109 S. W. 2d 1258, extrinsic evidence may be admitted to interpret a will, but it will not be admitted to show what the testator meant, as distinguished from what the words of the will express, but only for the purpose of showing the meaning of the words employed in the will. In that opinion we quoted

from the case of *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, 1199, as follows: " 'We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in deciding what he intended by the language which he employed. If the rule were otherwise, the making of wills would be so difficult that the very purpose of permitting this method of disposition of property would frequently be defeated.' "

Opposing counsel have cited many cases from this and other courts to aid us in construing this will. But the legal principles involved are not difficult, and have been frequently announced by this court. The difficulty in distinguishing these cases is in the application of these principles to the facts of each case, no two of which are alike.

The duty of the court is to ascertain the intention of the testator, and to give that intention effect. We must do this by a consideration of the language employed in the will. The imperfection of our language is such that it is difficult to write a sentence which can be given only one interpretation. One may write a sentence which expresses the thought he intended to convey, and it may express that thought, but, if this thought or purpose is involved, it is very difficult to so express it that no construction can be given except that intended.

Wills cannot ordinarily be written in a single sentence, and we must, therefore, read a will in its entirety and give effect, if we may, to all the language which the testator has employed. When we have done so, if the intention of the testator is clear, we have only to declare the intention thus expressed. If, however, the language of the will is ambiguous and the intention of the testator is not clear, we must invoke the aid of settled rules of construction with reference to which the will is said to have been written, although, in fact, the testator may have been wholly ignorant of these rules of construction. The application of these rules of construction may, in some instances, operate to defeat the actual intention of the testator, but, if so, the fault lies with him in failing to clearly express his intention.

It was the opinion of the court below that the language in paragraph seven, "it is my desire that whatever property that she may have that came to her through me shall be given to my children above, for them to have it in equal parts," was precatory only, as is evidenced by the following quotation from the chancellor's opinion: "The will conveys to Maggie E. Olive by clear terms the land and personal property, and this clear gift should not be modified or qualified by a later obscure and ambiguous statement nor should the gift be qualified by mere precatory language." Appellee seeks to support this finding by citation of numerous authorities to the effect that a clear gift by an earlier provision of a will will not be modified or qualified by mere precatory language.

We are cited also to cases like that of *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S., 1028, 11 Ann. Cas. 343, where it was held, to quote a headnote in that case, that "Where property is devised to the first taker in fee simple, with limitation over to another at the former's death, the limitation over is void for repugnancy."

These, and other cases of similar effect, would be decisive of this appeal, if it were assumed, or found, that the testator had used only precatory words relating to the disposition of the estate conveyed to his wife upon her death, or that he had devised to her in fee simple, with a limitation over to another. But these are the very questions we are considering and are called upon to decide.

The seventh paragraph is in the nature of a residuary clause. There is no partial intestacy in this case. By this paragraph the aged testator devised to his aged wife all of his property not devised to his children in preceding paragraphs. It does not express a mere hope, or preference, or advice, to the wife as to what she shall do with this property devised to her which she had not used or disposed of at the time of her death. The testator himself made that disposition by giving that property—whatever it may have been—upon the death of his wife to his children in equal parts.

The same sentence which defines the interest given the wife and gives the right to do with "as she sees fit" also disposes of any part of the estate which the widow owned at her death, that disposition being that it shall then be taken by the testator's children in equal parts. The testator was not asking his wife to make that disposition upon her death; he made that disposition himself when he executed the will.

Now, the testator did give to his wife the property described in the seventh paragraph, "to do with as she sees fit," and this language was, no doubt, sufficient to convey the right to sell and convey the fee, had the widow elected to sell. But she did not sell or dispose of anything. She accumulated more.

It was held in the case of *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. 2d 287, to which case further reference will be made, that "The great weight of authority, however, including this court, supports the rule that a life estate may be created, coupled with power of disposition, and that such power does not change the life estate into a fee for the reason that the power of disposition is not in itself an estate, but is an authority so to do derived from the will."

In the case of *Little Rock* v. *Lenon, supra,* the testator first devised his property to his wife in fee, but a codicil subsequently added provided "that all property left by me to my wife which has not been used or expended by her during her lifetime be donated and turned over to the City Hospital of Little Rock."

It was there contended, and the judge who wrote the opinion of the court had the view, that the codicil constituted "a mere wish or will, precatory words, that she (the wife) donate or give such of his (the testator's) property as remained, by will, to the City Hospital." But the majority of the court held otherwise, being of the opinion that the testator had not merely advised what he would like for his wife to do, but had himself made that disposition of his estate.

So, here, we conclude that the testator devised the bulk of his estate, including all his personal property, to his wife, to use it "as she sees fit," and to sell it, if she

saw proper to do so, and he did not merely indicate the disposition he wished his wife would make of any property she had not used, consumed or sold, but he made that disposition himself. The will itself disposed of the property which the wife had not used, consumed or sold, and it was unnecessary for the wife to do anything or to take any action to effectuate the testator's wishes.

The opinion in the recent case of *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417, confirms this view. The second paragraph of the will in that case reads as follows: "I give, devise and bequeath to my wife, Jennie Jackson, all and entire my real and personal property of every nature and kind and wheresoever situated, with full power in her as executrix, jointly with my executor, A. W. Jackson, to sell and convey any and all real estate of which I may die seized and possessed and wheresoever situated and to pass an absolute title in fee to the purchaser or purchasers thereof."

The fourth paragraph of the will reads as follows: "Fourth: Having confidence in my wife, I have made no provision for my children, Clara Jackson Robinson, Tennie Jackson Donaldson, A. W. Jackson, Emma Jackson and Mabel Jackson Herget, but it is my desire that after the death of my wife that all of the property which may not have been sold, conveyed or otherwise disposed of by her during her life shall then go to my children in equal parts, the children of any child that may be dead taking the deceased parent's part."

The widow, after the death of her husband, the testator, made a will conveying a portion of her husband's real estate. It was there held, to quote a headnote: "Wills—Construction of—Under a will giving all property of the testator to his wife with full power to sell and pass the title in fee to the purchaser and providing that 'all property not sold by her during her life shall go to my children in equal parts, etc.,' the wife could not pass title by will to property not disposed of by her in her lifetime, since, at her death, it passed to the children."

Here, Mrs. Olive, the testator's widow, could not have devised this property to her brothers and sister, or

to anyone else, since, at her death, the title passed to the testator's children, and if she was without power to devise the property by her will, they could not inherit the property from her, as her interest in her husband's estate terminated with her death.

We conclude, therefore, that the chancellor was in error in holding that the widow took title in fee. That decree will be reversed, and the cause will be remanded, with directions to enter a decree conforming to this opinion.

SOUTHWESTERN TRANSPORTATION COMPANY *v.* CHAMBLISS.

4-5342 125 S. W. 2d 123

Opinion delivered February 20, 1939.

A. H. Kiskaddon, C. S. Hadley, Gaughan, Sifford, Godwin & Gaughan, for appellant.

D. A. Jackson and *J. H. Lookadoo,* for appellee.

GRIFFIN SMITH, C. J. This appeal questions sufficiency of the evidence to sustain personal injury verdicts and judgments, one for $2,500 in favor of L. D. Chambliss; the other for $1,000 in favor of Glea Chambliss.

L. D. Chambliss claimed that while driving his automobile south on highway 67, he was injured a few miles north of Gurdon when a stick of wood fell from a Southwestern Transportation Company truck. The circum-

stances alleged were these: While appellee and the driver of a wagon were passing, going in opposite directions, appellant's truck, driven in a "dangerous, reckless, careless and negligent manner, and at a high rate of speed," passed the wagon, and after so passing, the truck wheels were "carelessly and negligently cut back to the right side of the highway." This action caused a stick of wood to fall and be hurled through the windshield of appellee's car, resulting in cuts on appellee's face from flying glass, and injury to the left eye.

Glea Chambliss, daughter of L. D. Chambliss, alleged that her injuries occurred when muscles and ligaments were torn loose from her hip bone and from the lumbar region of her spine; that she suffered contusions of her hip on the right side, and her nerves were completely upset. She said that when the stick came through the windshield, "I tried to get out of the way, and it caused me to hurt my back."

The causes were consolidated for trial.

It was admitted that appellant's bus traveled from Camden to Texarkana to Arkadelphia the morning of January 4, 1938, which was the day of the accident.

Alvin Francis, a witness for appellees, testified he was using a wagon in hauling wood and was near the drainage ditch "when the Southwestern truck passed me and moved on out of sight. The truck was traveling rapidly, and as soon as it passed, it came back on its side of the road. I didn't see anything happen right then. He knocked me off from seeing the car as he cut out to the side. [Appellees'] car was stopped with the windshield broken. I drove up to where the car was stopped. . . . It was a Southwestern Transportation Company truck that passed me. . . . The old gentleman got out of his car and walked over to where I was. There was glass on his shoulder and on his clothes, and blood was oozing out of his face. His daughter was sitting in the car. After they had stopped for a few minutes they drove on to Gurdon. The old man asked me about the truck and I told him what truck it was."

On cross-examination the witness was shown a statement he had given C. T. Kelliher. Francis admitted his

signature and said, "I told the truth about it.[1] The biggest part is correct, but part is not. . . . The part where you stated that I saw the car stop before the truck passed me. I never testified that at all."

Following introduction and discussion of the statement, Francis insisted he told Mr. Chambliss the name of the truck; that it had "Southwestern" on it. When asked what else was on the truck, he replied, "Southwestern Transportation." Asked if he was sure as to the words "Southwestern Transportation," he replied: "It had Southwestern Transfer Company [on it]." Later, he said: "It had Cotton Belt on it."

"Q. Why didn't you tell Mr. Chambliss that? A. He knew what I was talking about—he didn't ask me any further details and I didn't volunteer [any]." He said the truck did not have a tarpaulin on it and that he did not remember seeing any truck with a tarpaulin on it pass, but did remember seeing a brick truck, which passed him "right at the Chevrolet."

L. D. Chambliss testified: "Just as we crossed the [Terre Noire Canal] bridge this big truck came along and a stick of wood came off the top of it and went through our windshield. My eyes were so filled with glass I couldn't see anything. I couldn't tell what kind of a truck it was. . . . After the truck passed a wagon, the stick of wood came from somewhere—it looked to me

[1] The statement made by Francis was: "I was just driving along about the rate a team can travel. . . . There is a bridge over the canal and before I got to this bridge a big truck went around me, and I glanced around at it, and saw 'Southwestern' on the side of the trailer. The truck went on and I did not pay so much attention. . . . But I drove about 100 yards and before I got this distance I noticed an auto off to the side of the highway; it had stopped. However, before the truck passed me I had looked up that way and did not see any auto out there. . . . I drove to the auto and stopped my team. I noticed the windshield of this auto broken out mostly all on the right side. The man got out of the car before I got to him. . . . I saw some blood on his face and shattered glass on his coat. About the time I got stopped there was a truck loaded with brick came up behind me, and pulled around in front of my team. Then the driver of the brick truck got out and talked to this man in the auto. I heard him ask this man what big truck that was passed him down the road and he told him it was a Southwestern

like off the top of the truck. I was about sixty feet from the wagon when the truck went around it."[2]

On cross-examination the witness said the accident happened between ten and eleven o'clock [in the morning], about four or five miles from Gurdon and eleven or twelve miles from Arkadelphia. Witness and his daughter drove to the Norris garage at Gurdon. "I knew Mr. Ross at the garage and he called Arkadelphia for me. I told [Mr. Ross] it was a Southwestern Transportation Company truck. Some one asked if there was a tarpaulin on the truck and I told them if there was I didn't know it. I don't know whether or not I told him there was a tarpaulin and a stick of wood was holding the tarpaulin down and it fell off. I would not say that I didn't tell Mr. Ross the kind of truck it was. I couldn't say what information my daughter may have given Mr. Ross. . . . I didn't know, neither did my daughter, whose truck it was."

Glea Chambliss testified that while driving back from Arkadelphia she saw a wagon "coming meeting us"; that

truck. He also asked me what truck passed me just ahead of him, and I told him I saw 'Southwestern' on the side of it. I imagine the truck passed me making around 25 or 30 miles per hour. I never saw anything fall from this truck. . . . All I know is that I saw the Southwestern truck pass me, and then saw this auto on the side of the road with its windshield broken out. . . . I come up on the highway about a mile south of scene of accident or where the Southwestern passed me. . . . All I know is what they said and I know the truck passed around me. I imagine it was at least 100 yards between where truck passed me and where I saw the auto on the side of the road, and as I stated, I figure the auto had just pulled over on the side of the road and stopped, when I noticed it. This old man in the auto said he saw the truck pull around me down the road. The highway is straight along here and on a dump, rather high, which goes through the bottom. I only stayed there but a couple of minutes. The driver of the brick truck went ahead of me."

[2] Mr. Chambliss described his injury in the following manner: "The damage that was done to me was from the flying glass as the stick came through the windshield. It also cut my face and filled my left eye full of pulverized glass. My right eye, prior to that time, and for several years, had been bad. I have not been able to read much since the accident. I don't believe my eye is getting any better but believe it is getting worse. I had considerable pain from the injury; even now it hurts. I had to wear a blind over it for a month and a half. I wear the blind because the light hurts my eye."

she saw a truck coming in the same direction the wagon was moving, and it had to "whip around" the wagon in passing. "About the time the truck got even with our car a stick of wood flew from the top of the truck and went through the windshield of our car. The truck was going as fast as it could, making 50 or 60 miles an hour. . . . I saw the truck as it passed the wagon and I began to slow down because I knew there would be a collision if we both went full speed. The truck was just getting back on its side of the road when the stick flew off. . . . The stick was about two and a half or three feet long. . . . When it came through the windshield I tried to get out of the way and it caused me to hurt my back."

On cross-examination the witness stated that after the accident she drove to Gurdon at the rate of forty or fifty miles an hour. She was driving fast in order to reach Gurdon before the truck could get to Arkadelphia. Before going for first aid her father went to the [Norris] garage and had the sheriff called. The witness did not see a stick of wood in the road, but "wouldn't say there wasn't any." Miss Chambliss did not get out of the car at the garage. She said: "I didn't know what kind of a truck it was that the stick of wood fell from—it was just a large truck. I wouldn't say [whether] the truck had a tarpaulin on it, or not. The stick of wood did not hurt me. I did not notice my back hurting until the next day or two. I went to see Dr. McClain. He didn't take any X-ray; neither did he plaster my back up in any way, but gave me some liniment to rub on it. I went back to the doctor to see if it would develop into anything else. It did not. My back is better, but I don't do any work. . . . I have seen the Southwestern Transportation Company's truck [parked near the courthouse], and the truck from which the stick fell was a large truck just like that one. I saw the stick come from the top of the truck. The parked truck [near the courthouse] has a cab and a trailer, but I don't remember whether the truck from which the stick fell had a cab and trailer, or not."

Dr. McClain treated L. D. Chambliss' injured eye, and testified: "He didn't tell me what truck the stick flew

from." In mentioning treatment of the eye, after having described a small scar on the cornea, the doctor said: "I have seen him once since [February 12] and noticed his eye was much better, and didn't examine it. Most of what I found [in the way of injuries to Miss Chambliss] were subjective symptoms."

Delbert Taylor, testifying on behalf of appellant, stated he was driver of the brick truck mentioned by witnesses for appellees. He drove up immediately after the accident. Before meeting the [Chambliss] car he passed a man driving a wagon and team (evidently Alvin Francis) "six or seven hundred feet south of the car with the broken windshield. I saw the broken windshield and stopped my truck, and the driver of the wagon and team came up later behind my truck. Mr. Chambliss was standing outside the car and Miss Chambliss was sitting in the car on the opposite side of the wheel. I saw no truck ahead of me nor on the highway, but if one had been there I could have seen it for a mile or more. The road is straight, except that it goes over a little hill there."

The witness further testified: "Two trucks passed me: one while I was in Gurdon and the other just as I came out. The Southwestern Transportation truck passed me right in Gurdon. The other truck was a transport truck that hauls cars. . . . The Southwestern Transportation Company truck was going faster than mine. I had stopped when it passed me. My truck was loaded, and for that reason I had to take my time. . . . The Southwestern Transportation Company truck was fifteen minutes ahead of me and the other truck was behind it. As I came through Gurdon I stopped to let two men get off my truck [who had been picked up at Prescott], and while they were getting out the Southwestern Transportation truck passed me. I was traveling twenty-five miles an hour."

Earl Ross, manager of the Norris Chevrolet Company at Gurdon, testified that Mr. Chambliss drove up with his daughter and told what had happened and asked that the sheriff be called at Arkadelphia "and have him stop the truck that caused the injury. . . . In giving a description of the truck [in order to have the informa-

tion relaid to the sheriff] he said it was a Southern Grocery truck. It had a tarpaulin on it. He couldn't give the color, but thought it was red. I called [Sheriff] Shaw at Arkadelphia and told him [what Chambliss had said]. About thirty minutes later Mr. Carver, a deputy sheriff, called me back and asked me to describe the truck again. I then went to Mr. Chambliss again and asked him about it. He gave the same description he did the first time—that is, that it was a Southern Grocery truck, believed to be red in color. The Southwestern Transportation Company truck was never mentioned by either Mr. Chambliss or Miss Chambliss. . . . Mr. Carver informed me that he stopped a truck, but it did not answer the description, and he would have to turn it loose. When Mr. Carver called me back Mr. Chambliss restated that there was a tarpaulin on the truck. Mr. Chambliss said he was sure the tarpaulin was on the truck. The only thing he wasn't sure about was that it was a Southern Grocery truck."

Hugh McCarthy, an employee of the Norris Chevrolet Company, supported testimony given by Earl Ross that Mr. Chambliss called at the garage and reported the accident, saying that he did not know what kind of a [truck] it was, but that it did have a tarpaulin on it. . . . The Southwestern Transportation Company was not mentioned by either [of the appellees].

Deputy Sheriff Carver testified that he remembered the telephone call from Gurdon. Witness, with another officer, was instructed by the sheriff to investigate. They were told to look for a Southern Grocery truck, or a Southwestern Grocery truck. They were also informed that the truck had a tarpaulin on it. They found a Southwestern Transportation Company truck and were informed by the driver that he had just arrived. The driver told them he had not seen a truck with a tarpaulin on it. They took the truck number and called Mr. Ross at Gurdon, asking if he were sure the wanted truck had a tarpaulin, and "after he had talked to some one he said to me that it was a truck with a tarpaulin on it. We took the name of the Southwestern Transportation Company's driver and told him that if we needed him we would get in touch with him. He told us about seeing a car with a

windshield knocked out. He said he met the car on his way to Arkadelphia. He told us the man was holding a handkerchief over his face and a lady was driving. I looked over the Southwestern Transportation Company truck and don't know how a stick could stay up there. I don't think it could long at a time. . . . The driver of the Southwestern Transportation Company told us that after he saw the windshield of a car broken, he saw a stick of wood in the road. . . . I saw two trucks on Seventh street with tarpaulins on them. I don't know how they came in. I didn't talk to the drivers of the trucks that had tarpaulins on them. . . . Assuming that a car stopped two or three minutes at the place of the accident, then drove to Gurdon and [the driver] placed a call and the message got to the sheriff's office and we would get down to highway 67, a truck would have had time, running at the rate of forty miles an hour, to have gotten there."

S. R. Copeland, of the state police force, testified he was in the sheriff's office at Arkadelphia when the call came from Mr. Ross at Gurdon; that he went with Carver to look for the offending truck. "The instructions we had were that it was a Southern Grocery Company truck with a tarpaulin on it. . . . We saw a Southwestern Transportation Company truck and I called Mr. Carver's attention to it, but it didn't have a tarpaulin on it."

"Q. Did you make an inspection of the [Southwestern Transportation Company] truck? A. Yes, we looked it over and there were not any signs or any marks on it, and Mr. Carver called back to Gurdon about it."[3]

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[3] The witness Copeland, testifying as to the search in Arkadelphia for the truck described to the sheriff's office, said: "Q. Did you find any trucks over on Seventh street with tarpaulins on them? A. Two of them were in town at that time belonging to one man. They were hauling fruits and vegetables: I know the man, and he hauls fruits and vegetables from South Texas, and all the way up the line. Q. And those trucks had tarpaulins on them? A. Yes, sir, the one that was loaded—the one that came up one street as we were going down another. It had a tarpaulin, but it was nailed down on the end with strips; but the other had been in town some time."

C. T. Kelliher testified regarding the statement Alvin Francis had signed.[4]

D. E. Perry, truck driver for Southwestern Transportation Company, testified that the truck he was driving January 4, 1938, had been inspected in Little Rock about midnight. He drove to Texarkana and unloaded. He left Texarkana about nine o'clock, driving between thirty-five and forty miles an hour. His truck had a "governor" on it that prevented a higher rate of speed than forty miles an hour. His only stop between Texarkana and Little Rock was at Arkadelphia. "Coming [toward Arkadelphia], and coming up an incline around Curtis Junction, I saw [the Chambliss car] meeting me. The windshield was all shattered, and it looked like a hole had been broken in it, but the glass had not fallen out. . . . I saw the broken place in the windshield before I got to the car. . . . In Arkadelphia I noticed a [state police] car coming around from the highway. Mr. Carver got out of the car . . . and told me he wanted to look over my equipment, which he did. He told me to wait a short time, that he wanted to use the telephone. Mr. Carver then came out of the filling station and said, 'This is not the fellow we want.' I told him if he would give me some kind of a lead I might be able to help him. He explained about the piece of wood going through the [Chambliss] windshield, and I knew I met that automobile coming to Arkadelphia, and told him about it. They told me they were looking for a Southern Grocery truck with a tarpaulin on it. There was no occasion for me to carry a stick of wood on the truck. We carry a jack, block, jack-handle, and all the necessary equipment that goes with each piece. The equipment is locked up in a box on the side of the frame. We also carry a tool box in the cab, with the time books and pliers. I would have no occasion for a stick of wood to be put on the top of my truck. If a

[4] Kelliher further testified: "I work for the St. Louis Southwestern Railroad and the Southwestern Transportation Company. I took a statement from Mr. Francis and wrote it down as he gave it to me. . . . I didn't put anything in it that he told me not to put in. I didn't know where the accident happened and was trying to find out. The statement was taken after this suit was filed, and the filing of the suit was the first indication I had of the accident."

stick of wood was put there it wouldn't stay on top of the truck by the time I got out of Little Rock. There is nothing to hold a stick of wood on top of the truck. I 'straddled' a piece of wood after I passed this car with the broken windshield. I know there was no stick of wood fell from my car because the windshield was broken before the car ever got to me."

Since the jury returned verdicts in favor of both appellees, we must look entirely to the testimony given in appellees' behalf in determining whether the verdicts were based upon speculation and conjecture, or upon substantial evidence.

Alvin Francis was the only witness who testified that the situation of appellant's truck was such that an inference might be drawn that the stick of wood fell from it. When his testimony as to the *manner* in which a truck passed him, and as to the *time* it passed, is considered in connection with that of Glea Chambliss—who says she saw the stick fall from the truck that passed Francis—the jury would have been warranted in fixing liability upon the owner or driver of such truck, or both. The difficulty, however, lies in the absence of substantial testimony identifying the offending truck. It is true that Francis, in one phase of his story, says the truck that passed him was a Southwestern Transportation Company truck, but obviously that is a conclusion he drew from observations. Nowhere does he say that the words, "Southwestern Transportation Company," appeared on the truck; nor did he undertake, upon independent information, to say that he recognized the truck as one of appellant's fleet. Evidential value of his testimony is characterized by equivocation more than it is by directness. For example, he asserted that the truck had "Southwestern" on its side. "Q. Is that all it had? A. I don't know; I didn't stop to examine it. Q. What else did it have on it? A. Southwestern Transportation. Q. You are sure of that? A. It had 'Southwestern Transfer Company.' Q. You said awhile ago 'Southwestern Transportation Company,' and now you say, 'Southwestern Transfer Company.' A. It had 'Cotton Belt' on it."

At another place in his testimony, the witness said (referring to the truck that passed him): "I glanced around at it and saw 'Southwestern' on the side of the trailer."

It is obvious that this witness assumed that the truck was one belonging to Southwestern Transportation Company, but this assumption is based upon what he saw and inferred, for he does not testify that "Southwestern Transportation Company" appeared on the truck or trailer.

Testimony was offered by appellees showing that Perry, the driver, reached Arkadelphia at a period in point of time which would suggest a probability that he passed the Chambliss car as alleged by appellees. This is unimportant. Perry admitted being on the road at a time approximating that of the accident. It is significant, however, that Copeland, the state policeman, testified that he and the deputy sheriff looked Perry's car over, and *"there were not any signs or any marks on it."* This evidence is not disputed other than by the conjecture attaching to the testimony of Alvin Francis and Glea Chambliss. If the truck Perry drove had no signs or marks on it, it could not have been the one Francis says he saw that did have signs and marks on it—markings and signs he described in at least four ways.

Appellee L. D. Chambliss, on cross-examination, declined to say that he did not tell Ross the offending truck had a tarpaulin on it. Nor was Glea Chambliss willing to say the truck in question did not carry a tarpaulin. The testimony of Ross and McCarthy that L. D. Chambliss, in describing the truck to them, stated that it was equipped with a tarpaulin, is undisputed.

Finally, we have this situation: Francis saw a truck pass shortly before he met appellees' car. The truck "whipped around to its side of the road." Francis' method of identifying such truck as being one then operated by Southwestern Transportation Company has been commented upon. Glea Chambliss saw the stick of wood come from the top of the truck thus described as having cut around Francis. She did not identify the truck, nor did her father. Francis stopped his wagon

when he saw appellees had been injured, and from him appellees secured the identifying information. Both appellees then went to Gurdon. The father told Ross their injuries had been occasioned by a Southwestern Transportation Company truck; but his information was from Francis, and Francis did not know. We conclude, therefore, that there was no proper identification of appellant's truck.

The judgments are reversed, and the causes are dismissed.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY dissent.

SWETCOFF *v.* FELTS.

4-5394 125 S. W. 2d 469

Opinion delivered February 27, 1939.

Chas F. Cole, for appellant.

Dene H. Coleman and *S. M. Casey,* for appellee.

SMITH, J. Pennie Swetcoff came to this country from Bulgaria in 1914, and he has not yet learned to write our language, but has been taught to sign his name. He came to Batesville in 1935, and opened a cafe in that city, which he operated as "Pennie's Cafe." He became acquainted with C. C. Felts about January, 1936, when the latter was employed as a laborer on a sewer project in Batesville, and he gave Felts employment in his cafe at a wage of $6.00 per week. This wage was increased from time to time until it reached $12.50 per week. Felts was finally paid $14 per week, and there is a controversy as to whether the last increase of $1.50 per week, from $12.50 to $14.00, included room rent. Swetcoff was then rooming in the home of Felts, who was a married man.

In addition to his cafe, Swetcoff owned a tract of land in Texas, the present value of which does not appear, but we have the impression that it is of small value, although Swetcoff paid $1,500 for it during an oil boom in the vicinity of the land conveyed. On July 21, 1937, Swetcoff, who was an unmarried man, executed and acknowledged a deed to the land and a bill-of-sale to the cafe, conveying both to Felts. The deed does not appear in the record, but the bill of sale, which makes no reference to the deed, recites that it was executed "for and in consideration of the sum of Eleven Hundred and No/100 Dollars to me in hand paid by Conway Felts at and before the delivery of these presents." It appears to be entirely certain that the recited consideration was not paid. The testimony does not show what the consideration for the deed was.

Swetcoff contracted tuberculosis, and now has that disease in an advanced stage. He was advised by a physician that his work about the cafe would endanger the

health of his customers, and he testified that Felts told him frequently that the place would be closed if he (Swetcoff) continued to operate it, and that it was the consideration of this threat or fact which induced the execution of the bill of sale.

The testimony is in hopeless conflict as to the operation of the cafe after the execution of the bill-of-sale, but we think the preponderance thereof is to the effect that Felts operated the cafe after the execution of the bill-of-sale under the supervision and direction of Swetcoff, until the fall of that year, when Swetcoff became unable to give the business any attention.

Swetcoff brought this suit to cancel the bill-of-sale, and alleged that "this plaintiff has never received any consideration to support said bill of sale; that said bill of sale was executed by the plaintiff to the defendant with the understanding and agreement by the defendant that he would hold the property as trustee for the plaintiff and for his use and benefit, and it was never intended by the plaintiff nor the defendant that said bill-of-sale would be binding upon the parties thereto."

The chancellor denied the relief prayed, and from that decree is this appeal.

The testimony convinces us that Felts paid nothing for the business, and that the real agreement of the parties was that Felts should operate the business during the lifetime of Swetcoff and that Swetcoff should be supported out of its earnings. In other words, there was a conveyance of the title to the cafe, and the consideration for the conveyance was that Felts should support Swetcoff during the remainder of Swetcoff's life. Felts, in his answer, alleges, in effect, that this was the consideration for the bill-of-sale, and that he had complied with its undertaking up to the time of the institution of this suit, and the rendition of the decree, and that he was ready to continue to do so, and that Swetcoff left his home without cause, but he had continued to pay him the sum of $15.00 per week, and that he was ready and willing to continue that payment.

Swetcoff lived, at the time of the execution of the bill of sale, in the home of Felts. There was no change in the cafe account at the bank with which Swetcoff had done his banking business, but the bank was notified by Swetcoff to honor checks signed by Felts, but against this account checks were thereafter drawn by Swetcoff as well as by Felts. Among others, Felts drew checks against this bank account for the amount of wages he was being paid when the bill of sale was executed, this being done as late as November after the execution of the bill of sale in July, although Felts denied that he had issued any checks to his own order as wages after the execution of the bill of sale.

The bill of sale was prepared by Prior Evans, a Notary Public, and Felts admitted that "I told Prior that he could put in it that I would take care of him (Swetcoff) for the rest of his life, but Prior said it wasn't necessary." When asked, "Was part of the consideration for the execution of that bill of sale, that you were to take care of him (Swetcoff) as long as he lived?" Felts answered: "Yes, sir, I liked Mr. Pennie and wanted to go on taking care of him." Felts testified that even after the institution of this suit he had "offered to continue to take care of him for life, both verbally and by letter. Since then I have been paying him $15.00 per week."

That the obligation to take care of Swetcoff "as long as he lived" was the real consideration for the bill of sale we entertain no doubt.

Swetcoff became dissatisfied and left Felts' home. The reason given by him for doing so was that "They (Felts and wife) got to talking too much about what they were going to do about taking my business away from me."

We have, therefore, as we construe the testimony, the familiar case of one conveying his property to another, upon the condition that the latter should support the former during the remainder of his life.

The court below was evidently of the opinion that there had been no breach of this agreement, and dismissed the suit as being without equity.

Subsequent to the rendition of this decree Felts wrote Swetcoff a letter, in which he proposed to provide for the support of Swetcoff, but upon the condition that Swetcoff should not prosecute an appeal from the decree dismissing the suit. When Swetcoff did not assent to this proposition, Felts discontinued the $15.00 a week payments to Swetcoff, and a motion was thereafter filed to reopen the case and to cancel the bill of sale because of this failure to support, except upon the condition stated. This motion was overruled, and this appeal has been prosecuted to reverse the original decree and the subsequent action of the court in refusing to reopen the case.

The case of *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15, announces the principles of law which are controlling here, and they are to the following effect. The title to the property passed upon the execution and delivery of the bill of sale, and the provision in regard to support, although not written into the contract, but which was in fact the consideration for it, was not a condition precedent. The title passed upon the execution and delivery of the bill-of-sale, subject to be defeated, however, by the failure to perform the condition—that of support.

In this *Goodwin* v. *Tyson* case we quoted from the case of *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286, as follows: " 'The rationale of the doctrine is that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract, and therefore vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and, where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to, regardless of any remedy that the grantor may have had also at law. (Citing cases).' "

Here, the title to the cafe passed to Felts, but that conveyance was subject to be defeated by the failure on the part of Felts to perform the condition which constituted the consideration—that of support of Swetcoff.

Felts did not repudiate that obligation, and insists that he was performing it when this suit was instituted, and he proposed to continue to discharge his obligation to Swetcoff, provided this suit was dismissed. We do not think that the institution of this suit operated to discharge Felts from the continued performance of this obligation.

Swetcoff testified that Felts refused to perform this obligation; that his condition was such that he required attentions which he did not receive, while he remained in Felts' home, and that Felts failed and refused to furnish him medicine or the money with which to buy it. Had he established these facts, he would have been entitled to have the bill of sale canceled, upon the ground that the consideration had failed.

But the chancellor did not find this to be true, and we cannot say that his finding is contrary to the preponderance of the evidence; indeed, Swetcoff qualified his statement that Felts did not furnish medicine and medical attention by saying that these expenses had been paid out of the earnings of the cafe. But this is the source from which Felts was to derive money for that purpose. A doctor who attended Swetcoff professionally ten or twelve times during 1937 testified that Felts paid him for this service.

We do not think, however, that the unsuccessful attempt to make this showing operated to discharge Felts from his obligation to support Swetcoff. That obligation subsists, and must be performed unless Felts is willing to surrender the cafe.

Now, it is true that Felts discontinued support to Swetcoff when Swetcoff refused to dismiss his case, but this, under the circumstances of the case, cannot be treated as a breach of the contract. Swetcoff was not demanding support, but was insisting upon the return to him of the cafe, and this unjustified demand imposed upon Felts expenses in defending litigation in which that demand was made, which, so far, he has done successfully.

It was evidently the opinion of the court below that Swetcoff could not insist that the case be reopened and the original decree vacated because support had been discontinued, after the rendition of the original decree, inasmuch as Swetcoff was demanding by his suit, not support, but the return of the cafe.

The equity of the case appears to require the affirmance of the decree permitting Felts to retain the property; but if he wishes to continue to retain it he must resume the support of Swetcoff, and if he should hereafter fail to do so equity would require the cancellation of the bill of sale and the return of the cafe to Swetcoff.

Inasmuch as Swetcoff sought relief which he was not awarded, and to which he was not entitled, the costs of this case must be assessed against him, but Felts will not be allowed to reimburse himself for any costs he may have paid or incurred by withholding contributions to Swetcoff's support, which he must make from the date of this opinion.

Upon filing suit, Swetcoff prayed the appointment of a receiver to operate the cafe, and that order was made, pursuant to which a receiver was appointed, who operated the cafe for a week, then the court discharged the receiver.

In the order discharging the receiver, Felts was ordered to pay the attorneys for the receiver, who were the attorneys for Swetcoff, a fee of $50. We think this was error. The receiver was appointed upon an ex parte application, and upon a hearing seven days later as to the necessity and propriety of a receivership, the court discharged that officer. It was not shown what, if any, duties were performed by the attorneys for the receiver, but for service performed for the receiver for which compensation should be allowed—and that showing has not been made—the fee awarded to compensate such services should be taxed as costs of the case, and not against the party who opposed the appointment of the receiver and secured his discharge and prevailed in the final decision of the case.

As thus modified, the decree will be affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* WILLIAMS.

4-5383 125 S. W. 2d 441

Opinion delivered February 27, 1939.

Moore, Burrow & Chowning and *W. S. Mitchell, Jr.*, for appellant.

Chas W. Garner, for appellee.

MEHAFFY, J. The appellee instituted this action against the appellant, alleging in her complaint that Leroy Williams, now presumed to be dead, purchased from the appellant three policies of life insurance in which he insured his own life and named appellee as beneficiary; the numbers, dates and amounts of policies are set forth, and then appellee alleges that in September, 1923, while a bona fide resident of Pulaski county, Arkansas, the deceased disappeared, and has since that date absented himself beyond the limits of the state; that appellee has made diligent inquiry and search among his friends and people in Arkansas with whom he naturally would have communicated had he been alive; said inquiry and search being continuous in intensity since the date of his disappearance; that she has neither seen nor heard of him since his disappearance; that the premiums on said policies were one dollar per week and soon after insured's disappearance appellant's agents advised her to keep the premiums paid up and promised her that when the insured returned, her money would be refunded or else the benefit in the policies would be paid to her after she had paid premiums for five years; relying on this advice and promise, she paid the premiums to and including September 28, 1931, when she made a claim upon the appellant by completing forms sent by it which were accepted by it; her claim was denied; appellant stating

that the insured was alive as late as May 6, 1931, but refused to inform appellee of insured's whereabouts; appellee, believing the statement that the insured was alive, discontinued payment on September 28, 1931; the statement of appellant that insured was alive on May 6, 1931, is untrue; appellant knew at the time it made it that it was untrue, and it was made for the purpose of misleading appellee, and did mislead her and caused her to discontinue payment of premiums or pressing her claim to a conclusion at that time; appellee has since made further diligent search and inquiry and believes, and therefore alleges, that the insured is deceased; appellee would have pressed her claim to conclusion when she formerly filed same but for the erroneous and fraudulent statement of appellant, its agents and servants; that she has only recently discovered the untruthfulness of said statement; said insurance was written on the endowment plan and had a legal reserve and cash surender value sufficient to maintain the policy and it was appellant's duty to pay the premiums and thus keep the insurance in full force and effect so long as the reserves lasted; that is was appellant's duty to keep appellee truthfully and correctly advised of the whereabouts of insured and the amount of reserves, but it failed and refused to do so; she had repeatedly demanded payment, but her claims have all been refused by appellant; she then prayed judgment for $1,620, 12 per cent. penalty and a reasonable attorney's fee.

Appellant filed a general denial to the material allegations of this complaint. It, however, admitted the issuance of the three policies of insurance on the life of Leroy Williams, but alleged that the loss-payable clause provided that payments should be made to the executor or administrator of the insured's estate unless appellant elected to pay to another, and alleged that it has not so elected. The answer then sets out the numbers, dates and amounts of policies. An amended and substituted answer was filed alleging that the policies had lapsed for non-payment of premiums. It prayed that the suit be dismissed.

An amended and substituted complaint was filed alleging that a certain policy was $410 instead of $800. She alleged that insured was a bona fide resident of the state of Arkansas and that shortly after he disappeared the local agent and general agent, one of whom was named Mr. Roy, both residing in the city of Jonesboro, came to her home and persuaded her to keep the premiums paid up, and repeated the statement in her original complaint.

Appellee pleads as exhibits copies of communications received from the appellant, and prays for judgment in the sum of $820 plus 12 per cent. penalty and reasonable attorney's fee. She prayed in the alternative for judgment in the sum of $422 with interest at 6 per cent. per annum from October 19, 1931, until paid.

Appellant filed answer denying the allegations and pleading as in its original answer, and pleaded the statute of limitations as a bar to her cause of action.

Hattie Williams lived with her husband, Robert Williams, in Batesville, Mississippi. Robert Williams died in July, 1919. His brother, Leroy Williams, lived with Robert Williams, and after Robert Williams' death the appellee kept house and Leroy Williams was in and out just like he was when his brother was living. Appellee moved to Jonesboro in the fall of 1922, and in the spring of 1923, Leroy Williams lived with appellee just like he did in Mississippi. Leroy Williams bought policies of insurance on his life and made appellee beneficiary. The two policies were for $410 each, with weekly premiums. The first appellee knew about the insurance was when Leroy Williams left the money with her to pay Mr. Roy, the agent of the company. Leroy Williams paid the premiums on these policies until he left in the fall of 1923 or 1924. He said he was going to St. Louis, but appellee has never heard from him since and has made all efforts to find him. Wrote different friends in Jonesboro that knew him, wrote to Clarksville, Mississippi, where he said he was raised, and kept on looking around; she had friends she wrote to every week and asked them to let her know about Leroy Williams; she

wanted to know whether he was living or not; she did not pay anything on the policies for three or four weeks after he had gone; Mr. Roy, who was collecting insurance, asked appellee to keep the policies up, but it was not until after he and the superintendent came out and persuaded her; they both told her that if she kept the insurance up for a period of seven years and Leroy did not come back, the company would pay her the face value of the policies. She then paid on the policies, which were behind, and continued to pay until sometime in September, 1931. In the fall of 1930 or 1931 she talked to the agent in Little Rock and he brought two blanks out which she signed at his request; she thought he knew what he was doing; she made claims for the proceeds of the insurance in 1930 or 1931; they did not pay her and the manager, or assistant manager from the home office, told her he knew Leroy's whereabouts, but that he did not want appellee to know; she later got a letter from the home office on October 14, 1931. The following letter was introduced:

"Mrs. Hattie Williams

"1724 Pulaski Street

"Little Rock, Arkansas

"Dear Madam:

"We are sorry to find that you have found it necessary to write us in connection with your insurance. The exact terms and provisions of your policies are outlined on the third page of the policy form indicating that premium payments must be continued for at least ten years and the policies kept in force for that period before they will be eligible for the payment of a cash surrender value.

"We are today writing direct to the insured to find out whether he is willing that we should indicate to you his present address. We will notify you further as soon as we hear from him.

"Yours truly,

"(Signed) W. S. Prince,

"Manager."

Appellee testified that she received another letter from the home office dated August 26, 1931, and this letter was introduced as follows:

"Mrs. Hattie Williams
"1724 Pulaski Street,
"Little Rock, Arkansas.
"Dear Madam:

"We are sorry to learn that you have again found it necessary to write us in connection with your insurance. We are still awaiting certain necessary information from the manager of our Little Rock, Arkansas district and we are today requesting him to notify us promptly. As soon as we receive his letter we will be in a position to determine the action to be taken on your request for cash surrender.

Please be assured of our wish to be of every possible service to you.

"Yours truly,
"(Signed) W. S. Prince, Manager."

Both of these letters were from the home office in New York and were written on the company's stationery. Appellee relied on these statements and continued her search for Leroy and found a man they called Fats Williams that the company had communicated with, and he was supposed to be Leroy. Appellee talked to the agent of the company about this in 1933 or 1934, and he said he did not know who this man was, but he would find out. Appellee got acquainted with Leroy Williams in Mississippi; he was then about 18 or 19 years old and he was 22 or 23 when the insurance was written; he gave appellee three policies and asked her to keep them because he wanted to leave something so witness could bury him if anything happened to him; he paid the first premiums himself; appellee's name does not appear on any of the policies. The agent told her that they did not put the name of beneficiaries on Metropolitan policies any more. Leroy Williams was staying with witness in Jonesboro when he took out the policies; he would come and stay two or three weeks or a month and go out on Saturday where they had pay day at different mills like

all gamblers; he did not work any place only when he had to; then he worked at sawmills and lumber camps; he came to Jonesboro in February, 1923, and was in and out until he left either in 1923 or 1924; so far as witness knew he had no reason to leave, and he was in good health the last time she saw him. She started trying to locate him in 1930 or 1931. Leroy and his brother said all their people died during the flood; she never saw any of their relatives; when she first put her claim in she talked to the agent who brought the forms out; she wrote to the home office; was living in Little Rock at the time; the letter to the home office was written in February, 1931; written entirely in witness' handwriting, and states that Leroy Williams disappeared in 1923; at the same time that Leroy Williams was staying with her in Jonesboro, another boy came in and out whose name was Leroy Patton; he came and got a room awhile, and he would stay in jail and run around. She and Leroy Patton were arrested and fined at Jonesboro; she did not know Leroy Patton before he came to her house; came with some boys that roomed there. He was in Jonesboro when witness left; she did not tell Malinda Watkins that she had a husband, and that he had come to see her in Jonesboro. She did not pay premiums on all three policies for seven years; one of them lapsed in January, 1927, or 1926; she did not sign Leroy Williams' name to the application.

J. E. Roy testified in substance that he lived in Jonesboro in 1922 and 1923, and was agent for the Metropolitan Life Insurance Company writing and collecting insurance; went to work for the company in 1921, and worked until November, 1925; he worked for them again in 1930, and quit in 1932; knows Hattie Williams, the appellee, and knew Leroy Williams and wrote three policies on his life in 1923; Hattie and Leroy both paid premiums; Leroy Williams lived on Oak street when he bought the insurance; had no conversation with him as to who would be beneficiary; Hattie told him that Leroy had left and she was going to drop the insurance, and witness told her that, if she continued to pay premiums for five to seven years and would file a disappearance

claim, the company would pay her the insurance; she left Jonesboro and came to Little Rock and sent the money and premium receipt book back to witness; does not know that he made any promise that the money would be refunded; the company had two superintendents and each had five agents with whom he worked; they were anxious to keep business on the books; has not seen nor heard from Leroy Williams since 1924; does not know whether Swaringen, superintendent, talked to Hattie or not; wrote Hattie Williams that, if she would get in touch with an agent, he would transfer the business, but could not transfer it if she was not in reach of another agent; she was paying the premiums when witness quit.

H. A. Cleary lived in Jonesboro for 19 years; was in the installment business; knows Hattie Williams and knew Leroy Williams; does not know when he disappeared from Jonesboro; it has been a long time since witness saw him; knows he has not seen him since 1923 or 1924; has seen a boy today whom he knew as Leroy Patton; he and Leroy Williams are two different negroes; knows Leroy Williams, but does not know his whereabouts; has not talked to anybody about this case; knows Swaringen in Jonesboro; he was assistant manager of the appellant in 1923 or 1924.

Hattie Williams then testified that she knew Swaringen in Jonesboro; he was the man who talked to her about paying premiums; he told her that, if she kept it up and Leroy did not come back, she could file a non-appearance claim and be paid the face amount of the policy, and if he did come back they would refund the money she had paid. After he talked to her she kept the premiums paid. Mr. Swaringen said he was one of the officers of the company.

Mr. Charles J. LaGrassa is assistant manager of the appellant in charge of the company's records; lives in New York and has been employed by appellant for 33 years; part of his duties consist in keeping, supervising and preserving records, papers, documents and files in the home office, relating to policies of life insurance issued by appellant insuring the lives of individuals in

Arkansas; the policies sued on were issued on the life of Leroy Williams; issued through the Jonesboro office; amount $410 on the endowment at age 80 plan; the original application was attached to witness' deposition. Pursuant to the application of Leroy Williams, policies were issued; Hattie Williams was never designated as beneficiary. He then testified that the policies had lapsed for nonpayment of premiums in 1931; one policy lapsed in 1926, but that policy is not involved in the suit.

Leroy Patton lives in Cooter, Missouri; is 38 years old; knows Hattie Williams; he visited her at Jonesboro, and she was supposed to be his common-law wife; stayed with her until August, 1923, when he married; witness testified that he signed the policies as Williams and Mr. Roy examined him and told him he would not have to go to the doctor; that this was the first time he ever used "Williams" in his life; did not write the words "Leroy Williams" on where it says signature of applicant on policy No. 70608612; that these policies were issued on his life by appellant; he wrote his name "Leroy Williams" on the policies. Mr. Roy later told him he would have to be examined. Mr. Roy left a blank with him so he could sign it when he was examined; he signed it twice; the words "Leroy Williams" were already written on the policy; he signed the applications as "Leroy Williams," because appellee had told persons that he was her husband, and he signed Williams, because the law would arrest a man for sleeping with a woman, if he could not produce a license; they arrested them anyhow; did not know whether Hattie Williams had a brother-in-law or a husband; does not know when she left; since 1930 witness has been in Blytheville and Madison county, Illinois, and for the last three years in Cooter, Missouri; has been fined for drinking, gambling, transporting whiskey, and petty larceny, but never served any time in the pen; Mr. Butler came to see witness at Cooter, and before that he did not know that Hattie had filed a claim; company made no connection with him until 1931; has not been subpoenaed; came

because Mr. Butler came after him, and told him he would give him two dollars a day and expenses.

Malinda Watkins testified that she heard Hattie Williams say her husband was away, but would be home; she has never seen but one "Leroy"; did not know the name "Patton"; all she knew was Leroy Williams.

John Bennett knew Hattie Williams, and knew Leroy Patton, and knows a boy named Leroy Williams who is about ten or twelve years old; if there was another Leroy Williams there with Hattie, witness did not know it; there could have been another man.

Dr. W. C. Overstreet testified that he had examined Leroy Patton for insurance, but it was under the name of Leroy Williams; did not know the other Leroy Williams, unless this is he; maybe five years ago he met another Leroy Williams.

C. D. Bolle, teller at the Union National Bank, examined the application and also the letter supposed to be written by Hattie Williams; in his opinion the signature which appears on the application was written by the same person who wrote the letter.

Leroy Patton, recalled, testified that he wrote the words "Leroy Williams" several times on a piece of yellow paper; has not written "Leroy Williams" since he wrote it on the policy until Mr. Butler came.

Bolle was recalled and testified that he does not believe "Leroy Williams" in the application, and the words "Leroy Williams" on the white piece of paper were written by the same person; does not believe that the words "Leroy Williams" on this application were written by the same person who wrote these words on the yellow sheet; does think that the same person wrote the words on the yellow sheet that wrote "Leroy Williams" on the applications for policies.

Hattie Williams testified in rebuttal that she got acquainted with Leroy Patton just before Leroy Williams left; this Leroy Patton is not the boy she has been paying insurance on; heard Patton testify that he signed one of the applications; if he did witness was not there; she did not sign any of the applications; does not think

the woman who lived across the street knows; witness scarcely ever saw her; she never told this woman that she had a husband; everybody in Jonesboro knew that her husband was dead; when Leroy left he gave witness the policies, and said he was going to Missouri.

J. E. Roy testified on rebuttal that he had known Leroy Patton 12 or 15 years; if he ever bought any insurance witness does not remember it; Leroy Williams bought insurance; Williams and Patton are not one and the same person; talked to the lawyer who got killed some time last summer; he came to Trumann to see witness, and had two pictures of different negroes and asked witness who they were; witness told him one of them was Leroy "Fats" Williams and the other he did not know; Leroy "Fats" Williams was not the one that disappeared; Mr. Garner sent witness a picture of Leroy Patton and a white man, and asked witness if he could identify them; witness knew both Leroy Williams and Leroy Patton.

There was a verdict and judgment for appellee for $820 and interest at 6 per cent. per annum on October 19, 1931, and a statutory penalty of 12 per cent. and $200 attorneys' fees.

The appellant contends first that the court erred in refusing to instruct the jury to return a verdict for appellant, because it says, first, appellee failed to establish that she was entitled to the proceeds of the policies sued on, and sets out the policy and the statement of appellee that she was the beneficiary. The following provision of the policy is relied on:

" 'To pay.....the amount stipulated.....to the executor or administrator of the insured, unless payment be made under the provisions of the next succeeding paragraph,' which said paragraph reads as follows:

" 'The company may make any payment or grant any forfeiture privilege provided herein to the insured, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the

same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons, or of other proof of such payment or grant of such privilege to either of them, shall be conclusive evidence that all claims under this policy have been satisfied.' "

The appellant alleged that it had not elected to pay the appellee the proceeds of the several policies, and that appellee has no right to maintain this suit.

The undisputed evidence shows that appellee was told both by the agent and one of the superintendents that, if she would pay the premiums for a certain number of years, the face value of the policy would be paid to her. She relied on this and paid the premiums. Moreover, the appellant knew about this and undertook to show that the insured was alive. It first discovered a Leroy Williams who was known as "Fats" Williams, and told appellee that they had discovered Leroy Williams, the insured, and that he was alive. They evidently discovered that "Fats" Williams was not the insured, and then they discovered one Leroy Patton in Cooter, Missouri, who claimed that he represented himself to be Leroy Williams and took out the policies. After appellant told the appellee that the insured was alive, she stopped paying premiums. Appellant, however, says that appellee presented no testimony which even purports to bring herself within the rule laid down in *Metropolitan Life Insurance Company* v. *Fitzgerald,* 137 Ark. 366, 209 S. W. 77, and followed in the disappearance case of *Metropolitan Life Ins. Co.* v. *Fry,* 184 Ark. 23, 41 S. W. 2d 766. The court said in the Fitzgerald Case:

"The trend of our decisions shows that the statute requiring every action to be prosecuted in the name of the real party in interest has received a very liberal construction with the view of effectuating the wise purpose to permit those who are the real parties in interest to a cause of action to maintain the suit."

The court further said in that case: "There is no contention that the appellant has made, or would make, payment to some one other than appellee under the terms

of the option provided in the policy or that any one else was entitled to such payment. If an administrator had been appointed and had instituted this suit the uncontroverted facts of the record prove that, in that event, the amount to be recovered under the policy would go to the appellee as the real and only party in interest.

"Therefore, it would be magnifying form above substance and contrary to both the letter and spirit of the statute to hold that the appellee could not maintain the suit."

In the instant case, there is no contention that the appellant had made or would make payment to someone other than appellee, and in addition to this, it had told the appellee that it would pay to her. All that is said about the right to sue in the case in 184 Ark. referred to, is that the parties to the suit were entitled to his estate, and there being no creditors, were entitled to maintain the action.

It is contended, however, that the court, in instruction No. A, committed error, because the instruction closed with the following language: "Thus insuring his own life in said sum in favor of the plaintiff, Hattie Williams," etc.

There could have been no prejudice in this statement, because she had, by contract and agreement with the appellant, actually become the beneficiary. It is true that the authority of an agent cannot be established by the mere fact that the person claiming such authority has exercised it; but in this case the evidence itself shows that Roy and the superintendent that visited appellee were both agents of the company. Moreover, the company, as we have already said, knew all about the facts.

It is next contended that the court erred in refusing to instruct a verdict for appellant, because appellee's proof did not bring her case within the rule of the presumption of death statute. The statute reads as follows:

"Any person absenting himself beyond the limits of this state for five years successively shall be presumed to be dead, in any case in which his death may come in ques-

tion, unless proof be made that he was alive within that time." Pope's Dig., § 5120.

We think this is the most serious question in the case, and that it is a very close question as to whether he was a resident of Arkansas at the time he disappeared, and whether the evidence brings it within the statute.

The evidence shows that insured came to Jonesboro in February, 1923. According to the evidence of appellee, the insured disappeared in 1923 or 1924; she is unable to say which; but there is other evidence tending to show that he disappeared in the fall of 1924. This question, however, was submitted to the jury on an instruction requested by appellant, which reads as follows:

"In order to recover the face amounts of any of the policies the plaintiff must prove by a preponderance of the evidence that the person whose life was insured under the policies sued on herein is actually dead unless you find from a preponderance of the evidence that the insured when last heard from was a resident of Arkansas, and that he has been absent from the state of Arkansas for a period of at least five years from the ..... day of September, 1923, or 1924, and that during that time he was not heard from by near relatives, friends, or neighbors, who would be most likely to receive communication from him or be in a position to know whether or not he was living. In the event that you so find, a presumption arises that the insured is dead which presumption, however, may be rebutted by proof on the part of the defendant."

The jury were told plainly in this instruction that unless they found from a preponderance of the evidence that the insured, when last heard from, was a resident of Arkansas, and that he has been absent from the state of Arkansas for a period of at least five years, from September, 1923, or 1924, and has not been heard from by relatives, friends, or neighbors who would be most likely to hear from him and to know whether he was living, then the presumption arises that he is dead; but that this presumption might be rebutted by proof.

That question, having been submitted to the jury under instructions submitted by the appellant, the jury's finding is conclusive here, if there is any substantial evidence to support it. We are of opinion that the evidence was sufficient to justify the finding of the jury.

The evidence must show that insured was a resident of the state of Arkansas. This court said, in the case of *Burnett* v. *Modern Woodmen of America,* 183 Ark. 729, 38 S. W. 2d 24: "'Any person' used in this statute means any person who is a resident of this state, and who absents himself from his home or residence beyond the limits of the state for a period of five successive years, and who has not been heard from by near relatives, friends, or neighbors, those who would naturally make inquiry concerning his whereabouts and who would most likely receive communication from him and be in position to know whether or not he was living. If he has not been heard from by these or others, his death will be presumed unless there is proof to the contrary."

Both the residence and the absence beyond the limits of the state must be proved, but may be proved by circumstantial evidence; but neither death nor the fact of absence can be inferred from the mere fact of disappearance. *Met. Life Ins. Co.* v. *Fry, supra.*

It is next contended by the appellant that the court erred in not directing a verdict in appellant's favor, because the statute of limitations had barred appellee's cause of action.

The appellee filed her disappearance claim demanding the proceeds of the policies in the fall or winter of 1930. She had paid the premiums up to this time and up to 1931, and then her claim was denied in August, 1931, because appellant claimed that the insured was alive, and it had located him. When this false claim was made, appellee believed it to be true and ceased making payments. It developed that the person it claimed was Leroy Williams was a person named "Fats" Williams, and no one contends now that he was the insured.

It is a general rule that where one has deceived another or where, through active wrong or negligence, he

misleads another and causes him not to file suit, the statute is tolled or suspended until it is discovered that the representations were false. If a defendant intentionally or negligently misleads plaintiff by his representations and causes him to delay until the statutory bar has fallen, the defendant will be estopped from pleading the statute of limitations. *Missouri Pacific Rd. Co.* v. *Davis,* 186 Ark. 401, 53 S. W. 2d 851; *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. 2d 826.

The appellee was caused to stop paying premiums, and to not press her claim by the misleading information of the appellant in stating that it had discovered the insured alive. The person discovered at that time was "Fats" Williams, and it is not contended now that he was insured, and he was not present as witness at the trial.

The appellant then found another negro in Missouri which it claimed was Leroy Williams, but this was after the suit was brought. We think there is no merit in the plea of the statute of limitations.

It appears from the whole case that this appellee paid the premiums with the consent and at the suggestion of the appellant. This court recently said:

"In *Cronan* v. *Metropolitan Life Ins. Co.,* Supreme Court of Rhode Island, reported at p. 618, 147 Atl., 50 R. I. 323, it is said: 'The law is well settled that a beneficiary who pays premiums or loans money upon the security of the policy acquires in the policy a vested right which will be protected in equity against one who thereafter, without valuable consideration, becomes the substituted beneficiary. Although the policy contains a clause to the effect that no assignment of the policy will be recognized unless consented to by the insurance company, a beneficiary who acquires vested rights is only required to notify the insurance company of the fact before payment is made to another person.' " *Reilly* v. *Henry,* 187 Ark. 420, 60 S. W. 2d 1023.

Our conclusion is that the evidence is sufficient to support the verdict, and the judgment is, therefore, affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HARDEN.

4-5396 125 S. W. 2d 466

Opinion delivered February 27, 1939.

T. B. Pryor and *Daggett & Daggett,* for appellant.
John C. Sheffield, for appellee.

HOLT, J. The only question presented by this appeal is: Is there evidence of a substantial nature sufficient to support the jury's verdict?

Appellee, L. M. Harden, on April 7, 1938, filed complaint in the Phillips circuit court in which he alleged that as he drove upon appellant's track at a regular crossing in the city of Marianna, Arkansas, the automobile which he was driving was struck by one of appellant's trains, resulting in damages to his car and injuries to himself; that before driving on the crossing he brought his car to a full stop within fifteen or twenty feet of the track, looked in both directions and listened to determine whether or not a train was approaching, that his view was obstructed so that he could see, only in one direction, but a short distance. That he saw no train approaching. That appellant was negligent in failing to give the statutory signals by ringing the bell or blowing the whistle, and prayed for damages to his automobile in the sum of $250.00 and for personal injuries

in the sum of $2,000. Appellant denied every material allegation in the complaint and interposed the affirmative defense of contributory negligence on the part of appellee. A trial to a jury resulted in a verdict for appellee in the sum of $750.00.

The material facts stated in their most favorable light to appellee show that at the time of the collision he was living in Helena, Arkansas, and was a traveling salesman. During the past six years he had made Marianna frequently and was familiar with the crossing in question, having passed over it many times. Just before the collision in question appellee was driving West on Locust Street. When within fifteen or twenty feet of the crossing, he brought his car to a complete stop, listened but heard no warning signals of any kind indicating the approach of a train. He looked in both directions, north and south, and saw no train approaching. From where his car stopped he could only see a distance of 150 feet in the direction from which the train was coming. The crossing is on a curve of the railroad track. Appellee's vision was obstructed by trees and heavy foliage, and the record shows, both from photographs and testimony of witnesses, that the street over which appellee was traveling comes out of a cut just before crossing the track. Appellee after he started his car at the point fifteen or twenty feet from the crossing in attempting to pass over it, did not again look in the direction of the train until he was upon the crossing. The windows in his car were up. His motor made no noise to amount to anything and his car was making very little noise. His hearing is good. There is other evidence presented that no warning signals as required by the statute were given before this collision occurred. No complaint is made as to any instructions given or the amount of the verdict.

Under these facts, appellant earnestly contends that we should say as a matter of law that appellee was guilty of a degree of negligence equal to or greater than the operatives of appellant's train and, therefore, barred from recovery. To this contention we cannot agree. The principle of law governing in a case of this kind has been

frequently declared by this court and is well stated and illustrated in *Smith* v. *Missouri Pacific Railroad Company,* 138 Ark. 589, 211 S. W. 657, wherein this court said: "No inflexible rule can be laid down as to when or under what circumstances a traveler at a public railroad crossing will be free from contributory negligence in going over the crossing; but each case must necessarily depend upon its own particular facts. As a general rule a traveler on a street or highway approaching a railroad crossing is bound to exercise such care and prudence as an ordinary prudent man would exercise under the circumstances in looking and listening for approaching trains and stopping, if need be, before going on the crossing, and if he fails to do so, he is guilty of contributory negligence barring a recovery, although the railroad company itself is guilty of negligence. In the present case the plaintiff testified that he did look and listen for an approaching train before turning on the crossing, but that he did not see nor hear one. Counsel for defendant claim that plaintiff's testimony in this respect is not entitled to any probative force because the railroad track was straight for several miles north of the crossing and that he was bound to have seen the train had he looked for it. It will be remembered that the plaintiff drove northward on the street parallel with the railroad track and that he said there were some trees just outside of the right-of-way and some telegraph poles inside the right-of-way which obscured his vision to the north. In addition to this he listened for the statutory signals for the crossing to be given and did not hear them. It is true he did not look for the train when he got on the crossing; but the track to the north was straight and plaintiff had been looking in that direction for the train and listening for its approach or signals thereof as he drove up the street. When he did not see or hear the train as he drove on the crossing, the jury might have found that he was justified under the circumstances in thinking there was no train coming near enough to prevent his crossing in safety and that it would be best for his safety to devote his whole attention to driving his car over the crossing. He had only

thirty-five yards to go and it will be remembered that the train struck the hind wheels of his automobile, thus showing that in another instant he would have been across. Other witnesses testified that no warning of the approach of the train was given by blowing the whistle or ringing the bell for the public crossing as required by the statute."

The instant case presents a state of facts less favorable to appellant than those in the above case. Here we have a person approaching a street railroad crossing which is on a rather sharp curve. His view is so obstructed by trees, foliage and the banks of the cut from which he is emerging that he could not see more than 150 feet in the direction from which the train was approaching, when he looked after bringing his car to a complete stop fifteen or twenty feet from the track. He heard no signals or warnings of any kind from the operatives of appellant's train. Under these conditions, the jury might have found that the proximate cause of the collision and consequent damages was the failure of appellant to give the statutory signals.

In *St. Louis, I. M. & S. Ry. Co.* v. *Prince,* 101 Ark. 315, 142 S. W. 499, this court said: "Where a traveller crossed several tracks at a public crossing and was injured, it was held that where there was evidence that the plaintiff looked and listened before going on the track where he was injured, but on account of obstructions he was unable to see the approaching train in time to avoid injury, and was unable to hear it, the question whether he was guilty of contributory negligence was properly submitted to the jury. And to the same effect, see, also, *St. Louis, I. M. & S. Ry. Co.* v. *Garner,* 90 Ark. 19; 117 S. W. 763 *Louisiana & Ark. Ry. Co.* v. *Nix,* 94 Ark. 270, 126 S. W. 1076; *Ft. Smith & W. Ry. Co.* v. *Nessek,* 96 Ark. 243, 131 S. W. 686; *Arkansas & La. Ry. Co.* v. *Graves,* 96 Ark. 638, 132 S. W. 992; *St. Louis, I. M. & S. Ry. Co.* v. *Stacks,* 97 Ark. 405, 134 S. W. 315; *Arkansas Cent. Ry. Co.* v. *Williams,* 99 Ark. 167, 137 S. W. 829."

On the whole case, therefore, we conclude that there is evidence of a substantial nature to support the jury's verdict, and no errors appearing, we accordingly affirm.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* SCHMITZ.

4-5395 125 S. W. 2d 448

Opinion delivered February 27, 1939.

T. B. Pryor and *Daggett & Daggett,* for appellant.

A. M. Coates, for appellee.

HUMPHREYS, J. This is a suit by appellee, a passenger, against appellant, a common carrier, to recover damages sustained by him by reason of appellant's failure to carry him safely to his destination.

Appellant defended upon the ground that, although it failed to safely carry appellee to his destination, he, the passenger, failed to exercise ordinary care to prevent the alleged injury and damage which he suffered.

The cause was submitted to a jury upon the complaint, answer and testimony introduced by the respective parties which resulted in a verdict and judgment against appellant for $100.16, from which is this appeal.

The testimony introduced by the respective parties contains little or no dispute. The record, in substance,

reflects that appellee resided at Keeville, Ark., and decided to make a visit to his daughter who resided near La Grange Junction, Ark., located about nine miles south of Marianna. On the morning of September 25, 1937, he took the Greyhound bus from Keeville to Brinkley where he purchased a ticket costing $1.06 from appellant's agent over the Central Arkansas Bus Line to Marianna and over the bus line of appellant from Marianna to La Grange Junction. Under the schedule of the busses of the carriers appellee was to change busses at Oursler's Filling Station in Marianna which was also a bus station. He alighted from the bus upon which he arrived and waited about thirty minutes for the arrival of appellant's bus from Memphis to Helena which he was to take in order to go by La Grange Junction, which was between Marianna and Helena. The bus he was to take arrived from Memphis on or about schedule time and stopped at the bus station where he was waiting and he presented his ticket to the bus driver who refused to allow him to enter the bus saying that he was not going by La Grange Junction, but had been routed around by Moro and other towns to Helena.

According to appellee's testimony and the testimony of a disinterested witness by the name of W. T. Gwinn, the bus driver made no further explanation and made no suggestion to appellee as to any other mode of transportation from Marianna to La Grange Junction. It was then in the neighborhood of one o'clock p. m. and without making any inquiry as to other available transportation to his destination from anyone else or from any other agent of appellant he concluded to walk the rest of the way, a distance of nine miles and did so carrying his valise and a bundle or package which weighed about fifty pounds. The road from Marianna to La Grange Junction was constructed out of gravel part of which was covered with blacktop. Appellee had no acquaintances in Marianna. It was a chilly day and a drizzling rain was falling. Appellee was a day laborer about sixty-two or three years of age. He had suffered a little with rheumatism. He had recently been engaged in pick-

ing cotton at fifty cents a hundred and generally picked two-hundred and fifty pounds a day. After buying his ticket at Brinkley he had only three or four dollars left in his pocket. He arrived at his destination late in the afternoon, almost sundown, in a fatigued condition and was unable to walk or do anything for about three weeks, was just up and down in bed during that time, and was cured by the use of home remedies, but had to spend about $3 for medicine during the time he was unable to work. He testified that the walk with the heavy load he had to carry brought about a recurrence of his rheumatism and his suffering and illness for about three weeks.

The bus driver testified that he told appellee that on account of rain the night before he was routed by Moro and would not go to La Grange Junction. He also testified that on the 24th the bus went by La Grange Junction and that sometimes he went that way and sometimes the other way on account of repairs being made on the road through or by La Grange Junction.

W. C. Oursler, Jr. testified that sometimes the agent at Memphis notified him not to sell tickets to La Grange Junction when the bus was routed around by Moro, but that he did not know what instructions were given to the agent at Brinkley about selling or not selling tickets to or through places to or through which the bus did not run. Oursler also testified that sometimes when the bus was detoured around by Moro he would send passengers over to La Grange Junction who had purchased tickets to that point by private car and that had appellee seen him or made such a request he would have gotten a man who worked for him individually to take appellee over to La Grange Junction as he went home that way about five o'clock in the afternoon and there would have been no extra charge to appellee for that service.

There is no serious contention made that appellant was without fault in selling appellee a ticket over its bus line to a point where it did not stop. This was negligence on its part rendering it responsible for any damages to the passengers which might result from such negligence or wrongful conduct. The bus driver was told by the

routing agent at Memphis early the morning of the 25th that he must go around by Moro instead of by or through La Grange Junction and there was ample opportunity for the routing agent in Memphis to notify the agent at Brinkley not to sell any passenger a ticket who was going to La Grange Junction. We also think, after selling such a ticket, it was the duty of appellant to have made some provision to take care of passengers and transport them from Marianna to La Grange Junction. In the instant case there was no effort made to take care of passengers who had bought tickets to La Grange Junction, but such passengers were simply notified that the bus was not going to La Grange Junction that day leaving the passenger or passengers to get to his or their destination as best he or they could without aiding him or them. We think this was clearly negligent conduct on the part of appellant equal to that of selling a ticket to a point at which the bus would not stop.

The contention of appellant is, however, that appellee should not recover for the injuries he sustained because it was his duty in the exercise of ordinary prudence under the circumstances not to undertake to walk from Marianna to La Grange Junction and that such injuries that he suffered were the direct result of his own negligent act.

Appellant is asking this court to say as a matter of law that appellee should not have undertaken the journey on foot. We are not willing to say this as a matter of law because the jury could have reasonably found from the evidence that appellee was used to outdoor life and in the exercise of ordinary prudence might have undertaken the trip without certain harm or injury to himself. The road was not a difficult one to walk over being partly blacktop and partly gravel and the testimony as to the inclemency of the weather is that it was drizzling rain and a little chilly. Appellee was a laboring man and able to pick two-hundred and fiifty pounds of cotton a day. Just before taking the trip he had been picking cotton at fifty cents a hundred and picked on an average of two-hundred and fifty pounds a day. In view of his

ability to do hard labor and the desire on his part to save the few dollars he had in his pocket, we cannot and are not willing to say as a matter of law that appellee was negligent in undertaking to walk a distance of nine miles over a good road to his destination. We do not think any duty rested upon him after he had been refused admittance to the bus on which he had a right to ride to his destination under the provisions of his ticket to go out and hunt up private transportation if he felt able to walk the distance. The little rheumatism he had had prior to that time did not interfere with the performance of labor on his part, so the fact that he had a touch of rheumatism occasionally could not be taken as proof conclusive that he should not have undertaken the journey on foot. Of course, if we could say as a matter of law it was folly pure and simple on the part of appellee to take the journey on foot, then it would necessarily follow that his own acts of negligence were the direct cause of his injuries. We think the jury may have reasonably found that appellee acted as an ordinarily prudent person would have acted under the circumstances. Had he been decrepit or an invalid the undertaking would have been the undertaking of an imprudent person, but appellee was neither an invalid or a decrepit person. On the contrary he was in good health and an able-bodied man, and we do not think he must have foreseen as a prudent man that such a trip would necessarily put him to bed and injure his health.

There is no contention that the injuries he sustained did not entitle him to the modest judgment of $100.16.

No error appearing, the judgment is affirmed.

ADAMS AND RUSHER *v.* HENDERSON.

4-5392 125 S. W. 2d 472

Opinion delivered February 27, 1939.

Partain & Agee, for appellants.

Warner & Warner, for appellee.

McHaney, J. All the parties to this action are residents of the city of Fort Smith. Appellee is engaged in the bottling business there under the name of Dr. Pepper Bottling Company. This litigation grows out of a collision on Garrison Avenue in said city, of appellee's truck driven by one Plunkett with a Chevrolet automobile driven by appellant Adams as agent of appellant Rusher who was riding with Adams at the time of the collision which occurred on August 26, 1938.

Thereafter, on September 9, 1938, appellee brought this action against appellants in the Sebastian circuit court, Fort Smith district, to recover the damage done to his truck alleging negligence in the operation of said automobile and service was had on them on said date. On October 3, 1938, appellants filed their joint answer, attacking the jurisdiction of said court upon the ground that prior to September 9, to-wit, on September 1, 1938, they had filed suit against appellee and said Plunkett in the Crawford circuit court seeking to recover damages for personal injuries sustained by each of them in said collision, in the case of Adams, $10,000.00, and in the case of Rusher, $5,000.00. It was alleged that service was had upon appellee and Plunkett on September 1,—upon appellee in Crawford county, which return shows that it was had by serving another truck driver

of appellee, and upon Plunkett in Sebastian county; that the Crawford circuit court thereby obtained exclusive jurisdiction to hear and determine said cause; that on September 30, 1938, an adjourned day of the Crawford circuit court appellee appeared specially therein and moved to quash service upon him, which was overruled; that he then moved to have the complaint made more definite and certain, which was conceded, and the complaint amended; and that thereafter appellee and Plunkett filed separate answers denying the allegations of negligence and pleading contributory negligence, and that appellee did not set up any counter-claim or cross-action against appellants. He did set up the fact that he had brought the action above mentioned in the Sebastian circuit court and that said cause had been set for trial for October 4, and for that reason he was not filing any counter-claim or cross-action in the Crawford circuit court. The prayer was that appellee's complaint be dismissed or in the alternative that the action be abated, pending the outcome of the previous action in the Crawford circuit court. Appellee demurred to this answer on the ground that it "does not contain facts sufficient to constitute a defense in law or grounds for abatement." The trial court sustained this demurrer over appellant's objections and exceptions. They elected to stand on their answer and plea. On October 20, the case came on for trial, appellants were adjudged to be in default, a jury was empaneled to determine the amount of damages, and a verdict was returned for appellee for $250.00, on which judgment was entered. The case is here on appeal.

The sole question, therefore, is: Did the trial court have jurisdiction or should it have abated the action pending trial in the Crawford circuit court?

It cannot be doubted that the Crawford circuit court had jurisdiction of the subject-matter, and, for the purpose of this opinion, we assume it had jurisdiction of the parties, although all of them, plaintiffs and defendants, resided in Fort Smith in Sebastian county. It is also true and cannot be doubted that, but for the filing of the prior suit in Crawford county, the Sebastian cir-

cuit court had jurisdiction of the subject-matter and the parties. Did the filing and pendency of the prior action in the former court oust the jurisdiction of the latter? We think this question must be answered in the negative. In contending that it did, we think counsel for appellants have misconceived and misconstrued the statute and the decisions of this court applicable thereto. The statute relied on is § 1416 of Pope's Digest which provides what "the answer shall contain" in four paragraphs, the first and second not being applicable here. The third and fourth paragraphs are as follows: "Third: A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language, without repetition.

"Fourth: In addition to the general denial above provided for, the defendant must set out in his answer as many grounds of defense, counterclaim or set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished."

It is insisted that, since the passage of act 54 of 1935, in which the word "must" as used in paragraph four above was substituted for the word "may" as used in the prior statute, it is imperative that a "defendant must set out in his answer as many grounds of defense, counterclaim or set-off, whether legal or equitable, as he shall have." If appellee had gone to trial in the Crawford circuit court, without pleading his cross-action by way of counterclaim or set-off, he would have undoubtedly been thereafter barred of his right to maintain his action in the Sebastian circuit court, if pleaded, as it would have been *res adjudicata,* as held in the recent case of *Morgan* v. *Rankin, ante* p. 119, 122 S. W. 2d 555, relied on by appellants.

In *Morgan* v. *Rankin, supra,* Mrs. Rankin sued Morgan and another for the wrongful death of her husband, which grew out of an automobile and truck collision in which Morgan was injured and Rankin killed, long after

Morgan had sued the estate of Rankin, recovered judgment, and it affirmed by this court on appeal. She did not file a cross-complaint in Morgan's suit against the estate, of which she was the administratrix, to recover for the wrongful death of her husband, but went to trial on a general denial and a plea of contributing negligence. In this situation we said: "The widow, as administratrix of her husband's estate, had the right, and, we think, was under the duty of litigating, in the suit against her as administratrix, all the questions which she raised in the suit later brought for her personal benefit.

"If one participant in an automobile collision may, when sued by the other, waive the right to assert his own damages as a result of the collision and later sue for such damages in a separate suit we may reasonably expect two suits in many of such cases, and a more prolific and profitable field of litigation will be opened up than existed in the case of suits by guests against their hosts, before the passage of our guest statute on that subject.

"We think the present cause of action was barred by the former suit, and the judgment here appealed from awarding damages to appellee will be reversed, and the cause dismissed."

It was barred because it was *res adjudicata.* That is a wholly different situation from that presented in this case. Here, appellants sued appellee and Plunkett in the Crawford circuit court, and eight days later, appellee sued appellants in the Sebastian circuit court, long before he was required to answer in the Crawford circuit court. The parties in the latter were not the same as in the former. Plunkett, appellee's driver, was a defendant in the former, but was not a party in the latter. Neither was there the same cause of action in both cases, although both cases arose out of the same collision. In the former, appellants sued appellee and Plunkett to recover damages for personal injuries, while in the latter, appellee alone sued appellants for the damage to his truck. Section 1411 of Pope's Digest provides that the defendant may demur to the complaint where it appears

on its face: "Third. That there is another action pending between the same parties for the same cause." It has been several times held that if the pendency of the other action is not shown on the face of the complaint, so as to make it open to demurrer, it may be taken by answer, and if not taken by either it is waived. *Kastor* v. *Elliott,* 77 Ark. 148, 91 S. W. 8; *Board of Directors* v. *Redditt,* 79 Ark. 154, 95 S. W. 482. Appellants undertook to raise the question here by answer, but it would appear to be sufficient to say that the parties are not the same nor are the two actions the same.

In the recent case of *Anderson* v. *Erberich,* 195 Ark. 321, 112 S. W. 2d 634, a similar situation existed. A collision between a truck driven by Erberich and an automobile driven by Anderson resulted in personal injuries to both. Anderson sued Erberich's employer in the Crawford circuit court and Erberich sued Anderson in the Sebastian circuit court and recovered judgment against him. In disposing of the question of the jurisdiction of the latter court on account of the pendency of the former suit, this court said: "It is first insisted that the Sebastian circuit court had no jurisdiction of the cause of action, for the reason that jurisdiction of the cause had been acquired by the previous suit filed in the Crawford circuit court. A sufficient answer to this insistence is to say that appellee was not a party to that suit."

In *Church* v. *Gallic,* 76 Ark. 423, 88 S. W. 979, it was held to quote the language of this court in *Sims* v. *Miller,* 151 Ark. 377, p. 386, 236 S. W. 828, that "If more than one action between the same parties and with reference to the same subject-matter is pending the first judgment rendered in either action bars the other action, regardless of priority of commencement." In the latter case it was held, to quote a syllabus, that: "The mere filing of a complaint in one court while another action is pending in another court of this state does not operate as a dismissal of the prior action; the pendency of a prior action being ground of demurrer if it appears on the face of the complaint, or of defense by answer if it does not so appear." This statement is of course conditioned

on the fact that the parties are the same and the subject-matter the same as they were in that case, Miller being the plaintiff and Sims the defendant in both actions and in both Miller was seeking to recover a sum claimed due for breach of a written contract.

Appellants, also, rely on *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467, and *Vaughan* v. *Hill,* 154 Ark. 528, 242 S. W. 826. The latter case cites the former to support this statement: "When a case is brought in a court of competent jurisdiction, the authority and control of that court over the case continues until the matter is disposed of in the appellate court. The principle is essential to the proper and orderly administration of the law." In the former the parties and the subject-matter were the same and in the latter, the above statement was made in holding that a court of equity has jurisdiction to enforce an attorney's lien and that the court erred in removing such a suit to a court of law over appellant's objections. Like or similar distinctions exist in all the other cases cited by appellants.

We think that the necessary effect of § 1416 of Pope's Digest, as quoted and as construed by our decisions, is that if a defendant goes to trial without pleading any cross-action he may have, he may, thereafter, be barred from maintaining it, but that the mere pendency of an action in one court against two defendants does not preclude one of them from maintaining in another court of concurrent jurisdiction an independent action growing out of the same incident, where the subsequent action is first brought to trial.

It necessarily follows that the judgment must be affirmed.

BRAY *v.* STATE.

4114 125 S. W. 2d 478

Opinion delivered February 27, 1939.

S. A. Kelley and *W. M. Thompson,* for appellant.

Jack Holt, Attorney General and *Jno. P. Streepey,* Assistant Attorney General, for appellee.

HUMPHREYS, J. Information was filed on October 1, 1938, by the prosecuting attorney of the 16th judicial circuit in the clerk's office at Hardy, in the northern district of Sharp county, charging appellant with the crime of assault with intent to kill Witten Stewart on the 29th day of September, 1938, about eight o'clock at night by shooting him with a pistol at a gin in the town of Cave City in the southern district of Sharp county.

A short time after the shooting appellant was apprehended and lodged in the county jail of Independence county for safe keeping.

On October 3, 1938, the judge of the circuit court called an adjourned term of court to be held at Hardy on October 17 for the purpose of trying appellant and ordered the sheriff of Sharp county to notify appellant, who was in jail at Batesville, that he had fixed his bond at $15,000 and that he would be tried for the crime with which he was charged at said adjourned term of court. This, the sheriff did.

Appellant employed counsel who filed a motion with the clerk of said court interposing the defense of insanity of appellant at the time the offense was committed and presented the motion to the circuit court before appellant's case was called for trial, requesting that he be committed to the State Hospital for Nervous Diseases for observation and examination in accordance with the provisions of § 3913 of Pope's Digest for determining

his sanity or insanity. The motion filed by appellant omitting caption and signature is as follows:

"Comes the defendant, by his attorney, W. M. Thompson, and moves the court to commit the defendant, B. P. (Son) Bray, to the State Hospital for Nervous Diseases, for a period of observation and for reason states:

"That the said B. P. (Son) Bray, is charged with the offense of assault with intent to kill, such alleged to have been committed upon one Witten Stewart, on the ——— day of September, 1938, and that at the time of the said alleged assault, the said B. P. (Son) Bray, was suffering from insanity, caused from chronic syphilis, aggravated by continuous intoxication over a long period of time. That on the date of said purported assault, he was laboring under such mental infirmity as to make it impossible for him to appreciate the gravity of the offense with which he is charged, and that it is proposed and intended by counsel for defendant to enter a plea of not guilty by reason of insanity as a defense to the charge now pending against said defendant, and that said defendant should be committed to the aforesaid State Hospital for Nervous Diseases for a period of observation, to determine whether or not said defendant was insane at the time of the commission of the offense with which he is charged, and whether or not he is insane at this time.

"Wherefore, defendant prays that he be committed to the Arkansas State Hospital for Nervous Diseases for such period of observation as the court may determine would be a reasonable time in which to determine the sanity or insanity of defendant, both at the time of the commission of the alleged offense, and whether he is sane or insane at this time."

The motion was overruled over appellant's objection and exception, whereupon, appellant filed a motion in due form for a continuance, which was also overruled over his objection and exception.

The cause was tried to a jury resulting in a verdict of guilty and fixing his term of service in the penitentiary at one year.

A motion for a new trial was filed after the verdict of guilty was returned which was set down for hearing on November 12, 1938, and during the pendency thereof the court ordered that appellant be committed to the State Hospital for Nervous Diseases for observation and examination as to his sanity or insanity.

The officials of the State Hospital for Nervous Diseases filed a report on November 12, 1938, to the effect that appellant was not insane, whereupon, the court overruled appellant's motion for a new trial over appellant's objection and exception and proceeded to and did sentence him for one year in the state penitentiary in accordance with the verdict.

From the judgment of conviction appellant has duly prosecuted an appeal to this court.

Appellant insists that the court committed reversible error in overruling appellant's motion to commit him to the State Hospital for Nervous Diseases as provided by § 3913 of Pope's Digest, the pertinent part of which is as follows:

"Whenever a prosecution for any crime has been instituted in the circuit court by indictment or information and the defense of insanity at the time of the trial, or at the time of the commission of the offense has been raised on behalf of the defendant and becomes an issue in the cause, or the circuit judge has reason to believe that the defense of insanity will be raised on behalf of the defendant and will become an issue in the cause, or shall be of the opinion that there are reasonable grounds to believe that the defendant was insane at the time of the alleged commission of the offense with which he is charged, or has become insane since the alleged commission of such offense, the judge shall postpone all other proceedings in the cause and shall forthwith commit the defendant to the Arkansas State Hospital for Nervous Diseases, where the defendant shall remain under ob-

servation for such time as the court shall direct, not exceeding one month."

The question of whether the trial court committed reversible error depends upon whether § 3913 of Pope's Digest, the applicable part thereof being quoted above, is mandatory or merely directory and, if mandatory, whether appellant brought himself within the provisions of the statute entitling him to be admitted before or during the trial to the State Hospital for Nervous Diseases for examination as to his sanity or insanity.

This court in the recent case of *Whittington* v. *State, ante* p. 571, 124 S. W. 2d 8, decided that the statute in the main was mandatory provided a defendant should bring himself within the terms of the statute. In the Whittington Case this court ruled that the defendant, Whittington, did not bring himself within the provisions of the statute.

In the Whittington Case, this court stated that the section of the digest referred to "requires that a defendant be committed to the State Hospital for Nervous Diseases for an examination as to his sanity or insanity when the defense of insanity is raised on the behalf of the defendant and becomes an issue in the case or when the circuit judge has reason to believe that the defense of insanity will be raised on behalf of the defendant and will become an issue in the cause or that the court has reasonable grounds to believe that a defendant was insane at the time of the alleged commission of the offense with which he is charged or has become insane since the alleged commission of the offense." In that case the court further said that "a mere suggestion of insanity is not sufficient under the terms of the statute to require the court to commit the defendant to the State Hospital for Nervous Diseases for examination as to his sanity or insanity."

In the Whittington case, Whittington did nothing more than to make a mere suggestion that he was insane, whereas in the instant case appellant not only served notice upon the court that he intended to plead insanity and in fact did plead insanity, and there was much evidence

in the record tending to show that appellant was insane at the time of the commission of the offense.

Under appellant's notice that he would plead insanity in the case and the entry of such a plea by him entitled him to be committed to the State Hospital for Nervous Diseases before the trial of his case because such is the mandate of the law. Had the statute been merely directory it would be otherwise. The court had no discretion about the matter after appellant in the instant case brought himself within the provisions of the statute.

On account of the error indicated, the judgment is reversed and the cause is remanded for a new trial.

SMITH, J., dissents.

BURNS *v.* STATE.

4109 125 S. W. 2d 463

Opinion delivered February 27, 1939.

Joe Wills and *Sam Robinson,* for appellants.

Jack Holt, Attorney General and *Jno. P. Streepey,* Asst. Atty. General, for appellee.

HOLT, J. The appellants, William Mabel Burns, Haywood Duckworth and Roma Ollison, were tried and convicted of the crime of robbery in the Pulaski circuit court, first division, and each sentenced to ten years in the penitentiary, on information as follows: "Comes Fred A. Donham, prosecuting attorney within and for Pulaski county, Arkansas, and in the name and by the authority, and on behalf of the state of Arkansas, information gives accusing William Mabel Burns, Haywood Duckworth and Roma Ollison of the crime of robbery, committed as follows, towit: The said William Mabel Burns, Haywood Duckworth and Roma Ollison, in the county and state aforesaid, on the 7th day of June, A. D., 1938, unlawfully, feloniously, wilfully, maliciously and violently from the person of O. Sherman, (Trustee of Shorter College, a corporation) in fear, did take, steal and carry away $2,319.90, gold, silver and paper money, said money being then and there the property of him, the said O. Sherman (Trustee of Shorter College, a corporation), against the peace and dignity of the state of Arkansas."

The facts upon which the information was based and the convictions had, stated in their most favorable light to the State, substantially, are: O. Sherman, a colored minister and a Trustee of Shorter College, a corporation, and a resident of North Little Rock, Arkansas, at about eight o'clock p. m. on June 7, 1938, left a committee meeting at Bethel Church in that city, carrying a bag which contained approximately $2,300.00 in currency,

silver and a few checks. He got in his automobile with this bag of money and drove to a point near his home when another car drove up by his side and stopped him. One of the defendants, Roma Ollison, jumped out, and while Sherman was still at the wheel of his car, pointed a gun in his face, forced him to hand over the bag containing the money, then shot Sherman in the jaw, jumped back in his car and attempted to escape. In the car with Ollison was defendant, Haywood Duckworth. Sherman, although badly wounded, gave chase in his own car and succeeded in having Duckworth and Ollison captured by the officers. The bag in which the money was carried had been loaned to Sherman by Rev. E. J. Lunnon. There was also in the bag a pistol and bible belonging to Lunnon. Duckworth and Ollison voluntarily confessed their part in the robbery, admitted that Ollison shot Sherman in accomplishing the robbery, and in fact none of the details are seriously denied by them, except it is their contention that it was a fake robbery. Duckworth directed the officers to the place where the bag was thrown after the robbery in a ditch in Dark Hollow. The gun and bible were also found, but no money except a five cent piece was found in the bag or ever recovered.

Defendant Duckworth also made a voluntary confession to officer Jack Pyle in which he stated that the money was in a bag in a canvas sack and that he gave the money to defendant, Mabel Burns, in Fordyce, Arkansas, in Mabel Burns' home.

The record also reflects, according to the testimony of Rev. E. J. Johnson, that about fifteen minutes before eight o'clock, June 7, 1938, the day of the robbery, defendant Mabel Burns came from the north side of the church to the sidewalk and he and Duckworth stopped about the center of the church and talked three or four minutes. This was about fifteen minutes before Sherman left with the money. Duckworth then came across the street, talked to Burns three or four minutes, and Burns went across the street to the car and talked to someone who was in the car. There is other testimony that Burns was seen at the church that night.

Jack Pyle, an officer, further testified, that defendant, Mabel Burns, made a statement to him freely and voluntarily, without any hope or promise of reward, in which he admitted that he sent a telegram at 4:22 p. m., June 7, 1938, from the Little Rock office of the Western Union addressed to Roma "Bo" Ollison, c/o Fordyce Lumber Company, Fordyce, Arkansas, as follows: "You will be too late." Signed "Joe". Hiram King testified that he went with defendant, Mabel Burns, to the telegraph office in Little Rock. He said he wanted to send a telegram and that it was in the afternoon. Defendant Duckworth denied that Burns had anything to do with the robbery. Defendant Ollison made the statement in the presence of one of the officers that Burns was to send him a telegram if the money was out of the church by 3:30 o'clock, but later said he was forced to make the statement. Defendant Burns denied that he had any part in the robbery at all. Officer Lawrence testified that Burns made an admission to him in which he said he would show them where the money was and go with them to get it.

Appellants earnestly urge, first, that it was error as to Burns and Ollison for the trial court to allow Duckworth to testify that at some prior time he had told the prosecuting attorney that they, Ollison and Burns, planned and staged the robbery, for the reason that neither Burns nor Ollison were present when the statement was made and also that the conspiracy had then been completed. We copy from the record the testimony upon which this alleged error is based: "Q. I want to ask you if you didn't tell me this in my office? 'Did you participate in that robbery, I mean did you have anything to do with it' and you answered 'Yes'. 'Tell what you know about it, what you did, and what you got out of it. First, let me ask you this question—Who was in on the robbery?' and you answered, 'Romy Ollison, they call him Bo'? A. I don't know what I did, I am liable to have told you Blakely or anything. Q. And the further question, 'Who else'? Mr. Robinson: I object. Court: You have a right to impeach him by the questions. Mr. Robinson: That was a statement made

in Burns absence. Court: I don't think he is denying it, it is a matter for the jury to determine. Mr. Bogard: Didn't you tell me in that office there that you and Ollison and Burns planned and staged that robbery? Mr. Robinson: I object. Court: Objection overruled. Mr. Robinson: Save my exceptions. Mr. Bogard: Q. Didn't you tell me that? A. Yes, sir, I told you that, I was going to have to say somebody. Q. And you never at any time mentioned anybody but Mabel Burns and Roma Ollison? A. I might not have to you."

The record discloses a short time before this testimony was admitted that in the testimony of officer Pyle, while he was testifying about admissions made by one of the appellants, the court ruled that such admissions would not be admissible after the completion of the conspiracy against the other two appellants unless they were present. This admonition of the court is as follows: "Gentlemen of the jury, you are not to consider any statement made by the defendant Mabel Burns that in any manner incriminates the other defendants in connection with this conversation because if the crime was committed it was already completed, the statement of one conspirator against a co-conspirator, if such statement is made after the completion of the offense involved is not competent against the others, so you will not consider any statement made by Burns as evidence against Roma Ollison or Haywood Duckworth." We think this admonition of the court was broad enough, and was clearly understood by the jury, to mean that they were not to consider the statement of one defendant as against the other two when said statement was made out of their presence and after the conspiracy or crime had been committed. We do not think that the rights of Burns and Ollison could possibly have been prejudiced by the admission of the above testimony. This testimony was admitted on cross-examination of one of the appellants and it has always been held by this court that the cross-examination of the defendant to test his credibility may be given wide latitude. See *Wawak and Vaught* v. *State*. 170 Ark. 329, 279 S. W. 997.

Appellants next contend that it was error of the trial court to permit Burns to be convicted when charged as a principal, when it is contended that the evidence showed that if he were guilty of anything it was of accessory before the fact. Section 25 of Initiated Act No. 3, now Section 3276 of Pope's Digest, states that the distinction between principal and accessory is abolished and all accessories before the fact shall be deemed principals and punished as such. Prior to the passage of Section 3276 of Pope's Digest it was stated that accessories should be punished as principals, but it was held that they must be indicted as accessories before the fact. We hold that the rule formerly adhered to by this court and set out in *Boze Smith* v. *State,* 37 Ark. 274, wherein this court held that one who has advised or encouraged the commission of a felony, but was not actually or constructively present when it was committed, cannot be convicted upon an indictment charging him, not as an accessory before the fact, but as a principal perpetrator of the crime, has been changed by the above provision of the statute which became a law on January 11, 1937. Under this section there can be no longer any distinction between accessories before the fact and principals, and the reason requiring an accessory before the fact to be indicted as such no longer exists. The trial court did not err in instructing the jury that the distinction between principal and accessory has been abolished thereby permitting the jury to convict one who may be an accessory when charged as a principal, nor did the trial court err in refusing to grant a peremptory instruction because defendant Burns had been indicted as a principal.

Finally appellants contend that the court erred in refusing to give defendants' requested instruction No. 2, which is as follows: "You are instructed that if you find from the evidence in this case that Blakely entered into an agreement with Duckworth and/or Ollison whereby the said Duckworth and Ollison were to participate in a fake robbery of Sherman and that Sherman had full knowledge of the fact that the fake robbery, if any, was to be committed and that the said Sherman was a party

to the scheme, if any, then you will find all of the defendants not guilty." The only testimony disclosed by this record as to whether or not the admitted robbery was concocted and a fake, is found in the testimony of two of the appellants, Duckworth and Ollison. The testimony is ample to support the State's theory that the robbery was in no sense a fake, but real in every sense of the word. This court has held that one who obtains money by some fraudulent trick or artifice and carries it away, is guilty of larceny. See *Hunt* v. *State*, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33.

We think, however, that the court fully and correctly covered this question in instruction No. 19, which is as follows: "Where money or any other thing of value is unlawfully and feloniously taken from the person, or in the presence, of the owner by force, or intimidation, so as to constitute the crime of robbery, the crime of larceny has also been committed. In other words, robbery is simply larceny with the elements of force or putting in fear superadded. You may, if the evidence justifies it, convict either of robbery or larceny, but not both. Larceny may be by stealth alone or it may be accomplished by means of a trick or fraud, so that if you find from the evidence in this case beyond a reasonable doubt that the defendants, or any of them, used a trick or fraud to take, steal and carry away the personal property of Shorter College and to deprive said owner of the same, and that said defendant or defendants did so with a felonious intent you will find said defendant or defendants guilty of larceny." This instruction correctly submitted to the jury whether or not there was trickery or fraud used to deprive Shorter College of the money in question. We hold, therefore, that there was no error in the court refusing to give instruction No. 2 requested by appellants.

On the whole case we find no errors, and, since the evidence abundantly supports the verdict of the jury, the case is affirmed.

RAILWAY EXPRESS AGENCY, INC. *v.* GEE.

4-5398 125 S. W. 2d 802

Opinion delivered March 6, 1939.

McRae & Tompkins and *Bush & Bush,* for appellants.

W. F. Denman, for appellee.

MEHAFFY, J. This acton was instituted by appellee, Mrs. Grace Gee, against appellants, Railway Express Agency, Inc., and W. L. Hines, to recover damages for injury to Mrs. Gee. On the morning of February 24, 1938, Imon Gee, husband of appellee, had to make a business trip to Texarkana, and the appellee went with him to see Red River at Fulton while the river was at flood stage; they were in a small Ford coupe, and as they were leaving Prescott their car collided with a small truck driven by W. L. Hines, one of the appellants; neither of the cars was overturned; neither car was seriously damaged; the Gees drove away in their car, and Mrs. Gee

did not see a doctor on the trip, but the next morning her arm was bruised and swollen about three inches above the elbow. The complaint alleged that Hines was an agent of the Railway Express Agency, Inc., and that he negligently and carelessly drove the truck into and against the car in which appellee was riding, seriously, painfully and permanently injuring her right arm, shoulder, neck and face to her damage in the sum of $25,000.

It was alleged that the driver of the truck failed to keep a lookout, failed to keep his truck under control, and operated it at a high, reckless and dangerous rate of speed.

The answer of the Railway Express Agency, Inc., denied the material allegations of the complaint, and pleaded contributory negligence; and Hines also filed answer denying the material allegations and pleading contributory negligence.

There was a verdict and judgment for $5,000, and the case is here on appeal.

The evidence tended to show that on the morning of February 24, 1938, the appellee, with her husband left Prescott about 9:15 o'clock at the intersection of highway 67 and East Elm street; the evidence of appellee showed that they were crossing the street properly, on the proper side, and that the truck driven by Hines approached, and that at the time Hines was looking north over his shoulder. The truck struck the car in which appellee was riding and nearly turned it over; that Hines did not check his speed before the collision; that Hines said immediately after the collision: "I didn't see you before I hit you. I am sorry. Just as soon as I get through delivering this express I will come by the store and straighten it up." Appellee went on to Fulton, and later had the car repaired at a cost of $25.50. After the wreck, witnesses noticed in the back of Hines' truck a roll of something, looked like it might have been tires, and two boxes wrapped in brown paper; they looked like express packages. Gee did not discover that his wife was injured until while they were on the trip she complained and did not sleep any that night. The afternoon

after the collision there were two black places as big as a tea-cup on her arm; she has suffered considerably since that time; cannot do her normal housework; the injury is worse than it was a few days ago; she does part of her housework, and her husband helps her do the work; Hines was driving his car at a high, reckless and dangerous rate of speed all the time. After the collision the coupe was sitting diagonally on the highway, just across the black line in the center; the collision did not so disable the coupe as to prevent the trip, and it did not prevent the appellee from going on the trip, although she complained all the time.

The appellee's testimony showed that they slowed up when they started into the intersection, and as they slowed up to make the turn the truck hit their car. Appellee thought Hines was going to stop or turn. The Gee car was in the intersection before the Hines truck; Mr. Hines was driving a half-ton Ford truck. When they saw Hines coming appellee held her hand out, but he was looking north, and he hit the appellee's car, and appellee's car did not hit his. Appellee testified at length about the pain and suffering caused by the injury to her arm; she does her own cooking with what little assistance her husband can render; makes up her beds, but her husband does most of the housework; Hines' truck was going about 20 miles an hour; appellee was treated by Dr. Hesterly, and afterwards went to Little Rock to see Dr. McGill; her arm troubles her all the time, and she has to take tablets to make her rest; arm and shoulder are steadily growing worse.

Beverly Johnson testified that he was not looking at the cars when the collision occurred, but the Hines car hit the Gee car; the Gee car was struck about the middle of the door; there was something in the bed of Hines' truck; little boxes of some kind; witness heard Mr. Hines tell Mr. Gee as soon as he got through delivering express he would come over to see him; does not know what was in the boxes in the truck; does not know whether Mr. Gee signaled a left turn or not.

Mr. Gee testified that he did signal a left turn as he drove into the intersection.

Mrs. Emma Sampson saw the collision and stated that Gee came straight into the intersection on the right side of the street and turned south toward Hope; she saw the Hines truck coming and saw he was going to hit the Gee car; Hines was looking back over his shoulder; was driving fast, and Gee was not driving fast; the front of Hines' truck hit the center of the Gee car; Hines had something in his truck which witness took to be car casings and three or four boxes wrapped in brown paper; Hines was looking north over his left shoulder, and the car was coming as fast as he could drive.

Reece Marks testified that he saw Gee drive into the intersection; he got into the intersection before Hines did; the Gee car was hit about the center; saw some little boxes in Hines' truck; two or three of them.

Harvey Francis testified that he repaired the Gee car, and that the right door panel, the front and rear fenders and the running board were damaged, all on the right-hand side; the car had been struck about midship; the repair bill was $25.50.

Dr. J. B. Hesterly testified that he was a practicing physician and surgeon, and that Mrs. Gee came to him in February, 1938, suffering from an injury to her right arm and shoulder; the injury to the arm was just above the elbow up to the shoulder; there was a broken blood vessel; thinks she had an injury to the radial nerve; the nerve extends up into the shoulder; an injury to this nerve could cause pain where the nerve goes; witness dressed the arm; appellee complained of pain which he attributed to pressure on the radial nerve. It is possible that scar tissue was left there which is causing the present trouble; the greater the scar tissue the greater would be the pain; attributes her pain to scar tissue resulting from the hoemotoma. Dr. Hesterly further testified that Mrs. Gee was normal and healthy in every particular with the exception of her arm, and he would naturally expect her to get better; never saw any evidence of her arm being paralyzed, nor any evidence of the loss of the

functions of her arm; gave her some acetidine to make her sleep; did not think she needed morphine; did not give her any powerful sedatives; she complained some with pain around her neck, and said she felt a kernel under her arm, but she had no kernel under her arm; cannot say for sure whether she has a nerve injury; thinks she has an injury, but cannot be sure; thinks the scar tissue would pinch the nerve, and as long as the scar tissue is there she will have trouble; is still treating her, but she is a lot better; physicians have to go almost entirely on what the patient tells them, unless they are paralyzed, and there is no feeling; Mrs. Gee is not paralyzed and has feeling in her arm; as far as witness knows appellee told him the truth about her condition.

Dr. McGill testified in substance that he examined appellee and found a hard knot on her arm; she was constantly suffering pain; the examination revealed an injury to the radial nerve, a lump was there, the muscles were flabby, the strength of the arm diminished, and the arm and hand colder than the other arm; ordinarily the arm of a right-handed person is larger than the left arm; appellee's left arm is larger than the right; the lump of scar tissue is about the size of a silver dollar or larger; scar tissue never absorbs; her injury is permanent; thinks her condition will get worse; atrophy is taking place; the radial nerve is being pinched by scar tissue, and it will cause paralysis if the scar tissue contracts and pinches the nerve sufficiently; she has partial paralysis now; the right arm is a quarter of an inch smaller than the left.

Dr. Buchanan, a witness for the appellant, testified in substance that there was nothing to indicate paralysis of the arm, and there would be nothing about a bruise on her arm that would cause her ear to ache, and she complains of pain in her arm, neck and ear; could not tell that one of her arms was colder than the other; there was no flabbiness about her right arm; arms are the same size by actual measurement; a haemotoma is not a serious injury; has never known a bruise or blow on the

outside to injure radial nerve; it is most unusual to get paralysis of any nerve in the arm; there is no scar tissue in the lady's arm; if she had scar tissue her arm would be larger, not smaller; Mrs. Gee does not have the appearance of suffering great and excruciating pain; she looks well and healthy; finds no evidence of paralysis or atrophy in her arm; if one had total paralysis of the radial nerve, there would be total paralysis of the arm; if there were partial paralysis of the radial nerve there would be a partial paralysis of the arm.

The evidence introduced by appellants on the question of how the accident occurred, and whose negligence caused it, is in conflict with the evidence of appellee's witnesses.

Appellant Hines contends first that it is not shown by the evidence that the collision caused any injury to the appellee. Witnesses testified about the injury, and this question was submitted to the jury, and their finding is against the contention of the appellant.

He contends next that the court did not instruct the jury on proximate cause. Appellant Hines requested no instruction on proximate cause, but the court did, in effect, instruct the jury on this question.

Each defendant asked the court for a directed verdict, which was refused. Appellant Hines then says that the court instructed the jury orally, and sets out the oral instruction, which is quite long, and says that the court told the jury that the plaintiff claimed that she was injured, and argues that there is no evidence that Mrs. Gee was injured in the collision. We think there was ample evidence to submit this question to the jury, and its finding is conclusive here, there being substantial evidence to sustain it.

Appellant Hines next contends that there is no substantial evidence that he was acting within the scope of his employment at the time of the collision. So far as appellant Hines is concerned, if his negligence caused the injury, it is wholly immaterial what his relation was with the other appellant; but the evidence shows that immediately after the injury Hines said in the presence

of witnesses that as soon as he delivered his express he would come back and see Mr. Gee. There is sufficient evidence above set out to submit the question to the jury as to whether, at the time of the accident, Hines was acting within the scope of his employment of the express company.

The other appellant, Railway Express Agency, argues that the case should be reversed, because of the improper and prejudicial closing argument made by appellee's attorney. It then says that, in making his closing argument to the jury, the attorney for the appellee said:

"You may rest assured, gentlemen of the jury, that if any one of you, or your wife or daughter should come in here and have a case against a corporation, they will accuse you of being a liar, a perjurer and a thief." Objection was made to this argument.

The court announced that he did not hear the argument, and directed the jury to consider only the law and testimony. If the trial court did not know what the attorney said, he certainly could not reprimand him, and it was the duty of the attorney objecting to the argument to tell the court what was said. He does not claim that he did that. He does claim that the court learned what was said when the motion for new trial was filed, but, of course, that was too late for the court to admonish him. The trial was over, the jury discharged, and judgment had been rendered. But if this argument by the attorney was error, it was invited error. The attorney for appellants, in the examination of Dr. Buchanan, asked this question: "Dr. Buchanan, Mr. Denman usually uses you himself when he has got an honest injury, does he not?"

Although probably not intended as such by the attorney, this was an insinuation that this was not an honest injury. Lawyers in the heat of argument sometimes say things which they would not otherwise say. While the attorney may not have intended it, the statement could have been construed as charging what the attorney for the appellee said. In the examination of

appellee by the attorney for appellants, appellee was asked by the attorney: "You tell the jury that you think that a car struck by a car flying and hit broadside will only be knocked two feet—do you tell the jury that?" And again the attorney for appellants said, in his cross-examination of appellee: "You got your information from your attorney mainly, didn't you?" He also asked her: "How did Dr. McGill know what part of your body to make an X-ray of?" "Why did he make a picture of your right arm instead of your left foot?" This manner of examination was doubtless the cause of the statement made by appellee's attorney in his closing argument. If appellants' attorney had called attention of the court to what the attorney for appellee said, the court doubtless would have taken such steps as seemed necessary to correct the error; but certainly it would not be proper to not let the court know what the complaint was about, and then be permitted thereafter in his motion for a new trial to raise the question.

There was a verdict and judgment for $5,000. The injury, as shown by the testimony, was not a severe injury. The appellee did practically all of her work after the injury, her cooking and household work, and continued to do this, although she says her arm was getting worse. A majority of this court is of the opinion that the verdict is excessive; that is, that the evidence is insufficient to support a verdict for $5,000. This court cannot set aside a verdict simply because it thinks it is excessive, unless it can say that there is no substantial evidence to sustain a verdict of that amount.

The authorities on this question are discussed in *McCord* v. *Bailey & Mills,* 195 Ark. 862, 114 S. W. 2d 840. In that case the court said: "We have determined that the verdicts are excessive by at least a thousand dollars in each case, even though we consider the evidence in its most favorable light, for compensation for whatever injuries or losses were sustained by either. The evidence will not support a recovery in excess of $500 for each plaintiff.

"Therefore, if the appellees will enter a remittitur so as to permit a recovery by each for only $500, the judgments so reduced will be affirmed, or be entered here for that amount. If such remittitur be not entered within fifteen days judgments will be reversed and remanded on account of the error indicated."

Therefore, in this case a majority of the court, being of the opinion that there is no substantial evidence to sustain a verdict for $5,000, has reached the conclusion that the error may be corrected by permitting the appellee to enter a remittitur for $2,500. If such remittitur is entered within fifteen days, the judgment will be affirmed for the amount of the judgment, less the remittitur. If the remittitur be not filed within fifteen days, the judgment will be reversed, and the cause remanded for new trial.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* WRIGHT.

4-5404 126 S. W. 2d 609

Opinion delivered March 6, 1939.

[redacted]

T. B. Pryor and *Daggett & Daggett,* for appellant.

Marvin Watkins and *Richardson & Richardson,* for appellee.

HOLT, J. Appellee, Otto Wright, sued appellant in the Poinsett circuit court for damages to himself and his automobile growing out of an accident alleged to have been caused by the defective and unsafe condition of the crossing where appellant's switch track crosses the concrete highway in the town of Hoxie, Arkansas. The allegations of negligence set forth in appellee's complaint are that on and prior to November 8, 1937, appellant was negligent in maintaining the crossing in question in that: "The cross-ties supporting the rails were in a decayed condition, had sunk deeper into the ground, and the spikes holding the rails had given way because of the decayed condition of said ties; the concrete or asphalt covering the ends of the ties on each side of the track had risen above the level of the highway so as to form prominent humps on each side of the track bordering each rail of the track on the outside thereof; the rails of the track, and those placed between them, had sunk several inches below the level of the highway; that by reason of the prominent humps, as aforesaid, and the sunken condition of the rails and ties, as aforesaid, and the angle of intersecting said highway, as aforesaid, said crossing was defective, dangerous, and unsafe to the public in passing over it in the usual travel, all of which was known to defendant and the employees engaged by defendant whose duty it was to properly maintain said crossing, and defendant was negligent in maintaining said crossing in the manner aforesaid; that in the forenoon of November 8, 1937, plaintiff was driving his auto-

mobile northward from Hoxie to Walnut Ridge upon the east side of said highway at a reasonable rate of speed of about forty to forty-five miles per hour, and while he was doing so and while he was exercising ordinary care for his safety, he drove his car over said crossing, and, in passing over the crossing and because of its defective, dangerous and unsafe condition, as aforesaid, his car was suddenly and violently jerked, snatched, and bounced thereby causing the steering rod controlling the right front wheel and the rod which runs from one front wheel to the other to hold them in line to be sprung, thereby causing said car to leave the road and bear to the right and run across a ditch, strike a post and turn over, thereby demolishing plaintiff's car and inflicting injuries to his person, all of which was caused by the negligence of the defendant in maintaining said crossing in the defective, dangerous and unsafe manner, as aforesaid." He prayed for damages to his car in the sum of $300 and to himself in the sum of $2,700. Appellant answered denying each and every allegation of the complaint, and in addition set up the affirmative defense of the contributory negligence of appellee as a complete bar to a recovery. The case was submitted to a jury and a judgment was returned for appellee and against appellant in the sum of $2,200.

The facts, as reflected by this record, stated in their most favorable light to appellee, substantially are: It is conceded by the parties that 1,000 cars passed the crossing daily where the accident occurred. Appellee Wright has been a resident of Hoxie for about twenty-five years and on November 8, 1937, was a member of the town council of Hoxie. At the time of the accident he owned and was driving a 1935 model V8 Ford tudor sedan. The car was in good condition. It was raining slowly at the time of the accident, and appellee was driving north along concrete highway No. 67 from Hoxie toward Walnut Ridge. The concrete slab is 18 feet wide. The railroad track intersects this highway at an angle of about forty-five degrees and it was this crossing that he was negotiating at the time of the accident. Before he

arrived at the crossing he was driving between forty-five and fifty miles per hour and when within about 100 yards of it he released the accelerator, coasted onto and over the crossing at a speed of about forty-five miles per hour and when the car struck the crossing it bounced up as if it had struck a log and shifted to the right.

Appellee's version of what happened, in his own words, is as follows: "It got off the pavement. It began to scoot and I tried to straighten it up and back to the left on the pavement, and I found I couldn't do nothing with the car so I tried to stop it. I thought I was at least, but since the accident and I got my wits together I found that I had the accelerator in place of the brake, and when the car left the highway it had rained enough to make the surface of the ground and the grass slick, and by that time I had got hold of the brake and that caused the car to skid, and I was pretty well excited—all those telephone poles and everything there. And all I remember the car turning over was one time and a half and it stopped on the railroad upside down." The accident happened at about 9:30 a. m. Appellee had crossed this crossing at the same rate of speed many times before without accident.

On a day in the week following the accident he observed the condition of the crossing and saw high and low spots in the asphalt covering the ends of the cross-ties on each side between the pavement and the rails and there were other rails between the two rails of the railroad tracks running lengthwise with them, some low and some high. There were humps in the asphalt higher than the pavement. He had never made an examination of the crossing before and was unaware of its condition. After he had crossed the crossing and had gone about ten or twenty feet he observed something was wrong with his car and had gone about fifty feet before his car left the pavement. After the wreck he found the radius rods to his car bent to a v-shape and his right wheel turned out to the right. Had noticed some vibration to the car in crossing over this crossing before.

The incorporated limits of Walnut Ridge and Hoxie join, Walnut Ridge being the larger of the two. A great many automobiles from out of the state, including large trucks, cross this crossing and continued to do so after the wreck. His car turned over one and one-half times and landed on the west main line of the railroad track. He has been driving a car for a good many years and is thirty-one years of age, does not have the reputation of being a dangerous driver. Considers a speed of fifty to sixty miles per hour fast.

Tom Norris, on behalf of appellee, testified that he saw appellee's car as it went over the crossing going north. It seemed that he lost control of it and after it left the highway it turned over one and one-half times. He thought to himself the crossing was rough but did not look rough. You don't have to drive over the crossing fast to cause your car to shimmy. He had been familiar with the crossing ever since it was put in. Appellee's car was going about forty miles per hour. There is a highway sign in Hoxie fixing the speed limit at twenty-five miles per hour and there is a city ordinance to this effect.

W. C. Cloyd, marshal of Hoxie, testified the asphalt ridges were about four inches higher than the rails; steel rails were laid between the main line rails, some of which reached entirely across the highway, some were in pieces, they were not all uniform in height. People drove on this highway No. 67 as fast as sixty miles per hour. To his knowledge no arrests for speeding on this highway have ever been made. Appellee is considered a careful driver. A seed truck about a year before the accident had turned over at this spur crossing, but he does not know just what caused it. If you could drive over the crossing straight it would not be so rough, but it is angling and causes the car to twist.

R. D. Moore testified that he had been acquainted with the crossing for about seven years and it is worse than it used to be. The average speed over it is between forty and fifty miles per hour. On November 8, 1937, its condition was such that in passing over it a car would be

drawn to the side and this condition was worse going toward Walnut Ridge. He drove over this crossing every day for two or three weeks before the accident, sometimes making forty miles per hour, but never had a wreck.

Oswell Sullens testified that the crossing in question is rougher than other crossings. He usually drives between forty and sixty miles per hour in going over the crossing. The effect of going over the crossing is to cause the front end of a car going toward Walnut Ridge to jump; the crossing had been in that condition for quite a while before the wreck. Since the accident he has lowered his speed in going over this crossing. Never had a wreck at this crossing.

Dink Williams testified for appellee that he had several years experience as a civil engineer and made a plat of the crossing in question. He estimated the angle at which the spur track intersects the highway to be about thirty degrees. Plat was made on February 3, 1938, and the crossing appeared to be in the same condition then as it was on November 8, previously; there was no evidence or indication of anything new or changed about it. He had been acquainted with this crossing for several years. "On the south side of the crossing it seemed that the water or something had caused the asphalt to raise up there about the railings at that end in there. The south side was about, as I remember, about two and a half inches higher than the main rail that the train crosses over. There are several other railings in there used to raise the elevation between. The north side is about three inches higher than the main rail." The railings between the railroad rails were one to three inches out of line; off the level. The asphalt on the south side adjacent to the south rail was about six inches wide and that north of the north rail was about twelve inches wide. The rails which were laid between the railroad rails were from one to three inches off level; their distance apart were varied; they were not uniformly spaced. There is asphalt set between these rails, and some places are higher than others. Spent about forty-five minutes making the

measurements on February 3, 1938, and several cars passed during that time, none having accidents, and they crossed at the usual speed.

Jess Maness testified that he has been a mechanic for fifteen years, is acquainted with the crossing. In driving north over it the left front wheel reaches the crossing first and it jerks the wheels. He tested his cars over this crossing because it would reveal any vibration in the front end of cars more than any other place; this is due to the roughness of the crossing and the way it is set in the highway. He has driven over this crossing testing cars at various speeds up to sixty miles per hour; had crossed it many times up to ninety days before the trial; has never had an accident there, but does not cross fast in his own car for fear of damaging it. Anyone who drove over the crossing often should know where the humps were. The humps are on each side near the edges of the highway, between each lane of traffic, and in the middle of each lane. A car traveling forty or forty-five miles per hour and striking one of the humps on the crossing would have a tendency to bend the tie rod as it was bent on this car.

Tom Palmer, an automobile mechanic for fifteen years, testified that the crossing was rough on November 8, 1937, and taking in consideration the angle at which it intersected the highway and the humps, and if you hit it just right, it would throw you, and that would produce the condition that the car was in after the wreck. He does not think driving the car into the ditch sixteen inches or two feet deep with the ground soft and muddy would cause that condition of the car; that condition might be caused by running over a railroad track. In driving forty or forty-five miles per hour over the crossing he always picked the place to go. The right front wheel of the car went into the ditch first at such an angle that the pressure on it would have a tendency to bind it in to the front instead of outward to the front.

On behalf of appellant, A. F. Bradford testified that he is a civil engineer employed by appellant, is acquainted with the crossing in question and on February

21, 1938, made a plat of it. The crossing was constructed in conformity with Act of February 25, 1913, Acts 1913, p. 328, and was in that condition on the date of the accident. From the crossing to the whistling post, where the wrecked car finally stopped, is a distance of 325 feet. The grade in the highway from a hundred feet on each side of the crossing has a three-inch rise. The space between the rails is filled in with other rails, some broken, and with asphalt. There is not much variation in their heighth and distance apart, the greatest variation from all four corners being about two inches. The angle at which the crossing intersects the highway has nothing to do with its roughness and does not know of any repairs in the crossing since its construction. Pictures of this crossing were introduced in evidence. They were made on a day when the pavement was dry.

Charlie Prentiss testified for appellants he had lived in Hoxie twelve years facing this highway and he counted the cars passing his house one day and there were more than one per minute. Appellee has the reputation of being a fast driver. He has seen others drive as fast as Wright did on this highway. Can't say that the crossing is smooth and has observed cars shake as they went over it.

Willie Rackley testified that he rode with appellee from Hoxie post office to Red Star Service Station in Hoxie (two blocks) and felt unsafe and got out because of fast driving. Saw the Wright car as it hit the crossing and it appeared to be traveling faster than forty or forty-five miles per hour. Appellee's car left the pavement at the street intersection just north of the crossing, the wheels turned to the right and it left the pavement, cut across the ditch toward the railroad track, turned over when it hit the ditch and struck a whistling post and bounced over onto the railroad track bottom side up.

Fred Frew, for appellant, testified that when appellee's car hit the crossing it looked like the back end bounced up about eighteen inches high; could not see the front end; it seemed that appellee missed the highway beyond the crossing and hit the street intersection and turned over a couple of times.

Troy Pace testified that he had lived in Hoxie forty-two years and worked for the express company and drives a taxi; crossed this crossing often at forty miles per hour and it is not dangerous. He is familiar with the humps at the crossing and if you struck them it would cause your car to bounce, otherwise there would be only a vibration. Some folks travel over it faster than he does; he was never thrown off the pavement there.

Appellant earnestly contends here that giving to the testimony of appellee its strongest probative value it falls far short of that substantial character necessary to support a verdict in his favor. Appellant also insists that the trial court erred in giving certain instructions after modifying same. After a careful consideration of the entire record, we have reached the conclusion that appellant's first contention, to the effect that the evidence is not sufficient to support a verdict in appellee's favor, must be sustained. It, therefore, becomes unnecessary to consider the other questions raised by appellant.

Under the law it was the duty of appellant railroad company to exercise ordinary care, to keep and maintain the crossing in question in a reasonably safe condition for ordinary travel and this duty was a continuing one. The trial court in a proper instruction clearly stated this duty of appellant to the jury. The jury was also correctly instructed that any negligent act on the part of appellee, which caused or contributed to his injuries and consequent damage, would be a bar to recovery.

The practically undisputed facts, as reflected by this record, show that appellee, a man thirty-one years of age, twenty-five years a resident of Hoxie, one of its aldermen, entirely familiar with the crossing in question, at about 9:30 a. m. on November 8, 1937, while a steady rain was falling, drove his Ford V8 sedan automobile at an admitted rate of speed of approximately forty-five miles per hour north on concrete highway No. 67 from Hoxie toward Walnut Ridge over the crossing in question, his car at the time being in excellent condition, that as he struck the crossing his car bounced and

some twenty feet after passing over said crossing something seemed to pull his car to the right, he became excited, stepped on the accelerator instead of the brake and at a point about fifty feet from the crossing left the highway, went into a muddy ditch, turned over one and one-half times, ran into a whistling post and finally stopped with his car bottom side up on the railroad track 327 feet from the crossing.

From the photographs in evidence and the testimony of engineers, this crossing was constructed in compliance with the state law and at the time of the accident the depressions in it would not vary more than two to four inches. It is conceded that at least 1,000 cars a day, of all sizes and makes and at speeds up to sixty-five miles per hour, including trucks, passed over this crossing, and that from the date this crossing was constructed in 1926 not a single accident before this one had ever been recorded, except that a truck about a year before turned over at or near this crossing, but the cause of the mishap is not shown. It seems to us that there could be no better proof of the fact that appellant did use that degree of care required of it to keep and maintain this crossing in a reasonably safe condition for the ordinary use of the traveling public than that hundreds of thousands of cars negotiated this crossing safely, at all speeds, up to sixty-five miles per hour, up to the very time the accident in the instant case occurred, and the further fact that appellee's witness, Dink Williams, an engineer, made an examination of the crossing on February 3, 1938, eighty-seven days after the accident, and testified that at that time, to use his own words, "It didn't look like anything new had been done to it previously. There was no sign of any work that had been done on the crossing before." On this date, eighty-seven days subsequent to the accident, it is admitted that at least 87,000 cars had passed over this crossing in absolute safety and without complaint from anyone. Also there is no evidence that any complaint was ever made to the Hoxie municipal officials that this crossing was in a bad condition. We think that

under the evidence in this case appellee's own negligence was the proximate cause of the accident and the injuries resulting therefrom. Unless we are going to hold that the appellant is an insurer there can be no recovery in this case.

In *St. Louis & San Francisco Railroad Company* v. *Dyer,* 87 Ark. 531, 113 S. W. 49, this court states the duty resting upon a railroad company in cases of this character as follows: "The law requires the railroad to use ordinary care to keep the crossing of the public highway over its tracks in a reasonably safe condition for travel and crossing."

And again in *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 118 Ark. 72, 175 S. W. 415, the rule is stated in this language: "It is the duty of every railroad company properly to construct and maintain crossings over all public highways on the line of its road in such a manner that the same shall be safe and convenient to travelers."

In *Missouri Pacific Railroad Company* v. *Hare,* 194 Ark. 441, 108 S. W. 2d 577, this court reiterated that the duty of the railroad company was that as set forth in the Dyer and Smith cases, *supra.* The rule followed by this court is very clearly stated in an Iowa case, that of *Gable* v. *Kreige,* 221 Ia. 852, 267 N. W. 86, 105 L. R. A. 546, as follows: "The company owes only the duty to keep the highway in a reasonably safe condition; to put in as safe condition as highways usually are kept for travel. It is not bound to make the highway more safe than highways usually and ordinarily are made and kept for travel. From our common observation we all know that in nearly every mile of the highways of the country there are to be found depressions or ridges, or other inequalities of surface, which do not interfere with the safe use of the highway when traveled over in the usual and ordinary method, but which are sufficient to jolt vehicles passing over them. The severity of the jolt would depend, of course, largely upon the speed at which the vehicle is moving at the time it passes over. There is no duty resting upon a railway company to keep the surface of the road, at the crossing, so smooth and free from all inequalities that no

jar or jolt will be caused by vehicles passing over the crossing."

In another Iowa case, *Harris* v. *Chicago, M., St. & St. P. Railway Co.,* 278 N. W. 338, the court held: "While the court will take judicial notice of the difference in the usual means of transportation of the horse and buggy days and the present high speed automobiles, there is no duty to maintain a roadway more safe than roadways usually are; it is commonly known that roadways generally contain depressions and ridges sufficient to cause jolts to vehicles passing over them, the severity of the jolt depending upon the speed of the vehicle, and the burden rests on the plaintiff to show that the crossing is not suitable for the present conditions."

Again in *Myers* v. *Chicago, M. & St. Paul Ry. Co.,* 101 Fed. 915, the court said: "As already said, this inequality in the surface of the crossing had existed for years, and its position was such that it must be passed over by every vehicle that was driven over the crossing. It was not shown that it had ever caused, or aided in causing, an accident other than the one in which plaintiff was injured. By itself, it was not a self-operating or efficient cause of the accident."

Under the facts in this case we think it just as probable that the manner in which appellee was driving his car at the time of the accident was the proximate cause of the wreck and consequent damages as that a defect in the crossing might have been the cause. Juries may not base verdicts on speculation or conjecture. This court in the recent case of *Marathon Oil Company* v. *Sowell,* 191 Ark. 865, 88 S. W. 2d 82, said: "If presumptions are to be indulged in, and they are not, it is just as reasonable to presume that the method and manner of driving the truck was the cause of the accident as it is to presume that the defective condition of the truck caused it. It might have been caused by the speed of the truck in the loose gravel. It might have been caused by the negligence of the driver in failing to watch the road and to observe the curve which he was approaching on a down grade. It might have been caused

by any number of reasons as well as the defective condition of the truck. The law, however, does not permit verdicts and judgments to rest upon speculation and conjecture. *National Life & Accident Insurance Co.* v. *Hampton,* 189 Ark. 377, 72 S. W. 2d 543. It is the general rule in this state that in an action for personal injuries caused by the negligent conduct of another, no recovery can be had, in the absence of evidence showing it to have been the proximate cause of the injuries complained of. As stated by Judge HART in *Mays* v. *Ritchie Grocery Co.,* 177 Ark. 35, 5 S. W. 2d 728: 'It is also a general rule in this state that, in order to warrant a finding of negligence was the proximate cause of an injury, it must appear that the injury was the actual and probable consequence of the negligence and that it ought to have been foreseen in the light of attending circumstances.' "

We conclude, therefore, that the trial court erred in refusing to instruct a verdict in favor of appellant at the conclusion of the testimony, and since the case seems to have been fully developed it will be reversed and dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

LITTLE RED RIVER LEVEE DISTRICT NO. 2 *v.* MOORE.

4-5353 126 S. W. 2d 605

Opinion delivered February 6, 1939.

Culbert L. Pearce, for appellant.

Herbert Moody and *Brundidge & Neely,* for appellee.

GRIFFIN SMITH, C. J. May 5, 1936, Little Red River Levee District No. 2, and Judsonia Drainage District of White County, sold to G. D. Moore the merchantable timber on lands of the two districts which overlapped. The lands were acquired by the districts through foreclosures of liens for betterments.

Moore sold the oak timber to J. H. Bailey. The districts executed a joint release in Bailey's favor. The contract between Moore and the districts called for a cash payment of $250. An additional payment of $3,250 was to be made on or before May 21, 1936, and final payment of $3,500 matured on or before November 21, 1936.

Agreement between Moore and the districts recited: "The vendors expressly reserve and retain a vendor's lien on all of said timber to secure the balance due on purchase money; and, if the vendee cuts, removes, or sells merchantable timber from said land to the extent, value and amount of $3,500 before said notes are paid, the excess shall be applied to the satisfaction of the balance due."[1]

[1] A provision of the contract following the direction for application of the "excess" is: "And to the end that the vendors may know the amount of all sales made by the vendee, he shall furnish them duplicate invoices and bills of lading, statements of receipts and disbursements, and on demand shall exhibit his books for inspection and examination by agents and representatives of the vendee."

Another provision is: "All timber not cut and removed by the vendee within five years from the date hereof shall revert to and become the property of the vendors. After cutting the timber the vendee shall surrender one-fifth of the total acreage each year to the vendors, in tracts contiguous to each other, but, if he needs more time for cutting the timber on any specified tract, he may have additional time, not to exceed one year, upon paying state and county taxes due on the particular tracts which he elects to hold over."

Before either of the two larger installments was paid, Moore consummated his deal with Bailey. Acceptance by the district was evidenced in writing.[2] Bailey's payment of $4,500 was made to appellants to apply on the Moore contract.

It is contended by appellants that the contract with Moore gave him a maximum of five years within which to cut and remove the timber, but one-fifth was to be cut each year, and the land from which such timber was cut should be surrendered to the districts. If more time were required, the vendee had the right of an additional year by paying the state and county taxes "on the particular tracts which he elects to hold over."

Appellees contend that, the land being property of the districts, it is not subject to state and county taxes while so held; therefore, they urge, the taxpaying provision of the contract is unenforcible.

The court sustained demurrers to the complaint as to all allegations except one charging appellees with cutting unmerchantable timber. This appeal is from the chancellor's action in holding that as to the contractual matters pressed by appellants, the complaint did not state a cause of action.

It is well settled that where improvement districts acquire lands under authority given to foreclose better-

[2] The "Release of Lien" executed by appellants May 23, 1936, contained the following language: . . . "do hereby grant, sell, quit-claim and release unto the said J. H. Bailey" [here followed description of acreage], and then: "To have and to hold the same unto the said J. H. Bailey, and unto his heirs and assigns, with all the rights and privileges granted unto the said G. D. Moore in the original contract of sale and purchase hereinabove described."

ment liens, such districts hold in their governmental capacities; and, during such possession, state and county taxes are not assessable.[3] But the law is otherwise if the use made of the property after it has been acquired is other than that contemplated by the statute under which the district was created.[4]

First. Time within which the timber was to be removed was five years. But provisions in the contract for surrender of one-fifth of the acreage "each year to the vendors"; or, in the alternative, to exercise the option of procuring additional time not to exceed one year through payment of state and county taxes "due on the particular tracts," mean that the parties contemplated that one-fifth of the timber should be cut each year. Date of the contract was the time from which the privilege should run as to the first one-fifth. To procure additional time, payment of state and county taxes was requisite.

Second. While Bailey's contract contains language expressive of absolute release by the districts, there is a declaration that he, his heirs and assigns, shall hold "with all the rights and privileges granted unto the said G. D. Moore in the original contract of sale and purchase hereinabove described."

The construction placed upon Moore's contract attaches to Bailey.

Moore's partner was D. E. Benton. Moore and Benton sold timber to R. P. Moore and B. Johnson & Sons, but these transactions are not pertinent other than for the purpose of identifying the parties.

The construction we have given the contract seems to have been the one adopted by the parties, for in reply

[3] *Robinson* v. *Indiana & Arkansas Lumber & Mfg. Co.*, 128 Ark. 550, 194 S. W. 870; 3 A. L. R. 1426; *Kelley Trust Company* v. *Lundell Land & Lumber Co.*, 159 Ark. 218, 251 S. W. 680.

[4] Reference is again made to the opinion written by Mr. Justice HART in *Robinson* v. *Indiana & Arkansas Lumber Company*, where an exhaustive review of several cases was made and the distinction drawn between the status of *quasi*-corporations functioning as governmental agencies, and activities of such agencies serving in a proprietary capacity.

to a letter written to Moore by appellants' attorney,[5] there was a reply from Benton, on behalf of the partnership of Moore and Benton, stating that the taxes would be paid.[6]

In *Robinson* v. *Indiana & Arkansas Lumber & Mfg. Co.*, 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426, Mr. Justice HART, after stating that the St. Francis Levee District was a *quasi*-corporation to which certain governmental powers had been delegated, said: "The correctness of the chancellor's holding depends upon whether the lands were acquired by the levee district in its proprietary capacity or in the exercise of its functions as a governmental agency. In the former case the lands would not be exempt and in the latter case they would be exempt, from taxation. The distinction, we think, has been recognized in our previous decisions relating to the question." It was then stated that [the lands] "were not held for any purpose of gain or as an income-producing property," and, therefore, the proprietary attributes did not attach.

By Act No. 146 of 1905,[7] timber sold as such, without conveyance of the land upon which it is grown, is taxable as personal property, and this is true whether such timber has been cut, or not. In the instant case the timber

[5] June 18, 1937, the attorney for appellants wrote G. D. Moore: "By reference to the contract of sale and purchase of timber between the districts and Mr. Moore, dated May 5, 1936, it appears that it is required of the purchaser to surrender one-fifth of the acreage each year or pay an additional sum equal to the state and county taxes. Accordingly, we will thank you to furnish us a correct description of the lands you wish to surrender, or else arrange to pay the required additional amount." [NOTE—This letter was addressed to G. D. Moore and D. E. Benton jointly].

[6] June 22, 1937, Mr. Benton wrote: "In reply to yours of recent date, we have decided to pay the state and county tax on the one-fifth of the timber that G. D. Moore purchased from Little Red River District. I will look after this in the near future." [The letter was written on stationery of Benton & Moore, "D. E. Benton, President; G. D. Moore, Secretary"].

[7] Act 146 of 1905 appears as § 13599 of Pope's Digest: "Hereafter all timber in this state which has been sold separately and apart from the land on which it stands shall be classed as personal property, and shall be subject to taxation as such. And the said timber interests shall be assessed and the taxes collected thereon in the county where said timber is located."

in question became personal property for purposes of taxation when the contract was signed in May, 1936.

ON REHEARING

The improvement districts sold all the merchantable timber to Moore. The contract of sale required him to surrender one-fifth of the acreage each year, or as consideration for holding an additional year, to pay the state and county taxes due on each one-fifth so held over. With consent of the districts, Moore sold the oak timber to Bailey. Bailey received from the districts a release of all claims for any part of the purchase money remaining unpaid by Moore as against the oak timber. Thereafter the districts could enforce payment of unpaid purchase money due by Moore only against the timber other than oak. But the oak had been purchased by Bailey ". . . with all the rights and privileges granted unto the said G. D. Moore in the original contract of sale and purchase."

What *were* these rights and privileges? They included the right to cut and remove the timber within five years—one-fifth each year—and the land from which such one-fifth was annually cut should be surrendered to the districts. Additional cutting time was provided for, but this extension could be secured only by paying "the state and county taxes due" on the lands which otherwise would have reverted. No extensions beyond these times were given Bailey. The districts had only released, as against the oak timber, the right to enforce payment of the balance due on purchase price of all the timber. While the oak was fully paid for, the right to cut and remove it was referable to Moore's contract.

The contract to pay state and county taxes "due" upon election of the purchaser to hold the several one-fifths for an additional year was entered into under the mistaken belief that the districts would be required to pay such taxes, or that they would be cumulative charges against purchasers of the fee if and when the districts sold. Hence, the contract required the purchaser to pay the "state and county taxes due" upon any land which might have been, but which through election had not been, surrendered.

It is true the law provides that upon sale of timber it shall be classed as personal property and shall be subject to taxation as such.[8] But it does not appear that the timber was so assessed. When it shall be assesed the purchasers (because they are owners) must pay such taxes. But they must pay something more if they elect not to surrender a fifth of the land each year, as the original contract of sale provides.

It is also true, as appellees insist, that state and county taxes are not payable upon lands owned by the improvement districts which they acquired in consequence of sales for delinquent taxes. This is true because the districts hold the lands in their governmental capacities, and while so owned they are not subject to state and county taxes; nor are such taxes cumulative and chargeable to subsequent purchasers.

In view of the mutual mistakes of the parties as to the law governing payment of the state and county taxes, there was a failure of consideration for that part of the contract relating to extension of time for cutting the timber. But the contract is severable. The timber might have been cut one-fifth each year, without time grants. While the districts, had they not insisted upon collection of the tax equivalents, could not have been compelled to extend the time, they may not deny the privilege, in view of their insistence that the money be paid to them. Nor can the timber purchasers be required to make the payments. In the alternative, however, they should have the right to make the tender from time to time, and if they elect so to do, the districts will be required to accept.

There may be practical difficulties in determining what proportions of the tax equivalents should be paid by Bailey, who owns only the oak timber, and what parts should be paid by Moore, who owns the remainder; but this is a problem they must adjust.

The decree is reversed and the cause remanded, with directions to allow Moore and Bailey, or either of them, six months from the date of this opinion in which to pay the tax equivalents on so much of the land as was subject to the holdover privilege of the contract. It is so ordered.

[8] Pope's Digest, § 13599.

BROOKS *v.* HARRISON.

4-5397 125 S. W. 2d 813

Opinion delivered March 6, 1939.

[redacted]

Gordon E. Young, for appellant.

F. D. Goza, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant and the Southern Ice Company, Inc., to recover damages in the sum of $1,200 for the breach of an alleged contract they made with him to furnish him with all the ice needed to supply his customers on his ice route out from Malvern with ice from July 30, 1937, to the end of the season in November, 1937.

Appellant filed a motion to require appellee to make his complaint more specific by stating whether the alleged contract was oral or in writing, the date and essential terms thereof, the price to be paid for ice and the trade territory, and also that he be required to state the basis of computation used by him to determine the amount of his damages.

In response to this motion the appellee filed an amendment to the complaint stating that the contract was entered into on February 1, 1937, that it was an oral contract and that the price to be paid for the ice was 25 cents

a hundred and the duration of the contract was until about November 1, 1937. The court overruled that part of the motion asking that he state the basis he used in the computation made by him in arriving at the amount of his damages, over the objection and exception of appellant.

The appellant and his co-defendant filed separate answers to the complaint denying the material allegations therein.

The cause was heard upon the pleadings and testimony, at the conclusion of which the Southern Ice Company, Inc., moved for an instructed verdict in its favor, which motion was granted and the Southern Ice Company, Inc., was discharged as a party defendant in the cause.

Appellant also moved for a peremptory instruction in his favor which was denied, over his objection and exception.

The cause was then submitted to the jury under oral instructions of the court which resulted in a verdict of $500 against appellant, from which is this appeal.

Appellant contends for a reversal of the judgment upon the following grounds:

First, the court erred in not instructing a verdict for defendant (appellant).

Second, the court erred in failing to require the appellee to make his complaint more definite and specific at appellant's request.

Third, the court erred in refusing to give to the jury as law of the case appellant's offered instructions numbered 2, 4, 5, 7, and 8.

(1) It is argued that the court should have instructed a verdict for appellant on the ground that the evidence was insufficient to show that a contract existed between him and appellee with reference to furnishing appellee ice during the season beginning February 1, 1937, and ending about November 1, 1937. It is said that appellee was so uncertain about the contract himself that he brought the suit against both the Southern Ice Company, Inc., and appellant instead of bringing it against appellant alone. It is true appellee testified that he had

been buying ice for a number of years from the Southern Ice Company's distributing plants at Malvern and Arkadelphia which had been managed during that time by Stanley Brooks. It is also true that he testified that he saw a Mr. Record who was the representative of the Southern Ice Company, Inc., in Little Rock and that Record told him to see Stanley Brooks about getting the ice.

But as we read his evidence he finally stated that he had no direct contract with the Southern Ice Company, Inc., and that his contract was made with appellant, Stanley Brooks. He testified, in substance, that he had been selling ice for ten or twelve years furnishing ice that he had purchased from Brooks to the territory around Malvern and Arkadelphia and had established a regular route for that purpose, but that he had had some financial troubles and did not have a truck when he approached Brooks in February, 1937, to engage ice for the season; that he was unable to purchase a truck and so told Brooks and was advised by Brooks that it was going to be a good year and for him to go ahead and buy the truck and take ice from him during the season; that he followed his advice and purchased a truck; that Brooks agreed to let him have all the ice he would need to furnish that territory at 25 cents a hundred; that he was furnishing everything himself and selling the ice he purchased at 60 cents a hundred and that he was selling at an average of six thousand pounds a day and making a gross profit out of it of $21 a day or a net profit of $15 a day; that in order to get some help for delivery in this territory he sold a portion of his territory to the Deere boys and while he did not get permission from Brooks to do so, Brooks acquiesced in it and let the Deere boys have ice on the same basis that he was furnishing it to him; that a Mr. Phillips established an ice factory at Sheridan and was encroaching at times upon appellee's territory and at the suggestion of Mr. Brooks he bought several loads of ice from Phillips; that Phillips and Brooks got into a dispute about the amount of ice he was to purchase from each which resulted in them coming to an agreement to refuse to sell ice to appellee to supply the territory from

and after July 20, 1937; that when Brooks breached the contract with him he got a little ice from the Pine Bluff factory, but it went out of business and Brooks put on trucks and furnished ice to the territory thereafter to the exclusion of appellee.

Appellee introduced a witness by the name of Jack Naylor who was present when he made his contract with Brooks to furnish him ice for his territory in April, 1937, and heard Brooks advise him to get the truck and go ahead for the season of 1937. He also testified that he had worked on the route for about nine years and that appellee could have sold between five thousand and eight thousand pounds of ice a day from and after July 20, 1937. There was no dispute that appellee got the truck in accordance with Brooks' advice and that he actually operated in the territory from February until July 20, 1937, at which time Brooks refused to sell him ice from the Malvern or Arkadelphia plants and Phillips refused to sell him any ice after that time from the Sheridan plant.

Appellant testified that he sold about six thousand pounds of ice each day after the ice season opened up and would have sold that amount from July 20, 1937, until about November, 1937, and would have made a net profit thereon of about $15 a day. He was corroborated in this testimony by Leon Naylor and his sons who assisted him in delivering ice in this territory.

Mr. Brooks denied making any definite contract with appellee to furnish him all the ice he needed during the season beginning in February and ending in November and denied that he had entered into any collusion with Phillips not to sell appellee ice on and after July 20, 1937, but admitted that they refused to sell him ice because appellee and Phillips could not get along and because he was under no obligation by contract to furnish appellee all the ice he might need for any definite time.

We think there is ample evidence of a substantial nature in the record from which a jury might find that appellee did enter into a contract with appellant to furnish him the ice he might need to supply his patrons in the territory around about Malvern and Arkadelphia at a

fixed price of 25 cents per hundred during the season beginning in February and ending in November of 1937; and that appellant breached the contract to the damage of appellee in at least the sum of $500 if not more. We, therefore, think the verdict of the jury is supported by substantial evidence.

(2) Appellant next contends for a reversal of the judgment because the trial court did not require appellee to set out in his complaint the method by which he arrived at the amount of the damages he claimed. He did set out the date of the contract, the terms thereof, the expiration of the contract and the amount he was to pay for the ice, and we do not think on a motion to make more definite and certain it was necessary for him to set out the method by which he arrived at the amount of his damages. Under our civil procedure statutes it is required by § 1409 of Pope's Digest, among other things, that a plaintiff shall in ordinary and concise language, without repetition, state the facts constituting his cause of action. We think the complaint in this case substantially met that requirement and that the court did not commit error in refusing to require appellant to set out the particular method he used in figuring and setting out the figures in arriving at the amount of damages claimed by him. To do so would require him to plead his evidence.

(3) At the conclusion of the testimony the court instructed the jury orally and after a careful reading of the instructions given by him we have concluded that the court correctly instructed the jury on the issues involved.

Appellant requested a number of written instructions, but the applicable ones to the facts in the case were fully covered by the oral instructions of the court.

The court did not err in refusing to give the instructions numbered 2, 4, 5, 7, and 8.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* BLACKMAN.

4-5391 126 S. W. 2d 285

Opinion delivered March 6, 1939.

R. E. Wiley and *Richard M. Ryan,* for appellant.

Glover & Glover, for appellee.

SMITH, J. On July 18, 1937, Charlie Blackman was a resident of Arkadelphia, Arkansas, but for five months prior to that date had been employed by the Missouri Pacific Railroad Company in track work—replacing old with new ties—near Poplar Bluff, in the state of Missouri. A number of the other members of the crew with whom he worked lived in or near Arkadelphia, and it was his and their custom to spend the week-ends at their homes in this state. They were given an identification slip which enabled them to travel on the trains of the railroad company without payment of fare from Poplar Bluff to their homes, and return.

On the date above mentioned Blackman and thirteen other members of his crew were completing such a trip.

They had been to Arkadelphia, and were returning to their employment, but were not engaged in performing any service for the railroad company while doing so. The identification slip on which they were traveling reads as follows:

"Missouri Pacific Railroad Company

"Identification slip No. 24942

"When properly signed will be authority for conductors and train auditors to pass Jack Strong and 13 men from Gurdon, Ark., (a station south of Arkadelphia, where some of the crew resided) to Poplar Bluff if used on or before July 18, 1937, upon presentation, at starting point, of time pass No. B1128.

"Date: July 18, 1937

"Honored on train No. 18.

"This form must be used in accordance with instructions contained in pass circular.

"Signed: B. B. Rushing.

"Title (Illegible)."

On the reverse side of this slip the following matter was printed:

"The names of men to be carried must be shown below before boarding train:

"The name of each person to be carried is given above. Each person named is an employee of this railroad and is traveling on railroad business."

The name of Jack Strong is written on a line above the words: "Person holding pass sign here." There appears also on the reverse side of this "Identification slip" spaces for 18 names, and in 13 of these spaces names of employees were written, and in the 10th space appeared the name of Charlie Blackman.

Presumably a similar "Identification slip" had been used for the trip from Poplar Bluff to Arkadelphia. Before the completion of the return trip to Poplar Bluff Blackman received an injury which he and others testified was caused by the negligent operation of the train. Just where the accident occurred is not shown. Blackman recovered judgment for $750 to compensate his injury, and from that judgment is this appeal.

The point was raised in the motion for a new trial, but is not seriously argued in the briefs on this appeal, that the testimony was not sufficient to support the finding that the railroad company had been negligent in the operation of the train. However, upon this issue we are of opinion that the testimony was sufficient to support the finding that the railroad company had negligently operated the train, and that appellee's injury resulted from this negligence.

Reversal of the judgment is asked upon the ground that this transportation was free, and was used upon condition that the employees transported had assumed all risk of accident and injury and had released the carrier from all liability therefor. There was offered in evidence an annual pass expiring December 31, 1937, which had been issued to Rushing, the foreman, which contained this waiver of liability, but no such provision appeared on the "Identification Slip" on which Blackman traveled without payment of fare.

The train conductor read into the record the matter printed on the reverse side of the pass issued to Rushing, it being there recited that the holder of the pass "hereby assumes for said person and dependants all risk of accident and injury to person, and all damage to or loss of property, and releases the carrier from all liability therefor." The conductor was asked: "Q. When those red slips (identification slip, copied above) are presented to you, with a pass, you honor them?" and he answered: "A. Yes, sir."

We understand from this testimony that when Jack Strong, who had possession of the "identification slip," presented the slip to the conductor, he also exhibited the pass issued to Rushing, the foreman, who had issued the "identification slip." The insistence, as we understand the argument, is that this waiver of liability for a negligent injury appearing on the pass must be construed as applying also to the "identification slip," referred to by witnesses as a "group trip pass."

Assuming this to be true, the further and principal insistence for the reversal of the judgment is to this ef-

fect. Blackman was making an interstate trip. He was traveling on a free pass. The railroad company had the right, in issuing a pass for such a trip, to exempt itself from liability for a negligent injury to the pass holder. In this connection, it may be said that no contention is made that the railroad company was guilty of gross negligence or of willful or wanton conduct in the operation of the train. On the contrary, the testimony barely suffices to show any negligence to support the recovery.

For a reversal of the judgment counsel for the railroad company rely chiefly on the case of *Kansas City Southern Ry. Co.* v. *Van Zant,* 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348, and other cases to the same effect are cited.

In the Van Zant Case the facts were that an employee of the defendant railway company obtained from his employer a free pass for his mother over defendant's railroad, and while riding on this pass the employee's mother was injured. The pass had printed thereon the provisions that " . . . The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage." The Supreme Court of Missouri held (289 Mo. 163, 232 S. W. 696), to quote a headnote in that case, that "The Hepburn act, fixing a penalty against a common carrier which issues an interstate free pass, 'except to employees and their families,' and a like penalty against any person who uses such pass, did not attempt to cover the field of damages for personal injuries negligently inflicted by the carrier upon a person riding on said pass, but the sole purpose of that part of the act was to prohibit the issuance of free transportation by interstate carriers. It did not prohibit the issuance of an interstate free pass obtained by a railroad employee for his mother, a member of his family, nor prevent her from recovering damages for personal injuries received by her, in this state, while riding, in an interstate journey, on said pass."

The Hepburn act, above referred to, as amended in numerous respects, appears in Title 49, Chapter Transportation, United States Code Annotated, pages 10, *et*

seq. The portion of that act relevant to the Van Zant Case and to this reads as follows: "(7) Free transportation for passengers prohibited; exceptions; penalty. No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families . . . ; Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families . . . ; provided further, that the term 'employees,' as used in this paragraph shall include . . . ex-employees traveling for the purpose of entering the service of any such common carrier; . . ."

An appeal to the Supreme Court of the United States was prosecuted from the decision in this Van Zant Case, and that decision was reversed in an opinion appearing in 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348, it being held by the Supreme Court of the United States, to quote the headnotes in that case, that "1. By forbidding common carriers engaged in interstate commerce to issue free passes for interstate journeys, except to specified classes of persons (Hepburn Act, 1906) Congress took over the subject to the exclusion of state laws, not only as to what passes may be issued and used, but also as to their limitations, conditions and effect upon the rights and responsibilities of the passenger and railway company, respectively. 2. A condition affixed to a free pass, issued under the Hepburn Act, that the person accepting and using it assumes all the risk of accident and personal injury, is valid."

Subsequent to this opinion by the Supreme Court of the United States in the Van Zant Case, the question again arose in the state of Missouri, where, in the opinion in the case of *Dunn* v. *Alton Railroad Co.,* 88 S. W. 2d 224, it was said: "It is now no longer open to question but that the entire subject of free interstate transportation has been taken over by Congress to the exclusion of all state laws and policies, and that the stipulation in a

free interstate pass releasing the carrier from liability, being a part of the pass itself, is valid and enforceable."

Upon the subject of "limitation of liability" in the transportation of interstate passengers, there appears an extended note, citing many cases, beginning at page 85 of Title 49, USCA, and the annotator makes the statement that "The state courts are required to, and, since the determination of the federal Supreme Court in the above cases, do, follow the above rule," that is, that the carrier may exempt itself from liability to the user of a free pass in interstate transportation against injury resulting from its negligence.

It was said, however, in the case of *New York Central Railroad Co.* v. *Mahoney,* 252 U. S. 152, 40 S. Ct. 287, 64 L. Ed. 502, 9 A. L. R. 496, that a stipulation on a free pass purporting to release the carrier from all liability for negligence is ineffective where injury to the passenger results from the willful and wanton negligence of the carrier's servants; but, as we have said, there is no contention here that the negligence of the railroad company in the instant case was willful or wanton or gross.

This court had held, in the case of *St. L., I. M. & So. Ry. Co.* v. *Pitcock,* 82 Ark. 441, 101 S. W. 725, 118 Am. St. Rep. 84, 12 Ann. Cas. 582, and in the case of *Memphis, D. & G. Ry. Co.* v. *Steel,* 108 Ark. 14, 156 S. W. 182, Ann. Cas. 1915B., 198, as had many other courts, that this exemption from liability was contrary to public policy, and was void for that reason. That holding, as applied to interstate transportation, must now be modified to conform to the opinions of the Supreme Court of the United States.

But it does not follow, on that account, that the judgment here appealed from must be reversed. In the first place, the "identification slip," copied above, recites that each of the persons named thereon is an employee "of this railroad and is traveling on railroad business." And in the second place there was no attempt, in this "identification slip," to exempt the railroad company from liability for injury resulting from its negligence. The railroad company had determined

that these employees were traveling on railroad business, and had not attempted to exempt itself from liability for injury to them while so traveling as authorized by the "identification slip."

The Georgia Court of Appeals, in the case of *Charleston & Western Carolina Ry. Co.* v. *Thompson,* 13 Ga. 528, 80 S. E. 1097, held, to quote a headnote in that case: "As a general rule, a stipulation in a free pass given by a carrier, to the effect that the person who accepts it assumes all risk of injury in transportation, is enforceable; and as to a passenger who has accepted transportation under such a pass a carrier is liable only for injuries resulting from wantonness or willful negligence; but an exception to this rule is presented in the provisions of the 'Hepburn Act' (Act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp., 1911, p. 1286, 49 USCA., § 1 (7) which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be regarded as a part of the consideration paid for the services of the employees, and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that if the plaintiff (the wife of an employee) was traveling on a free pass, she would not be entitled to recover."

This opinion was reversed upon appeal to the Supreme Court of the United States, in an opinion by Justice Holmes. 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476. The headnotes in that case read as follows:

"Under the free pass provision of the Hepburn Act of June 29, 1906, 49 USCA, § 1 (7), a free pass issued by a railroad company between interstate points to a member of the family of an employee is gratuitous and not in consideration of services of the employee.

"As a pass issued to a member of the family of an employee of a railroad company is free under the provisions of the Hepburn Act permitting it to be issued, the stipulations contained in it and on which it is ac-

cepted, including one exempting the company from liability in case of injury, are valid.

"Quaere whether under § 6 of the Act to Regulate Commerce, an interstate carrier can issue a pass in consideration of services."

At § 973 of the chapter on Carriers, 10 Am. Jur., page 38, it is said: "Accordingly, where a person agrees with a carrier to enter its employ at a certain place, and in consideration of the interests of both a free pass is given to such place, and in traveling on the carrier's road to the place of employment the person is injured by the negligence of the carrier's agents, such person must be regarded as a passenger for hire and not as an employee, and the carrier is liable for damages caused the passenger by its negligence."

In the case of *Tharp* v. *Central of Georgia Ry Co.*, 31 Ga. App. 598, 121 S. E. 592, it was held by the Court of Appeals of Georgia that an employee of a railroad company, while being carried to and from his place of work as a part of the contract of service was a servant, and not a passenger, and that his status as such was not altered by the fact that his right to travel under his contract of service was evidenced by a free pass containing a stipulation, printed thereon and assented to by him, that it had been given as a gratuity and upon the condition that the servant releases the company from all liability for injuries which may be received by him as a result of the company's negligence while using the pass. And, further, that since such an employee is not a person riding gratuitously or receiving transportation as a favor and without consideration, the company could not defend upon the ground that the employee was riding upon a free pass. It is true that in that case the employee was riding upon an intrastate pass from one point to another both in the state of Georgia; but the right of the employee to recover was not sustained on that account, but upon the ground that the employee was not being gratuitously carried. This opinion was delivered ten years after the Supreme Court of the United States, in the Charleston & Western Carolina Ry. Co. Case, *supra,* had reversed

the Georgia court, and six years after the Georgia court in the case of *Wright* v. *Central of Georgia Ry. Co.*, 18 Ga. App. 290, 89 S. E. 457, had given full recognition to the authority of this Charleston & Western Carolina Ry. Co. Case.

Here, the railroad company recognized and stated the fact to be, in the "identification slip," on which Blackman was traveling, that he was on company business at the time of his injury, and it did not attempt to advise him that he was traveling at his own risk. The "identification slip" had he read it would not have advised him such a contention would be made if he sustained an injury.

We conclude, therefore, that Blackman's right to recover damages to compensate his injury was not defeated by the fact that he paid the conductor no fare, and the judgment will be affirmed.

DAVIS *v.* BURFORD.

4-5359 125 S. W. 2d 789

Opinion delivered March 6, 1939.

Saye & Saye, for appellant.

Shaver, Shaver & Williams, A. L. Burford, Alex G. Sanderson, Jr., Bert B. Larey, Willis B. Smith and *Ben E. Carter,* for appellees.

McHaney, J. This litigation involves the title to 58 acres of land described as follows: Northeast quarter of the northeast quarter and east one-half of the southeast quarter of the northeast quarter, section 11, township 20 south, range 28 west except two acres out of the first described tract, in Miller county, Arkansas, which has lately become valuable by reason of the discovery of oil. Appellants brought this action against appellees to remove certain clouds from, and to quiet their title to, the above described land. Appellants alleged title in themselves, in an unbroken chain, from the government. They sought to cancel, as a cloud on their title, an oil and gas lease on said land executed by appellee, A. J. Cross, to appellees, Giles and Juan, dated August 21, 1935, and an assignment thereof by them to appellee, Burford, dated August 28, 1935, and numerous conveyances by Cross and other appellees of royalty and other interests therein. Appellees defended on many grounds, some of which will be hereafter discussed, but principally on the ground that appellants are not now and never have been the owners of said lands, and that a certain deed from Cross to E. J. Crain, and another deed from Crain to appellant Davis, erroneously included said land by mutual mistake. Trial resulted in a decree for appellees, and this appeal followed.

The history of the title is that on January 20, 1915, appellee Cross purchased from B. F. Goodson 240 acres of land, same being east one-half of northeast, southwest, northeast, and southeast northwest of 11, and west one-half northwest of 12—20 south, 28 west, which, of course, includes the land in controversy. On October 30, 1916, Cross and wife undertook to sell E. J. Crain a tract of the same land he had purchased from Goodson, "containing in all one hundred acres more or less—all in section 11, township 20, range 28 west," as recited in the deed, but the justice of the peace scrivener described 180 acres as follows: East one-half, northeast, southwest, northeast, southeast northwest, and 20 acres off the west one-half northwest. What Cross intended to convey and what Crain intended to purchase was 100 acres described as follows: West one-half southeast northeast, southwest northeast, and southeast northwest same section, township and range. That this was a mistake and was mutual is evidenced by the fact as recited in the deed that only one hundred acres were conveyed, and by the further fact that on September 17, 1924, upon discovering the error in the deed of Cross to them, Crain and wife quitclaimed the land in controversy as also the west one-half northwest of section 12, except 3 acres in the northeast corner, back to Cross, but the scrivener failed to mention the township and range, and misspelled Goodson's name in the 3-acre exception. This exception is described in said quitclaim deed as follows: "except three acres in the northeast corner of the northwest quarter of the northwest quarter, said section (12), same being one acre wide east and west by three acres long north and south, heretofore sold J. H. Westbrook by B. F. Hoodson." The record shows that, by deed of July 19, 1910, B. F. Goodson, not B. F. *Hoodson,* and wife sold and conveyed to J. H. Westbrook three acres of land "in the northeast corner of the northwest quarter of the northwest quarter of section 12 in Township 20 south, range 28 west, containing 3 acres of land; the above land lying north and south, 3 acres long and east and west 1 acre wide."

On November 30, 1918, E. J. Crain and wife executed and delivered to appellant Davis a warranty deed to the "east one-half of the northeast quarter and the southwest quarter of northeast quarter of the northwest quarter of section eleven (11), and twenty (20) acres off of the west one-half (½) of the northwest quarter, containing in all one hundred acres more or less, all in section eleven (11), township 20, range 28 west." It will be noted that this description covers 110 acres, and that neither tract is adjacent to the other. Although made on November 30, 1918, this deed was not filed for record until August 14, 1937. But on January 20, 1920, appellant, S. B. Davis, realizing that his deed did not cover the 100 acres of land he intended to buy, secured a quitclaim deed from B. F. Goodson and wife, appellee Cross, and E. J. Crain and wife to this land: west one-half southeast northeast, southwest northeast, and southeast northwest 11-20-28, and on February 12, 1920, conveyed same by this correct description to K. K. Dickson and J. T. Davis. Under this latter description, E. J. Crain assessed and paid the taxes for 1916 and 1917. Under it appellant Davis assessed and paid the taxes for 1918 and 1919, and under it said Dickson and J. T. Davis and their grantees have assessed and paid the taxes for 1920 and subsequent years. None of them have ever paid taxes on any property in section 11-20-28, except the 100 acres described in the quitclaim deed last above mentioned. The erroneous deed from Crain to appellant Davis is further shown to have been a mutual mistake by the fact that the ten-acre tract therein described (southwest northeast northwest) belonged to H. J. Mitchell, and on January 25, 1938, said Davis quitclaimed it back to said Mitchell.

Because of the error of omitting the township and range from the description in the deed from Crain and wife to Cross of September 17, 1924, Mr. Crain having died in the meantime, his widow and heirs-at-law made and delivered to Cross their quitclaim deed in which they correctly described the land as the northeast northeast, except 2 acres in the northeast corner, and the east one-

half of southeast northeast, 11-20-28, and this deed was recorded July 20, 1937, before appellant Davis recorded his erroneous deed and before Cross had any information that Davis held such a deed.

It is further sufficiently established by the evidence that appellee Cross has been in the actual possession of the land in controversy since January, 1915, the date of his purchase from B. F. Goodson, and that at no time, prior to the filing of this suit, did appellant Davis or any other person claim to own said property or any interest therein, but on the contrary Cross had his barn and garden thereon and several acres of this land in cultivation at the time of his erroneous deed to Crain, and the barn is still there. He cultivated the cleared land for several years himself and for some other years through tenants, cut and sold timber therefrom, fenced it, paid the taxes thereon from 1915 to the present time, and has exercised all the acts of ownership and control over said land that the ordinary landowner exercises, and at no time did appellant Davis or any one else question his right to do so or in any way claim title thereto. On examination by the court, he testified he didn't know how many acres he was buying when he got his deed from Crain, did not know what part of the Cross place he was getting; didn't know how much land there was in the Cross tract, and doesn't know yet.

We think this evidence is sufficient to show that there was a mutual mistake in the deed from Cross to Crain, and in the deed from Crain to appellant Davis, and that neither Crain nor said Davis intended to buy from Cross, and that Cross did not intend to convey any of the land in controversy. We are of the further opinion that, because of said mutual mistake in each of said deeds, Crain and appellant Davis acquired no title to said land. But, if it could be said that they did, Crain's deed back to Cross of September 17, 1924, which was duly filed for record January 12, 1925, at a time when the deed from Crain to Davis was not of record, and at a time when Cross had no actual knowledge of the deed from Crain to Davis, effectively placed the title back in

Cross, who should be regarded as an innocent purchaser for value without notice of any claim of said Davis, provided, of course, the omission of the township and range in said deed is not fatal. We do not think it is fatal for the reason the exception in the deed supplied this defect. The rule is that a deed is not to be held void for uncertainty if by any reasonable construction it can be made available. *Varner* v. *Rice,* 44 Ark. 236; *Walker, et al.* v. *David, et al.,* 68 Ark. 544, 60 S. W. 418. In *Lemon* v. *Tanner,* 173 Ark. 414, 292 S. W. 668, we said: "The rule is that a description of land is sufficient if the land can be located by evidence *aliunde* from the description itself. If the descriptive words themselves furnish a key for identifying the land conveyed, nothing more is required." Citing *Tolle* v. *Curley,* 159 Ark. 175, 251 S. W. 377. See, also, *Snyder* v. *Bridewell,* 167 Ark. 8, 267 S. W. 561. Now, the exception in this deed correctly gives the township and range in which the excepted land is located, and it necessarily follows that the land conveyed must be in the same township and range.

Our statute, § 1847 of Pope's Digest, provides that no deed of real estate shall be valid against a subsequent purchaser for a valuable consideration without actual notice, unless such deed shall be filed for record. There is no constructive notice of a deed until it is filed for record, § 1846 *Id.* In *Penrose* v. *Dougherty,* 70 Ark. 256, 67 S. W. 398, it was held that, "where land is conveyed to two grantees by different deeds executed on the same day, but the evidence does not show which was first delivered, or that either grantee had notice of the other's deed, the grantee who first placed his deed on record, acquired the superior title" under § 1847 of Pope's Digest, quoting a syllabus. It was also held in *McDonald* v. *Norton,* 123 Ark. 473, 185 S. W. 791, 1199, that an unrecorded deed is not constructive notice to a subsequent *bona fide* purchaser or mortgagee. Therefore, Cross being a *bona fide* purchaser from Crain to the land in controversy and having neither actual nor constructive notice of Davis' deed from Crain, and having recorded his deed first, acquired the superior title.

We are also of the opinion that appellants cannot recover because of the adverse possession of Cross during all the years from 1915 to the present time, even assuming that his conveyance to Crain was valid at the time, which, as we have shown, it was not. While it is true, as we have held, that where the grantor of land remains in possession, there is a presumption that he holds in subordination to his grantee, it is also true that such presumption fades away with the lapse of time where his occupancy is unexplained. *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; *Tegarden* v. *Hurst,* 123 Ark. 354, 185 S. W. 463; *Shelby* v. *Shelby,* 182 Ark. 881, 32 S. W. 2d 1071. In the Tegarden Case 14 years' possession was held sufficient, and in the Shelby Case 17 years. Here Cross held possession for 23 year and is still in possession.

Other questions are argued in the splendid briefs of learned counsel on both sides, but we think it unnecessary to discuss them, as those above mentioned are decisive of the case.

The decree of the court is correct, and must be affirmed.

DOVER *v.* HENDERSON.

4-5402 125 S. W. 2d 798

Opinion delivered March 6, 1939.

J. F. Quillin, for appellant.

Gordon B. Carlton, for appellee.

HOLT, J. On February 3, 1937, appellees filed suit for unlawful detainer in the Polk circuit court against appellant, L. M. Dover, and for possession of three lots in the town of Hatfield, which they claimed to own, and for rents. Appellant filed answer and after issues joined the cause was submitted to the court and on April 27, 1937, judgment was rendered in favor of appellees, awarding them possession of the property, but held that no sufficient showing was made to entitle them to rents. From this judgment, appellant Dover, in apt time, perfected his appeal to this court, and on the 3rd day of May, 1937, executed a supersedeas bond, with himself as principal and Ober Rowe, D. O. Dover and Dr. C. A. Campbell as sureties. His appeal was prosecuted to this court and the judgment of the trial court was affirmed on November 22, 1937, and is reported in 195 Ark. 496.

Upon the return and filing of a mandate with the clerk of the Polk circuit court, appellees filed a motion in the Polk circuit court for a summary judgment against appellants, Dover as principal and Ober Rowe, D. O. Dover and Dr. C. A. Campbell, as sureties on the supersedeas bond,

for rents on the property in question, in the sum of $324.70, which had accumulated during the appeal to this court, covering the time appellees had been deprived of the possession and use of said property, pending said appeal, from April 27, 1937, to February 25, 1938.

Appellants filed their joint response to the motion denying the right of appellees to recover for rents and damages, and pleading as a complete bar to the action, on the bond, both that the bond did not bind appellants for the payment of rents, and that all questions raised in the motion, except that of physical damage to the property, were *res adjudicata*. They further pleaded that the bond was not in statutory form and offered that as another defense to summary judgment thereon. Upon the petition, response, evidence of witnesses introduced by both appellants and appellees, the original judgment of the trial court and its findings of law and fact in the first trial, the court entered judgment in favor of appellees and against appellants in the sum of $324.70 for the rents accruing since the judgment in the original suit rendered on April 27, 1937, up to February 25, 1938, the latter date being the time appellants surrendered possession of the property in question to appellees. From this judgment comes this appeal.

Omitting formal parts, the motion for summary judgment filed by appellees is as follows. "Come the plaintiffs, Talmadge Henderson and Vivian Henderson, and move the court for judgment against the defendant, L. M. Dover, and the sureties on his supersedeas bond, Ober Rowe, D. O. Dover and Dr. C. A. Campbell, and each of them, for cause state: That on the 23rd day of April, 1937, plaintiffs were awarded a writ of possession against the defendant, L. M. Dover, by an order of this court for possession of lots 4, 5 and 6 in block 5, of the town of Hatfield, in the above-styled action. That the defendant prayed and was granted an appeal to the Supreme Court of Arkansas from said order and judgment of this court, and on the 3rd day of May, 1937, the defendant, L. M. Dover, and Ober Rowe, D. O. Dover and Dr. C. A. Campbell executed a supersedeas bond

wherein it was provided that they would pay all rentals and damages to said plaintiffs during the pendency of the appeal, of which appellees, plaintiffs herein, were kept out of possession by reason of said appeal. That said supersedeas bond was duly filed with the clerk of this court on the 3rd day of May, 1937, and a copy of said bond is attached hereto, marked Exhibit "A", and made a part of this motion. That thereafter the defendant perfected his appeal to the Supreme Court, and on the 31st day of January, 1938, the date when said judgment was affirmed, and thereafter, until the 25th day of February, 1938, the defendant kept plaintiffs out of possession of the said property and retained the use and possession of said property himself. That during said period of time the defendant failed, refused and neglected to pay the rental on said property and still continues to refuse payment of said rental. That the customary and proper rental to which plaintiffs are entitled for said period of time is one cent per gallon of the gasoline sold by said defendant at his station on said property, and that during said period the defendant sold 32,470 gallons of gasoline, and the rental thereon amounts to the sum of $324.70 and $100 damages to building. That the plaintiffs are entitled to a judgment against the defendant, L. M. Dover, and the sureties on said supersedeas bond, Ober Rowe, D. O. Dover and Dr. C. A. Campbell, and each of them, in the sum of $324.70 as reasonable rental and damages for the use of said property and withholding the same from the plaintiffs. Wherefore plaintiffs ask for judgment against the said L. M. Dover, Ober Rowe, D. O. Dover and Dr. C. A. Campbell in the sum of $324.70 as rental and $100 damages for the use of the property herein described for the period set out and for the further sum $15 which was the cost of printing of plaintiffs' briefs in the Supreme Court in this cause."

The material portions of the supersedeas bond, copy of which was made a part of this motion as Exhibit "A", are as follows: . . . "Now, L. M. Dover, as principal, and Ober Rowe, D. O. Dover and Dr. C. A.

Campbell, as sureties, hereby covenant with the said appellees that the said appellant will pay to the appellees all costs and damages that may be adjudged against the appellant on the appeal, . . . and shall perform the judgment of the court appealed from . . . and all damages to property during the pendency of the appeal of which the appellees are kept out of possession by reason of the appeal."

Appellants in their joint response to this motion allege as follows: "They deny that said bond bound the respondents to pay all rents and damages to said plaintiffs during the pendency of the appeal; they state that, in the complaint filed in this action, the plaintiffs ask judgment against the defendant, L. M. Dover, for rent upon the property involved herein, the sum prayed for being cumulative as such rents might accrue; that when judgment was rendered in this cause against the said defendant on April 23, 1937, the court specifically found that the plaintiffs were not entitled to rent upon said property, as is shown by the court's findings of fact and of law, a copy of which is attached hereto, marked Exhibit "A", that upon said findings of facts and law the judgment of the court was entered upon the record, said judgment being specifically referred to herein, and in said judgment the plaintiffs were not awarded judgment for rents. That upon the rendition of said judgment the said defendant appealed from the portion thereof which was against him, but the plaintiffs did not appeal nor cross-appeal from the findings and judgment upon the question of rents; that the time for such appeal or cross-appeal has now expired, and that the said judgment of this court has now in all things been affirmed by the Supreme Court of Arkansas, as alleged in plaintiffs' motion. That in the answer to the original complaint of the plaintiffs, the said defendant denied that he owed the plaintiffs for any rents; that the issue thus joined was material to this cause as first presented, and that the question of rents, therefore, has been fully adjudicated and determined against the plaintiffs, and is now *res adjudicata.* That because no judgment for rents

was entered against the said defendant, the supersedeas bond upon which judgment is now asked by the plaintiffs did not include rents or any damage except physical damage to the property, and that, therefore, the respondents are not liable to the plaintiffs for rents or any other damage except physical damage to the property. That the said bond is not in the statutory form, and does not, therefore, authorize or permit judgment against sureties thereon. The respondents plead all of the above matters and things as a complete bar to plaintiffs' motion, and allege that all the issues raised in said motion are *res adjudicata.*"

Omitting immaterial parts, the trial court at the close of all the testimony, entered judgment as follows: "Whereupon the cause is submitted upon the motion for judgment on supersedeas bond, the response and plea of abatement interposed thereto on the part of the respondents and on the evidence taken on the part of both plaintiffs and respondents. The court being well and sufficiently advised as to all matters of fact and law arising herein doth find. That the damages sustained by plaintiffs by reason of the wrongful withholding of said possession from the date of judgment of this court until the date when the possession of the property was restored to plaintiffs amounted to $324.70, said damages being in the nature of rentals based on the usual customary rental on said property and other property of similar character rented in like manner in that community. That under the terms and conditions of said supersedeas bond the respondents, and each of them are liable to the plaintiffs in damages in said sum of $324.70," and ordered that appellees recover of appellants and each of them in the sum of $324.70.

On this state of the record appellants earnestly contend, first, that since there was no judgment for money rendered in the original case the court did not have authority to grant summary judgment upon the bond. It is true that the only judgment rendered by the court in the original suit was for possession of the lots in question and no money judgment was awarded, and this court

on appeal from that judgment could award none, however, the judgment that we are now considering on this appeal is a judgment growing out of the liability of appellants incurred on the supersedeas bond which binds appellants to pay to appellees "all damages to the property during the pendency of the appeal of which appellees are kept out of possession by reason of the appeal." Obviously no judgment could have been rendered by the circuit court for rents at the time of the trial on the bond for none had accrued within the terms of the supersedeas bond at that time. The provision of the statute, Pope's Digest, § 2785, with reference to judgment against sureties is as follows: "Upon an affirmance of any judgment, order or decree by the Supreme Court, which has been wholly or in part superseded, judgment shall be rendered and entered up against the securities on the supersedeas bond, and the court shall award execution thereon." It is clear, therefore, that when the judgment of the trial court was affirmed the liability of the principal and sureties on the supersedeas bond became fixed, however, the extent of their liability and the amount of appellees' recovery against appellants for rents or damages must be tested by an action at law on the bond as was held in *Bolling* v. *Fitzhugh,* 82 Ark. 206, 101 S. W. 173.

We have set out at length the motion for summary judgment and the response thereto filed by the parties in the court below. We hold that the effect of these pleadings and the trial thereon amounted to a suit at law on the bond in question. It makes no difference whether they be called a motion and response or a complaint and answer, their effect and the judgment rendered must be the same. Section 1232 of Pope's Digest provides: "The forms of all actions and suits heretofore existing are abolished." *Climer* v. *Aylor,* 123 Ark. 510, 185 S. W. 1097. The case was tried and fully developed on the issue as to the amount of rents to which appellees were entitled during the pendency of the appeal. No rights were denied appellants. The trial court found this amount to be $324.70. To hold that this procedure was

not in effect an action at law on the supersedeas bond in question would be to put form above substance.

Appellants next contend that the bond was not in statutory form and did not cover rents. The supersedeas bond upon which the judgment in this case is based is a statutory one and not a common law bond. In all cases appealed to this court when the appellant executed a supersedeas bond, § 2765 of Pope's Digest sets out specifically the provisions and conditions that such supersedeas bond shall contain. Among other things this section provides as follows: "Will satisfy and perform the judgment or order appealed from in case it should be affirmed, and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property during the pendency of the appeal of which appellees are kept out of possession by reason of the appeal."

The bond, in the instant case, contains this provision of the statute except that the word "rents" is omitted, so that the only variance between the statutory bond and the bond which was actually filed in the instant case and upon which the judgment was predicated, was the omission of the one word "rents." We hold that the word "damages" as used in the bond filed in the instant case was broad enough to include rents, and that it was the intention of the parties that rents were included. This being a statutory bond the provisions of the statute must be considered as written into it.

In *New Amsterdam Casualty Co.* v. *Detroit Fidelity & Surety Co.*, 187 Ark. 97, 58 S. W. 2d 418, this court said: "The bond sued on is a statutory bond, and such bonds, executed in the form prescribed by the statute, are to be construed, as respects the rights of both principal and surety, as though the law requiring and regulating them were written in them. *Crawford* v. *Ozark Ins. Co.*, 97 Ark. 549, 134 S. W. 951; *Detroit Fidelity & Surety Co.* v. *Yaffee Iron & Metal Co., Inc.*, 184 Ark. 1095, 44 S. W. 2d 1085; *Zellars* v. *National Surety Co.*, 210 Mo. 86,

108 S. W. 548; 9 C. J. 34. In construing this bond the court must construe it as if the law were written into it." See also *Jones* v. *Hadfield,* 192 Ark. 224, 96 S. W. 2d 959, 109 A. L. R. 488.

Again in *United States Fidelity & Guaranty Co.* v. *Fultz,* 76 Ark. 410, 89 S. W. 93, this court said: "The bond was executed pursuant to the instructions of the statute and the obligators are presumed to have known the terms of the statute and to have bound themselves with reference thereto."

In *Wilson* v. *King,* 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802, this court points out the functions of a supersedeas bond in the following language: "In order to stay the proceedings on a judgment or decree, during an appeal therefrom to this court, the statute requires the appellant to file a bond, executed by one or more sufficient sureties, to the effect, among other things, that the appellant shall pay 'all rents or damages to property during the pendency of the appeal, of which the appellee is kept out of possession by reason of the appeal.' The effect of the bond is to secure the payment of the value of the use of the property for the time appellee was deprived of the possession, and the damages to it during the same time, in the event the judgment or decree is affirmed. The object is to protect the appellee. . . . When filed, it relates back, and covers all rents and damages which accrued before and after it was filed, and during the pendency of the appeal. *Dugger* v. *Wright,* 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; *Bentley* v. *Harris, Admr.,* 2 Grat. 357."

We hold, therefore, that no error was committed in this regard.

Appellants finally contend that the question of rents was *res adjudicata.* We think there is no merit to this contention for the reason that whatever rents, if any, may or may not have been due up to the time of the original trial in the circuit court below, could have no bearing on such rents as might accrue during the pendency of the appeal, and the decision of the trial court holding against appellees on the question of rents due up to the

time of the judgment of the trial court in the original suit cannot affect the court's judgment for rents from the date of the judgment in the original suit during the time of the appeal from that judgment.

On the whole case we hold that there were no errors, and the judgment of the trial court should be affirmed, and it is so ordered.

EVERTON SILICA SAND COMPANY, INC. *v.* HICKS.

4-5400 125 S. W. 2d 793

Opinion delivered March 6, 1939.

W. S. Walker, John H. Shouse and *J. Loyd Shouse,* for appellant.

Ben E. McFerrin, Ben C. Henley and *Tom W. Campbell,* for appellee.

MEHAFFY, J. This action was instituted by appellees against the appellant, Everton Silica Sand Company, Incorporated, in the Boone circuit court to recover damages for personal injury to Harold Hicks, who was seventeen years old at the time.

V. A. Hicks, the father of Harold Hicks, sued as next friend of Harold Hicks, and also in his own behalf. The appellant, Everton Silica Sand Company, Inc., is a corporation under the laws of Arkansas engaged in the silica sand business at Everton, Arkansas. It is alleged that on July 23, 1937, Harold Hicks was working as an employee of the appellant at Everton when he sustained serious and permanent injury, caused by the negligence of the appellant. Harold Hicks was working in the second story of said plant approximately twelve feet above the floor of the second story, where there were two cog wheels operating on separate shafts, the cogs fitting into and between each other; he had worked at the plant only a short time; he was ordered by his foreman to go up where the cog wheels were located and oil them by pouring crude oil upon the cogs; no instructions were given him as to rules and methods of safety; the only method he had ever seen employed in oiling the wheels was to take a small can, dip it into crude oil, and pour the oil from the can onto the cogs while the machinery was in operation; while the wheels were turning, the only way he could get near the cog wheels was to climb upon a plank about two inches thick, ten inches wide, and twenty feet long, extending from two walls or platforms about ten feet above the second floor; there were no supports for said plank other than the pillars at the ends thereof, leaving some 18 or 20 feet between the ends unsupported and permitting said plank to sag in the middle; that the plank extended within two or three feet of the cog wheels, and to oil them it was necessary for appellee to stand upon the plank and reach over the end of an intervening beam, a distance of two or three feet, to pour the oil while in a stooping position; the weight of appellee caused the plank

to sag and this caused appellee's foot to slip while he was in the act of pouring oil on the wheel, and he was caused to fall forward; his right hand caught in the cog wheels, crushing and mangling his hand so that his right arm had to be amputated. The negligence consisted in failure to instruct as to the proper and safe manner of oiling the wheels, and failure to warn him of danger, and failure to furnish him reasonably safe instrumentalities and appliances, and to provide him a reasonably safe place on which to stand.

Harold Hicks sought to recover for his injury, and V. A. Hicks for loss of services of his son and moneys expended for doctor's bills and other expenses incident to the injuries.

The appellant answered denying the material allegations of the complaint, pleading assumption of risk and contributory negligence.

There was a verdict and judgment for Harold Hicks in the sum of $3,150 and for V. A. Hicks in the sum of $350. The case is here on appeal.

Harold Hicks, a boy seventeen years old, began work for appellant on June 1, 1937, and was injured on July 23rd, thereafter. The building where he worked was two stories, and he had to work in both stories. His job was to keep the screen clean, and oil up the machinery in the morning before it started, if it needed oiling. The cogwheels which he was oiling at the time he was injured did not have to be oiled every morning, but only once or twice a week; he was instructed to oil them when they needed it. In order to oil the cog wheels, he had to climb up strips nailed on the wall to a height of ten or twelve feet. There was a plank ten or twelve feet above the floor of the second story which was about two inches thick, twelve inches wide, and about twelve feet long. He had to stand on this plank and stoop over to pour the oil on the cogs; there was no support under the plank except at each end, and it sagged. While he was stooping over oiling the cogwheels, his foot slipped and his hand was caught in the cogwheels; his hand and arm were crushed, so that his right arm had to be amputated; he had received no instructions whatever from anyone;

he had simply been told by the foreman to oil the cogs when they needed it; his foreman had told him not to stop the machinery to oil the cogs unless it had to be stopped; his arm was crushed up to near his shoulder; he knew about the cogwheels, and, of course, knew they were dangerous.

Two or three witnesses for appellant testified that shortly after his injury he stated to them that he did not know how it happened. These witnesses also stated that he did not seem to be suffering much at the time. One witness testified that she told appellee that he had made a mistake and that he said: "Yes, that is true." At the same time she inquired how the accident happened, and he said he guessed he was where he had no business, but he thought he could get away with it. This conversation was after they brought him to the hospital, but before they amputated his arm. There was also some evidence introduced by the appellant to the effect that the plank did not sag.

The evidence shows that V. A. Hicks, father of the boy, owed a doctor's bill of $259 and another bill of $10, and expenses for dressing of $3, and that what he had spent because of the injury, together with the doctor's bill, amounted to something over $300.

All of the evidence shows that the boy was strong and healthy and was earning $50 per month.

It is first contended by appellant that the evidence is not sufficient to sustain the judgment, and that appellant was entitled to a directed verdict. It is argued that the danger, if any existed, was open and patent; that there were no hidden or latent dangers about the place of employment.

An adult servant, when he enters employment, assumes all the risks and hazards incident to the employment. He does not, however, assume any risk that results from the negligence of the master or any other servants, unless he knows of such risks. But this is not true where the servant is a seventeen-year-old boy. In order to assume the risk he not only must know of the danger, but must appreciate it, comprehend it; and everyone knows that a seventeen-year-old boy does not possess the judg-

ment of a grown person. The authorities are practically unanimous in holding that such a person must be warned and instructed if he is to be exposed to dangerous machinery.

The general rule is stated as follows:

"(1) That the master owes a duty towards an employee who is directed to perform a hazardous and dangerous work, or to perform his work in a dangerous place, when the employee, from want of age, experience, or general capacity, does not comprehend the dangers, to point out to him the dangers incident to the employment, and thus enable him to comprehend, and so avoid them, and that neglect to discharge such duty is gross negligence on the part of the employer; (2) that such an employee does not assume the risk of the dangers incident to such hazardous employment, because he does not comprehend them, and the law will not, therefore, presume that he contracted to assume them." Labatt's Master & Servant, Vol. 3, p. 3067.

Appellant cites and relies on a number of authorities, but in each of the cases where the servant was held to assume the risk, the servant was either an adult, or if a minor, had been given instructions and warnings. In the case of *Arkadelphia Lbr. Co.* v. *Henderson,* 84 Ark. 382, 105 S. W. 882, a seventeen-year-old boy was injured. The court discussed the rule as to assumption of risk by servants, and said:

"If the danger of the employment is patent, and the servant, by reason of his youth and inexperience, does not know or appreciate the danger incident to the service he is employed to do, it would be the duty of the master to warn him of it and instruct him to avoid it, so far as it can be, before exposing him to it. (Citing authorities.) In all cases where there is a duty to warn a servant, it would be a breach of such duty to expose him to such dangers without giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers and the necessity for the exercise of due care and precaution, and to do the work safely, so far as it can be done with the proper care on his part.

For a breach of this duty the master is liable for the damages resulting therefrom."

Appellant calls attention to the case of *Furlow* v. *United Oil Mills,* 104 Ark. 489, 149 S. W. 69, 45 L. R. A., N. S., 372. In that case the court said:

"If, however, the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do or to the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the dangers."

It is contended that the court erred in giving instruction A, which reads as follows:

"The jury is instructed that it is the duty of every company employing young and inexperienced employees in Arkansas to instruct such employees as to the proper manner to do the work they are employed to do; and if you find from a preponderance of the evidence that Harold Hicks was young and inexperienced in the work he was employed to do for the defendant company, then it was the company's duty to so instruct him."

The specific objection urged to this instruction is that it broadens the duty of the defendant beyond the requirements of the law. We do not think so, and appellant does not point out wherein it broadens the duty. Another objection urged to it is because appellant says there is no evidence in the record that the plaintiff was inexperienced, nor that there was a failure to warn him, or that there were any dangers of which he was not fully advised.

The appellee testified that he did not receive any warning or instruction from anybody.

Appellant also urges that there was no evidence that the appellee was inexperienced. The law is that warning and instruction must be given if the employee is inexperienced or a minor. In this case there is no dispute about the fact that the appellee was only seventeen years of age. The appellee did not state that he appreciated the dangers, and it is matter of common knowledge that a boy seventeen years of age does not possess discretion and judgment and appreciate dangers as an older person would. He knew the cogs were there and knew it was

dangerous, but there is no evidence that he appreciated the danger.

It is urged that instruction B was wrong because the court told the jury that it was the duty of a corporation employing men to use care, etc. Of course, it is the duty of a master generally, whether it is a corporation or individual, and no prejudice could have resulted from the use of the word "corporation."

The objection urged to instruction No. 1 is, first, that no ordinary jury could understand it, and that it is confusing and misleading. The instruction is very long, but we do not think it is misleading or confusing, or that it imposes a higher duty on appellant than is required by law.

It would serve no useful purpose to discuss in detail all the instructions, but we have carefully considered all of them and have reached the conclusion that the instructions, considered as a whole, correctly stated the law to the jury.

The law is well settled in this jurisdiction that the master is liable for injury to a minor by dangerous machinery unless the minor has been given proper warning and instructions.

The judgment is affirmed.

AMERICAN STATE BANK, CHARLESTON, ARK., *v.* STREET IMP. DIST. NO. 3.

4-5473 125 S. W. 2d 796

Opinion delivered March 6, 1939.

Arnett & Shaw, for appellant.

A. N. Hill and *T. A. Pettigrew,* for appellee.

GRIFFIN SMITH, C. J. Invalidation of Street Improvement District No. 3 of the town of Charleston, Arkansas, was sought in a proceeding instituted by appellant, the allegation being that there was material variation in boundaries declared in the petition and those shown in the statutory notice[1] as published.

In substance the agreed statement is: Second street, under the description proposed in the petition, would be paved from Greenwood street to Prairie street. Second street runs east and west. Vine street is one block east of Prairie. In the newspaper publication there are two descriptions: (a) That shown by the petition, "Second street from Greenwood to Prairie" (correct), and "Second street from Greenwood to Vine." The latter description extends the proposed improvement one block, but the betterment area is not affected.

It is conceded by appellant that the added description is a duplication insofar as it identifies the paving from Greenwood to Prairie street, and that it is a clerical or printer's error as to the extension from Prairie to Vine. It is also stipulated that the error is not prejudicial.

The law is well settled that publication of notice is jurisdictional. The facts having been shown, a stipulation cannot affect the result unless, as a matter of law, the error or misprision may be excused. In the absence of publication in substantial compliance with statutory

[1] Pope's Digest, § 7281.

requirements, the town council was powerless to proceed with formation of the district.

The reports are full of cases sustaining the view that the petition, the notice, and the ordinance must be in harmony. In these cases we find the following expressions:

"The foundation of the improvement was the petition of the owners." [2]

"Under the statute the extent and character of the improvement, as expressed in the ordinance, must substantially comply with the terms of the petition upon which it is based." [3]

"A special limited jurisdiction is conferred upon the city council to lay off the district as designated by the property-owners in the first petition, and the council must conform strictly to the authority conferred upon it." [4]

"It is essential that there be no uncertainty about the improvement which it is proposed to make. All of the decisions make it plain. . . . The details and plans of the improvement may be worked out by the board of improvement after the establishment of the district petitioned for, but the discretion of the board is limited to carrying out the purpose of the petition." [5]

"It is the duty of the city council to pass an ordinance in substantial compliance with the terms of the petition upon which it is based." [6]

"The omission from the publication of one lot which was included in the petition cannot be said to be an immaterial variance." [7]

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[2] *Smith* v. *Improvement District No. 14,* 108 Ark. 141, 156 S. W. 455, 44 L. R. A., U. S., 696.

[3] *Smith* v. *Improvement District No. 14, supra.*

[4] *Smith* v. *Improvement District No. 14, supra.*

[5] *Cox* v. *Road District,* 118 Ark. 119, 176 S. W. 676.

[6] *Holt* v. *Ring,* 177 Ark. 762, 9 S. W. 2d 43.

[7] *McRaven* v. *Clancy,* 115 Ark. 163, 171 S. W. 88. See, also: *Voss* v. *Reyburn,* 104 Ark. 298, 148 S. W. 510; *Norton* v. *Bacon,* 113 Ark. 566, 168 S. W. 1088; *Bell* v. *Phillips,* 116 Ark. 167, 172 S. W. 864; *Paschal* v. *Swepston,* 120 Ark. 230, 179 Ark. 339; *Pope* v. *City of Nashville,* 131 Ark. 429, 199 S. W. 101; *Kempner* v. *Sanders,* 155 Ark. 321, 244 S. W. 356; *Jarrett* v. *Baird,* 161 Ark. 31, 255 S. W. 564; *Selz*

In *Smith* v. *Improvement District No. 14, supra,* Mr. Justice Hart, in speaking of the extent and character of the district, stated that they should "substantially" comply with the terms of the petition. This expression, however, was quoted from *Kraft* v. *Smothers,* 103 Ark. 269, 146 S. W. 505,[8] which was an opinion handed down by Mr. Justice Hart a year before the Smith-Improvement District Case was decided. In the latter case there appears the language quoted *supra,* holding that a special limited jurisdiction is conferred upon the city council to lay off the district as designated by the property owners in the first petition. It was then said that "the council must conform *strictly* to the authority conferred upon it." [Italics supplied]. Fifteen years later, in the Holt-Ring Case,[6] the language used by Mr. Justice Hart in the Kraft-Smothers Case again appears in a decision holding that it is the duty of the city council to pass an ordinance in "substantial" compliance with the terms of the petition upon which it is based. In the meantime, however, there appeared the holding in the Cox-Road District Case[5] where it was said that "all of [the] decisions make it plain that there must be no uncertainty about the improvement proposed."

In *Bennett* v. *Kelley,* 179 Ark. 530, 16 S. W. 2d 992, a more liberal construction, or rule, was adopted, in a holding that where the notice was at variance with the petition and ordinance, and where, from a comparison of the ordinance with the petition an interested party could have ascertained that the variance was but a misprision or typographical error, no legal prejudice resulted. In the Kelley-Bennett Case the northeast corner of lot 4, block 5, etc., was described as the northwest corner of lot 4, block 5. Mr. Justice Kirby said: "These patent clerical or typographical errors in the published description of the boundaries of the district did not invalidate the ordinance creating it."

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v. *Paving District No. 1 of McGehee,* 173 Ark. 245, 292 S. W. 133; *Dunbar* v. *Street Improvement District of Dardanelle,* 172 Ark. 656, 290 S. W. 372.

[8] *Bennett* v. *Kelley,* 179 Ark. 530, 16 S. W. 2d 992.

In the instant case there is no allegation or even a suggestion that property was erroneously included in the district for purposes of taxation. Whether paving on Second street ended at Prairie street, or was extended to Vine (as the erroneous publication would indicate), boundaries of the district for betterment assessments are not affected. The ordinance was in the language of the petition; only the notice, with its duplication of the description, is complained of.

The chancellor properly sustained appellee's demurrer to the complaint. Affirmed.

J. W. MYERS COMMISSION COMPANY *v.* COX.

4-5349 125 S. W. 2d 475

Opinion delivered February 20, 1939.

D. H. Howell, for appellant.

Batchelor & Batchelor and *E. D. Chastain,* for appellee.

GRIFFIN SMITH, C. J. J. W. Myers Commission Company shipped from Van Buren, Arkansas, to appellee,

Grace Cox, at Waterloo, Iowa, a mixed car of cabbage and beans, billed at $460. Mrs. Cox protested that as to the cabbage, quality was deficient, and she declined to pay the agreed price of $1 per hundred pounds. When the bill of lading was not honored, the railroad company sold the shipment for $136 and applied proceeds as credit on freight charges of $225. An advance payment of $50 had been made to appellant in June, 1937, at the time the contract of purchase and sale was consummated.

December 28, 1937, the commission company filed suit in Crawford circuit court. Service was had by attaching a truck and 100 sacks of potatoes then in possession of Walter Williams. Williams intervened, claiming the potatoes. He asked damage compensation of $150. There was an agreement February 12, 1938, that the truck belonged to R. & S. Motor Sales Company. It was released. March 5 Mrs. Cox filed an answer and cross-complaint, alleging damages of $150 for breach of the sales contract, $800 for wrongful attachment, and asked that the initial payment of $50 be refunded.

March 25, 1938, the commission company amended its complaint by alleging that Mrs. Cox and Williams were partners. The following day Mrs. Cox and Williams were awarded judgments for $75 and $110, respectively, in consequence of jury verdicts. The commission company has appealed.

In its motion for a new trial appellant alleges: (1) That the court erred in permitting Mrs. Cox to testify that "the reasonable usable value of the truck was $10 per day for 36 days." (2) That error was committed in permitting Mrs. Cox to testify that she lost six days of time and was compelled to spend $10 in coming to Van Buren to attend trial. (3) That the court erred in giving certain instructions. (4) That it was error to permit Mrs. Cox to testify that she lost three days' time, with her truck, valued at $10 per day, at Waterloo, Iowa, on account of appellant's action in shipping the below-quality produce. (5) That the court erred in permitting Mrs. Cox to testify that "if the car of cabbage and beans had arrived at Waterloo, Ia., in good condition and of

No. 1 grade as per sales contract [with the plaintiff], she could have sold the same for a profit of $200."

June 7 appellant wired Mrs. Cox at Waterloo that shipment had been made the previous day. Mrs. Cox telegraphed on the 8th, complaining of quality and condition. She closed her telegram by offering to "accept at seventy-five cwt," and requested answer by Western Union immediately. Appellant replied on the 8th, saying the shipment had been loaded under government supervision, and added: "If you will not accept 'as is,' we will call on department of agriculture to investigate." On the 9th Mrs. Cox replied: "Cabbage terrible. Cannot accept. Go ahead with investigation. Reply Western Union." On the 9th appellant wired: "Reducing draft to confirm your wire yesterday seventy-five cents hundred." A telegram from Mrs. Cox to appellant dated the 9th reads: "Cabbage deteriorating fast. Only inspector here WWIB. Get your inspector; I am through."

Filing time of the telegrams—that is, the hour of day—is not shown. On cross-examination Mrs. Cox testified that after making an inspection she wired the commission company offering to accept the cabbage at seventy-five cents per hundred pounds. The transcript shows: [Mrs. Cox] "admitted that she received a wire from the plaintiff on June 9, agreeing to reduce the draft to 75 cents per cwt, but by that time [I] had made up [my] mind not to have anything further to do with it, and refused to handle beans or cabbage at any price."

First. The appellee, Cox, failed to show that appellant's telegram consenting to a reduction in price was not received while her offer was outstanding; nor did she show that appellant's acceptance, which she requested by telegraph, was not sent within a reasonable time. Her offer to waive alleged deficiencies in quality, and deterioration, was transmitted June 8. It is true appellant's first message was not an acceptance, but it did contain a proposal to have the department of agriculture make an investigation. Mrs. Cox sent another message on the 8th (presumably later in the day), making a seventy-five cents per hundred offer. On the 9th the offer was accepted. Mrs. Cox' telegram of the 9th is not free from

ambiguity. She said: "Only inspector here WWIP. Get your inspector; I am through." Whether she meant to say her offer of seventy-five cents was withdrawn, or whether the expression "I am through" had reference to procurement by her of an inspector, there is some doubt.

In view of the relationship of the parties and the advantage Mrs. Cox had in being where she could personally inspect the shipment, we conclude that even if she intended her telegram of the 9th to be a withdrawal of the seventy-five cent offer, it was ineffective because of appellant's reasonable promptness in wiring an acceptance. At the time Mrs. Cox made her offer, the freight charges had accrued, and she knew or should have known what they were. The shipment was made f. o. b. Van Buren, and any deterioration occurring during transit would constitute a claim to be pressed by Mrs. Cox.

Since construction of the contract (which is a question of law) determines liability or non-liability of Mrs. Cox, we conclude that the court erred in submitting this question to the jury. The judgment for $75 in favor of Mrs. Cox is reversed. Testimony of appellant that the balance due was $285, after allowing for initial payment of $50, credit of approximately $136 on freight as a consequence of distress sale of the produce, etc., is not contradicted. Therefore, judgment is given here for $285 against Mrs. Cox and in favor of appellant.

Second. There was substantial evidence from which the jury could find that Williams, in purchasing the potatoes, acted in his own behalf. While it is improbable that this is true, nevertheless we cannot say that such finding was not supported by the quantum of testimony essential to a determination of that question.[1]

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[1] Mrs. Cox was in Van Buren the night the potatoes and truck were attached. She had been in company with Williams and two other men. Williams testified that when they got to the garage after the writ of attachment had been served, Mrs. Cox claimed the potatoes. He also testified that he had been in the Imperial Valley [of California] where he bought tomatoes and other perishable commodities. He admitted that Mrs. Cox brought such produce to Joplin in her truck, where he (Williams) sold it, and "with the money [I] obtained therefor, and with some money that [I] had saved, [I] bought the potatoes in question from M. L. Miller, and paid for them with

Because of the perishable nature of the potatoes, appellant petitioned the court for authority to sell them. The record does not show what action the court took with reference to the petition, but the attached property was delivered to appellant, and it is presumed the potatoes were disposed of in due course.

Instruction No. 3, given at the request of Williams, was erroneous, and prejudicial.[2] If Williams owned the potatoes, the only damages recoverable by him was the market value, there being no evidence that they were purchased for a special purpose known to the appellant. The first sentence of the instruction is correct, but it was improper to add, "Also he is entitled to such damages as he has sustained because of such attachment." The only evidence tending to show additional damages was Williams' testimony that he was compelled to make several trips to Van Buren, and that he had lost lots of time.

In *Goodbar et al.* v. *Lindsley,* 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54, this court said: "Expenses incurred by a defendant in attachment in prosecuting his own suit for damages must be borne by himself, the same as expenses are borne by others who become actors in the court to right their wrongs."

If Williams owned the potatoes (and the jury found that he did), it was incumbent upon him, in alleging damages additional to the market price of the potatoes, to show what these damages were. By adding to the instruction the word "also," and the sentence of which it was a part, the jury was permitted to speculate as to matters not established by proof. Because of this error the judgment in favor of Williams is reversed, and the cause is remanded for a new trial.

[my] own money. Grace Cox had nothing to do with the purchase or paying for the potatoes, [and] had no interest in them whatever."

[2] Instruction No. 3 reads as follows: "If you find for the intervener, then you should find the market value of the potatoes when attached and your verdict should reflect that sum in favor of the intervener. Also he is entitled to such damages as he has sustained because of such attachment, if it was wrongfully sued out, and his property so taken, if any."

DILLEN *v.* FANCHER.

4-5380 125 S. W. 2d 112

Opinion delivered February 20, 1939.

Virgil D. Willis, for appellant.

J. Loyd Shouse and *John H. Shouse,* for appellee.

McHANEY, J. Other branches of this litigation have heretofore been twice before this court. *Dillen* v. *Fancher,* 193 Ark. 715, 102 S. W. 2d 87, and *Dillen* v. *Fancher,* 195 Ark. 400, 113 S. W. 2d 483.

Appellant is the daughter of appellee and the late Dotson Fancher, she being one of the two heirs-at-law of the latter. Dotson Fancher died testate. In his will, which was duly probated, he named appellee and his father, W. A. Fancher, his executors, with the provision that, upon the death of either, the survivor should continue as sole executor. W. A. Fancher preceded the testator in death and appellee is and has been sole executrix of said estate. The will provided that no bond should be required and no accounting should be made to any court. Letters were issued to appellee without a bond and she has filed no accounts with the probate court.

Appellant filed in the probate court a petition praying that appellee be required to make bond, and to file

inventory, appraisal and accounting, or be discharged as executrix. This petition was denied. An appeal was taken to the circuit court and was again denied. It is now on appeal to this court.

The question presented is: Shall the provisions of the will control, regardless of statutory provisions? Section 22 of Pope's Digest requires bond to be given before the granting of letters. Section 51 provides that executors and administrators shall take possession of decedent's personal property and make a true inventory thereof. Section 580 requires an appraisement thereof. Other sections provide for the filing of settlements and accountings.

The clear intention of Mr. Fancher, as expressed in his will, was that his wife, and his father, or the survivor of them should serve, in this case his wife, as executrix without giving bond and without making reports and settlements. In *Bankhead* v. *Hubbard*, 14 Ark. 298, it was held that where letters testimentary upon estates of deceased persons are granted by the clerk, in vacation, he has no discretion in any case to dispense with the bond required by statute, even where the will directs otherwise, but that in such matters the probate court has a large discretion which will not be controlled by this court, unless there is such outrageous abuse of it as to produce manifest injustice. This case is cited in Thompson on Wills (2d Ed.), § 555, to support this statement: "In a few other states the matter of requiring a bond of the executor is left to the discretion of the court. In still others, the executor must give a bond unless the testator in his will has directed otherwise. In the latter instance the direction amounts merely to a power given the court to dispense with the bond where it is deemed prudent to do so, but does not deprive the court of the power to require a bond if it is deemed necessary or is demanded by one who is interested in the estate; but the testator's wishes in the matter will be respected unless good reasons for disregarding them appear."

Here, appellant is a remainderman in the estate of her father,—her mother, the appellee, being the life tenant. *Dillen* v. *Fancher*, 193 Ark. 715, 102 S. W. 2d 87.

For this reason alone she claims the right to require a bond and an accounting. She does not allege and prove any mismanagement, waste, or conversion by the life tenant. Indeed, in the second appeal of this case, 195 Ark. 400, 113 S. W. 2d 483, it was held that a charge of waste was not sustained. In Woerner on Administration and Wills, vol. 2 (3d Ed.), p. 833, par. 251, it is said: "But if a court become satisfied that the executor, who was solvent when named in the will, is likely to become insolvent, and that there is danger that he may abuse his trust, or has ground to suspect that he will indirectly and fraudulently administer the estate to the prejudice of creditors or legatees, he will be ordered to give bond with sufficient surety to protect the estate. In such case any person who has an interest in the estate may interpose to move for an order requiring security, and when the interest is averred positively and under oath it cannot be questioned on the trial of an application for security. And a bond given by an executor without sureties, although approved by the judge of probate, is not such a bond as the law contemplated."

We think the matter of requiring bond and accounting rests largely in the discretion of the probate court, and that this court should not interpose to control such discretion unless a manifest abuse thereof is shown, and none is either alleged or proven in this case.

The judgment must, therefore, be affirmed.

STATE, EX REL., EVANS *v.* WHEATLEY.

4-5471 125 S. W. 2d 101

Opinion delivered February 20, 1939.

Price Shofner, for appellant.

Jack Holt, Attorney General and *Owens, Ehrman & McHaney,* for appellee.

HOLT, J. In this case appellant sought unsuccessfully in the Pulaski circuit court, third division, to have Walter Wheatley, one of the appellees herein, ousted from the office of state senator and was also unsuccessful in his effort to secure an injunction against the state auditor and the state treasurer, restraining them from paying Wheatley any compensation as state senator. Hence this appeal.

Appellant set up in his complaint that he is a citizen and taxpayer of Garland county, Arkansas, and that suit was brought on behalf of himself and all other taxpayers of the state; that appellee, Walter Wheatley, was elected to the office of state senator for the fourteenth senatorial district at the general election in November, 1938; that he had been sworn in as a member of the state senate, and unless ousted from that office, that he would exercise the powers and perform the duties of that office in the session of the General Assembly then just convened and now in session; that unless restrained or prohibited, the state auditor would issue warrants to said Wheatley, and the state treasurer would cash them in payment for his services as state senator. That Wheat-

ley was ineligible to serve as state senator, because he had been convicted of a felony by the Garland circuit court, and had been sentenced to serve one year in the state penitentiary as a result of said conviction. He further alleged that conviction of a felony is an infamous crime under the laws and Constitution of this state. The complaint prayed that the state auditor and state treasurer be restrained from issuing and cashing any warrants to Wheatley for services, and that the court enter a judgment of ouster of Wheatley from said office and for other proper relief. The complaint was duly sworn to. After demurrers filed by appellees had been overruled, they each answered denying each and every material allegation of the complaint and asked that it be dismissed.

The cause was submitted to the trial court on appellant's complaint, defendants' demurrer and their motion to transfer to equity, defendants' answer and an agreed statement of facts, which is as follows: "That the defendant, Walter Wheatley, prior to January 1, 1916, was lawfully engaged in the retail liquor business; that the General Assembly of the state of Arkansas for 1915 enacted what is commonly referred to as the "bone dry" law, making it illegal on and after January 1, 1916, to barter, sell, procure, or give away spirituous liquor in the state of Arkansas. That shortly after January 1, 1916, and during said year, the said Walter Wheatley, without profit to himself, but purely as an accommodation to another person, procured one pint of gin, and was subsequently convicted for a violation of the above-mentioned "bone dry" law and sentenced to serve one year in the penitentiary; that prior to the time for appeal from said conviction had elapsed the then governor of the state of Arkansas issued a full and complete pardon to the said Walter Wheatley; that the said Walter Wheatley did not serve any part of the sentence imposed upon him by the court. That M. O. Evans appeared before the Arkansas state senate in 1937, and contested the right of Walter Wheatley to hold the office of state senator. That the senate affirmed the right of Walter

Wheatley to hold the seat to which he had been elected, and said body seated the said Walter Wheatley, and he served during the General Assembly of 1937 and the special session of 1938. That Walter Wheatley was the candidate of the democratic party in the general election of 1938, running for the office of senator from the fourteenth senatorial district. That he was opposed in said election by two other candidates, one of whom was the plaintiff in this action, M. O. Evans. That in said election Walter Wheatley was elected to the office of state senator, and that M. O. Evans ran third in said election. That the senate has accepted the qualifications of the said Walter Wheatley, and he has been sworn in as a member of that body, and is now serving and acting as state senator from the fourteenth senatorial district."

The trial court found that the crime of which Wheatley was convicted was not and is not an infamous crime, that he is eligible to serve as state senator, and that the senate already having passed upon his qualifications and having accepted him, and he having been sworn in as a state senator, the court was without jurisdiction to grant the relief prayed and dismissed the complaint.

The appellant insists here that the trial court had jurisdiction to hear and determine this cause; that the action of the senate in seating Wheatley as a member of that body did not deprive the courts of jurisdiction to pass on his eligibility to serve as a senator, and that the constitutional provision, that each house of the General Assembly shall be the sole judge of the elections and qualifications of its members, did not include the power to judge as to the eligibility or ineligibility of anyone who might be elected to such a body.

Article V, § 11 of the Constitution of the state of Arkansas, provides as follows: "Each house shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members." We are of the opinion that this section of the Constitution is decisive of this case, and that the senate is the sole judge of the qualifications of its members. The above language is clear and unambiguous. This court said in

State ex rel, Attorney General, v. *Irby,* 190 Ark. 786, 81 S. W. 2d 419, ". . . where the language employed in the Constitution is plain and unambiguous the courts cannot and should not seek other aids of interpretation *Clayton* v. *Berry,* 27 Ark. 129; *State* v. *Ashley,* 1 Ark. 513; *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586, and every word used should be expounded in its plain, obvious and common acceptation. *State* v. *Martin,* 60 Ark. 343, 30 S. W. 421, 208, L. R. A., 153." It is undisputed here that the senate has passed upon the qualifications of Senator Wheatley and held him qualified.

Article V, § 9 of the Constitution provides: "No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime shall be eligible to the General Assembly or capable of holding any office of trust or profit in this state." Appellant insists that Senator Wheatley is ineligible to a seat in the senate under this provision of the Constitution for the reason that he has been convicted of an infamous crime. We hold that the senate is the sole judge of his eligibility under this section. It may be that the senate in passing upon his eligibility or qualifications found that the crime with which he was charged was not infamous. But be that as it may, the action of the senate in that regard and in seating him is final, and the trial court in this case was without jurisdiction to determine that matter.

We cannot agree with appellant that the word "qualifications," as used in § 11, art. V of the Constitution, should be given the restricted definition and interpretation which he insists should be placed upon it. We think it includes and embraces the word "eligibility."

In *Raney* v. *Taylor,* 166 Ga. 476, 143 S. E. 383, the Supreme Court of Georgia said: "The judge, in a written opinion included in the record, distinctly recognizes the constitutional provision embodied in § 6430 of the Civil Code which declares that 'each house shall be the judge of the election returns, and qualifications of its members' but in effect holds that the question raised in this case is not one as to the qualifications of the respondent as a member of the General Assembly, but is as to his 'eligibility,' and in effect

holds that the court has the right to pass upon the 'eligibility' of a member of the General Assembly, and, if the member in question be found to be 'ineligible,' to deprive him of his seat. In support of that conclusion the trial judge sets forth in his opinion the definitions of the word 'qualification' and the word 'eligibility.' These definitions are taken from Webster's Dictionary, and are as follows: 'Qualification' is defined: 'Any natural endowment, or acquirement which fits a person for a place, office or employment, or enables him to sustain any character with success; and enabling quality or circumstance; requisite, capacity or possession.' 'Eligibility' is defined: 'Proper to be chosen, qualified to be elected —legally qualified.' We are of the opinion that the word 'qualifications,' as used in the constitutional provision quoted, is not subject to the limitations which the definition taken from the dictionary referred to would seem to impose. The word 'qualifications,' as thus used in the Constitution, seems to include also certain of the elements of 'eligibility.' "

In *Commonwealth* v. *Jones,* 10 Bush, p. 725, the court said: "We concur in the construction of the constitution as given by the court in the case of *Hall* v. *Hostetter* (17 B. Mon. 784), 'that the words *qualifications* and *qualified* are used therein in their most comprehensive sense, to signify not only the circumstances that are requisite to render a citizen eligible to office or that entitle him to vote, but also to denote an exemption from all legal disqualification for either purpose'; and we concur fully in the illustration given in that case: 'The circumstances under which a citizen is entitled to vote are prescribed in the constitution; but he may have those qualifications and still by some act have become disqualified, and not be a qualified voter in the sense in which the word is used in the Constitution. The word *qualifications* seems to be used in the same sense and implies not only the presence of every requisite which the constitution demands, but also the absence of every disqualification which it imposes.' "

By the above provision, art. V, § 11 of the Constitution, a clear mandate is given to each house of the General Assembly to be the sole judge of the qualifications of its members, and the courts of this state have no authority or jurisdiction to question the wisdom of their actions in seating or refusing to seat one elected to membership.

We conclude, therefore, that no error was committed by the trial court, and its judgment is accordingly affirmed.

FOSTER-GRAYSON LUMBER COMPANY *v.* BOND.

4-5379 125 S. W. 2d 106

Opinion delivered February 20, 1939.

W. H. Kitchens, Jr., for appellant.

Hawkins & Keith, H. M. Barnes, for appellee.

MEHAFFY, J. On January 24, 1924, W. D. Wingfield and wife, and B. A. Moody and wife executed and deliv-

ered a mortgage to the Columbia County Bank on 1,220 acres of land, including the 40 acres involved in this suit, to secure the sum of $8,490.42. This mortgage was recorded January 25, 1924. On January 29, 1924, the mortgagors executed and delivered to appellee, J. N. Bond, a warranty deed to the 40 acres and the same was recorded February 2, 1924.

In October, 1928, suit was filed to foreclose said mortgage and a decree entered in September, 1929, in favor of the Columbia County Bank against the mortgagors for the amount due, with interest, together with lien on said 1,220 acres, subject to a prior lien in favor of one Anne Mower. The land was sold to the Columbia County Bank, a commissioner's deed was presented and approved by the court on January 30, 1930, and ordered recorded. A *scire facias* to revive said judgment issued July 18, 1932, and judgment was revived October 27, 1932. Appellee was not made party to any of said proceedings.

The Columbia County Bank was consolidated with the Peoples Bank under the name of Columbia-Peoples Bank on December 1, 1931, and this bank became insolvent and was taken in charge by the Bank Commissioner in May, 1934. On April 10, 1936, the State Bank Commissioner sold 1,100 acres, including the 40 acres in question, to appellant for the sum of $12,500.

This action was instituted on June 18, 1937, by appellants, alleging the facts above set forth and that the lands described included the northwest quarter of the southeast quarter of section 30, township 19 south, range 19 west. It was alleged in the complaint that when the mortgage was executed to the Columbia County Bank it had no knowledge of the deed made to appellee and received no knowledge until June 12, 1937.

Foreclosure proceedings were begun, as mentioned above, and the land, including the 40 acres here involved, was sold by the Commissioner to the Columbia County Bank and said sale and Commissioner's deed were approved by the court, and the deed recorded in 1930.

The appellants pray that the appellee, J. N. Bond, be given a reasonable time within which to redeem said

40 acres for such amount as may be adjudged to be due on said 40-acre tract; that if J. N. Bond fails to pay to appellant the amount adjudicated within the time allowed, or fails to plead herein whatsoever, the prayer is that the deed to Bond be found inferior and subordinate to appellant's deed, and that title to said 40 acres be quieted in appellants.

After constructive service, appellee appeared and filed an answer denying the allegations of the complaint and alleging that he purchased the property on January 29, 1924; a warranty deed was executed and delivered to him, and was filed for record on February 2, 1924. He denies that appellants had no actual knowledge of the existence of this deed. Further answering, he alleges that before the deed from Moody and Wingfield was delivered to him, the Columbia County Bank agreed and promised to satisfy the mortgage covering this land, and the justice of the peace making the deed was advised to hold it until advised from the bank that the mortgage had been satisfied, and said justice of the peace did hold said deed until he was advised by the Columbia County Bank that said mortgage was satisfied and then delivered same to appellee. Appellee alleges that on January 29, 1924, he went into possession of said land, cleared it, built fences and started cultivating same; that he had been in open, exclusive, adverse possession of same at all times since January 29, 1924; had assessed the land for taxes in his name and has at all times since 1924 paid taxes on said land and if the appellants or the ones under whom they claim title ever had any interest in said land, the interest is now barred by the statute of limitations. Appellee prays that complaint of appellants be dismissed for want of equity, and that title of said land be quieted in him as against said appellants.

On April 27, 1938, the court entered a decree dismissing appellants' complaint for want of equity, and quieting title to the above described 40 acres of land in appellee, J. N. Bond. The case is here on appeal.

The following agreement was entered into:

"By stipulation, following records of Columbia county affecting land in question were introduced in evi-

dence, and it was agreed appellee was not made a party to the foreclosure proceedings or any proceedings based thereon.

"Deed of trust by W. D. Wingfield *et ux* and B. A. Moody *et ux* to Columbia County Bank to secure $8,-490.42, due December 1, 1924, with eight per cent. interest thereon from date until paid; acknowledged by W. D. Wingfield *et ux,* B. A. Moody *et ux,* filed for record January 24, 1924, and recorded January 25, 1924.

"Warranty deed executed and delivered by B. A. Moody *et ux* and W. D. Wingfield *et ux* to J. N. Bond, dated and acknowledged January 29, 1924, filed for record and recorded February 2, 1924.

"Decree foreclosing mortgage described above; judgment for Columbia County Bank against W. D. Wingfield *et ux* and B. A. Moody *et ux* for sum of $7,-884.35 with eight per cent. interest from September 19, 1929, until paid, together with lien on 1,220 acres, subject to prior lien in favor of one Anne Penfield Mower, executrix, in amount of $3,170.61.

"Commissioner's report of sale based on said decree, wherein the land was sold to Columbia County Bank on December 31, 1929, for sum of $5,920.01, Commissioner's deed presented and approved on January 30, 1930, and ordered recorded.

"Commissioner's deed, based on said decree and sale, filed for record January 30, 1930, recorded January 31, 1930.

"*Scire Facias* to revive said judgment issued July 18, 1932, served on B. A. Moody *et ux* July 19, 1932, and on W. D. Wingfield *et ux* July 27, 1932.

"Decree of revival of said judgment dated October 27, 1932.

"Deed from Marion Wasson, State Bank Commissioner, to appellant, Foster-Grayson Lumber Company, dated and acknowledged April 10, 1936, filed for record December 22, 1936, and recorded December 23, 1936, whereby 1,100 acres, including 40 acres in question, were conveyed for a stated consideration of $11,000."

The evidence on the part of the appellee was to the effect that the appellee bought the land from Wingfield

and Moody and learned at the time he agreed to purchase, that someone had a mortgage on it; the deed and money was placed with W. A. Malloch; money to be paid to the grantors when the mortgage was cleared, and the deed to be delivered to witness. The deal was held up for several days until Mr. Moody could state that the mortgage was cleared; after securing the deed appellee took immediate possession, erected buildings thereon, and cleared and fenced the land, putting about 35 acres in cultivation. Mr. Hardaway was in charge for appellee. No one has ever claimed title adverse to appellee prior to the filing of this suit, except that McNeill wrote him that he, witness, was paying taxes on 40 acres of the land they owned; witness told McNeill that he had bought the land and paid for it, whereupon McNeill said that he would see Moody and get it straightened out, and that is the last he heard of it; does not remember the exact date, but it was about 1924; he paid $400 for the land and did not learn that the Columbia County Bank had a mortgage on the land until McNeill wrote him that he was paying taxes on property they owned; Moody and Wingfield agreed to get a release from the mortgagee and this was left entirely to Mr. Malloch and Mr. Moody; the $400 was to be paid to Moody and Wingfield; he made his first crop on the land about 1927; McNeill wrote him about seven years after he bought the land and he went to see him and McNeill told him the money was paid by Mr. Moody and he would straighten it out; appellee has paid taxes on the land every year since 1924.

W. J. Malloch testified that appellee asked him to hold the money and to pay Moody and Wingfield upon instructions from the bank that the mortgage had been satisfied; he also held the deed. After a few days witness received a letter from McNeill that the papers were satisfied and to go ahead and deliver the deed and money; this was written information and the signature appeared to be McNeill's. Does not remember the contents except in a general way; it stated substantially that that was his authority to deliver the papers and deeds and turn over the money; does not remember the exact words; arrangements were made between Moody, Bond and the bank and

they were to furnish witness with a statement telling him the record was clear before he delivered the deed to Mr. Bond or the money to Mr. Moody; witness knew that McNeill was cashier of the bank.

Mr. Moody, a witness, testified that he and Wingfield sold the land to Bond advising him at the time that it was under mortgage to the Columbia County Bank; witness agreed to see McNeill and try to get the land released from the mortgage; McNeill stated to witness that he would satisfy the mortgage on the land; this occurred a few days after witness sold the land to Bond and witness reported this to appellee; some six or seven years later, when witness was advised that the mortgage had not been satisfied he went to see McNeill and was advised by him to see the president of the bank who stated that he was not interested; Mr. Hutchinson was not president of the bank when he had his first conversation with McNeill; told McNeill that Malloch was holding the deed and money until they got the title straight; witness voluntarily gave mortgage to the bank to secure a prior indebtedness and did not borrow any additional money at that time; witness asked McNeill in 1924 about releasing the mortgage, and he said it would be all right to go ahead and he would release the 40 acres; did not obtain a written release, but thought McNeill's statement would be all that was necessary; has never seen the written instrument Mr. Malloch testified about, but he said he received a written statement from McNeill.

Mr. Hardaway testified that he rented the land from appellee in 1926, about 25 acres in cultivation, four or five in woods, balance in pasture, all under rail fence; had not known of anyone claiming interest in the land adversely to appellee and has known of no one claiming except appellee; the bank has not had any control over it; the rail fence around the land burned and witness fenced it with wire in 1935 for appellee.

E. L. Waller and Bayless Lindsay testified that they had known the land for several years and that when appellee bought it it was wild and unimproved and appellee immediately commenced to clear and improve and fence it; nearly all of the land is in cultivation; they do not

know anyone, nor have they heard of anyone having any claim to the land adverse to appellee since he bought it; the bank has had nothing to do with farming, clearing, fencing or cultivation of the land.

J. C. McNeill testified that he was cashier of the Columbia County Bank in 1924 and until the bank was consolidated with the Peoples Bank in 1932; he recalls the Columbia County Bank obtained a mortgage from Wingfield and Moody on several hundred acres of land in 1924; that witness wrote Moody in 1930 that if $400 was paid to the bank it would release the 40 acres, and he said this was the first time the board ever considered the release of the 40 acres; nothing had been paid for the release, and he denied writing Malloch and stated he would not have had any authority without a resolution of the board. In 1930 he got authority from the board of directors to accept $400.

A. P. Walker, county and probate clerk, testified that the land in question was assessed to Columbia County Bank and also to appellee in the years 1930 and 1931; the bank paid taxes in 1933; appellee appears to have assessed the land every year, but he has no record showing he paid the taxes.

McNeill then introduced a letter that he had written to Moody, dated July 29, 1930. He also testified that he did not remember talking to appellee and that Malloch was mistaken and he could not recall anyone to whom he wrote in 1924 unless he had a copy of the letter; did not write such a letter to Malloch; does not recall talking to appellee and does not know why appellee was not included in the foreclosure suit.

The appellants insist that the bank was not charged with any notice of appellee's deed because it was made subsequent to the mortgage, and that an agreement to satisfy a mortgage must be shown by clear, satisfactory, and convincing evidence. They call attention first to *Riley* v. *Atherton,* 185 Ark. 425, 47 S. W. 2d 568.

In the case referred to the court quoted from 19 R. C. L. that an agreement to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside

the written contract. That is not the question here. The parol release was not to release the mortgagor from any liability at all, but all of the evidence shows that the appellee here was to pay the $400 when the mortgage on this 40 acres was released, and there was no agreement to release the mortgagor from any liability.

But, as argued by the appellants, the appellee claims not only that there was an agreement to release the 40 acres from the mortgage, but that appellee claimed title also by adverse possession. Appellants cite and rely on *First State Bank of Eureka Springs* v. *Cook,* 192 Ark. 213, 96 S. W. 2d 510. The court said in that case: "A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage."

In the instant case the preponderance of the evidence shows that arrangement had been made with the bank for it to release the mortgage, and not until that agreement was reached was the deed turned over to appellee and his money paid to the grantors. When this was done, and not until then, appellee took possession, cleared and cultivated the land, paid the taxes, and we think the overwhelming weight of evidence is that this was all done with the understanding that the 40 acres had been released from the mortgage.

It is true the cashier of the bank testifies that he does not recall the conversations with appellee and others, but they testify positively that the mortgage had been satisfied. It would be quite unusual for the bank to have a mortgage on this property and permit anyone to occupy it, cultivate and pay taxes on it the length of time appellee did, if there had been no agreement to release.

Equity cases are tried here *de novo,* but unless the decree of the chancellor is against the preponderance of the evidence, we do not reverse.

In the instant case we think the decree of the chancellor is supported by the preponderance of the evidence, and the decree is therefore affirmed.

WILLIAMS *v.* DUMAS.

4-5377 126 S. W. 2d 934

Opinion delivered March 13, 1939.

T. O. Abbott, for appellant.

Robert C. Knox, N. A. Cox and *C. E. Wright,* for appellee.

McHANEY, J. This is a suit by appellant, a negro, against appellee Dumas, to compel specific performance of a contract partly in writing and partly in parol to con-

vey nine acres of land in a square in the NE corner of the S½ SW SW, Sec. 23-18-17, Union County, and against both appellees to cancel an oil and gas lease on said nine acres, executed by Dumas to Harrison on June 12, 1937.

Appellant acquired the title to said land on October 22, 1922, and has been in the actual possession thereof from that date to the present time. On April 5, 1927, he and his wife executed and delivered to Dumas a deed of trust thereon to secure a note of $130. This indebtedness not having been paid, said deed of trust was foreclosed, the land ordered sold, and, on November 16, 1931, Dumas became the purchaser on a bid of $60 and costs, receiving a commissioner's deed thereto, which was not filed for record until March 24, 1937, five days after the discovery oil well came in in that vicinity.

On April 22, 1932, within the period of redemption from the foreclosure sale (right of redemption not being waived in the deed of trust), appellant entered into a contract with Dumas for the repurchase of said nine-acre tract for the sum of $150, paying in cash $35 of the purchase price, and receiving from Dumas the following writing: "4-22-1932, Received of Elbert Williams $35 on land. Deed to be *maid* later. F. L. Dumas." In addition to the foregoing, appellant alleged that no definite time was fixed or agreed upon between them of the payment of the balance of the purchase money, but that same was to be paid in installments in a reasonable time; that he had at all times been in the exclusive possession thereof, as owner, and had exercised all the rights of ownership and dominion over same since the date of his repurchase on April 22, 1932; and that he had no information that Dumas claimed any interest therein, other than a vendor's lien to secure the balance of the purchase money of $115 and interest thereon at 10 per cent., until shortly before this suit was filed. He tendered into court a sum sufficient to cover the balance due, including principal, interest and taxes paid by Dumas.

Appellee Dumas answered, admitting the deed of trust, its foreclosure, the commissioner's deed to him, the oil and gas lease by him to appellee Harrison, and deny-

ing all other material allegations. He also interposed a plea of the Statute of Frauds in bar of the action and a plea of laches in bar of a recovery. Harrison adopted the answer of Dumas. Trial resulted in a decree dismissing appellant's complaint for want of equity.

The fundamental facts are not in dispute. Appellant has owned the land since 1922 and has at all times been in the exclusive possession thereof. He became indebted to Dumas and in 1927 executed a deed of trust to him to secure same. The land was sold to Dumas in the foreclosure sale in 1931, but appellant continued in possession under his equity of redemption which was not foreclosed. In April, 1932, he contracted with Dumas to repurchase for $150, the contract being partly in writing and partly oral, and actually paid $35 in cash, nearly one-fourth of the purchase price, and thereafter continued in possession under said contract. After said date, he cleared about two and one-half acres of new ground; built a two-room dwelling house, fourteen by twenty feet, with a porch in front, out of number two lumber; built a barn and a shed; constructed some picket, wire and rail fences; and otherwise exercised acts of ownership over said land, such as receiving check from the government under the AAA and under the soil conservation act, signing up each time as the owner to the knowledge of Dumas, he thinks. The value of these improvements is in dispute, but it cannot be said they are not of substantial value. They were made after the repurchase and up to and including 1934. In 1935, Dumas, as appellant says, told him to pay the taxes and that he attempted to do so, but found the land delinquent, and was advised by the clerk that it had forfeited in Dumas' name and that only Dumas could redeem it. So it will be seen that appellant was at all times in possession as the owner, up to the foreclosure sale as owner-mortgagor; from that time to April 22, 1932, as owner of the equity of redemption; and from the latter date as owner under a contract of purchase for $150 with $35 of that amount paid. He was never in possession as tenant of Dumas. The written memorandum copied above is something

more than a mere receipt for $35 paid on land, which both parties agree refers to the land in controversy, and is a promise on Dumas' part to convey the land to appellant by a deed to be thereafter made. Had it described the land and stated the balance of the consideration to be paid, the written instrument alone would have been sufficient to support an action for specific performance. No time for payment of the balance being stated, a reasonable time would have been given. Here no time for payment of the balance is stated in the memorandum, and the parties agree that no definite time was fixed orally. Appellant says it was to be paid in installments in a reasonable time along as he could get it, and Dumas says it was to be paid the next year. He declared no forfeiture because of failure to pay the next year, but, on the contrary, as late as 1936, according to his own testimony, he was negotiating with appellant for the payment of the balance of the purchase money.

We are, therefore, of the opinion that the writing taken in connection with the undisputed facts sufficiently establishes the contract, if the evidence relating to it is competent, and that the cases cited by appellees, including *Phillips* v. *Jones,* 103 Ark. 550, 146 S. W. 513, are not controlling to the contrary. In *Rugen* v. *Vaughan,* 142 Ark. 176, 218 S. W. 205, it was held, to quote a headnote, that: "Payment of a small part of the purchase money of land and making permanent improvements, as by clearing the land and finishing a house, in value equal to a fourth of the purchase price, is sufficient ground for specific performance of an oral contract for the purchase of land." See also *Ashcraft* v. *Tucker,* 136 Ark. 447, 206 S. W. 896. It was held in the Rugen Case that continuance in possession of a lessee after an oral contract to purchase is not sufficient to take the contract out of the statute of frauds. Here, appellant did not continue in possession as lessee. He never was a tenant of Dumas, but was in possession at all times as owner. He never paid nor agreed to pay rent. The contract was partly in writing, and his possession, coupled with all the facts and

circumstances heretofore recited certainly makes out a case for specific performance.

But appellees say appellant is barred by the statute of frauds. We cannot agree. Payment of a part of the purchase price, the continued possession of appellant as owner, the written memorandum, the making of permanent and valuable improvements, taken separately or all together constitute such part performance as to take the contract out of the statute. *Phillips* v. *Jones, supra; Ashcraft* v. *Tucker, supra; Rugen* v. *Vaughan, supra; State Bank* v. *Sanders,* 114 Ark. 440, 170 S. W. 86. Moreover, as was said in *Littell* v. *Jones,* 56 Ark. 139, 19 S. W. 497, "So long as the right to defeat the purchase exists [by redemption] agreements to extend the time or modify the conditions for redemption have been held not to come within the statute, for the defendant is in many respects regarded as the owner of the land, and by such agreements purchases nothing, but merely holds what he already has."

Appellee Dumas says he agreed to convey to appellant only the surface rights and to reserve what was left of the right to the oil and gas. In this respect his testimony contradicts the writing and for this reason is incompetent. The writing contemplates a deed to the land, which includes all interest therein, as there was no exception therein.

Nor can we agree with appellees that appellant was guilty of laches sufficient to bar recovery. The facts herein stated refute the allegation.

Appellee Harrison purchased from Dumas with appellant in possession, as owner. This possession was sufficient to put him on notice of appellants' rights. He cannot therefore be held to be an innocent purchaser under his lease from Dumas.

The decree will be reversed and the cause remanded with directions to enter a decree for specific performance and to cancel the lease of Harrison as a cloud on appellant's title. Appellees to pay all costs.

Opinion delivered March 13, 1939.

Claude F. Cooper and *T. J. Crowder,* for appellants.

Jack Holt, Attorney General, *Jno. P. Streepy,* Asst. Atty. General, for appellee.

SMITH, J. Two informations were filed by the prosecuting attorney in Osceola District of Mississippi County, in each of which Henry Johnson, Dan Johnson, and Dollie B. Johnson were charged with the offense of night-riding.

One information charged that the defendants ". . . did unlawfully, wilfully, feloniously and maliciously write and publish a threatening message or token and post same at Battle's Ferry Landing to Dean's Island near Pecan Point, in said district, county and state, in which they threatened to do violence to certain cotton pickers employed to work on the farm of Trice Battle, among whom was ..... Letson, whose further name is to this informant unknown, if the said cotton pickers did not stay out of the cotton fields of the said Trice Battle; that said message or token was written with the felonious and unlawful intent to intimidate and threaten the said cotton pickers on the farm of the said Trice Battle (that the defendants united, confederated and banded themselves together to do an unlawful act in the night-time); and by writing and posting the following notice, which is made a part of this information:

"Stay out of field if you don't want get in trouble.

"Cotton pickers demand $1 per hundred for picking this crop of cotton. Wages for picking this crop are 40c, 50c, 60c, 85c per hundred. Cotton is selling about 8c per pound plus the government subsidy, which makes it worth over 10c per pound. Cotton picking wages therefore must be in line with the selling price of cotton.

"We urge all cotton pickers—union or non-union, to sit down in their homes and wait until prices reach $1 per hundred before picking another boll. U. S. law forbids transportation of labor across state lines during a strike.

"Wage Committee,

"Southern Tenant Farmers Union,

"Affiliated C. I. O.

"Join the Southern Tenant Farmer's Union and raise your wages."

The charging part of the other information is exactly the same as the one copied above except that it names Rufus Branch, instead of Trice Battle, as the man whose cotton pickers were intimidated from working, and mentions Dick Robinson and Albert Fisher as the cotton pickers who were intimidated, instead of ..... Letson.

During the progress of the trial the court permitted the prosecuting attorney to amend each of the informations by inserting the words inclosed in the parentheses: "that the defendants united, confederated and banded themselves together to do an unlawful act in the night-time." When permission was given to make this amendment, and when the amendment was made, the presiding judge stated: "The court offers to permit the defendant to have such additional time as he may desire to meet the amendment, if he is not now prepared to meet it." No one of the defendants requested the time which the court offered to give, and the trial proceeded upon the information as amended.

This action of the court was not assigned as error in the motion for a new trial, and it is not here insisted that this action was erroneous. It appears, therefore, that if there was any error in permitting this amendment, that error was waived. The amendment did not change the nature of the crime charged or the degree thereof, and was therefore permissible under § 24 of Initiated Act No. 3, which appears as § 3853 of Pope's Digest.

It is insisted, however, that the informations as amended do not charge a public offense. In the case of *Kosier* v. *State,* 163 Ark. 513, 260 S. W. 404, which, like the instant case, was a prosecution under what is commonly called the night-riding statute, it was held that "An indictment for night-riding, . . . , being substantially in the language of the statute, was sufficient." Here, the indictment, not only employs the language of the statute, but recites the facts which constituted a violation thereof, and it was, therefore, sufficient to charge that offense.

No objection was made to the fact that the trial was had upon both the informations, but error is assigned in

the refusal of the court to grant the defendants a severance upon the trial of these informations. Section 3140, C. & M. Digest, which granted the right to sever two defendants jointly indicted for a felony, was amended by § 29 of Initiated Act No. 3 of 1936, (Acts of 1937, page 1384) *supra,* to read as follows: "Section 3140. Severance in felony cases. When two or more defendants are jointly indicted for a capital offense, any defendant requiring it is entitled to a separate trial; when indicted for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court. When separate trials are ordered in any case, the defendants shall be tried in the order directed by the court." In the recent case of *Graham & Seaman* v. *State, ante* p. 50, 121 S. W. 2d 893, it was held that in the trial of persons charged with a felony not capital, the denial of their motion for a severance was, under the amendatory act (§ 3976, Pope's Digest) within the discretion of the trial court, and was reversible only when that discretion had been abused. We think there was no abuse of this discretion in the instant case in denying the right of severance, especially in view of the fact that the defendants were charged with having conspired and confederated together to violate the law, and it was, therefore, necessary and proper to show their joint participation in the acts constituting a violation of the law which the information charged.

A special demurrer was filed to each information, in which it was alleged that the night-riding statute, which the accused were charged with having violated, contravened the 1st amendment to the Federal Constitution, in that it abridged the freedom of speech and the right of the people peaceably to assemble, as well as § 6, of Article II, of the Constitution of this state upon the same subject, and also that the statute was in violation of the 14th amendment to the Federal Constitution guaranteeing all persons the equal protection of the laws.

We do not think the legislation is violative of these constitutional provisions. The law applies alike to all persons who violate its provisions, and we find nothing in

it intended or calculated to abridge the right of free speech or of peaceable assemblage.

The notices, made part of the information copied above, were printed in part and written in part. All was printed except the sentence "Stay out of field if you don't want get in trouble," which sentence was written on the printed notice. The court charged the jury—and in that view we concur—that the printed notices, read apart from the writing thereon, were innocuous, and that the posting of these printed notices, apart from the writing thereon, either in the day or during the night, did not constitute a violation of the law. In other words, the jury was told, in effect, that the defendants had the right to refuse to pick cotton for a price less than $1 per hundred, and had the right to demand any price for their labor which they saw proper to charge. They not only had the right to do so themselves, but had the right to urge others to join them in this demand for an increase of wages, and that they could do this by word of mouth, by peaceable assemblage, or by a public appeal through printed notices. But what they did not have the right to do was to intimidate and prevent others from working for the wage offered, if those others wished to do so.

Upon this issue the court charged the jury as follows: "You are further told, gentlemen, that it is not unlawful for any labor organization to strike. They have the right to strike if they desire, without violating the law, so even if a strike was called it was not a violation of the law. The charge that they are being tried here for is not for striking, but under the night-riding statute the state charges that they violated the night-riding statute by seeking to threaten or intimidate in violation of the laws of that statute by certain messages that the state contends were written and published."

The writing upon the notices, "Stay out of field if you don't want get in trouble," was not merely an appeal for support in the prosecution of the strike. The jury found, under instructions submitting that question, that it was a threat of violence—of hurt—to anyone who picked cotton for a less price than was demanded by the

Southern Tenant Farmers' Union. Whether this threat of harm was calculated to and did intimidate was a question of fact submitted to the jury, of which more will be presently said. In submitting that issue the court charged the jury as follows: "Among the things you will have to determine here, gentlemen, is whether or not the messages written were written for the felonious purpose of intimidating and whether or not they did intimidate or were calculated and intended to intimidate as defined to you in the statutes of the State of Arkansas that I have just read to you."

The jury returned verdicts finding the defendant Henry Johnson guilty in one case only, and the defendant Dan Johnson guilty in the other case only, and their punishment was fixed at one year each, while the defendant Dollie B. Johnson was found guilty in both cases, and she was given a sentence of two years in each case, making her total sentence four years.

It is insisted that the testimony was insufficient to support any of these convictions, and that incompetent testimony was admitted, especially in the case of Dan Johnson.

Dollie B. Johnson is the daughter-in-law of Henry Johnson, but neither Dollie B. nor Henry are related to Dan. There was a preliminary hearing before a justice of the peace in the cases of Henry and Dollie B. Johnson, but none in the case of Dan Johnson. Witnesses at the trial from which this appeal comes gave testimony as to the statements made at the preliminary trial by Henry and Dollie B. Johnson, to the giving of which testimony Dan Johnson objected. The court admonished the jury that this testimony could not be considered by the jury in passing upon the guilt or innocence of Dan. However, it appears that substantially the same testimony was given by Henry and Dollie B. Johnson at the trial in the circuit court; indeed, much of the testimony is undisputed and is to the following effect.

There existed in Mississippi county a labor union known as the Southern Tenant Farmers' Union, which was an affiliate of a nation-wide labor organization com-

monly referred to as the C. I. O. One Mitchell, of Memphis, was an officer of the tenant union. It was known that a letter had been received from Mitchell, and several persons, including appellants, were at the home of Henry Johnson to hear the letter read. There had also been received a package containing printed notices like the one above copied. Dollie B. Johnson admitted that she wrote on three of these notices the words, "Stay out of field if you don't want get in trouble." One of the notices containing this warning was posted on the gate of the Branch farm, another was posted in the Trice Battle farm. Henry Johnson dictated to Dollie B., who had been the secretary of the local organization, the words which Dollie B. wrote on the notices. Henry Johnson admitted that the meeting was held at his home, and that Dan and Dollie B. Johnson were present, and there was testimony to the effect that Dan admitted that he had posted the notice on the Branch farm, and there was testimony to the effect that Henry Johnson took some copies of the notice from the meeting. The notices were posted during the night of this meeting, and posted copies were discovered very early the next morning, one witness said "just as the sun was peeping up."

The testimony abundantly supports the findings that if Dan and Henry Johnson did not actually post the notices, they were instrumental in having this done, and that they acted pursuant to an understanding that this should be done which was agreed upon at the meeting held in Henry Johnson's home, and that the notices were posted during the night-time.

That the notices were intended and calculated to intimidate laborers who were willing to pick cotton for the wages offered is shown by the effect which the discovery of the notices produced upon the laborers. A number of pickers who had been brought in trucks from Memphis refused to enter the fields, and some who had commenced picking left the fields when told of the notices. There was panic among the pickers, and some said they were afraid to enter the fields.

Among other objections to the informations is that they failed to allege the names of the persons who were intended to be and had been intimidated. This objection may be answered by saying (a) that it was not necessary that the persons be specifically named—the notices were addressed to any and all persons who should pick cotton for a wage less than that demanded by the union, and (b) each information did allege the name of a person who had been intimidated. ..... Letson testified that the pickers were afraid to go in the fields, and Albert Fisher, named in the other information, testified that when he heard of the notices he went home and remained there for two days.

Section 1 of the night-riding statute, which appears as § 3499 of Pope's Digest, provides that "If two or more persons shall unite, confederate or band themselves together for the purpose of doing an unlawful act in the night-time, . . . , or to do any felonious act, or if any person shall knowingly meet or act clandestinely with any such band or order, . . . , they shall each be guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term not to exceed five years."

Here, the testimony established the fact to the satisfaction of the jury that a meeting was held, which all the appellants attended, when the agreement was reached pursuant to which the notices were posted in the night-time, threatening with hurt persons who were unwilling to join in the strike for higher wages, and this conduct constituted a violation of the law above quoted.

We perceive no reason, however, why other or greater punishment should be imposed upon Dollie B. Johnson than was imposed upon her confederates. It is true she wrote the threatening part of the notices, but she did this at the suggestion and dictation of her associates. The jury was warranted in finding that she knew the notices would be posted in the night-time, and that the matter which she wrote upon the notices would give greater emphasis to them, but so did her associates, who actually posted them or caused them to be posted, and

she was no more guilty than they were. We conclude, therefore, that no greater sentence should be imposed upon her than upon them, and her sentence will, therefore, be reduced to one year to conform to theirs.

The judgments in the cases of Henry Johnson and Dan Johnson are affirmed.

[redacted]

BURNETT *v.* STATE.

4118 126 S. W. 2d 277

Opinion delivered March 20, 1939.

[redacted]

J. M. Jackson and *Peter A. Deisch,* for appellant.

Jack Holt, Attorney General, *Jno. P. Streepey,* Asst. Atty. General, for appellee.

McHANEY, J. Appellant was indicted, tried and convicted of murder in the first degree for the shooting and killing of I. C. Emerick. His punishment was fixed at life imprisonment in the state penitentiary.

For a reversal of the judgment against him, appellant contends that the court erred in excusing for cause

Mr. J. R. Grogan, a member of the regular panel of jurors. The following occurred on the *voir dire* examination of the juror: "By the court: Q. Mr. Grogan, you have been asked by the prosecuting attorney if you had formed an opinion as to how this killing occurred, in answer to the prosecuting attorney's question you said that you had formed an opinion? A. I have. Q. Then I asked you if it was from what was said by witnesses, and you said it was not, then the prosecuting attorney asked you if you had an opinion on your mind now, and you said you had, then he asked you if it would take evidence to remove that opinion, and you said that it would, then counsel for the defense asked you if you could lay aside that opinion and try the case solely on the evidence you heard from the witness stand and the instructions of the court, and you said that you could. Let me ask you this question, you formed an opinion from what you heard about the case? A. Yes, sir. Q. You still have that opinion now? A. Yes, sir. Q. Can you lay aside that opinion from right now as though you never had formed it and go into the jury box without an opinion until you heard the witnesses? A. I don't know about laying the opinion aside. The court: I am going to excuse him."

Examination: "By Mr. Jackson: Q. Mr. Grogan, you say the opinion you now have is formed from having talked to people who are not witnesses in this case? A. As far as I know they are not. Q. And from what they told you you formed an opinion? A. Yes, sir. Q. If selected as a juror to try this case, notwithstanding the opinion you now have, having been formed from rumor and hearsay, I will ask you if you can discard it, lay it aside, and try the case according to the law and the evidence as you hear it here in the courtroom and not permit the opinion you now have to influence or control you in any manner or any degree in arriving at a verdict? A. Yes, sir. Q. And you will do that? A. Yes, sir, I don't know whether these were facts. Mr. Jackson: The court has excused you, and I now except to the ruling of the court."

Examination: "By the court: Q. In answer to my question a moment ago when I asked you if you could lay your opinion aside you stated that you would be governed by the evidence, but you didn't think you would be able to lay the opinion aside as of now, in other words, you can't lay the opinion aside first, but you must hear evidence before you lay your opinion aside? A. I think that is right. The Court: Then I excuse you."

Examination: "By Mr. Jackson: Q. Then after you hear the evidence and the instructions of the court, can you return a verdict in accordance therewith? A. Yes, sir. The court: I am excusing him, because he stated that he cannot as of the present moment, lay his opinion aside, but that he would lay his opinion aside after he heard the evidence. Mr. Jackson: I want the record to show that the opinion he now has is formed from rumor and hearsay, and I except to the ruling of the court in excusing the juror."

No error was committed in excusing this juror. It is a rather unusual assignment, in that the situation is usually the reverse, that is, that the court has usually refused a peremptory challenge of a juror for cause, and the defendant excepts and assigns error because thereof. Here, the court excused the juror, because he did not appear to be free from bias or prejudice. So far as this record discloses, a fair and impartial jury was selected to try appellant. He concedes that he was not entitled to the service of any particular juror, and that the trial court does and must have a wide discretion in such matters. Such has been the rule in this court throughout the years. It is true, as appellant contends, and as we have many times decided, "that a juror is not disqualified simply, because he has an opinion based on rumor and hearsay where he states he can disregard the opinion and try the case as though he had never heard it discussed." Had the court held juror, Grogan, qualified and competent over appellant's objections, and had he been convicted and appealed, assigning error because thereof, it is quite probable we would still overrule the assignment. In *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643,

with reference to the selection of trial jurors from the regular panel, this court said: "These were matters over which the circuit judge must necessarily have a wide discretion. It is thoroughly settled that a defendant has no right to the services of any particular juror. He may only demand that he be tried before a fair and impartial jury, and it is difficult to imagine a case where the judge had excused a juror from further service on the regular panel which would afford any defendant just cause of complaint."

Here, appellant complains, because the court excused one of the regular panel for cause, on its own motion. Even though it be conceded the juror was competent, and that the court should not have excused him, still appellant is not prejudiced, because he was tried by a fair and impartial jury. We think, however, the court correctly excused the juror. So, in any event, appellant has no just complaint.

Only one other question is presented for our consideration, and that is, whether appellant "acted in self-defense at the time the fatal shots were fired that resulted in the death of I. C. Emerick." This question was one for the jury and was submitted on conflicting evidence and under instructions not questioned. The jury has settled this conflict against appellant and is conclusive here. We think it would serve no useful purpose to set out the evidence.

The judgment must be affirmed. It is so ordered.

THE FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* STATE, USE COLUMBIA COUNTY.

4-5330 126 S. W. 2d 293

Opinion delivered March 20, 1939.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Oren Harris and *Edwin B. Keith,* for appellee.

HUMPHREYS, J. On August 27, 1937, the State of Arkansas, on the relation of the prosecuting attorney of Columbia county filed the following complaint in the chancery court of Columbia county to recover $4,960.45 from Lula McAlister Gillum, Treasurer of Columbia county for the term from January 1, 1933, to December 31, 1934, and from the Fidelity & Casualty Company of New York, which was surety upon her official bond. The complaint is in words and figures as follows:

"Comes the plaintiff, State of Arkansas, for the use and benefit of Columbia county, Arkansas, on the relation of Oren Harris, as prosecuting attorney, and for its cause of action against the defendants, Lula McAlister Gillum and the Fidelity & Casualty Company of New York, a corporation, alleges:

"That at the general election held in Arkansas, in the year 1932, for the election of state and county

officers for Arkansas, to serve for the term of two years, beginning January 1, 1933, and ending December 31, 1934, the said Lula McAlister Gillum was elected to serve as treasurer of Columbia county, Arkansas; said Lula McAlister Gillum thereupon qualified as such county treasurer, took the oath of office prescribed by law for such treasurer, and served as county treasurer of Columbia county, Arkansas, continuously for the term of two years, to-wit: Beginning January 1st, 1933, and ending December 31, 1934; and was the regular elected, qualified, commissioned and acting county treasurer in and for Columbia county, Arkansas, at the time of the commission of the acts complained herein.

"That the defendant, The Fidelity & Casualty Company of New York is, and was at all times mentioned hereinafter, a corporation, authorized to do, and doing business in the state of Arkansas.

"The said defendant, Lula McAlister Gillum as such county treasurer, duly executed her official bond, as treasurer on the 30th day of December, 1932, with the Fidelity & Casualty Company of New York, as her surety thereon, in the sum of $22,500 for the term aforesaid, that is, for the years of 1933 and 1934, and that said bond was duly examined and approved on December 30th, 1932, by Honorable Aubrey Rowe, as county judge, and was duly filed in the Columbia county circuit court, on the 6th day of January, 1933, and affirmed and was filed for record and recorded in Record Book 3, at page 155, of the records of Columbia county, Arkansas; that among other things it was provided in said bond that if the said treasurer, Lula McAlister Gillum, shall well, truly, and faithfully discharge and perform the duties of her office, and at the expiration of her term of office, shall render unto her successor in office, a correct account of all sums of money, books, goods, valuables and other property as it comes into her custody, as such treasurer of said Columbia county, Arkansas, and shall pay and deliver unto her successor in office or any other person authorized to receive the same, all balances, sums of money, books, goods, valuables and other property, which shall be in her hands and due by her, then the above

obligation shall be null and void; else the same to remain in full force and virtue; that a copy of said bond is attached hereto, marked Exhibit 'A', and made a part of this complaint; that said Bond was in full force and effect and covered the period from January 1st, 1933, to December 31st, 1934, both dates inclusive.

"That for the years of 1930, 1931, 1932, and 1933, a large number of claims were presented to the county court of Columbia county, Arkansas, for payment of obligations incurred by said county; that said claims were allowed by said Court and ordered paid. In obedience to said order of allowance, the county clerk of Columbia county, Arkansas, drew, issued and delivered county warrants drawn upon the County General Fund in Columbia county, Arkansas, and for the fiscal year of 1930-1931, the said Court allowed claims and the county clerk thereof, issued warrants which were void for the reason that said order and warrants were made and issued, after the revenues of said county, chargeable to the County General Fund, had been exhausted, and said void warrants in the sum of $22.40, which were issued in the fiscal year of 1930-1931, were presented to the said Lula McAlister Gillum, as county treasurer, in the year of 1933, and was then and there paid, cashed and redeemed by her; that void warrants in the sum of 50c which were issued in the fiscal year of 1930-1931, were paid, cashed and redeemed in the year of 1934, by the said Lula McAlister Gillum, as said treasurer; that the county court of Columbia county, Arkansas, for the year of 1931, allowed claims and the clerk thereof, issued warrants in excess of the revenues derived from all sources for that year, which were void, and the said Lula McAlister Gillum, in the year 1933, paid, cashed and redeemed said void warrants issued in said year of 1931, in the sum of $915.19; that the said Lula McAlister Gillum, as said county treasurer in the year of 1934, paid, cashed, and redeemed void warrants, which were issued in 1931, that were void because they exceeded the revenues from all sources of that year, in the sum of $50; that the county court of Columbia county, Arkansas, allowed claims for the fiscal year of 1931-1932, and the

county clerk thereof issued warrants in excess of the revenues of said county from all sources for that year; and the said Lula McAlister Gillum, as said county treasurer, in 1933, paid, cashed and redeemed said void warrants issued in the fiscal year of 1931-1932, in the sum of $2,147.90, and in the year of 1934, the said Lula McAlister Gillum, as county treasurer, paid, cashed and redeemed void warrants issued in the fiscal year of 1931-1932, in the sum of $133.45; that the county court of Columbia county, Arkansas, for the year of 1933, allowed claims against said county and the county clerk thereof issued warrants thereon in excess of the revenues from all sources for that year, which were void, and the said Lula McAlister Gillum paid, cashed and redeemed said void warrants in the year of 1933, that were issued in excess of the revenues of the fiscal year of 1933, in sum of $221.80, and the said Lula McAlister Gillum, as said treasurer of said county, in 1934, paid, cashed and redeemed said void warrants that were issued in excess of the revenues of the fiscal year of 1933, in the sum of $725.85; making a total of said void warrants paid, cashed and redeemed in the year of 1933, by the said Lula McAlister Gillum, as treasurer of said county, in the sum of $3,307.37, and a total of said void warrants paid, cashed, and redeemed in the year of 1934, in the sum of $909.-80, and a sum total of void warrants during the year of 1933, and 1934, paid, cashed and redeemed by the said Lula McAlister Gillum, to the amount of $4,217.17.

"That it became and was the duty of the said Lula McAlister Gillum, as county treasurer, as aforesaid, to refuse to accept, pay, cash or redeem all void or invalid county warrants of the said Columbia county, Arkansas, which were presented to her as such county treasurer, either for redemption in cash or in payment of any debt, forfeiture penalty, tax or any other obligation due the said Columbia county, Arkansas; that, notwithstanding this duty, as aforesaid, of the said Lula McAlister Gillum, as such treasurer, she, as treasurer of Columbia county, Arkansas, did during the term of her office, 1933-1934, accept, pay, cash and redeem void warrants in the aforesaid sum of $4,217.17, said warrants being illegal, fraudu-

lent, invalid and absolutely void, and not a valid charge against the said Columbia county, Arkansas, and to the great damage and loss to said county in said amount; said warrants being illegal, fraudulent, invalid and absolutely void, for the reason that they exceeded the revenues of said county for the year in which they were issued.

"That this breach of duty as aforesaid, by her, the said Lula McAlister Gillum, as Treasurer, constitutes and is a breach of the conditions of her official bond, as set out above to the great damage and loss of Columbia county, Arkansas, in the amount of $4,217.17.

"That on the 5th day of April, 1933, the said Lula McAlister Gillum, as county treasurer of Columbia county, Arkansas, filed her quarterly report for the first quarter of 1933, with the Columbia county court of Columbia county, Arkansas, which is a written report purporting to show the total sums of money on hand, received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'B', and made a part of this complaint.

"That on the 8th day of July, 1933, the said Lula McAlister Gillum, as county treasurer of Columbia county, Arkansas, filed her quarterly report for the second quarter of 1933, with the Columbia county court for Columbia county, Arkansas, which is a written report purporting to show the total sums of money on hand, received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'C', and made a part of this complaint.

"That on the 7th day of October, 1933, the said Lula McAlister Gillum, as county treasurer of Columbia county, Arkansas, filed her quarterly report for the third quarter of 1933, with the Columbia county court of Columbia county, Arkansas, which is a written report purporting to show the total sums of money on hand, received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'D', and made a part of this complaint.

"That on the 17th day of January, 1934, the said Lula McAlister Gillum, as county treasurer of Columbia

county, Arkansas, filed her quarterly report for the fourth quarter of 1933, with the Columbia county court of Columbia county, Arkansas, which is a written report purporting to show the total sums of money received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'E', and made a part of this complaint.

"That on April 13th, 1934, the said Lula McAlister Gillum as county treasurer of Columbia county, Arkansas, filed her quarterly report for the first quarter of 1934, with the Columbia county court of Columbia county, Arkansas, which is a written report purporting to show the total sums of money on hand, received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'F', and made a part of this complaint.

"That on the 10th day of July, 1934, the said Lula McAlister Gillum, as county treasurer of Columbia county, Arkansas, filed her quarterly report for the second quarter of 1934, with the Columbia county court of Columbia county, Arkansas, which is a written report purporting to show the total sums of money on hand, received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'H', and made a part of this complaint.

"That on the 3rd day of January, 1935, the said Lula McAlister Gillum, as county treasurer of Columbia county, Arkansas, filed her quarterly report for the fourth quarter of 1934, with the Columbia county court of Columbia county, Arkansas, which is a written report purporting to show the total sums of money on hand, received and disbursements made for said quarter. A copy of said report is attached hereto, marked Exhibit 'I', and made a part of this complaint.

"Plaintiff alleges that no final report was made by the defendant, Lula McAlister Gillum, at the expiration of her term of office, which ended December 31st, 1934, other than the quarterly reports filed, as stated herein; that said reports were not made under oath, as required by statute, in such cases made and provided, and in fact,

did not set forth the correct account of moneys received and disbursed, that the said defendant, Lula McAlister Gillum, as such treasurer of Columbia county, Arkansas, was required to make, because in said reports, the said Lula McAlister Gillum attempts to take credit for the said void warrants herein above described, that she paid, cashed, and redeemed. That she is not entitled to credit on her settlements for the period of 1933-1934, in the sum of $4,217.17, which was for void warrants. That it was the duty of the said defendant, Lula McAlister Gillum, to pay over said sums to the officers entitled to receive the same, and that she had failed and refused to account for and to pay over to the officer entitled to receive the same, the said moneys paid out for void warrants in the amount of $4,217.17. That the plaintiff is entitled to interest on said amount at the rate of six per cent. (6 per cent.) per annum from January 1st, 1935, until paid.

"That the defendant, Lula McAlister Gillum, as county treasurer for the term of 1933-1934, failed and refused to account for and pay over to the officer entitled to receive the same, the further sum of $743.28, that said sum was received by her as county treasurer, and credited to the School Account of Columbia county, Arkansas, that in the quarterly reports described herein, the defendant failed and neglected to give a correct account of said school funds, and said reports do not, in truth and in fact, set forth a true accounting of said fund, that the plaintiff is entitled to interest on said amount of said $743.28, at the rate of six per cent. (6 per cent.) per annum, from January 1st, 1935, until paid, that this constitutes and is a further breach of the conditions of her official bond, as set out above, to the further damage and loss of Columbia county, Arkansas, in the further amount of $743.28, making a total amount of damage and loss of Columbia county, Arkansas, due to a breach of duty, and of the conditions of her official bond, in the sum of $4,960.45.

"Wherefore, plaintiff prays that the account of the said Lula McAlister Gillum, as treasurer of Columbia county, Arkansas, for the years of 1933 and 1934, be by

the court, surcharged for fraud, error, accident or mistake and restated, and that the plaintiff have judgment against the said defendants herein named, in the sum of $4,217.17, and the further sum of $743.28, making a total of $4,960.45, together with interest thereon at the rate of six per cent. (6%) per annum from January 1st, 1935, until paid, and for all costs herein, and for all other equitable relief, to which the plaintiff may be entitled."

To this complaint appellant filed the following demurrer:

"1. This defendant offers to confess judgment in the sum of $743.28, which is the amount alleged that the defendant, Lula McAlister Gillum, failed to account for and pay over to the proper officer entitled to receive the same.

"2. For its first ground of demurrer to that portion of the complaint of the plaintiff wherein recovery in the sum of $4,217.17 is sought for the cashing of void warrants, this defendant states that the complaint fails to allege facts sufficient to constitute a cause of action, for the reason that a county treasurer should not be held liable, and is not liable for the act of cashing a warrant which was void because issued in contravention of Amendment No. 10 to the Constitution of the state of Arkansas.

"3. For its second ground of demurrer to that portion of the complaint wherein recovery for $4,217.17 is sought for the cashing of void warrants, this defendant states that the plaintiff's alleged cause of action is barred as to all warrants which were cashed more than three years prior to the date upon which the summons in this case was issued, which was the 4th day of September, 1937; that is to say, the alleged cause of action on any warrant cashed by the defendant, Lula McAlister Gillum, prior to September 4, 1934, is barred by the statute of limitations.

"4. For its third ground of demurrer to that portion of the complaint which seeks a recovery of $4,217.17 for the cashing of void warrants, this defendant states that this court has no jurisdiction over this subject-matter for the reason that this is not properly an instance

of the right to surcharge the account of the defendant, Lula McAlister Gillum. The question of fraud, error, accident or mistake in the said officer's account is not here involved. The alleged wrongful act of the defendant, Lula McAlister Gillum, in the performance of her duties and her failure to refuse to cash the alleged void warrants have nothing to do with her accounts or settlement.

"Wherefore, the defendant, The Fidelity & Casualty Company of New York, prays that the demurrer to the complaint heretofore filed be sustained, and that the plaintiff be required to announce whether the offer to confess judgment for $743.28 be accepted, and for all other equitable relief."

Appellant refused to accept the offer of $743.28 whereupon the court overruled the demurrer to the complaint and appellant, standing on its demurrer, refused to plead further and the court rendered judgment against appellant for the entire amount sued for together with interest thereon, from which appellant duly prosecuted an appeal to this court.

Mrs. Gillum made no appearance in the case. In filing its demurrer to the complaint appellant admitted that the warrants paid by the treasurer were issued in excess of the revenues for the several years alleged, and that said warrants were void under the doctrine of the case of *State, use Jackson County* v. *Murphy,* 192 Ark. 439, 92 S. W. 2d 205, but insists that that case should be overruled in view of the fact that this court in the decision of *State, use Perry County* v. *House,* 193 Ark. 282, 99 S. W. 2d 834, released the county judge and clerk from civil liability. It is argued that these cases are inconsistent, but there is no inconsistency between them. In the latter case the county judge was exempted from civil liability because he acted in a judicial capacity within his jurisdiction, and released the clerk for the reason that he performed a clerical duty in issuing the warrant under the direction of the court. The latter case has no bearing upon the former case in which this court ruled that a duty rested upon the treasurer of a county to pay out the funds to the parties to whom they belonged and

not upon void warrants. The gist of the former case was that a treasurer who had custody of the county funds failed in the performance of his duty when he paid such funds out on void warrants. We adhere to the ruling in the former case for the reason and on the grounds therein stated which we regard as sound for otherwise Amendment No. 10 would be no protection whatever against the unlawful payment of funds which belong to the county, school districts, etc., which had been intrusted to the custody of the treasurer. It would indeed be an anomalous situation if no one were responsible for the payment of void warrants or void claims in violation of Amendment No. 10 to the Constitution of Arkansas.

Appellant also contends for a reversal of the judgment on the ground that the chancery court was without jurisdiction to determine the issues joined. It will be observed that the allegations of the complaint are that the treasurer paid out the money on void warrants, and falsely obtained credits for the amount in her accounts current and final account and prayed that the accounts be falsified and surcharged so as to show the balance due the county from the treasurer, and that the county have judgment for the amounts for which the treasurer falsely and fraudulently obtained credits. It also appears from the complaint that more than one year had expired after the final report of the treasurer so that it was not within the power of the county judge to make the correction. It is admitted in the demurrer that appellant was indebted under the provisions of its bond for $743.28 for which the treasurer had obtained false and fraudulent credits. These allegations admitted by the demurrer clearly and unmistakably state a cause of action in equity. This court ruled in the case of *Yates* v. *State, use Miller County,* 186 Ark. 749, 54 S. W. 2d 981, that chancery courts had jurisdiction to correct mistakes and fraud in settlements of county offices after the time had elapsed for the county court to make such corrections. It is true that this court said in the case of *State, use Jackson County* v. *Murphy, supra,* that "The payment of void warrants was purely a violation of his official duty and

the bond promised that he would faithfully perform his duties," and the unlawful expenditures might be recovered in the circuit court. In that case it did not appear that the treasurer had taken credits falsely and fraudulently for the amounts he had paid out on void warrants whereas in this case it is alleged that the treasurer not only paid void warrants, but that in her settlements she took credits for the amounts she had thus paid out on the void warrants. The prayer to falsify and surcharge her account brought the instant case within the jurisdiction of the chancery court. It is conceded that one of the duties imposed by the law and against a breach of which the county is protected by the idemnity bond was that the treasurer should pay over to the county or her successor in office all moneys collected and not properly expended in the faithful performance of her duties.

Appellant's last contention is that the judgment should be reversed because the alleged indebtedness is barred by the statute of limitations. It is argued that the three-year—and not the five-year—statute of limitations (Pope's Digest, § § 8928 to 8938) applies, and that the statute began to run from the date of the treasurer's last quarterly settlement, which, as stated above, was January 3, 1935.

We think the three-year—and not the five-year—statute of limitations is applicable to this suit. The Circuit Court of Appeals of this circuit had occasion to apply § 6960, C. & M. Digest (which is now § 8938, Pope's Digest) in the case of *Futrall* v. *City of Pine Bluff,* 87 Fed. 2d 711. That was a suit to recover a sum erroneously paid to the treasurer of the city of Pine Bluff. The same statute would apply in cases of that character, whether the money had been paid to or had been paid by the treasurer, and it was there held that the three-year statute was the applicable statute. In so holding the court there said: "The meaning of these sections of the statutes of Arkansas must be determined from the decisions of the Supreme Court of that state. An analysis of such decisions as throw light upon the question here involved has convinced us that an action to recover money paid or obtained through an honest mistake of

fact or law, in the absence of fraud, corruption, or wilful diversion, is an action founded upon an implied contract or liability, not in writing, and must be commenced within three years. *Richardson* v. *Bales,* 66 Ark. 452, 51 S. W. 321; *Clarke* v. *School District No. 16 et al.,* 84 Ark. 516, 106 S. W. 677; *Board of Education of Ouachita County et al.* v. *Morgan et al.,* 182 Ark. 1110, 34 S. W. 2d 1063. See, also, *Tedford Auto Co.* v. *Chicago, R. I. & Pac. Ry. Co.,* 116 Ark. 198, 172 S. W. 1006; *England* v. *Hughes et al.,* 141 Ark. 235, 217 S. W. 13; *Clements* v. *Citizens' Bank of Booneville,* 177 Ark. 1085, 9 S. W. 2d 569; *Cherry* v. *Falvey,* 188 Ark. 827, 68 S. W. 2d 98. And compare, *Sims* v. *Craig, County Treasurer et al.,* 171 Ark. 492, 286 S. W. 867; *Core et al.* v. *McWilliams Co., Inc.,* 175 Ark. 112, 298 S. W. 879."

In this case, as in that, the money sought to be recovered had been paid or obtained through an honest mistake of law or fact, and there was an absence of fraud, corruption, or wilful diversion.

We are, of course, not bound by this decision, but it must be remembered that the Court of Appeals was not attempting an original construction of this statute. The court was assuming to follow our construction of this statute in the cases there cited, and we think those cases support the conclusion that in actions of this character the statute of limitations is three years, and not five years. The fact that the treasurer is liable on his bond for this erroneous payment of invalid warrants does not alter the nature of the liability, which may be ascertained and recovered upon in a single suit.

We are of the opinion also that the statute of limitations commenced to run from the date of the respective settlements. The erroneous payment of an invalid warrant is the basis of the cause of action. It is this payment of an invalid warrant which constitutes the conversion of the money with which it was paid, and this conversion is consummated when the treasurer reports its payment and asks credit therefor in the settlement. When this was done a cause of action arose for the amount of money so wrongfully paid out.

Section 2435, Pope's Digest, provides that the treasurer shall annually on the first Monday in July, "and oftener, if so required," make a full and complete settlement with the county court of all funds and moneys that have come into his hands as such treasurer, and at such settlement it is made the duty of the county court to make actual count of the money appearing by such settlement to be in the treasurer's hands.

Section 2438, Pope's Digest, requires the treasurer to keep a register of warrants similar to the one required to be kept by the clerk, "to which the time when paid shall be added in a separate column," and by § 2439 the treasurer is required to file "a copy of his register of warrants paid."

By § 2440, Pope's Digest, the treasurer is required, at his annual settlement with the county court, to produce all the warrants redeemed by him during the preceding year, and the presiding judge is required to write the word "Redeemed" across the face of each warrant and sign his name thereto, and to cause all warrants thus redeemed to be filed in the office of the clerk of the county court. If quarterly settlements had been required, as they may be, the same procedure would be followed in regard to warrants for the payment of which the treasurer asked credit in the settlement. But if quarterly settlements were not required, and had not been made, then the statute would run from the date of the annual settlement in which the payment of the various warrants was reported. Here, the treasurer made quarterly settlements, which if, in fact, were settlements, showed the warrants paid during the quarter or period of time covered by the settlement. So that, in any event, the statute of limitations began to run when the treasurer sought credit for the amount of the invalid warrants which had been improperly redeemed.

This holding comports with the view upon which the recent case of *McCoy* v. *State, use of Greene County,* 190 Ark. 297, 79 S. W. 2d 94, was decided. In that case the county treasurer and the sureties upon his official bond were sued for fees and emoluments of office in ex-

cess of $5,000 per annum retained by the treasurer for the years 1929 and 1930, the term of his office. During this term the treasurer expended various sums of money in connection with the administration of his office, for which he claimed credit when sued for the excess over $5,000 which he had retained. He had previously made no report of these expenditures for which he claimed credit in the suit against himself and the sureties on his bond. We there said: "The statute could not, and did not, begin to run from the dates upon which he should have filed the settlements. It was not known that he would make, or had made, any improper charges until settlements were filed. If the three-year statute be applicable, it must be computed from the date of the filing of the August settlement in 1930. The three years did not expire until August of 1933. The claim, therefore, was not barred by the statute of limitations of three years."

It does not sufficiently appear, from the record before us, on what date the treasurer, in her reports, took credit for warrants improperly paid, but as to some, at least, of these warrants more than three years had elapsed before the filing of this suit. The cause of action was barred as to invalid warrants shown by any settlement to have been paid more than three years prior to August 27, 1937, the date on which the suit was filed.

The decree will, therefore, be reversed, and the cause remanded, with directions to ascertain these facts and to enter a decree in accordance with that finding.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK *v.* MUNFORD.

4-5407 126 S. W. 2d 282

Opinion delivered March 20, 1939.

Silas W. Rogers, for appellant.

J. V. Spencer, for appellee.

BAKER, J. Appellant begins its statement of this case with this paragraph:

"On February 18, 1938, the appellee, Amy Munford, filed this suit against appellant, Metropolitan Casualty Insurance Company of New York, in the sum of $300. The suit was based on an accident disability policy dated August 7, 1937, and the plaintiff, Amy Munford, alleges that she is suing in the capacity of beneficiary. On March 16, 1938, appellant filed its answer and in the answer admits that the policy was issued and admits that the plaintiff was beneficiary, but further answering, states "that on the signed application of Otis Munford, defendant did insure his life on the condition that the said insured was a farmer and that he was working for himself and that the rate as such farmer was in 'E' class and

on such classification he was entitled to the $300.00 worth of insurance at $1.25 monthly premiums."

The insured at the time he was accidentally killed was hauling or loading logs for Mike Munford, employed by the Calion Lumber Company. It is alleged that as a logger he should have been classified under appellant's classification "H", and not "E", as it appears he was listed upon the application for insurance. It is alleged that under the classification of "H", his premium would have been $1.95 per $100 of insurance, per month, instead of $1.25 for $300 of insurance, and it is further stated that under the classification of "H", the amount of premium he paid in would have purchased $64.10. This amount was tendered, but refused. It is admitted that the insurance policy was in full force with all premiums paid at the time the insured was killed. The only real question that arises in the case is the contention made by the appellant that insured had changed his occupation after the issuance of the policy and that at the time of his death he was employed in a more hazardous work and that he should have been classified so as to pay the much higher rate of insurance, or to the same effect, that the amount of premiums paid would have bought a very much smaller sum, as the limit of recovery.

We copy from the policy of insurance a pertinent portion thereof.

"In consideration of the policy fee of five dollars and the Monthly premium of One 25/100 Dollars and of the statements in the Application for this policy, a copy of which is endorsed hereon and made a part of this contract does hereby insure Ottis Munford of Strong, Ark., hereinafter referred to as the Insured, a farmer by occupation, subject to all conditions and limitations hereinafter contained and endorsed hereon or attached hereto, from 12 o'clock noon, standard time at the place where the Insured resides on the day this contract is countersigned, until 12 o'clock noon, such standard time, of the first day of Sept., 1937, and for such time thereafter as the premiums paid by the insured, as herein agreed shall maintain this Policy in force."

The principal sum of this insurance was $300. Upon the trial of the case the foregoing policy was introduced in evidence and there was attached to it, as a part of it, according to the copied portion of the policy, insurance application, the pertinent part of which may be found in the following questions and answers:

"4. What are your occupations? (Name them all) General Work. Classed by the Company as? E

"5. What are all your duties in above occupation? .....

"6. Employer?..... Your wages or income? ..... per.....

"7. What is your employer's business?..... Business address?.....

"8. Who desired as beneficiary? (Full name) Annie Munford. Relationship? Mother."

Upon the trial of this case the appellant offered as a witness one of its general agents, who identified and sought to introduce what he alleged was the original application. This so-called original application had inserted after the question "What are your duties and occupations?" the word "farming", although the word or answer did not appear in the application attached to the policy and made a part of it by the express terms of the policy. The trial court expressed a doubt as to the admissibility of this evidence and directed a verdict for the plaintiff for the sum of $300, the amount of insurance, upon which the judgment was entered.

This appeal challenges the correctness of that judgment and the propriety of the trial court's act in refusing to consider this so-called original application for insurance and in refusing to submit to the jury, as contended for by appellant, the proposition to determine whether the so-called original application should be deemed the basis of the insurance contract, or the copy attached to the policy.

From the foregoing it will be seen that all the occupations mentioned, or stated by the insured are included in the one answer given by him, "general work." He did not say that he was a farmer nor that he was farming. He did not classify himself under the company's

schedule, but it appears from the application that the company made that classification. It does not appear from the application attached to the policy what kind of work he was doing, nor has any proof been abstracted in this record tending to show what his employment was at the time or on the date the policy was applied for, issued, or delivered.

The language of the policy is controlling in this case. It is the language employed by the insurance company, that is that "the application, copy of which is endorsed hereon and made a part of this contract." There is no ambiguity in the quoted language. It does not warrant the introduction of the alleged original application to vary or contradict the contract.

The insurance company had an application from one who was apparently a good risk. The application was incomplete in some of its details, that is, the answers to all questions had not been set out, but the insurance company was satisfied with these answers and made its own classification of "E" and issued its policy thereon for $300. It was the insurance company that asserted the applicant was a farmer and wrote that into the insurance policy. It is true that the insured accepted this policy so designating him as a farmer, but it follows, by no means, that he knew that there was a different rate of premium to be paid if he were hauling logs or making crops. In fact copy of the application shows the classification was made not by the insured, but by the insurer. Since this copy of the application by the unambiguous, unequivocal language of the insurer, was made a part of the contract of insurance, both the parties were bound thereby. We can lend appellant no aid in changing or modifying this instrument.

This was a suit at law. There was no allegation of fraud, or mistake, or contention that there was any misunderstanding, so it seems apparent that the insurance company should not now be permitted as a defense to amend or change the contract to defeat its liability.

The general rule seems to be that where a copy of the application is made a part of the contract, such copy governs and controls, rather than the alleged original,

of which it is the supplied copy, if they differ one from the other. 33 C. J. § 837, p. 115; 1 Joyce on Insurance, § 190 pp. 498, 499, 500.

But it is also argued that since the company designated him as a "farmer", when it issued the policy, the words "general work," means and refers to such work as farmers generally do. That might be true under certain conditions and circumstances, but the insured did not represent himself to be a farmer, according to this copy of the application. He gave the company the answer that he did "general work", a descriptive term that might mean one thing in one particular locality and a different thing in another. In this case the insurance company, no doubt, had knowledge of the conditions in communities in which it operated. The company was under no obligation to accept the application, but having done so it is bound by what appears in it.

When it accepted this application without requiring amendment, by the applicant, its policy must necessarily have followed the copy of application made a part of contract, without an effort to change or modify same. 1 Couch on Insurance, § 89, p. 158. At any rate the insured did not represent or warrant that he was a farmer.

Even if the policy, including the application accepted as a part thereof was ambiguous then such policy must be construed most strongly against appellant and most favorably for appellee. *Great American Casualty Co.* v. *Williams*, 177 Ark. 87, 7 S. W. 2d 775; *Life & Casualty Co.* v. *Ford,* 172 Ark. 1098, 292 S. W. 389; *Missouri State Life Ins. Co.* v. *Martin,* 188 Ark. 907, 69 S. W. 2d 1081.

This rule is so generally established, so universally recognized, that its statement needs little supporting authority.

Appellant asserts that the insured had changed his occupation and offers as evidence of that allegation the proof of death, submitted by the beneficiary, to the effect that while the insured was engaged in loading or hauling logs, a log rolled upon him and killed him. It may be true that a log-hauler is engaged in a much more hazardous occupation than a farmer, but there is no evidence in this case that the insured was not a log-hauler

at the time the policy was issued, nor is there any proof in this case that his answer, "general work", was not fully understood by him and by the agent to whom he gave the application. So, if it be understood that the answers given by the insured were warranties, there is no evidence of a breach thereof.

A settlement of this one issue determines all the other propositions, as those presented in the brief are merely incidental.

The judgment is affirmed.

RAILEY *v.* CITY OF MAGNOLIA.

4-5493 126 S. W. 2d 273

Opinion delivered March 20, 1939.

Walter L. Brown and *Whitley & Utley,* for appellant. *Edwin B. Keith, McKay, McKay & Anderson* and *Wade Beene,* for appellees.

SMITH, J. The court below dismissed as being without equity the suit of appellant, a citizen and taxpayer of the city of Magnolia, in which he sought to enjoin the officials of that city from proceeding, under Ordinance 244 of that city, which ordinance, if valid, authorized an election upon the question of the construction of a municipal hospital.

This appeal is from that decree, and appellant, the plaintiff below, questions first the action of this court in advancing the cause for submission. The cause affects the public interest, and it has always been the policy of this court to advance such causes for submission.

The second point made is that the ordinance was passed August 23, 1938, and the election which it provided for, to determine whether the city should issue bonds, pursuant to the provisions of the Amendment No.

13 to the Constitution, to erect a hospital, was held September 26, 1938, thus defeating the right to have the ordinance itself referred to the electorate of the city for approval or rejection.

The ordinance does not authorize the issuance of bonds. It provides that an election shall be held, at which time the electors shall vote upon that question, and requires the affirmative vote of the electors to confer that authority.

The authority to issue bonds for certain designated purposes, and, among others, the erection and equipment of hospitals, conferred by Amendment No. 13, is conditioned upon the submission of that question to the electors of the city, and an affirmative vote upon the subject. The question must be referred to and be approved by the electors before the power may be exercised, so that the election is, itself, a referendum. *Campbell* v. *City of Eugene,* 116 Ore. 264, 240 Pac. 418. But it is not essential to the decision of this case to hold that there was no right to have the ordinance authorizing the election to be referred, and we may treat that question as being reserved without changing the conclusion which must be reached.

Amendment No. 7, commonly referred to as the I. & R. Amendment, provides that "Municipalities may provide for the exercise of the Initiative and Referendum as to their local legislation." Pursuant to this power there was passed, in 1927, an Ordinance No. 167, by the city of Magnolia, which limits the time for filing a referendum petition to thirty days after the passage of any ordinance, and no attempt was made to exercise this power within thirty days after the passage of the ordinance, or at any other time. In view of the fact that only ninety days is allowed after the adjournment of the General Assembly in which to file petitions for referendum on a law statewide in its operation, we cannot say that thirty days is too short a time in which to petition for a referendum on a city ordinance.

The testimony shows very clearly that when Ordinance No. 244 was passed it contained the emergency clause declaring that the ordinance should be in force and effect from and after the date of its passage. It is true

the emergency clause did not defeat the right to have a referendum on the ordinance, but the emergency clause did have the effect of making the ordinance effective from and after its passage, subject, of course, to the right of the electors of the city to reject it, had they exercised their right of referendum within the time and manner allowed by Ordinance 167 for that purpose, which was not done. Ordinance No. 244, therefore, authorized the holding of the election on the day on which it was held. *Wait* v. *Hall,* 196 Ark. 508, 118 S. W. 2d 853.

It is insisted that the election was not held at the usual voting places, as the ordinance required. There are three wards in the city of Magnolia, and two voting places in Ward No. 1. The elections do not appear to have always been held at the same place in one of the precincts in Ward No. 1. There were three such places where elections had been held at one time or another, but all were within a block of each other. The last preceding election in one of the precincts of Ward No. 1 had been held at an office across the street from the Western Union Telegraph Company's office, but the election here in question was held in the Telegraph Company's office, and the witness by whom the showing was made that the place of the election had been changed admitted that he had no difficulty in locating the place where the election was in progress. In Ward No. 2 the usual place of holding the elections was in the main court room in the courthouse. The election in question was held in another room on the same floor of the courthouse, only twelve feet away.

The election in Ward No. 3 was usually held in the rear of the Farmers' Bank & Trust Company building. A notice was posted on the door of the room where the elections were usually held in that ward advising that the election was being held in the City Hall, a block away, and the witness who testified as to this change of place admitted that he had no trouble in finding the place where the election was in progress. There appears to have been no attempt to deceive or prevent any voter from exercising his right of suffrage by misleading or confusing him as to the place of the election. The changes in the places were unimportant.

The case of *Rural-Dale Consolidated School District No. 64* v. *Carden,* 178 Ark. 257, 10 S. W. 2d 253, involved the validity of a school election which had been held at a place other than that designated by the school directors in the notice of election. In holding that this circumstance did not invalidate the election we quoted from the case of *Bordwell* v. *State,* 77 Ark. 161, 91 S. W. 555, as follows: " 'Election was not void because, instead of being held at the place lawfully fixed for that purpose, it was held at another place near at hand, if persons attending the latter place could be seen from the former place, and it did not appear that any one was misled.' "

It is insisted that the election was ineffective as it was held for the purpose only of determining whether a hospital should be erected, and the ordinance made no reference to its equipment. We think, however, that authority to erect a hospital would imply authority to equip it. A naked building would not be a hospital. It would require the essential equipment to make it such, and authorization to erect a hospital would import authority to equip it.

It is insisted that the election was ineffective because no definite millage of taxation was voted. But the Amendment No. 13 imposes a limitation upon the tax which may be levied (except for waterworks and light plants) not exceeding five mills. The affirmative vote in this case does not, of course, authorize a levy of not exceeding five mills to erect a hospital and five mills additional to equip it. The building and equipping of a hospital is a single enterprise, and the levy to pay for both cannot exceed five mills. *Watkins* v. *Duke,* 190 Ark. 975, 82 S. W. 2d 248. The amendment does not require that the ordinance shall state the millage to be levied, but it does limit the amount which may be voted, and there is no showing of any attempt to exceed this limit.

The title of Ordinance No. 244 reads as follows: "An ordinance submitting to the voters of the city of Magnolia the question whether it will issue bonds not exceeding $33,000 for the purpose of building a city hospital." It is argued that the city now proposes to issue bonds in the sum of $39,000 to erect the hospital, and that there

is no authority for this action. The ordinance provides, however, that the election is "for the purpose of determining whether the city of Magnolia will issue $33,000 in negotiable bonds, bearing interest at the rate of six per cent. per annum, but convertible to a lower rate of interest on such terms as the city shall pay and receive substantially the same amount of money as upon the six per cent. bond sold at not less than par."

The testimony shows that under the contract for the sale of the bonds the city will receive $39,000 for $39,000 in four per cent. bonds, and that to mature those bonds the city will be required to pay only the sum of $56,980, as against the sum of $58,160 which it would be required to pay on a $33,000 issue of six per cent. bonds, thus effecting a saving to the city of $1,180. This action, not only does not violate the provisions of the ordinance, but is expressly authorized.

It is finally insisted that notice of the election was not given by the mayor by advertisement weekly for at least four weeks in some newspaper published in said municipality, as required by Amendment No. 13. In answer to this objection, it may be said that appellant raised no such objection in the complaint filed by him, nor was any testimony offered upon that subject. That question cannot be raised here for the first time without allegation or testimony to sustain it. We must presume that had the objection been raised that no notice of the election was given, the testimony would have shown to the contrary. At any rate, we cannot enjoin the city from proceeding with the erection of the hospital upon a ground neither alleged nor proved.

Certain other questions are discussed in the briefs which we think are not of sufficient importance to require discussion. We conclude, therefore, that the objections urged to the ordinance are not sustained, and that the court below did not err in dismissing the complaint as being without equity. The decree so ordering is, therefore, affirmed.

NELSON *v.* STOLZ.

4-5403 127 S. W. 2d. 138

Opinion delivered March 20, 1939.

M. P. Matheney, for appellant.

J. K. Mahoney, H. S. Yocum, Emon A. Mahoney and *Charles E. Wright,* for appellee.

Jack Holt, Attorney General, Amicus Curiae.

HUMPHREYS, J. This is a suit by appellee, who is and was a real estate agent or broker, against appellant, brought by him in the second division of the circuit court of Union county to recover a commission in the sum of $1,000 for selling certain undivided interests in minerals under a certain 110 acre tract of land in Union county, Arkansas, owned by appellant. Appellee alleged

that under the contract he was to receive as compensation 10 per cent. of the sales price; that he made a sale of an undivided one-fourth interest in said minerals to George W. James for a consideration of $8,250 as a result of the transaction, and the sale of an undivided one-half interest in the minerals under ten acres of said land to J. H. Alphin for $1,500, entitling him to $150, and that he did certain curative work on titles, entitling him to $25, and prayed judgment against appellant and the Exchange Bank & Trust Co., garnishee, in the total sum of $1,000, and by amendment to the complaint alleged that he was a real estate broker duly licensed by the Arkansas Real Estate Commission at the time of the transaction.

Appellant filed an answer denying generally all the allegations in appellee's complaint and pleaded by way of defense that appellee's services were to be gratuitous, and that he was precluded from recovering any amount as commissions for effecting the sales by reason of the further fact that at the time of the transactions he had not obtained a broker's license from the Arkansas Real Estate Commission to conduct a real estate business in Arkansas under the provisions of act 148 of the Acts of 1929 and act 142 of the Acts of 1931 amending the former act (now Pope's Digest, §§ 12476-12485).

The cause proceeded to a trial and at the conclusion of the testimony appellant requested the court to instruct a verdict for her, but the court denied the request over appellant's objection and exception, and submitted the cause to the jury upon the testimony and instructions given by him, resulting in a verdict and consequent judgment against appellant, from which is this appeal.

For the purposes of this appeal it is only necessary to make a short statement of the facts. Appellee had been a real estate broker or agent in El Dorado, Arkansas, for a number of years, engaged in selling royalties, leases and lands for his clients. He had formerly resided in Council Bluffs, Iowa, and appellant had resided in Omaha, Nebraska. They were old friends. In 1936 appellee made a trip to Omaha for the purpose of blocking up some mineral acreage in the Schuler area near El

Dorado and appellant rendered him very material assistance in procuring leases from people living in and around Omaha and in fact procured a lease from appellant on her 110 acre tract of land in Union county without consideration. Oil was not discovered until in March, 1937, at which time there was another oil boom in the Schuler field and a number of persons were wiring to appellant trying to purchase royalties and leases from her on her 110 acre tract so she wrote to appellee, who was her friend, calling his attention to the fact that she had rendered him material services back in 1936 in procuring leases and asked his advice regarding the sale of her royalties. Appellee answered her letter on March 24, 1937, offering her any assistance he could give her in return for the help she had given him in Omaha and urged her to come to Arkansas. Several letters and telegrams passed between them and appellee testified that she called him on long distance telephone and asked him to handle her property and that he replied to her that he would do so for 10 per cent. of whatever the property might be sold for and that she agreed to do this. She denied that she ever agreed to pay him 10 per cent. over the telephone for effecting sales of her royalties or leases and there is nothing in any of the telegrams or letters which passed between them before she came to Arkansas showing that she did enter into any such contract.

She decided to go to El Dorado and arrived there April 2, 1937, and was met at the train by appellee. The evidence is conflicting as to just what part appellee took in the sales of her property, but a sale was effected on April 3 between appellant and George W. James covering a one-fourth royalty interest in her entire 110 acres for the total sum of $8,250 the contract of sale being evidenced by a written contract of sale and purchase which provided for an escrow of the deed and money, examination of the title, etc. A part of the purchase money was paid by George W. James to appellant and the balance was evidenced by a cashier's check which was deposited together with appellant's deed in the Exchange Bank & Trust Co., El Dorado, subject to approval of title. The

title required some curative work, but was finally approved on May 6, 1937.

While appellant was in El Dorado, a sale was effected through the assistance of appellee to an undivided one-half interest in the minerals under ten acres of said land to J. H. Alphin. Alphin deposited $1,500 in the First National Bank of El Dorado and appellant deposited her deed. The deposits were made under an escrow agreement subject to the approval of title on April 5, 1937, in the First National Bank of El Dorado, but the title was finally approved on June 7, 1937, and $750 was accepted by appellant instead of $1,500 on account of a disagreement relative to the amount of minerals she conveyed to him.

According to the undisputed testimony appellee was not a licensed broker under the statutes referred to at the time he claims to have made a contract with appellant for the sale of her property nor at the time the sales were made and the escrow agreements relative thereto were made. On April 18, 1937, differences arose between appellant and appellee and she wrote him a letter to the effect that on account of the differences which had arisen she had decided to discharge him as her agent. On April 23, 1937, he wrote to her that the deal was practically closed and his work was all done and demanded 10 per cent. of the amounts for which the minerals had been sold as his fee, amounting to $975 plus $25 for doing certain curative work relative to the titles to the property.

On April 28, 1937, after appellee had been discharged appellee applied to the Arkansas Real Estate Commission for a broker's license and dated his application back to April 1, 1937, and on April 28, 1937, he obtained a broker's license No. 422 for the year 1937. Although appellant has raised a number of questions on this appeal for a reversal of the judgment obtained against her, her main contention is that the judgment should be reversed and the cause dismissed because at the time the sales were made appellee had no license from the Arkansas Real Estate Commission to conduct a real estate business and that the subsequent acquisition of a state license did

not entitle him to recover a commission. Section 12476 of Pope's Digest provides as follows:

"It shall be unlawful for any person, firm, partnership, co-partnership, association or corporation to act as a real estate broker or real estate salesman without first having complied with every provision of this act and having secured a regular, valid license issued by the Arkansas Real Estate Commission, authorizing the performance of such acts."

The last clause of § 12477 of Pope's Digest provides as follows:

"No recovery may be had by any broker or salesman in any court in this state on a suit to collect a commission due him unless he is licensed under the provisions of this act and unless such fact is stated in his complaint."

This court ruled in the case of *Birnback* v. *Kirspell,* 188 Ark. 792, 67 S. W. 2d 730, that a broker not having made an application for a license before effecting a sale of land was not entitled to recover a commission for making same.

Appellee argues that although he had not applied for a license and did not have a license on April 3 and 5 when the escrow agreements were entered into for the sale of said property the sale was not made until the escrow agreements were completed. This position is not sound because the escrow agreements related in no way to the commission which appellant was to pay appellee for making the sale. The appellee was not a party to the escrow agreements nor was it provided in them that he should not receive his commissions until the escrow agreements were completed. The escrow agreements simply provided that when appellant perfected the titles to the property she was entitled to receive her money and the purchasers entitled to receive their deed. It is true that the escrow agreements provided that in case she did not perfect her title to the property the certified checks should be returned to the purchasers and the deeds returned to her. But the contract to pay appellee 10 per cent. for making the sale, if such a contract did exist, was not dependent upon the perfection of her title to the property. Appellant contracted in the escrow agreements to com-

ply with the requirements of the attorneys for the purchasers, but it did not provide that the broker or appellee should perfect the titles before he was entitled to his commissions. It is true that appellee had obtained a license at the time the titles were finally approved under the escrow agreements and that the money and deeds were delivered on May 26, in the case of the James sale and on June 7, in the case of the Alphin sale, but it is also true that he had no license on April 3 and April 5, 1937, when the sales had been effected and the escrow agreements had been entered into between appellant and the purchasers.

Whatever the contract may have been, whether for 10 per cent. of the purchase price or whether for gratuitous return for services appellant had rendered appellee in 1936, we think the parties themselves construed the contract when appellee admits that he was discharged from any further obligation and entitled to his commissions when appellee discharged him on April 18, 1937. It further appears that appellee claimed his commissions and threatened to bring a suit for them before he obtained a license. In the case of *Poston* v. *Hall*, 97 Ark. 23, 132 S. W. 1001, this court said:

"Where a real estate broker produces a purchaser who is ready, willing and able to purchase the property upon the terms under which the agent is authorized to negotiate the sale, and the owner refuses to convey, the agent is entitled to his commission."

It was said in the case of *Reeder* v. *Epps*, 112 Ark. 566, 166 S. W. 747, (quoting headnote No. 1 and headnote No. 3):

"In the absence of a special contract providing otherwise, an agent employed to sell or find a purchaser for land, earns his commission and is entitled to recover the same when he procures a purchaser ready, willing and able to buy upon the terms named, and the principal enters into a binding contract with the produced purchaser, or having an opportunity to do so declines to accept the purchaser."

"When A. employed B. to sell land for him, an obligation is implied on A.'s part not only to furnish a good

title, but a marketable one, and if A. fails to do so upon the production by B. of a purchaser ready, willing and able to buy the land, B. earns his commission, notwithstanding a defect in the title which prevented the sale."

This court said in the case of *Lasker-Morris Bank & Trust Co.* v. *Jones,* 131 Ark. 576, 199 S. W. 900, that:

"The broker, having presented a proposed purchaser who is capable of entering into a contract of purchase, and willing to do so, has earned his commission when the vendor accepts him and enters into a valid contract with him for the sale of the land, even though the sale is never in fact consummated by reason of the failure of the proposed purchaser to perform his part of the contract."

This court also said in the case of *Emerson* v. *E. A. Strout, Farm Agency,* 161 Ark. 378, 256 S. W. 61, that:

"The import of the contract (brokerage contract) was to the effect that there should be a completed sale or exchange of the lands in order for appellees to earn their commission, but, even so, under the law, it was only necessary for the agent to produce a purchaser, ready, willing and able to comply with the contract of sale and purchase."

This court said in the case of *Busey* v. *Felsenthal,* 178 Ark. 42, 9 S. W. 2d 775, (quoting syllabus), that:

"Brokers with whom a royalty interest was listed for sale could recover the commission agreed upon where they procured a purchaser ready, willing and able to buy, but the owner subsequently refused to carry out the contract of sale, and breached it by selling to another."

We think under these opinions as well as under the opinion rendered in the case of *Birnbach* v. *Kirspel,* 188 Ark. 792, 67 S. W. 2d 730, that the date of the sale to George W. James was on the date of April 3, 1937, and that the sale of J. H. Alphin was on April 5, 1937, when he presented the purchasers or procured the purchasers, according to his testimony, ready, willing and able to comply with the contract of sale and purchase. All that appellant had to do under the escrow contracts was to comply with reasonable requirements for perfecting her title in order to specifically enforce the contract against the purchasers, and likewise the purchasers had a right

to specifically enforce the contract against her when the title was perfected which perfection of the title was incumbent upon appellant under the escrow contract.

It being undisputed in the record that appellee had no license at the time he procured these purchasers who entered into an enforceable contract with appellant, that fact alone (the failure to have a license) prevents him from recovering a commission in this case. If he had had a license at the time he procured these purchasers he could have then sued and recovered his fee without reference to the escrow contracts which did not concern him.

The court should have instructed a verdict under the undisputed facts in the case for appellant when requested to do so, and on acount of his failure to do so the judgment is reversed, and the cause is dismissed.

FIRST NATIONAL BANK, PARIS *v.* MCKEEN.

4-5326 127 S. W. 2d 142

Opinion delivered March 20, 1939.

Arnett & Shaw, for appellant.

White & White and *J. M. Smallwood,* for appellee.

GRIFFIN SMITH, C. J. This appeal questions a decree finding that First National Bank at Paris did not have the right to charge appellee's account with certain checks drawn on it by Blue Ribbon Corporation, such checks having been received as part of a deposit with which appellee was credited.

The checks were issued Saturday, February 29, 1936, payable to laborers in mines distant from Paris. Appellee cashed some of the checks. Others were accepted in trade or on account, such transactions having occurred on Saturday at appellee's store. The bank closed at three o'clock. Appellee insists that checks aggregating $776.31, and other checks, were cashed by him just as the bank was closing Saturday afternoon, and that he received $898. Appellant's explanation is that appellee presented the checks Monday, March 2, in connection with a deposit; that an adding machine slip was attached to the deposit ticket, showing a total of $1,515.43 in checks. Five hundred dollars cash was deducted and paid to appellee, whose account was credited with the difference of $1,015.43. It is not clear whether all checks comprising the claim of $776.31 were with the Monday deposit, or some were included in the list cashed Saturday.

It is admitted by Blue Ribbon Corporation's secretary that the checks were issued to workers February 29, but were dated March 2—this for record purposes. If appellee accepted checks February 29 post-dated March 2, he did so with notice. However, the issue was intended for release on the 29th, and if the bank in these circumstances cashed them for appellee, the fact that *prima facie* they were not payable until March 2 is immaterial.

The bank's original ledger sheet, showing Blue Ribbon Corporation's account, reveals that 129 checks were cashed from February 17 to February 28. On the 28th Blue Ribbon's credit balance was $50.64. February 29 $999 was deposited, and $1,498.50 was deposited March 2. Balance at the close of business March 2 was $2,475.80.

The February 29th credit was established through deposit of a check for $1,000 drawn in favor of Blue Ribbon Corporation by United Sales Company of Kansas City, Missouri, less exchange of $1. The $1,498.50 credit resulted from deposit of a $500 check drawn by Independent Lumber & Coal Company, of St. Joseph, Missouri, and a $1,000 check of United Sales Company, less exchange of $1.50. The checks were drawn on Missouri Valley Trust Company, of St. Joseph.

According to appellant's agents, the bank received a telegram from St. Joseph Monday afternoon near four o'clock stating that payment had been stopped on the three checks deposited by Blue Ribbon Corporation. Appellee says he was called by the bank about six o'clock Monday evening (after dark) and was told not to accept any more Blue Ribbon checks—that "something had happened."

Tuesday morning, March 3, appellee received from appellant sixteen Blue Ribbon checks on which appellee had received credit of $776.31.

June 20, 1936, appellant charged to loss $846.61—the difference between the March 2d balance of $2,475.80 and $1,629.19. At the same time, the latter item was charged off. Checks drawn by Blue Ribbon Corporation and cashed by the bank or handled by parties other than appellee made up the loss of $846.61.

The rule supported by the great weight of authority[1] is that when a check is offered for deposit in the bank on which it is drawn, the bank has the right as against such depositor to reject it or refuse to pay it, or to receive it conditionally; but if it unqualifiedly accepts the check and places it to the credit of the depositor, it cannot thereafter, in the absence of fraud or collusion, repudiate the transaction. "The reason for this rule," says American Jurisprudence,[1] "is that the unqualified acceptance of the check constitutes a completed transaction the effect of which is the same as though the check had been paid in cash and cash in turn deposited in the account. As a consequence, as between the bank and the depositor, the former must bear the loss if the check proves to be

[1] American Jurisprudence, v. 7, § 457, p. 327.

an overdraft on the drawer's account. The title to the check passes to the bank, which then becomes a debtor for the amount of such check. It is not necessary, in order to complete the credit to the depositor, that the check be debited to the drawer and marked 'paid'."[2]

To the same effect is Corpus Juris Secundum, vol. 9, § 284, at page 592. There it is said that "Where a bank has unqualifiedly accepted and placed to the credit of a depositor a check drawn on itself, it may not thereafter, in the absence of fraud or collusion, repudiate such completed transaction, although a depositor who has suffered no loss through dishonoring of the check may not recover of the bank, and by agreement the right to charge back may be preserved."

A leading case from which the rule seems to have been constructed is *First National Bank of Cincinnati* v. *Burkhardt,* 100 U. S. 686, 25 L. ed. 766, where it was said:

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned."

Law of the Burkhardt Case was applied by this court —or, rather, the principle was stated—in *Arkansas Valley Bank* v. *Kelley,*[3] where it was said: "Some innocent person must suffer; and, as the bank's election to treat as a cash deposit the check from Payne by Burroughs, instead of receiving it for collection, as might have been done, caused the loss to fall upon it, the loss must remain there."

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[2] See list of annotated cases referred to in American Jurisprudence, v. 7, p. 327 [note 5].

[3] 176 Ark. 387, 3 S. W. 2d 53, 58 A. L. R. 808.

In *Rogers Commission Company* v. *Farmers Bank of Leslie*,[4] Mr. Justice Kirby said: "It was not necessary to the bank's liability that it should have on deposit to the drawers' credit more than the amount of the check at the time of its presentation, for it would have become liable to its payment by an acceptance of it, and could have permitted an overdraft as it had usually done, or withheld its own check, which it claimed to have in its drawer against the account of the makers of the check, which latter the testimony indicates it did do."

Appellant insists that the proof, including admissions of appellee, shows it was customary for the bank to accept without question checks drawn by its depositors, and at the close of the day's business to charge back all worthless items.[5]

Blue Ribbon Corporation mines at Scranton, where pay checks were delivered, closed at three o'clock. Appellee customarily cashed such checks because appellant bank closed at three o'clock. Because of simultaneous closing hours, the miners could not get to Paris in time to present their checks at the bank.

Appellee was asked how the bank received his deposit. His reply was that when a deposit was tendered "They checked [the list], and if there was [a check] not good they would hand it back to me."

"Q. Prior [to the time in question] you had deposited checks that were bad, and they brought them back to you, and charged them back to you? A. I have gotten back several small ones, but not the day I deposited them. They would charge them back and deliver them to me—one or two dollar checks. Q. You have had that to arise since this time on several little checks?—

[4] 100 Ark. 537, 140 S. W. 992.

[5] On the face of the deposit ticket was printed: "All checks and drafts are credited subject to payment under conditions stated on back of duplicate ticket." On the reverse side of the ticket the following appears: "In receiving items for deposit or collection, this bank acts only as depositor's collecting agent. . . . All items are credited subject to final payment. . . [The Bank] may charge back any item at any time before final payment whether returned or not; also, any item drawn on this bank not good at close of business on day deposited [may be charged back]."

When you deposit a bunch of checks, don't they just look at your indorsement, and if the check is not good they charge it back? A. That is the way they did these. I guess it is the ordinary way the bank handles them."

This is the strongest testimony tending to prove a custom or practice known to appellee. By this evidence it is sought to raise a legal presumption that the bank conditionally accepted Blue Ribbon checks. If such custom prevailed, it is immaterial whether items comprising the charge-back were cashed on Saturday, or were included in the Monday deposit. If, on the other hand, the right to charge arises solely on account of reservations expressed on the deposit ticket, such right must have been exercised not later than the close of business of the day of conditional acceptance.

Admittedly no checks were charged Saturday, nor was there a debit to appellee's account on Monday. None of the items comprising the claim was charged to Blue Ribbon Corporation's account. Presumably they were carried as cash from Saturday (if appellee's testimony is correct) or from Monday afternoon's closing hour (if appellant's explanation is the proper one) until Tuesday morning. Appellant does not contend appellee was notified Monday that the checks would be charged to him. It is only insisted he was advised not to accept other similar checks.

The evidence is not sufficient to avouch a custom. Appellant insists it relied upon appellee's indorsement; that he was a customer of known responsibility; that his checks were examined only for the purpose of verifying the amounts and the total.

Conspicuous—and we think controlling—is the fact that during all of Monday's banking day, Blue Ribbon's account showed a credit balance of $2,475.80. Not until four o'clock was there any indication, even to the bank, that this balance was synthetic—and this was an hour after doors had been closed. If appellee, or anyone entitled to the information, had asked bank officials at any period of the day if Blue Ribbon checks were good, an affirmative answer would have been given.

The bank elected to treat the foreign checks deposited by Blue Ribbon Corporation as so much cash. It charged $2.50 as exchange for handling them.

There was evidence of a custom whereby Blue Ribbon Corporation would not deposit its out-of-town checks until the pay roll was due. The bank, although having complained of the practice, permitted it.

Miscellaneous checks charged to Blue Ribbon account June 18 were cashed March 2 (or possibly February 29) because appellant elected to treat Blue Ribbon's deposit as an established credit insofar as third parties were concerned.

If the bank had any doubt about the St. Joseph checks, a relatively inexpensive telegraph message or telephone call would have put that doubt at rest. By an expenditure of approximately $1.50 the deposit could have been verified. If custom is to be relied upon, appellee has shown that it was appellant's practice to accept as cash Blue Ribbon's eleventh-hour deposit of foreign checks.

Of those concerned in the case at bar, only the bank had expressed disapproval of the practice of withholding deposits until pay rolls were ready to be released, yet in spite of its apprehension appellant continued to accept the business and to establish credits which Blue Ribbon Corporation was authorized to check against.

Appellee, if forced to sustain the loss, would be a victim of conditions he did not set in motion and over which he had no control. Of course, he could have refused to cash the checks. Extreme prudence might have suggested an inquiry regarding their status; but proof is conclusive that the only answer possible would have been one confirming his own belief that they were good.

The decree is affirmed.

SMITH, FRANK G., MCHANEY and HOLT, JJ., dissent.

HOLT, J. (dissenting). I cannot agree with the majority opinion in this case. The effect of it is to say to every bank in this state that when one of them credits a customer's account with a check (or checks) drawn on it, it does so at its peril. In other words, should the bank after having given its customer's account credit

for the check drawn on it, find out, at the close of business, on the same day during which the deposit was made, that there were insufficient funds in the account on which the check was drawn to cover it, then the bank regardless of any custom, or agreement with the customer, would not be permitted to charge the amount of the check back to the account of the depositors, but must assume and pay the amount of this check itself. I do not think this is the law of this state. If it should be and the majority opinion allowed to stand, then Arkansas banks must, of necessity, add new employees and increase the expense of operation to an unprofitable and unjust degree.

The effect of this decision is that when customers, such as large department stores in the larger cities of this state, that accept literally hundreds of checks daily, go to make their deposits, the bank teller, before crediting the grand total of these checks on the passbook of this depositor, must leave his cage, go back to the bookkeeper and ascertain whether each one of these hundreds of checks is good. This might conceivably take hours while the line of customers waited. Such a rule would, in my opinion, paralyze banking and is not the law of this state.

The facts in the instant case disclose that appellee, a graceryman at Paris, Arkansas, had for a number of years on Saturday afternoon, after banking hours, cashed a large number of checks for coal miners in that neighborhood who held checks drawn on the Blue Ribbon Corporation's account in appellant bank. This practice of appellee was not only to accommodate these employees in cashing their checks, but naturally we must assume that it was good business on his part for the reason that a large number of these coal miners would spend the proceeds of these checks with appellee in the purchase of merchandise. I think the undisputed proof shows that twelve of the sixteen checks in question were cashed by appellee on a Saturday and deposited with appellant bank on the following Monday, March 2, and the great weight of the testimony shows that the other

four checks were deposited on the same day. The evidence also shows that it was the custom of appellant bank to accept checks drawn on it, for deposit when offered by appellee, and at the close of business on the same day the deposit was made, to charge back to appellee's account any and all checks that were not good, and that appellee understood and agreed to this custom cannot be doubted.

The uncontradicted evidence also shows that within the passbook in which appellee's deposits were entered with appellant bank, and on the face of the deposit ticket used by appellant, was printed the following contract and agreement between appellant and appellee: "All checks and drafts are credited subject to payment under conditions stated on back of duplicate ticket." On the reverse side of the ticket the following appears: "In receiving items for deposit or collection, this bank acts only as depositor's collecting agent . . . . All items are credited subject to final payment. (The Bank) may charge back any item at any time before final payment whether returned or not; also, any item drawn on this bank not good at close of business on day deposited (may be charged back)." Appellee had been doing business with appellant bank for more than ten years and as to the custom under which such business was done, referred to above, I think appellee's own testimony settles that issue. We quote from the record his own words, as follows: "A. I have got back several small ones, but not the day I deposited them. Q. When would you get them? A. Afterwards. Q. They would charge them back to you and deliver them back to you? A. One or two dollar checks. Q. You have had that to arise since this time on several little checks—when you deposit a bunch of checks don's they just look at your indorsement and if the check is not good they charge them back? A. That is the way they did these. Q. That is the ordinary way of handling checks on that bank, isn't it? A. I guess it is."

Not only does appellee admit the custom which had sprung up between him and appellant, but states further

that he even permitted appellant to return checks afterwards and accept these charges against his account after the close of business on the day of deposit. The size of the checks in proving custom can be of no consequence. The fact remains that appellee did permit these checks to be charged back to his account. I think that we cannot, and should not, say that the day's business in any bank in this state ended at three o'clock in the afternoon or at any other hour when its doors were closed to the public on that day. Certainly there must be additional time given to the bank and its employees to check through its daily business and determine the status thereof. It may be said to be a matter of common knowledge that a large part of the bank's business is performed after its doors are closed.

Of course, if appellant bank intended unqualifiedly to accept these sixteen checks in question when deposited by appellee on March 2, then appellee would be entitled to recover; on the contrary if appellant intended to accept these checks only on condition of their payment, then appellant should not be held liable for their payment.

We think the rule of law governing the instant case to be as stated in Corpus Juris, Vol. 17, § 24, titled "Customs and Usages", wherein the text-writer said:

"The better authority seems to support the rule that the established usage of a bank is binding on persons dealing with it whether they have actual knowledge thereof or not, particularly where it has been so long established that its customers may well be presumed to have known of it, where they have had previous dealings with the bank, or where it is a general custom among the banks of the place; but there are numerous decisions more in consonance with the general rules relating to usages which hold that the usage of a particular bank will not bind the party dealing with it, unless he has express knowledge of it. Other authorities hold that as in other cases a banking usage must either be known or so well established as to raise the presumption that it was known."

In *Townley* v. *Exchange National Bank of Tulsa,* 108 Okla. 144, 234 P. 574, under facts similar to the instant case, the rule is stated by the court as follows: "On accepting a deposit, that the law usually creates the relation of debtor and creditor is not in dispute in this case, and that, when such deposit is made in the form of a check drawn upon the bank by another depositor and there is no want of good faith on the part of the depositor, the giving of the depositor of credit to the amount of the check precludes the bank from recalling or repudiating the credit. 3 R. C. L. 153; 7 C. J. 635; (and other citations). On the strength of the same authorities, we think that it is equally well settled that such acceptance, to constitute this relation of debtor and creditor as set out above, must be an unconditional one, and *that where a custom is known to a depositor, or so well established it should be known to him,* such checks are accepted by the bank on condition that an examination of the drawee's account discloses sufficient credit to warrant the payment of the check by the bank, that such conditional acceptance, under said custom, does not create the relation of debtor and creditor until the custom has spent itself, and the bank has had the opportunity to determine whether the check should be honored or charged back against the deposit of the customer.

In the case of *Pollack* v. *National Bank of Commerce,* 168 Mo. App. 368, 151 S. W. 774, it was said: 'Where a depositor of a bank presented to it a check for deposit, with knowledge of the custom of the bank to take checks and defer payment for a reasonable time until the bank ascertained whether there were sufficient funds of the drawer to pay it, the depositor was estopped from asserting that the bank, giving him credit for the deposit, could not, on finding insufficient funds to pay the checks, charge the depositor's account with the amount thereof.' That such custom and established usage on the part of the defendant bank, as well as other banks in the city of Tulsa, existed was known to the plaintiff or should have been known to him, was the defense pleaded by the bank. The defendant bank further pleaded that on

the passbook of the plaintiff on which he received the credit was printed: 'Checks on this bank will be credited conditionally. If not found good at the close of the day of deposit, they will be charged back to depositors, and the depositor notified, etc. . . .' That such custom or usage as to such checks obtained was shown by the evidence, not only in the conduct of the business of the defendant bank, but in the other banks of said city."

See, also, *First Nat. Bank* v. *Burkhardt,* 100 U. S. 686, 25 L. Ed. 766, wherein the court said: "If the check were to be considered as received on deposit when it was left with the teller, and Cannamon was the debtor of the bank and the bank his creditor from the time, then the transaction was not within the guaranty, and Burkhardt was not liable. If, on the other hand, the bank had the right to hold the check until after banking hours, and then to make its election, and to credit the depositor and charge Cannamon with the amount, as was done, the check was covered by the guaranty, and the bank was entitled to recover."

On this same question of custom in the case of *Bank of Charleston* v. *Hill,* 177 Ark. 1138, 9 S. W. 2d. 1064, this court held, as is shown by the third headnote, as follows: "Where the banking custom, in the absence of a special agreement, was to receive checks for collection only, to be recharged in the event of collection not being made, though credit was given to the depositor at the time of the deposit, the presumption would be that the bank and depositor contracted with reference to this custom."

Since, therefore, the uncontradicted proof in this case shows the existence of, not only a custom between appellant and appellee to charge back the checks in question, but also a written agreement clearly giving this right to appellant, it is my view that this case should be reversed, and, since it appears to have been fully developed, dismissed.

I am authorized to say that Justices Smith and McHaney concur in this dissent.

DIXIE LIFE & ACCIDENT INSURANCE COMPANY *v.* LEACH.

4-5408 126 S. W. 2d 926

Opinion delivered March 27, 1939.

[redacted]

Ben D. Brickhouse and *Henry H. Rightor, Jr.*, for appellant.

A. M. Coates, for appellee.

HOLT, J. This action was begun in the Phillips circuit court by appellee against the appellant to recover the sum of $200 on an insurance policy issued by appellant on the life of Silas Leach, husband of appellee. The complaint filed on April 9, 1938, alleged the issuance of the policy, the payment of the premiums, the death of the insured, Silas Leach, due proof of death, that appellee was the beneficiary, and that all conditions and requirements under said policy had been fully complied with by appellee. Appellant filed an answer in which it denied every material allegation set out in the complaint and in addition defended on the further grounds that the death of Silas Leach was due to high blood pressure,

which caused heart trouble, and that in the application for insurance, signed by the deceased, he stated that he did not have heart trouble and was in sound health, that this statement was untrue and that said application was a part of the insurance contract. Subsequently appellant filed an amendment to its answer in which it set up a release by appellee of all rights and claims which she might have had growing out of said policy.

The case was tried to a jury and a judgment rendered in favor of appellee in the sum of $200, and as part of the costs a 12 per cent. penalty and an attorney's fee of $50 on behalf of appellee were assessed. A motion for a new trial was filed, and on May 19, 1938, the trial court heard and overruled this motion. To this action of the court appellant duly excepted, asked for and was granted an appeal to this court and a period of 160 days from May 19, 1938, was granted appellant in which to prepare and file its bill of exceptions. This bill of exceptions was not filed until October 29, 1938, which was 163 days from May 19, 1938, or three days beyond the time allowed by the trial court.

The grounds assigned by appellant for a reversal of the judgment in this case relate to errors alleged to have been committed in the trial of the case. In order to present these errors properly to this court they must appear in the record. In order that the matters complained of may become a part of the record they must be properly preserved and presented in a bill of exceptions duly signed by the trial judge and filed with the clerk within the time allowed by the trial court. This was not done in this case. This court has many times held, in an unbroken line of decisions, that where the bill of exceptions was not filed in time, and the evidence is not brought into the record by a bill of exceptions, this court can only consider, on appeal, errors apparent on the face of the record.

In *Petroleum Producers' Association* v. *First National Bank,* 165 Ark. 267, 263 S. W. 965, this court said: "Where time is allowed by the trial judge for filing a bill of exceptions beyond the term for a given number of days, the rule for computing the period

allowed is the same as that of any other statute of limitations, and it excludes the day on which the order granting the time is made and includes the last day. *Early & Co.* v. *Maxwell & Co.,* 103 Ark. 569, 148 S. W. 496; *Peebles* v. *Columbian Woodmen,* 111 Ark. 435, 164 S. W. 296. . . . According to numerous decisions of this court, where time is allowed for filing a bill of exceptions, the bill should not only be signed within the time, but should be filed with the clerk within the time so allowed. *Pekin Stave Co.* v. *Watts,* 95 Ark. 331, 129 S. W. 796." See, also, *Engles* v. *Okla. Oil & Gas Co.,* 163 Ark. 270, 259 S. W. 749, and *L. D. Powell Co.* v. *Stockard,* 170 Ark. 424, 279 S. W. 1001. In the absence of the bill of exceptions, the presumption is that the evidence adduced at the trial sustained the finding and judgment of the court below. *Williamson* v. *Mitchell Auto Co.,* 182 Ark. 296, 31 S. W. 2d 413.

It is urged by appellant that the judgment of $200 rendered in favor of appellee erroneously exceeded the face value of the policy, that in no event, under the terms of the policy, was appellee entitled to a cash benefit value of more than $180 or a funeral benefit of $200. The trouble with this assignment of appellant is that the insurance contract in question was not made a part of appellee's complaint, nor was any request made by appellant that the provisions of the policy be made a part thereof. The record reflects that the policy was introduced in evidence by appellee and thereby made a part of the record, and since we hold that there is no bill of exceptions before us in this case, we, cannot consider the provisions of this policy relative to what amount of cash benefit appellee would be entitled. That clearly was a matter of proof. The provisions of the policy do not appear on the face of the record.

We conclude, therefore, that since the bill of exceptions in this case was not filed in apt time, and since no errors of law appear on the face of the record, the judgment must be affirmed, and it is so ordered.

STATE, USE INDEPENDENCE COUNTY *v.* BAKER.

4-5415 126 S. W. 2d 937

Opinion delivered March 27, 1939.

Preston W. Grace, for appellant.

R. W. Tucker and *S. M. Casey,* for appellee.

GRIFFIN SMITH, C. J. The questions are, Did the complaint state a cause of action, and did chancery have jurisdiction?

The State of Arkansas, through its prosecuting attorney for the Third Circuit, brought this action for the use and benefit of Independence county against Edgar Baker, county and probate clerk. Bondsmen were joined as defendants.

It was alleged that during 1935 and 1936 the defendant Baker presented to the county court various claims for official services, which were allowed and paid; that such defendant, at the time the accounts were presented

and when payment was received, knew he was not entitled to the amounts demanded, and that "His procurement of such orders of allowance with the knowledge that he was not entitled thereto amounted to fraud in the procurement of such orders of allowance."

The excesses and unauthorized charges alleged in the complaint to be fraudulent amount to $1,055.43.

Baker demurred to the complaint. He also filed an answer and cross-complaint, and a motion to dismiss. The cross-complaint alleged that through error, claims for sums to which the clerk was legally entitled for services rendered in 1933, 1934, 1935, and 1936, had not been filed, or presented to the county court.

The decree found that the demurrer should be overruled, but that the motion to dismiss should be treated as a special plea of *res judicata*, and sustained. It was also held that the pleadings and proof ". . . were not sufficient to establish such fraud as would authorize collateral attack as against the county court allowing Edgar Baker's claims." The cross-complaint was dismissed. No appeal was taken from the action of the court in dismissing the cross-complaint, and that order has become final.

The first item of the complaint alleges that Baker collected $253.90 for cancelling and redeeming warrants at ten cents each.[1] Notation on the State Comptroller's re-

[1] Section 1 of act 157, approved March 25, 1933, amends § 4573 of Crawford & Moses' Digest. That part of the act applicable to county clerks appears as § 5661 of Pope's Digest. By checking the fee items as they appear in the published Acts of 1933 with §§ 5661 and 5659 of Pope's Digest, it will be observed that items which should appear in § 5661 of the Digest are omitted from that section, but are erroneously included in § 5659, and that numerous duplications appear.

Attention might also be called to a typographical error in Pope's Digest. The 26th item appearing on page 1541 is: "For every rule or order not heretofore specified, 20c." This item, having been copied from the County Clerk's schedule, is shown in act 157 (first item, page 486) to be ten cents instead of twenty cents. An inspection of the original bill in the office of the Secretary of State shows that ten cents is the correct figure.

The fourteenth item of § 5662 of Pope's Digest is: "For furnishing for publication copy of the delinquent list of delinquent and

port, and evidence on behalf of the plaintiff, are to the effect that the fees were not earned ". . . because no record was kept to conform with § 2010, C. & M. Digest, so as to show the county debt."[2] Purpose in requiring that redeemed warrants be entered is ". . . to show at all times the full amount of the indebtedness of the county." Appellant assigns two reasons for seeking to surcharge this item: (1) The services were not rendered; (2) the law does not authorize such charge, even if the book entries had been made.

The clerk testified it had been customary to allow ten cents each for the cancelled warrants. In the absence of statutory authority, this (custom) would not be sufficient to justify the allowance.[3] Section 2440 of Pope's Digest, brought from the Revised Statutes,[4] makes it the

insolvent taxpayers, for each name, . . . 5c." Act 169, approved March 21, 1935, which now appears as § 13834 of Pope's Digest, makes it the duty of the collector "to cause to be published in some newspaper . . . a list of those persons who have failed or refused to pay the personal property taxes assessed against them. . . . The newspaper publishing the list shall receive as publication cost the sum of ten cents per name, which sum, together with five cents per name for the collector preparing and furnishing the list, shall be charged to the delinquent taxpayer."

[2] Section 2010 of Crawford & Moses' Digest (now § 2556 of Pope's Digest) is: "It shall be the duty of the county clerk to enter in a book, to be provided by him for that purpose, the amount, number and date of all redeemed warrants or other evidences of indebtedness that may have been cancelled, so as to show at all times the full amount of the indebtedness of the county."

[3] In *Miller County* v. *Magee*, 177 Ark. 752, 7 S. W. 2d 973, this court, quoting from Chief Justice COCKRILL, said: "Observance of a few general rules deducible from the statutes and decisions will serve to simplify the questions. Three things must be found to concur before the county court is authorized to allow a claim against a county in favor of an officer for fees: (1) There must be specific statutory authority to the officer to make a charge for the service rendered; (2) he must be required by the statute, or by the rules of practice or order of the court, to perform the service; (3) the statute must indicate expressly or by fair intendment the intention to permit the fee allowed by the statute for the service to be charged against the county." [See cited cases.]

[4] Section 2440 of Pope's Digest is shown to be § 34 of Chapter 40 of the Revised Statutes. This section, however, is from Chapter 41 of the Revised Statutes.

duty of the county treasurer at his annual settlement to produce the warrants redeemed by him during the preceding year, ". . . and the [county judge] shall write the word 'redeemed' across the face of each warrant, and sign his name thereto, and cause all warrants thus redeemed to be filed in the office of the clerk of the county court."[5]

In the absence of citation to authority for making the charge of $253.90, and in view of appellee's testimony that he relied upon custom, the burden rests upon appellee to point to some classification under the fee act or revenue laws whereby the charge became valid.

The second item questioned is $75 for ". . . recording, checking, and posting the county treasurer's fourth quarterly settlement." There is no statutory authority for this charge. However, Act 157 of 1933 (24th item) allows ten cents ". . . for making settlement of each account with the county." Item No. 41 of the Act allows ten cents per hundred words ". . . for recording every paper not heretofore provided for." Treasurers' reports (made annually on the first Monday in July, ". . . and oftener, if so required")[6] may be recorded at the direction of the county judge, and they should be. When so recorded, the county clerk, under Item No. 41 of Act 157, is entitled to ten cents per hundred words for such service.

The third, fifth, and eighth items, aggregating $39.80, are for ". . . quorum court attending and recording the acts of the court." There is no specific statutory provision for such charge, and reference must again be had to Item 41 of Act 157.[7]

The fourth item is alleged to have been a duplication of a $15 charge. Whether it was, or was not, is a question of fact to be determined in the first instance by the lower court.

[5] Act 41, approved February 18, 1931 (§ 2520 of Pope's Digest), requires the county clerk to preserve warrants for a period of two years after cancellation, after which time, in company with the county judge and county treasurer, he shall burn them."

[6] Pope's Digest, § 2435.

[7] "For recording every paper not heretofore provided for, for every hundred words, 10c."

The sixth and seventh items are for services in executing affidavits of candidates under the Corrupt Practice Act. Section 4 of Act 308, approved April 2, 1913,[8] directs candidates to file such pledges with the county clerk, but it does not contemplate that the county pay the cost. Such costs must be borne by those seeking office.

The ninth item is $196.85 ". . . for 3937 calls of delinquent personal taxes certified to the printer at five cents per tract." Act 169 of 1935 imposed this duty upon the collector. [See last paragraph of footnote No. 1, this opinion.]

The tenth item, $71.55, is alleged to be an overcharge for recording the personal delinquent list. This is a question of fact for first consideration by the lower court.

Item No. 11, $155.60, is alleged to be an overcharge. Payment was made to the clerk by the collector for handling delinquent real property lists, on the basis of thirty cents per tract. Under a subdivision of Act 157 of 1933 there is a title, "Fees for Services Under the Revenue Laws." It authorizes the county clerk to charge ten cents per tract ". . . for furnishing copy of delinquent lands to printer," and ten cents additional ". . . for attending sale of delinquent lands and making record thereof."

Other items are alleged to be duplicates. A correct determination of their verity involves a question of fact for the lower court's judgment.

Appellees have filed in this court a motion to dismiss because of appellant's alleged failure to comply with Rule 9. The motion is overruled.

It is insisted by appellees that the suit is, in effect, a collateral attack on judgments of the county court; also, that the allegations of fraud were not sufficient to give jurisdiction to chancery. Many of our cases are cited as authority for the proposition that if by any evidence a claim presented to the county court could be allowed, and it is allowed without appeal within six months, effect of such allowance is a binding judgment, and that it can only be set aside by showing that fraud was perpetrated upon the court. Mistake of facts in evidence, de-

[8] Act 308 of 1913 now appears as § 4893 of Pope's Digest.

liberate false swearing by witnesses—these are matters entering into consideration of the facts, and if the claimant is not a party to the fraud, the judgment will not be set aside if the court acted in good faith. These general principles of law are not to be denied.

We think, however, that the rule announced in *Johnson County* v. *Bost,* 139 Ark. 35, 213 S. W. 388, is applicable to the instant case, and that it correctly declares the law. In the opinion, written by Chief Justice McCulloch, it was said:

"The contention of appellee is that as to the other items, where there was legal authority for their allowance, but which are claimed to have been erroneous in fact, the evidence fails to show that there was any fraud practiced on the county court in procuring the allowances. Counsel for appellee abstracted the testimony of appellee himself and of the county judge, where it is shown that the accounts were made out upon customary blanks and that there was no concealment of fact, or fraud, in other words, practiced. We are of the opinion, however, that the fact that appellee was the clerk of the circuit court, and thus occupied a confidential relationship toward the county with respect to his duty in correctly keeping the records of the proceedings of the circuit court and the items for which fees were allowed, and that through his two terms he presented very numerous accounts containing illegal and incorrect items, showing that he was systematically padding his accounts, was sufficient to constitute such fraud as would justify a court in setting aside such judgments allowed."

In the Bost Case, *supra,* the improper claims were presented by the clerk of the circuit court. In the case at bar, they were presented by the clerk of the county court. If the relationship of confidence referred to by Chief Justice McCulloch existed between the county judge and the clerk of the circuit court, is it not appropriate to say that a higher degree of confidence and trust would ordinarily exist between the judge of the county court and the clerk of the same court?

In either case, dealings of the kind involved should be characterized by the utmost good faith; and if, by the

application of the rule promulgated in *Johnson County* v. *Bost* the public interest can be protected without, at the same time, depriving judgments of that degree of finality which must attach to them when they are properly procured, every consideration of equity calls for the application of that rule for the benefit of Independence county.

The decree is reversed and the cause remanded with directions that it be retried in a manner not inconsistent with this opinion.

WASHINGTON COUNTY *v.* DAY.

4-5412 126 S. W. 2d 602

Opinion delivered March 27, 1939.

J. W. Trimble and *O. E. & Earl N. Williams,* for appellant.

Pearson & Pearson, for appellee.

HUMPHREYS, J. As the facts are undisputed only a question of law is involved on this appeal, and that question is, must a landowner accept a warrant issued under an order of a county court payable out of a fund showing a large net deficit in payment of adjudicated damages for taking and using a part of his land for public highway purposes, or may he refuse such a warrant and require that a warrant be issued to him payable out of an available fund containing a net balance sufficient to pay his adjudicated claim.

In the trial of the cause in the circuit court of Washington county appellant and appellees filed an agreement entered into on September 17, 1938, as follows:

"It is hereby stipulated and agreed by the parties hereto that the county court of Washington county by its order of May 29, 1937, and upon the petition of the State Highway Commission of the state of Arkansas, did condemn and take certain lands of the plaintiffs herein (appellees') for the purpose of changing and widening state highway No. 62, the same being known as Fayetteville-Prairie Grove Road; that said order of the county court taking plaintiffs' (appellees') lands was made and rendered under the authority and procedure as set forth in §§ 6905 and 6968 of Pope's Digest of the Statutes of the State of Arkansas.

"That plaintiffs (appellees) filed their claim in the county court for the damages sustained for lands taken and the damages caused to the remaining lands of the plaintiffs in the sum of $2,500; that said claim was allowed by the county court in the sum of $750; that plaintiffs appealed from this order and the cause was tried in the circuit court of said county, which court on the 13th day of November, 1937, rendered judgment against said county for the sum of $1,900.

"From this judgment the county appealed to the Supreme Court. The Supreme Court on the 9th day of May, 1938, affirmed the judgment of the circuit court. The mandate of the Supreme Court was filed in the

Washington circuit court and by court order was spread of record.

"That on the 10th day of June, 1938, the plaintiffs (appellees) filed in the county court of said Washington county a certified copy of the judgment, of said circuit court; a certified copy of the mandate of the Supreme Court; and a certified statement of the judgment, interest and costs, in the total sum of $1,999.55. On said June 10, 1938, said county court ordered said sum to be paid out of the State Apportionment or Gasoline Turnback Fund. That the plaintiffs declined to accept such warrant and appealed same to the circuit court, on the claim that said warrant should be issued as provided in § 6968 of Pope's Digest.

"That on January 15, 1938, the quorum court appropriated $5,000 or so much thereof as might be needed from State Apportionment or Gasoline Turnback Fund to pay for rights-of-way of State and Federal Highways and damages caused thereby."

Other facts undisputed relate to the state of the county finances, that is the balances and outstanding warrants in the three funds of the county, namely: The County General; the Road and Bridge; and the State Apportionment or Gasoline Turnback Fund, which is as follows:

	Date of $1,900 Judgment in Circuit Court	Date of County Court Order on Turnback Fund	Date of Circuit Ct. Judgment vs. General Revenue
	11/13/1937	6/10/1938	9/17/1938
General Revenue Balance, Cash...	$12,917.55	$12,360.41	$14,147.46
Road and Bridge Balance, Cash...	$ 1,822.17	$ 6,485.86	$ 66.37
Turnback Net Deficit.....	$55,670.36	$40,908.66	$56,161.68

Another fact appearing in this record which is undisputed is that the Turn Back Fund out of which the county court directed that a warrant be issued in payment of appellees' judgment could not be paid for about three and one-half years as the deficit in that fund could not be overcome for that period of time.

Under the undisputed facts cited above the circuit court found that on the 17th day of September, 1938, the only available fund out of which the judgment might be paid was the County General Fund, that on that date the County General Fund had a cash net balance of $14,147.46, and that on that date there was only a cash net balance of $66.37 in the Road and Bridge Fund, and on that date the State Apportionment or Gasoline Turn Back Fund disclosed a net deficit of $56,161.68.

Based upon this finding, supported by the undisputed facts, the circuit court declared that under the law appellees were entitled to a warrant drawn against the County General Fund for $1,999.55, which amount covered the judgment and interest thereon, in payment of their judgment, and ordered and adjudged that the county clerk issue a warrant against the County General Fund for said amount payable to them, and to deliver same to them upon demand, and ordered and adjudged that the county treasurer pay same out of the County General Fund in his hands.

From this judgment appellant has duly prosecuted an appeal to this court.

Counsel for appellant admit that when subdivision 1, of paragraph (h) of § 1 of act 63 of the Acts of 1931 as amended by § 2 of Act 48 of the Acts of 1933 is read in connection with the last part of § 6968 of Pope's Digest, which is a part of the Act of May 31, 1911, there are three county funds out of which appellees' judgment might be paid, but contend that it was within the discretion of the county court to determine out of which fund it should be paid.

In support of this contention they cite § 2906 of Pope's Digest. It is true that this section confers broad powers upon the county court and makes him in effect the fiscal agent of the county, but it does not make the acts, judgments, final orders and proceedings of county courts absolute. All such acts, judgments, final orders and proceedings of county courts are to be exercised under the superintending control of the circuit courts. Section 2860 of Pope's Digest provides:

"The circuit courts shall exercise a superintending control and appellate jurisdiction over county, probate, court of common pleas and corporation courts and justices of the peace; and shall have power to issue, hear and determine all the necessary writs to carry into effect their general and specific powers, any of which writs may be issued upon the order of the judge of the appropriate court in vacation."

Section 2867 of Pope's Digest provides:

"They (referring to circuit courts) shall have superintending control over the judgments, final orders and proceedings of county courts, and county boards and officers."

If it be true that the county court was vested with discretionary power to say from which of the three funds appellees' judgment might be paid, in doing so he must necessarily exercise a sound discretion and not an arbitrary discretion. In exercising this discretion in the instant case the county court directed the issuance of a warrant payable out of a fund which did not have any money with which to redeem the warrant for about three and a half years, whereas he could have issued a warrant in payment of appellees' judgment out of an available fund which showed a net cash balance of $14,147.46. This action on the part of the court was arbitrary in view of the fact that in the exercise of a sound discretion he might have directed the issuance of a warrant out of an available fund that showed a net cash balance of $14,147.46. If he had exercised a sound discretion it would have enabled the appellees to collect their judgment and this record does not disclose that the payment thereof out of the General Revenue Fund would have prevented the usual and orderly functions of the county government. In other words the record does not reflect that the payment of appellees' warrant out of the General Revenue Fund would have prevented the county from paying all the statutory claims against the county. Of course it would have been the duty of the county judge to direct that a warrant be issued against the Road and Bridge Fund to pay the judgment of appellees instead of direct-

ing the issuance of a warrant payable out of the General Revenue Fund because the latter part of § 6968 of Pope's Digest provides as follows:

"Provided further, all damages allowed under this act shall be paid out of any funds appropriated for roads and bridges, and if none such, then to be paid out of the General Revenue Fund of the county."

Our construction of this provision in § 6968 of Pope's Digest is that as between the Road and Bridge Fund and the General Revenue Fund, the damages for taking appellees' land for public use must be paid out of the Road and Bridge Fund, if there is sufficient money in said fund to do so, and that the county court was authorized to use the money in the General Revenue Fund for such a purpose when the money in the Road and Bridge Fund was insufficient to do so. The undisputed facts in this case show that there was only $66.37 in the Road and Bridge Fund on September 17, 1938.

The circuit court was correct in holding that appellees were not required to accept a warrant in payment of their judgment in taking their land for public purposes on a fund which showed a net cash deficit of $55,670.36 and directing the county clerk to issue a warrant in payment of said judgment against the General Revenue Fund and in directing the county treasurer to pay said warrant out of said fund then in his hands.

The judgment of the circuit court is, therefore, affirmed.

GRIFFIN SMITH, C. J., dissents.

RUSSELL *v.* WILLIAMS.

4-5423 126 S. W. 2d 614

Opinion delivered March 27, 1939.

Bush & Bush, for appellant.

McRae & Tompkins, for appellee.

HOLT, J. Appellees, Letha Mae Williams and J. J. Williams, her husband, brought this action in the Nevada chancery court against Verna O. Russell and Arthur, Ozell, Dorothy and Herbert Russell, as the widow and heirs at law of Elmore W. Russell, deceased. Elmore W. Russell was the brother of appellee, Letha Mae Williams.

The complaint alleged "That plaintiffs on or about April 1, 1934, entered into an oral partnership contract with E. W. Russell, deceased, by the terms of which plaintiffs agreed to move from Chicago to Nevada county and agreed to take charge of the mercantile business owned by the said Russell at Falcon, Arkansas, run the store, keep the books, look after the details connected with the cotton ginning business of the said E. W. Russell, and also the details and accounts of the farms owned and operated by the said Russell, so as to permit the said Russell to devote his time to the buying, selling and dealing in real estate, timber and mineral rights in southwest Arkansas, and the plaintiffs under said contract were to receive one-half of the profits and bear one-half of the losses accruing from said store and arising from trading and speculating in real estate, timber and mineral rights; but were to receive no interest in the profits of running the gin or the proceeds of the farms at that time owned and operated by the said Russell."

That appellees moved to Falcon on April 1, 1934, and proceeded to comply with the partnership agreement; that the title to all real estate, timber and mineral interests acquired by Elmore Russell for the benefit of the firm was taken in his name; that as the result of said understanding and contract plaintiffs and the said E. W. Russell carried out their joint enterprise of running the store, buying and selling real estate, timber and mineral interests and dividing

the profits during the remaining part of 1934 and all of 1935 and 1936 and until the 19th day of August, 1937, when the said E. W. Russell was injured in an automobile accident from which he died on September 7, 1937; that all of the debts of said partnership have been paid. That said partnership acquired lands and mineral interests specifically described in the complaint, but referred to in the briefs as the Fletcher and Warren lands, the Nabors lease and the Peasley place. Interest in these properties formed the basis of plaintiffs' (appellees') suit. Plaintiffs sought to recover one-half interest in these properties in accordance with the partnership agreement.

The defendants (appellants here) denied every material allegation in the complaint, specifically denied the partnership agreement and further alleged that if the partnership agreement existed it was oral and within the statute of frauds.

The material facts in this case are substantially as follows: Appellee, Letha Mae Williams, is the sister of Elmore Russell, who died September 7, 1937. In 1933 Letha Mae Williams was living in Chicago, Illinois, with her husband, J. J. Williams. At that time she was employed in a bank and her husband was working in a garage. Her brother, Elmore Russell, induced her and her husband to move to Falcon, Arkansas.

Mrs. Sherron testified that Elmore Russell told her of the partnership they had formed; that he had helped Mr. Williams get work on the highway and that his sister, with the help of his son's wife, was taking care of the store and that let him out where he could trade, buy timber or oil leases or anything he wanted to and that they had a fund that this all went through, what he made from the store and what he made from his trades being put into this fund.

J. W. Russell testified that Elmore told him at the time he (J. W. Russell) was writing to appellees that if they would come down to Falcon he would share the profits he made from his trading with them, that Elmore told him to tell them this in his letter to them.

Mrs. C. G. Moody testified: "Well, he (Elmore) made mention every time he would bring it up about their partnership and what the future held for them and how much better they were doing due to the fact that they did have the partnership business and he kept apologizing for taking them away from us. He said everything including Mr. Williams' outside earnings went into the business."

J. L. Russell testified that Elmore told him that he had a partnership with appellees in which they shared equally.

Mrs. Catherine Williams testified: "I assisted Mrs. Williams (appellee) to open a set of books. She set up an account on the first page of the cash journal purporting to cover the first ten months of the business and this statement was signed by Elmore Russell and Jas. J. Williams." That Mrs. Williams and Elmore Russell told her about the partnership as a basis to work from. "Q. Do you know of your own knowledge that what Jim Williams made on the outside went into the joint account? A. Yes, sir. Q. What did Elmore Russell tell you he was going to do? A. He was trading on the outside. Q. What was to go with any profits, any money or lands or minerals that he acquired? A. It went into the partnership. It was a partnership business." That the car was used by Elmore Russell on the outside, and the partnership account was paying for it. Williams and wife put into the business something over $400.

Appellant, Arthur Russell, son of E. W. Russell, deceased, and administrator of his estate, testified: "Q. Did he ever say anything to you about his relationship with them? A. Well, the store and the Warren royalty. Q. Well, what about the store, A. I understood they had a half interest in it. Q. What did he say about their interest, if any, in any real estate that he owned? A. I never did know anything about that. Q. Did you ever hear your father say that he intended to give them any interest in any royalties or any lands or interests that he owned? A. Yes, the Warren royalty and that place that was traded for that. Q. The Fletcher place? A. Yes, sir, the Fletcher place. Q. What did he say? A. He just said he meant to give them a cut on that. That is what he told me. Q. Did

you ever hear him say anything about giving them an interest in the Peasley place, or in the Peasley lease? A. I heard him say he was going to give them a cut in the lease."

Letha Mae Williams testified: "Before leaving Chicago to come to Falcon my husband and I each had steady employment. My brother, Elmore Russell, was very optimistic over the possibilities at Falcon. His letter was very much in detail about the possibilities down there. My husband and I finally decided to go to Falcon rather than to San Antonio because living expenses would be cheaper, and then the enthusiasm and belief that Elmore had in the oil possibilities and the tests that had been made, and the faith he had in it convinced us there was perhaps quicker success there than in San Antonio. After Jim and I came to Falcon and got started, Elmore wasn't around the store any to speak of. He began to trade on the outside, as he had hoped to do. "Q. Now, was Elmore pleased with that relation down there, Mrs. Williams? A. He told me he was. . . . Q. Mrs. Williams, to what extent was Elmore familiar with every item on this joint account? A. He turned every item over to me, either gave the charge or the deposits he made or gave me the checks to go and deposit. Q. Was he thoroughly familiar with every item in this joint account? A. Every one of them. Q. As a matter of fact, did you not get practically all the information that went into the joint account from him? A. It was his outside information and earning together. The $600 debit for the Peasley land was run through the joint account because it was paid through the joint account. This $600 was half of the $1,200 balance due on the purchase money after the timber was sold. It was necessary for Elmore Russell and Mr. Speer to have a settlement after the lease was sold to the Texas Company for $1,980 because the partnership was entitled to one-half of the profit. I am familiar with the Fletcher and Warren transaction. The profits from the Fletcher trade went into the joint account."

Mrs. E. W. Russell, widow of E. W. Russell, testified: "Q. Mrs. Russell, I want you to tell the court what you know about any partnership agreement that your husband

had with Mr. and Mrs. Williams. A. Well, I don't know of any only the store. Q. You do know they went into the store on a fifty-fifty basis? A. Yes, sir. Q. Did Mr. Russell ever tell you that they had a partnership interest in any lands that he acquired? A. No. Q. Did Mr. Russell at any time indicate that he intended to give them an interest in certain pieces of royalty? A. Yes, sir. Q. What did he say about that? A. He said he was going to give them an interest in the Warren royalty and in the Fletcher royalty and an interest in the Peasley lease."

In addition to all this, on the second page of the joint account book appears the following entries: June 24, E.W.R. ½ Peasley land, $600; June 24, E.W.R. ½ Peasley oil lease, $990; June 24, E.W.R. ½ Exp. and taxes due J.E.S. (meaning J. E. Speer) $25.58. The record reflects that the Peasley land cost $4,000. According to the testimony of Mrs. Williams, the timber cut off the land paid all of the purchase price but $1,200. The land was bought by J. E. Speer and E. W. Russell, each to have a one-half interest, and the $600, one-half of the balance, $1,200, due by E. W. Russell was paid by the partnership and was the $600 entry above referred to. Then a lease was sold for $1,980 and the $990 entry above was one-half of this lease money. The other entry, $25.58, "expense and taxes," was for one-half the taxes and expenses, the other half being paid by J. E. Speer.

On this state of the record, the trial court found that the plaintiffs (appellees here) about April 1, 1934, entered into a partnership contract with Elmore Russell, deceased; that all debts of the partnership had been paid and as a result of the joint efforts of plaintiffs and Elmore Russell, said partnership acquired as profits of the partnership the property in question here. From this decree comes this appeal.

Appellants earnestly insist, (1) that even if the oral contract of partnership was made as alleged, it was within the statute of fraud (§ 6059, Pope's Digest) and void in so far as it related to an undivided interest in the land and mineral rights sued for; and (2) that there is no written evidence and no competent oral testimony that the alleged partnership was ever formed. We can-

not agree with appellants on either of these contentions. We think that the findings of the chancellor that an oral partnership agreement was made and entered into, as alleged, is not against the preponderance of the evidence. We think this oral evidence in connection with the book account entries, signed by the parties, as this record reflects, amply support appellees' contention that a partnership agreement was entered into.

We are also of the opinion that the statute of frauds does not apply in this case. We think the preponderance of the testimony is to the effect that a partnership was formed by the parties for the purpose of buying and selling land, leases and royalties before any of the property in question was purchased, and that they were buying for speculation only and were not buying lands or leases to keep but for the purpose of selling them at a profit.

This court in *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. 2d 282, said: "Real estate purchased for partnership purposes, paid for with partnership funds, and held and used as partnership property, will be treated as personalty for the purpose of the partnership, and as partnership property, regardless of the manner or by what agency it is bought and in whose name the title is held. The holder of the legal title will be considered a trustee for the partnership."

The rule of law governing cases of this character is well stated in *Chester* v. *Dickerson,* 54 N. Y. 1, 13 Am. Rep. 553, wherein the court said: "Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other?

"Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without a writing. If there was a parol agreement in this case before the written one, it was just like the one embodied in the writing, to-wit, a partnership to purchase, lease and take refusals of land and then sell, lease or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief."

Again in *Thompson* v. *McKee,* 43 Okla. 243, 142 Pac. 755 L. R. A. 1915A, 521, we find in the syllabus: "An oral partnership agreement to share in the profits and losses arising from the purchase and sale of real estate is not within the statute of frauds; and the existence of such partnership, and the interest of the members of the firm therein, may be established by parol evidence.' ' This court in *Beebe* v. *Olentine,* 97 Ark. 390, 134 S. W. 936, (quoting syllabus) held: "A verbal agreement between two persons whereby they agree to buy certain lands jointly and to divide the profits from a resale thereof is not within the statute of frauds."

We have carefully examined the case of *O'Bryan* v. *Zuber,* 168 Ark. 613, 271 S. W. 347, cited and relied upon by appellants; however, we are of the opinion that it does not control here.

On the whole case we conclude that the decree of the chancellor was correct, and accordingly it is affirmed.

CLARKE *v.* THE FEDERAL LAND BANK OF ST. LOUIS.

4-5414 126 S. W. 2d 601

Opinion delivered March 27, 1939.

H. S. Grant, for appellant.

W. H. Bengal, for appellee.

SMITH, J. A decree was rendered December 18, 1936, on personal service, foreclosing a mortgage executed by

W. B. Clarke, and Carrie L., his wife, to The Federal Land Bank of St. Louis. The mortgaged lands were sold, pursuant to this decree, by the commissioner appointed for that purpose, on February 6, 1937, to the land bank, and the report of this sale was duly made and filed May 25, 1937, and was approved and confirmed on the same day. Thereafter, and on the same day, the commissioner, in open court, acknowledged the execution of a deed to the bank for the lands which he had sold. The deed was approved, and it was ordered that the deed be filed for record, and it was duly recorded May 27, 1937. Later, on a date not disclosed by the record before us, the bank sold and conveyed the lands purchased at the foreclosure sale to Leland Bunch.

On April 11th Clarke and wife filed "Motion to cancel and set aside sale of lands, cancel and set aside deed made and executed to plaintiffs by commissioner." This relief was asked on the ground that the commissioner's "sale was not had and held in the manner and form required under the terms of the decree of foreclosure granted by this court on the 18th day of December, 1936."

The foreclosure decree directed the commissioner to advertise the time, terms and place of sale for a period of not less than twenty days next before the day of sale, by at least three weekly insertions of the notice of sale in some newspaper published in Jackson county, in the chancery court of which county the decree had been rendered. It is contended that the notice of sale was published only twice, the first publication being made on January 14, 1937, and the second on January 21, 1937, and the proof of this publication was not verified as required by § 8784, Pope's Digest.

The sale should, of course, have been advertised for the time specified in the decree of foreclosure, and the proof of publication of the notice of sale should have been verified. Had these objections, or either of them, been called to the attention of the court before confirming the sale, the court would, no doubt, have required proof that the notice of sale had been published for the time and in the manner required by the decree of foreclosure, and that proof of the publication be verified as required by

law. But no such objection was made before the confirmation of the commissioner's report. Indeed, the objection was not made until after an intervening term of the court had been held and had adjourned. We conclude, therefore, that the objections now made have not been made in apt time. The defendant in the foreclosure suit had the right to interpose the objections he now makes against the confirmation of the sale; but he shows no reason why these objections were not made prior to the confirmation of the commissioner's report. The purpose and effect of the confirmation of the commissioner's report of sale is to ascertain and adjudge whether the sale had been held in conformity with the provisions of the decree of foreclosure and of the law relating to sales thereunder. The decree of confirmation imports a finding that the terms of the decree and the provisions of the statute were complied with, and objections made thereafter, which offer no reason why they were not made before confirmation, come too late.

The purported proof of publication appearing in the record shows that the first publication of the notice appeared more than twenty days prior to the sale. It does not appear that there was no other evidence as to publication. Other proof as to the publication of the notice may have been offered upon considering the confirmation of the commissioner's report. Such testimony would have been competent. *Whitford* v. *Whitford,* 100 Ark. 63, 139 S. W. 653; *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841; *Mahan* v. *Wilson,* 169 Ark. 117, 273 S. W. 383; *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30.

It is true also, as a general proposition, that a decree of confirmation cures any irregularities in the conduct of a sale, if the court, in the first instance, might have authorized the sale to be held in the manner in which it was in fact conducted. Section 394, Chapter Mortgages, 19 R. C. L., page 581. Moreover, "It has been decided by this court that a confirmation of a judicial sale is a final decree from which an appeal may be prosecuted." *De Yampert* v. *Manley,* 127 Ark. 153, 191 S. W. 905. There was no appeal from this decree, and the motion to

vacate it was not filed until nearly a year after its rendition.

The court dismissed the motion to vacate as being without equity, and as that decree appears to be correct it is affirmed.

DIXIE MOTOR COACH CORPORATION *v.* TOLER, JUDGE.

4-5470 126 S. W. 2d 618

Opinion delivered March 27, 1939.

C. E. Johnson and *Pinnix & Pinnix,* for petitioner.

Talley & Talley, for respondent.

GRIFFIN SMITH, C. J. Petitioner asks that a temporary writ of prohibition be made permanent.

In an action brought in Hot Spring Circuit Court, John Hellen alleged he was a resident of the city of Hot Springs, in Garland county; that the defendant, Dixie Motor Coach Corporation, is a foreign corporation authorized to do business in Arkansas; that plaintiff purchased a bus ticket at defendant's station in Hot Springs good for transportation from that city to Pitman's Service Station; that he was unfamiliar with the highways and did not know when the bus arrived at the station; that Hubbard, in charge of the bus, failed to call the destination, but proceeded to a point four and one-half miles beyond, then demanded fifteen cents as additional fare; that such amount was paid; that concurrent with payment plaintiff asked how much farther it was to the station and was informed by Hubbard it had been passed; that he (plaintiff) asked to be taken back to the station, whereupon ". . . [Hubbard], with great violence and force, grabbed plaintiff by the shirt, tearing it, and at the same time kicked the plaintiff in the side, injuring him, . . . and by use of great force put this plaintiff off the bus."

Summons was issued by the clerk of Hot Spring Circuit Court. It was served on Virgil East, ". . . driver of coach, [in] Hot Spring county."

The court overruled a motion to quash. Defendant procured temporary prohibition.

Was the service effective?

Act 98, approved April 1, 1909,[1] provides a method for obtaining service on all foreign and domestic corporations which maintain a branch office or other place of business in any of the counties of this state.[2] Plaintiff says the attempted service was had under authority of Act No. 70, which became a law February 26, 1935, without the Governor's approval.[3]

[1] Act No. 98 of 1909 appears as § 1369 of Pope's Digest.

[2] While *Powers Manufacturing Company* v. *Saunders*, 169 Ark. 748, 276 S. W. 599, 274 U. S. 490, 47 S. Ct. 678, 71 L. Ed. 1165, is not involved in the instant case, Act 98 of 1909 was the statute pointed to by the Supreme Court of the United States as creating the discrimination upon which the reversal was predicated.

[3] Act 70 of 1935 appears as § 1377 of Pope's Digest. Section 1 is as follows: "When the defendant is the owner or the operator of

Section 2 of Act 70 provides that it shall not be so construed as to repeal existing venue or service statutes —except as to conflicts—the intent being to afford ". . . additional methods of obtaining service of summons as against the owners and operators of motor buses, coaches and trucks." Section 3 is the emergency clause.[4]

What necessity induced the General Assembly to provide additional methods of obtaining service?

Act No. 98 of 1909 permitted summons to be served on foreign or domestic corporations in any county where a branch office or other place of business was maintained, but trial was restricted to the county of service except in certain circumstances involving joinder. Act No. 70 does not affect Act 98.

It is insisted by petitioner that injuries sustained by the plaintiff did not result from operation of the bus; that ". . . there was the interposition of a separate, independent agency—the alleged altercation or re-encoun-

any motor bus or buses, motor coach or coaches, or motor truck or trucks, engaged in the business of carrying and transporting either passengers, freight, goods, wares or merchandise over any of the highways of this state, the service of summons may be had upon any such owner or operator by serving same upon any clerk or agent of any such owner or operator selling tickets or transacting any business for such owner or operator, or may be upon any driver or chauffeur of any bus, coach or truck being operated or driven by such driver or chauffeur as a servant, agent or employee of any such owner or operator, and service so had upon the agent or agents of any such owner or operator or had upon any such chauffeur or driver of any such bus, coach or truck being operated or driven by such driver or chauffeur as a servant, agent or employee of any such owner or operator shall be deemed and considered as good and valid service upon such owner or operator whether such owner or operator be a person, firm or corporation."

[4] The emergency clause, in part, is: "Whereas, many motor buses, coaches and trucks are being operated upon the public highways of this state and by reason of their operation persons are being injured and their property damaged and in many instances there is now no agent of the owner or operator of such vehicles upon whom service of summons can be had in counties through which same are being operated, therefore an emergency exists on account of such injuries and damages to persons and property and no adequate provision for service of summons existing, it is found that this act is necessary . . ," etc.

ter. . . . The right of action in this case, if any exists, must find its justification in the allegation that 'the defendant's employee, Tom Hubbard, with great force and violence, grabbed the plaintiff, John Hellen, by the shirt','' etc.

In The Law of Automobiles, by Berry, and in Blashfield's Cyclopedia of Automobile Law and Practice, the rule announced is:

''It is certain that the passenger has the right to pass from the conveyance at the end of his journey in safety—that is, free from the assault of the carrier's servants. Therefore, it would seem the principle attending the obligation continues to afford protection to the passenger until the further necessity of relations with the servants of the carrier at and in the vicinity of its conveyance as by way of settlement of the charge for the transportation is passed. Obviously the passenger may not be ruthlessly assaulted by the carrier's servants without liability on its part while in the very act of paying the charge of transportation. . . . Though the journey is ended, the passenger is clearly within the protection of the carrier and the relation continues until the settlement of fare is made and he is permitted by the carrier to take his leave in peace.''[5]

''The carrier-passenger relationship imposes on the taxicab operator the obligation to protect the passenger from the insult or assault not only by outsiders, but by his own servants as well. Thus far the passenger has a right to the absolute protection of the carrier, and thus far the carrier is an insurer of his safety, to-wit, from such assaults or insults at the hands of its servants.''[6]

We said, in *St. Louis, Iron Mountain & Southern Railway Company* v. *Jackson*,[7] that carriers of passengers are not absolute insurers of the safety of their passengers against injury and ill treatment from other passengers. ''Such is not the rule, however, in case of injury resulting to the passenger from the misconduct of its servants, it being an insurer of the safety of the pas-

[5] Berry, The Law of Automobiles, vol. 6, p. 210.

[6] Blashfield's Cyclopedia of Law and Practice, vol. 4, § 2216.

[7] 118 Ark. 391, 177 S. W. 33, L. R. A. 1915E, 668.

senger against wilful assaults and intentional ill treatment of its servants, for whose acts it is responsible."[8]

If Act No. 70 was intended as a service statute, applicable to that class of cases illustrated by the instant suit, then it must be conceded plaintiff was injured by operation of the bus on a highway of the state, it being necessary for present purposes to look only to allegations of the complaint.

It was held in *Coca-Cola Bottling Company of Southwest Arkansas* v. *Bacon, Judge,*[9] that summons served in Nevada county on the defendant's truck driver in a suit alleging injuries from drinking contaminated Coca-Cola was void, the defendant's place of business being in Ouachita county, and it having no agent or place of business in Nevada county. In that case the law was declared to be: "Reading [Act 70] from its four corners, the mode or manner of service provided therein has application only to actions for damages to persons or their property occasioned by the negligent operation of motor buses, coaches or trucks, on the highways of this state."

We think, however, that § 3 of Act 70 shows the purpose for which the legislation was enacted. There, it is recited that through operation of motor buses and trucks upon the highways of the state, persons are being injured and their property damaged, ". . . and in many instances there is now no agent of the owner or operator of such vehicles upon whom service of summons can be had in counties through which same are being operated; therefore an emergency exists on account of such injuries and damages to persons and property, *and no adequate provision for services of summons existing, it is found that an emergency exists,*" etc.

In the case at bar the plaintiff is a resident of Garland county. The incident of which he complains occurred west of Hot Springs, on Highway No. 270, in Garland county. It is alleged that Hellen ". . . purchased a ticket at defendant's station in the Citizens Building in

[8] Compare cases cited at page 396, 118 Ark. 391, 117 S. W., p. 35. Also, see West Publishing Company's Arkansas Digest, vol. 4, § 283 (3) under "Carriers."

[9] 193 Ark. 6, 97 S. W. 2d 74.

Hot Springs." This is equivalent to a declaration that defendant maintained a place of business in Garland county.

No necessity existed for filing the action in a county other than Garland. There was ample legal facility for service of summons.

It is our view, therefore, that Act No. 70 was intended to afford service rights only in those cases where adequate provision had not been made by previous statutes, and that it has no application to the case at bar.

Writ granted.

McHaney and Baker, JJ., concur.

Garmon *v.* The Home Insurance Company of New York.

4-5421 126 S. W. 2d 621

Opinion delivered March 27, 1939.

A. L. Smith, for appellant.

Vol T. Lindsey and *Verne McMillen,* for appellee.

Baker, J. This suit originated in the chancery court when the Home Insurance Company of New York filed

an action to cancel a policy of insurance issued to appellant, covering property in the town of Gravette, Arkansas.

The defendant, Newt Garmon, answered plaintiff's complaint and filed a cross-complaint, alleging destruction of property by fire and asking for recovery of the amount of insurance. The insurance company filed an answer to the cross-complaint. Upon trial of the case the trial court dismissed both the complaint and cross-complaint and decreed that the cross-complainant, Garmon, take nothing by the suit and adjudged costs against each of the parties, that is to say, that each should pay costs that had accrued by reason of his own action in the suit. The plaintiff did not appeal from this decree of the court, but the defendant, Newt Garmon, has prayed an appeal.

It is insisted by appellant that since the complaint was dismissed the only question that remains in the case is the one arising out of the charge by the insurance company that Garmon, appellant, burned his own house. While we do not agree to this statement, it is perhaps not vitally essential that we discuss any other particular matter on this appeal.

As a defense to the cross-complaint it was pleaded, first, that the agent writing the insurance acted without authority; second, that the policy was fraudulently obtained; and, third, that the insured burned the property and, therefore, had no right to recover.

There is a serious question arising out of the manner in which this policy was issued as disclosed by evidence in relation to the authority of the agent of the insurance company, and this testimony is restated here, not solely for the purpose of determining the particular power or authority of the agent to issue the policy, but rather as a part of the facts and circumstances offered as proof tending to establish the fraudulent procurement of the policy and the wrongful destruction of the property.

The property was an old frame two-story building in the town of Gravette, somewhat removed from the center of active business. We are told that when it was first built it was intended for use as a private school. We do

not know, and it makes no particular difference, whether it was to be used as a school or dormitory, for that was so long ago that it was no longer recognized as a school building, but was, at the time of its destruction, known as the "Old Opera House." It seems to have gotten that name by reason of the fact that after it had ceased to be used for a school property it became a show-house or theatre building for the local community. Its usefulness in that respect, however, had long since ceased, and at the time of the fire a part of one of the large downstairs rooms had been cut off, or partitioned, one side of which was used as a station for the delivery of cream. The tenant payed five or six dollars a month rental therefor. In another small corner room there was a small barber shop in which two barber chairs had been placed. The tenant of this portion paid $5 per month for his rental. The upstairs portion was occupied only by the policy-holder. He was unmarried, had some photographic paraphernalia and materials located therein. He had one or two heating stoves, a cook stove and some clothes there. A part of the ground floor had been fixed for use as a garage, but was no longer so occupied; however, appellant had stored therein an old Star car, which he says was of the approximate value of $25.

The evidence seems, or at least tends, to establish the fact that appellant was crippled so that he could not get about very well; that he was sometimes in poor health and although he claimed this property as his actual home or place of residence, he frequently went to the home of his sister at Decatur about nine miles away where he might have her nursing on account of his incapacity to wait upon and care for himself.

Mr. Garmon was at the home of his sister the night this property was burned. There is not much dispute about the fact that he left the property, which he claimed as his home, between five and six o'clock, when it was getting dark. A little later he was at Decatur. His sister, brother-in-law and one visitor testified that he had supper there. In fact, some of them testified that he was there at eight or nine o'clock when they retired and was there next morning. Whether he remained

there during the entire time after he first went to the house at about dark is not extremely important in this case and the evidence in that regard is in conflict. There are one or two witnesses who say that a few minutes prior to the time when the fire was discovered, his car was seen parked at this building where the fire occurred. This evidence is not at all unreasonable although it is contradictory of some witnesses who, at least, left the impression, if they did not say positively that he was at the home of his sister nine miles away.

Mr. Garmon was called as a witness by the insurance company. He was examined carefully, and later was recalled in his own behalf when he testified again. It may be said in regard to his testimony, both in his examination in chief and when he was cross-examined, that his testimony was very unsatisfactory, extremely evasive and very little of it was of any very great value in establishing any particular fact except his desire to recover the full amount of the insurance evidenced by the policy which called for twenty-eight hundred dollars ($2,800) on the building, and for one hundred dollars ($100) on personal property. He did not even want to produce his deed to the property, which he had obtained perhaps about two weeks before the fire. It appears that the deed was dated March 7th and was given him by a man who lived in Oklahoma, and who had formerly lived in Gravette and Mr. Garmon received it a day or two later. He had not placed it of record at the time he got the insurance policy which was issued by the agent of the insurance company at Decatur on the 23d day of March, 1936, about eight or nine o'clock a. m.

On the same day on which the policy was issued, at about nine o'clock that night the property was destroyed by fire. This was only a few minutes after Garmon's car had been seen at the building.

The evidence offered in regard to this agent's authority was to the effect that in the town of Decatur where he lived he had the right to countersign and deliver policies, but in the vicinity or surrounding country he had only the right to accept applications and forward them

to the company which would issue the policy if it approved the risk.

The evidence shows that insurance agents are furnished descriptive lists of property in the community in which they are authorized to act. It seems that these lists consist of serial numbers applicable to each piece of property and of other numbers by which insurance agents and others engaged in that business describe the property the subject of the insurance. In this case the agent who issued this particular policy had no such descriptive list or serial numbers of properties in Gravette where this property was located. He had seen the property, knew its location and appearance.

Evidence of insurance agents in Gravette, two of whom testified, is to the effect that Garmon had applied to each of them for insurance, but they did not accept his application or write insurance on this property, but one of them gave him the serial number and other descriptive numbers of this property and a statement as to the rate on the property and also the rate on the personal property located therein. Garmon denied that he applied to these men for insurance, but admits that he obtained from one of them these descriptive numbers and rates, which he took to the agent of the Home Insurance Company of New York at Decatur and procured from him the policy with these descriptive numbers written therein and upon the rates given him by the agent at Gravette.

While this case may be distinguished from a recent decision in regard to the authority of agents and acceptance of applications, (*Security Insurance Co.* v. *Van Norman,* 195 Ark. 200, 111 S. W. 2d 561) we think it unnecessary to discuss or settle that question in view of other conclusions upon which we have all agreed. There are some other facts in this case which should be stated and an effort will be made to give details of principal matters in controversy.

The testimony shows that Garmon admits that he was at the property between five and six o'clock in the afternoon; that he bought some kerosene and took it to his rooms in the building. He says it was for use

in his cook stove. According to his own statement, he left the building almost immediately after he delivered the kerosene there, and went to the home of his sister where he ate supper.

The town marshal, who said he had been watching the building, because he was afraid it would burn, is perhaps better able to explain what occurred at the time the fire started than any one else. He was going along a street of Gravette, going toward this building and not far away, when he observed a small flame at, or about the window sill. He said this flame seemed to go under the window sill and fill the entire room with a flash as of burning gasoline or kerosene. It is argued by appellant that after dark even the lighting of a match or candle would light up the entire room, but that is not the description of the occurrence as made by the marshal, nor is there any suggestion of the agency striking the match.

Although the fire burned slowly and took considerable time to break through and get to that part occupied by the cream station, the owner of that station says that portion of the building was so filled by some form of gas that it was impossible for him to enter and save his property. The owner of the barber shop was able to enter and remove practically all of his property. At the place where the barber shop was located there was no complaint of this gaseous condition.

The insurance company made an attempt to establish the fact that its agent had been drinking very heavily about two weeks prior to this fire and on account of his condition in this regard he was unable to enter into any form of valid contract whereby either he or the company might be bound. Two men who were sureties for the agent of the insurance company testified in regard to this fact. The appellant answers this testimony by stating, more in the nature of an argument than conclusion of fact, to the effect that he was present while the insurance agent wrote the policy of insurance for him upon a typewriter. He argues that inasmuch as the policy is in evidence and that the typewritten part, or portion thereof, is practically perfect, it is evidence within itself that the insurance agent was not at all incapacitated.

There are other facts which will be mentioned later. We are unable to say as a matter of law that when an insurance agent is able to write and deliver a policy of insurance he is capable of making a contract. Nor can we say as a matter of experience to what extent a man must be intoxicated to be unable to bind himself or his company, particularly under such circumstances as appear in this record.

Whatever may be the facts in this regard, it is undisputed that the appellant, Mr. Garmon, had bought this old dilapidated building outside the active business district of the town of Gravette, discarded as it was from any of the uses that had been made of it, such as a school or dormitory, or theatre building, or even garage. There is no doubt about the preponderance of the evidence in establishing the value of the building. It is fair to say that one witness for appellant testified that he is a contractor and he had made estimates of the value of the building material and labor for replacement of the building and fixed that sum in excess of five thousand dollars. Garmon himself finally admitted that five hundred dollars was the amount he was to pay for the house and lot altogether. He testified that he had at one time paid one hundred dollars, and another time two hundred dollars, and still owed two hundred dollars of the original contract price. He denied that he owed any part of this on this building for the reason, he said, the remainder, or last two hundred dollars was secured by a mortgage on a piece of farm property that he owned and upon which the house had been burned during his ownership, exactly two years prior to the fire that destroyed the building in controversy.

This extensive review is taken from more than 150 pages of appellant's abstract of evidence. The trial court made no special findings of facts. For that reason we have stated matters on all issues.

Appellant admits that the insurance on personal property did not cover his photographic materials, or the Star car which he says was in the building when it burned.

It must be said that the determination of the rights of the parties here rests upon the decision of questions of fact rather than upon propositions of law. We think the trial court might well have found there was fraud in the procuring of this policy upon property worth less than one fifth of the amount of insurance, or that the insurance contract was corruptly collusive. However, we hesitate to believe that condition prevailed. We also hold that if the defendant did not himself set fire to and destroy the house the circumstances in proof tend to establish, at least, a plan and design to profit greatly, more than five-fold, at the expense of the insurance company, whose premium had never been paid and was not tendered until some days after the fire. The fact that a policy had been issued was not reported to the insurance company prior to the report that the property had burned.

It is argued forcefully that the testimony of the witnesses who say that Garmon's car was parked at or near the building only a short time before the fire was discovered should not be believed. The witnesses who testified to that fact had no interest in this litigation. They testified positively and directly, like business men who had only a desire to tell the truth as compared to the statements, or answers of Garmon, who was pert, indirect, evasive, intentionly secretive and impolite, if not contemptous toward counsel.

Why may not the court have properly decided these issues against him? The trial court knew, as we do, that he need not necessarily have been personally present at the time the flash of fire indicated the building was marked for destruction. He had at stake more than five times the value of the property he had not paid for according to the record. It appears that he alone was interested in its destruction.

It is, also, argued that the so-called valued policy provision of our statutes, which prevents the insurance company from reducing loss claims on real property destroyed by fire, makes it improper for us to consider that matter here. Pope's Dig., § 7720. We do not think so. The question under consideration is not the amount of insur-

ance, but whether there was any insurance at all. If we should take appellant's view, the beneficent effects of the statutory valued policy provision of insurance policies on real property could be converted into a camouflage to conceal and protect fraud and crime.

This case, like others resting solely upon facts presented, must be determined according to the findings justified by the record. Recently we have had several similar controversies for decision. In these we reviewed the findings and decisions of the trial court and announced our holdings accordingly. Attention is called to the *Homestead Fire Insurance Company* v. *Russell,* 186 Ark. 1197, 53 S. W. 2d 584. In that case this court felt justified in going further than the trial court and held that the preponderance of evidence showed that Russell was responsible for the fire. So, also, in the case of *Rankin* v. *National Liberty Insurance Co.,* 188 Ark. 195, 65 S. W. 2d 17, this court affirmed the verdict of the jury which had determined the responsibility of the fire in that case. In a still more recent case of *Hill* v. *Mass. Fire & Marine Insurance Co.,* 195 Ark. 602, 113 S. W. 2d 104, this court affirmed the decision of the chancellor who held that a transfer of property to procure insurance was fraudulent and that the owner himself destroyed the property.

While the foregoing cited cases are not particularly referred to as precedents, they indicate the office of the court in the settlement and determination of the rights of the parties according to principles of justice rather than technical or assumed positions which apparently warrant unfair recoveries.

The plaintiff in lower court did not appeal. Appellant has shown no right of recovery. The decree of the chancellor is, therefore, affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* SALE.

4-5416 127 S. W. 2d 133

Opinion delivered March 27, 1939.

Daggett & Daggett, for appellant.

J. Ford Smith and *W. J. Dungan,* for appellee.

McHANEY, J. Appellees brought this action at law, in unlawful detainer, against one Henry Strange to recover the possession of a tract of land, described in the complaint as: "The place known as the Holt Bend Place, being all of the fractional section 12, township 9 north, range 4 west, in Woodruff county, Arkansas." They alleged that they were the owners thereof with all improvements, and had rented same to Strange as tenant; that the tenancy terminated December 31, 1933; and that although written demand for possession had been made according to law, he refused to surrender same. Strange

answered, denying that appellees had title to said lands, and alleged title in appellant, who, by leave of court, intervened in said action claiming title thereto by virtue of a patent from the United States, dated October 17, 1934, being No. 172763. The case was transferred to the chancery court. Appellees answered the intervention and pleaded adverse possession for more than seven years, since March 18, 1929, and payment of taxes in bar of appellant's right of recovery.

Trial resulted in a decree dismissing appellant's intervention for want of equity, from which is this appeal.

The facts are undisputed and are as follows: On September 28, 1850, Congress passed an act entitled "An act to enable the State of Arkansas and other states to reclaim the 'Swamp Lands' within their limits," which made a grant to the state of all the "Swamp and Overflowed Lands" remaining unsold at the date of the passage of said act. Pursuant to the request of the Governor of Arkansas, of October 20, 1853, and in accordance with said act, a patent dated August 26, 1859, was issued to the State of Arkansas by the President and the Recorder of the General Land Office to "The whole of fractional section twelve east of White River in township nine (9) north of the Base Line, in range four (4) west of the Fifth Principal Meridian in Arkansas, according to the official plats of survey of the said lands, returned to the General Land Office by the Surveyor General . . ." This tract of land, according to the plat of the original government survey of 1845 contained 97.81 acres, divided into three tracts containing 44.87 acres, 50.39 acres and 2.55 acres, which plat is on file in the land office of this state. Although said patent was dated August 26, 1859, title to the land passed to the state in *praesenti* as of the date of the Act of September 28, 1850. In *Rogers Locomotive Mach. Works* v. *American Emigrant Co.,* 164 U. S. 559, 17 S. Ct. 188, 41 L. Ed. 552, it was said: "While, therefore, as held in many cases, the Act of 1850 was in *praesenti,* and gave an inchoate title, the lands needed to be identified as lands that passed under the Act, which

being done, and not before, the title became perfect as of the date of the granting Act."

So it will be seen that the title of the Government to the whole of fractional section 12 east of White River in township 9 north, range 4 west, as surveyed and platted, passed to the State of Arkansas by the patent of August 26, 1859, and related back to the date of the "Swamp Land Grant," September 28, 1850.

Title of the state passed from it in two conveyances, one to H. P. Clingman in 1856 to the southwest quarter thereof and the other to John S. Lowery in 1854 to the southeast quarter thereof and through mesne conveyances to appellees, to them by a commissioner's deed in foreclosure proceedings against J. H. Holt.

In 1929, the commissioner of the general land office caused these and other lands to be resurveyed and the plat of such resurvey was accepted June 18, 1931. This new survey platted said fractional section 12 east of White River into four lots as follows: Lot 1, 22.61 acres; lot 2, 46.75 acres; lot 3, 51.64 acres, and lot 4, 38.97 acres, making a total acreage of 159.97, instead of 97.81 acres as shown by the plat of the original survey, or a difference of 62.16 acres. This increase in acreage over the original survey may be accounted for in part at least to error in the original, or to a moving of the left bank meander line of White River further east on the east side of the tract, which fact is shown by the re-survey.

On July 27, 1932, appellant, as successor to the Cairo & Fulton Railroad Company, filed its primary limits list with the general land office under the acts of Congress of February 9, 1853 (10 Stat. 155) and July 28, 1866 (14 Stat. 338), claiming the right to a patent to said lots 1, 2, 3, 4, section 12, in the bend of White River, and other lots, as shown by the plat of the re-survey, accepted June 18, 1931. On May 22, 1934, appellees filed a protest against said list and claimed title to lots 1, 2, 3 and 4 of said section 12 under the old description, and erroneously stated that the U. S. Government had issued patents to Clingman and Lowery, whereas the patent therefor was issued to the state and from the state to said Clingman and Lowery. They asserted that the land

claimed by them was the identical land covered by the lot description in said re-survey. The acting assistant commissioner overruled the protest of appellees and dismissed same, subject to the right of appeal within thirty days, but no appeal was taken. In doing so, he said: "Pursuant to an examination in the field this land was held to have been erroneously omitted from the original survey of the township as shown on the official plat approved January 20, 1845. A dependent re-survey and extension survey of the omitted land was made in November, 1929, and plat thereof was approved on April 8, 1931, and accepted June 18, 1931." Again he said: "Said lots 1, 2, 3, 4, section 12, are in a bend of the White River. The land in this bend was, in accordance with the said plat of 1845, known as fractional section 12, east of White River. Fractional section 12, east of White River, 97.81 acres, being three lots east of White River, was approved to the state on July 28, 1853, in a state swamp selection under the act of September 28, 1850 (9 Stat. 519) pursuant to which patent No. 7 issued on August 26, 1859. Lots 1, 2, 3, 4, said section 12, on the plat of April 8, 1931, is in the said bend of the river and contiguous to fractional section 12, east of White River, according to the said plat of 1845. No such land as that described by the protestant as patented to Lowery and Clingman could be either identical with or contiguous to any part of fractional section 12, east of White River, 97.81 acres."

There cannot be any doubt that the land known as fractional section 12, east of White River, as surveyed and platted in 1845, is in the same bend in White River and is the same land re-surveyed in 1929 and platted April 8, 1931, except the additional acreage surveyed in the latter survey. In other words, the plat of 1931 covers all the land on the plat of 1845 and 62.16 acres more, caused either or both by an error in the survey of 1845 or by accretions to the land surveyed and platted in 1845. In either case the Government had no right to make the re-survey of 1929 as reflected by the plat of 1931. It was without the power thus to disturb vested rights of *bona fide* owners. A clause in the act of March 3, 1909 (35 Stat. 845), as amended by joint resolution

approved June 25, 1910 (36 Stat. 884), reads: "That no such resurvey or retracement shall be so executed as to impair the *bona fide* rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." Similar protection is given to the rights of claimants under the provisions of the act of September 21, 1918 (40 Stat. 965). If these statutes do not prohibit the very thing done in this case, then they are meaningless. By this resurvey and the action of the general land office pursuant thereto, land, the title to which had been out of the Government since 1850 and in the state and her grantees since that time, is attempted to be swallowed up by an illegal survey and conveyed to appellant. No such power was given the general land office and none could be given. In the early case of *Rector* v. *Gaines,* 19 Ark. 70, it was held, to quote a headnote, that: "A sale of the public lands, by the executive of the federal government, before the public surveys, may be treated as void: But if the public survey be regularly made, returned and approved, a sale would be valid, although the survey be defective or erroneous, if such defect does not render the identity of the tract uncertain as to locality or quantity." In *State of New Mexico* v. *State of Colorado,* 267 U. S. 30, 69 L. Ed. 499, 45 S. Ct. 202, the Supreme Court of the United States held, that after the land department has surveyed and disposed of public lands, rights therein acquired are not affected by corrective surveys subsequently made by the department. It has been held that the courts may correct original United States surveys that have been upheld by the land department and overthrow the credit due as established by field notes, where the evidence is clear and convincing. *Blair* v. *Brown,* 17 Wash. 570, 50 P. 483. We are not unmindful of such cases as *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.,* 232 U. S. 186, 58 L. Ed. 564, 34 S. Ct. 297, and *Lee Wilson & Co.* v. U. S., 245 U. S. 24, 62 L. Ed. 128, 38 S. Ct. 21, holding to the effect that where, through fraud or error, land is excluded from a survey of public land by a meander line, the land department, on discovering the mistake, may deal with the excluded area, cause it to be resurveyed and

dispose of it. No such situation exists in the case at bar. The resurvey here involved is a resurvey of land already surveyed and sold according to the plat of that survey which covers the whole of fractional section 12 east of White River. It purports to cover all of said fractional section. No part of it is omitted from the original survey. The increased acreage shown by the resurvey, if due either to error or accretions, could not justify a resurvey and destroy vested rights of more than three quarters of a century.

For these reasons the resurvey was without authority of law and the decision of the acting assistant commissioner was, therefore, without binding effect, since there was no jurisdiction in him or his office to determine the questions presented.

The decree of the court dismissing appellant's intervention for want of equity is affirmed.

[redacted]

WILLIAMS *v.* HARPER.

4-5375 126 S. W. 2d 941

Opinion delivered April 3, 1939.

[redacted]

John M. Shackelford and *Boone T. Coulter,* for appellant.

Hawkins & Keith and *H. M. Barnes,* for appellee.

McHANEY, J. Appellant brought this action to cancel, as a cloud on his title, a certain mineral deed exe-

cuted by himself and wife to appellee to an undivided one-half interest in the minerals under the SW¼ of the NE¼ of section 14, township 16 south, range 22 west, in Columbia county, Arkansas, dated March 15, 1937, on the ground of failure of consideration.

It is undisputed that on March 2, 1937, appellant executed an oil and gas lease to appellee covering said land for an agreed consideration of $200 to be paid on approval of title by his attorneys. The lease was deposited in escrow in a bank in Waldo, pending approval of title. On March 5, 1937, appellee's attorneys disapproved the title because of a tax forfeiture and sale of nine acres. On March 12, appellee took the lease out of the bank and caused it to be put of record. He tried to get a quitclaim deed from the purchaser at the tax sale, but failed to get it. At this point the evidence is in dispute. Appellee testified that shortly after he failed to get said quitclaim deed, he saw appellant and told him he would be unable to accept the lease, and explained to him that since the tax deed covered only nine acres, if appellant would give him a mineral deed to one half of the land, he would accept the lease and pay the purchase price of $200 for both conveyances; that appellant agreed to this and on March 15, 1937, he and his wife conveyed to appellee one-half the minerals under said land. Appellee further testified that he told appellant he would try to clear up the title and if he succeeded, it would also clear up appellant's title to the remainder. Appellant admitted the execution and delivery of the mineral deed, but stated very positively it had nothing to do with the lease or the $200 purchase price; that the consideration for the mineral deed was the agreement of appellee to clear up the title to his land; that he had done nothing about clearing the title; and that the consideration had failed.

Trial resulted in a decree dismissing the complaint for want of equity.

Appellant argues that the act of appellee in taking the lease agreement out of escrow and putting it of record constituted an acceptance of the title as a matter of law. We do not think so, although it is cogent evidence of an acceptance. But appellee testified he thought he

could get a quitclaim deed from the tax purchaser which he failed to get. Both the bank and appellant were anxious for the $200 to be paid, as the bank held a mortgage on the property and appellant desired to satisfy the bank out of the proceeds. Appellee notified the bank and appellant that he could not take the lease on account of the title, but would take it with the mineral deed, and pay the $200 and that all this was agreed to before the lease was recorded or the purchase money paid. As we see it, only a question of fact is presented, and we are unable to say the decree of the court is against the clear preponderance of the evidence.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* DUTY.

4-5406 126 S. W. 2d 921

Opinion delivered April 3, 1939.

Daily & Woods, and *Jeff Rice,* for appellant.

Duty & Duty and *Vol T. Lindsey,* for appellee.

MEHAFFY, J. On April 30, 1938, Rella Duty filed a complaint in the Benton circuit court against the appellant, Metropolitan Life Insurance Company. Service was had on the insurance commissioner, and the appellant, after receiving the summons, communicated with Daily & Woods on May 6, 1938. Appellant directed Daily & Woods to appear and protect the company's interests, and if necessary, to employ associate counsel to assist. The letter to Daily & Woods further stated that after they had had an opportunity to communicate with plaintiff's attorney, to advise them as to the number of the policy involved, name of the insured, and nature of the action. When Daily & Woods received this letter, they wrote to Mr. Fred Allred, clerk of the Benton circuit court, requesting that he send a copy of the complaint and inquired about the time the court would meet with jury in the future. The letter to the clerk stated: "Also please notify us the date of the convening of the next jury term of your circuit court." They did not make a request to know when court would meet except to ask when it would meet with a jury. The clerk, on May 10, 1938, wrote to Daily & Woods as follows: "No date set for court with jury. If you will write me later, maybe I will know."

On May 31, 1938, judgment by default was entered against the appellant. On May 31, 1938, counsel for the Metropolitan Life Insurance Company forwarded to the clerk of the Benton circuit court by mail, the answer of the Metropolitan Life Insurance Company together with a check for $2.50 as a deposit for costs. This answer was received by the clerk of the Benton circuit court on June

1, 1938, and was filed on that day. The clerk immediately wrote attorneys for the appellant that he had filed the answer, but that judgment was rendered against the Metropolitan Life Insurance Company in circuit court on May 31, 1938, in the amount of $3,000 and costs, and the clerk returned to the attorneys their check.

After the default judgment, Daily & Woods employed Mr. Jeff Rice, an attorney at Bentonville, who examined the records to ascertain when court adjourned and what the record showed. Thereafter, on June 17, 1938, the Metropolitan Life Insurance Company filed suit in the Benton circuit court against Rella Duty to set aside and vacate the default judgment rendered on May 31, 1938. The suit was based on § 8248 of Pope's Digest, which is as follows:

"The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh and eighth subdivisions of § 8246 shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint, a summons shall issue and be served, and other proceedings had as in an action by proceedings at law."

The appellant, in its suit against Rella Duty, prayed that the default judgment be vacated, set aside and held for naught. The appellant, in its complaint, set up the facts above stated and alleged that it had a valid and meritorious defense to the action and suit brought by Rella Duty against it. Appellant sets out in its complaint what it alleges the meritorious defense is.

On September 19, 1938, the appellee, Rella Duty, filed answer to the complaint of appellant denying each and every material allegation contained in the complaint, and asked that the complaint be dismissed, and that she recover costs.

On October 17, 1938, the court found that the appellant had no grounds for setting aside the judgment, and dismissed appellant's complaint. Appellant was given ten days to file a motion for new trial.

Motion for new trial was filed within the time allowed by the court, which motion was overruled. Appeal to this court was granted, and ninety days granted in which to prepare and file bill of exceptions. The bill of exceptions was filed and the case is here on appeal.

Mr. John S. Daily, a member of the firm of Daily & Woods, testified that they received notice of the pendency of this suit by letter from the home office dated May 6, 1938; there was enclosed a copy of the summons and the general counsel of the home office wrote Daily & Woods to appear and protect the company's interests, and if necessary employ associate counsel; the letter asked for certain information and when the letter was received by Daily & Woods witness wrote Fred Allred, clerk of the Benton circuit court requesting information about the time court would meet and asked specifically when court would meet with a jury; the clerk, on May 10th, wrote Daily & Woods that there was no date set for court with jury, but if they would write him later he would probably know. Witness further testified that the complaint was signed by Vol T. Lindsey as the sole attorney for plaintiff; witness was in Fayetteville on the 17th, 18th or 19th of May, does not recall which day: had planned to go on to Bentonville on that trip and confer with Mr. Lindsey, the attorney for Rella Duty; his business in coming to see him was to explain that he had not received the file from the company and was not prepared to file an intelligent answer; witness wanted to secure an agreement to defer the filing of an answer until he had full information; he learned while at Fayetteville that Mr. Lindsey was ill and had left or was leaving immediately for the Mayo Clinic, and for that reason he did not go on to Bentonville; he later learned that Mr. Lindsey would not be back for several weeks; on May 28 he received the file from the New York office, and the following day mailed answer together with costs deposit to Mr. Allred, the clerk; the letter was mailed May 31st and returned to him with a note stating that the answer had been received, but that judgment had been entered the day before; this letter was not received at the office

of Daily & Woods until June 2. As soon as witness received the letter from the clerk he called him by long distance telephone and asked him why he had not notified him that court would meet on May 31st, and the clerk stated that he did not know it or he would have notified him; witness then called Mr. Jeff Rice, attorney in Bentonville, requesting that he investigate the matter, and then went to Bentonville and conferred with Mr. Lindsey; sought his consent to set aside the default judgment, and explained to him what had occurred; Mr. Lindsey refused to agree to set the judgment aside and thereupon complaint was filed in this case. He did not give witness any notice of any kind that court would be held on May 31st; first notice they had was on June 1st that a default judgment had been entered on the previous day; he wrote the insurance company on the 11th enclosing copy of complaint, and the next time he heard from the company was the 28th or 29th of May; when asked if there was anything unusual about the suit, he answered that there was; that this claim was in connection with a policy upon which a death benefit had previously been paid, and the claim and file had been closed almost a year previously, and the papers and records would not be in the active files of the company; he understood that answer was required to be filed by noon of the first day court is in regular or adjourned session, twenty days after service had; does not know that he told the company this; wrote them on the 11th sending a copy of the complaint and asked the company to send file immediately so answer could be filed before service matured. The answer filed was a general denial and was forwarded on May 31st; this answer did not have any allegations in it, except a general denial; got the impression from Mr. Allred's reply to his letter that he was speaking about when court would be back; did not write the clerk any more and made no further inquiry until the letter of June 2nd was received; the reason he did not was that he did not have full information with reference to the claim, and was in no position to file an answer; he knew the plaintiff's attorney was ill and out of the state, and

did not know that any other attorneys would appear in the case and ask for default judgment; this is the first time he has ever had any connection where the opposing side has sought a default judgment without giving advance notice; he was in Fayetteville on the week of the 16th; was informed that Mr. Lindsey was ill and had gone or was leaving for Mayo's Clinic; he does not know who told him, but there was a group of persons and one of them told him; called Mr. Rice on June 2nd; did not call Lindsey's office in Fayetteville because he had no reason to question the correctness of his information; was authorized by the company to employ local counsel and did not call local counsel and ask him to look out for the day of adjourned court; there was no reason to prevent him from filing an answer between May 10th and May 21st; he could have prepared a general denial.

The following letters were introduced in evidence:

"May 6, 1938.

"In Re: Rella Duty v. Metropolitan
"(HDG-15371)
"Daily & Woods, Esquires
"Attorneys at Law
"Merchants National Bank Building
"Fort Smith, Arkansas

"Gentlemen:

"We enclose herewith summons in the above entitled action served upon the Insurance Commissioner of Little Rock, Arkansas, on May 2, 1938. Please appear and protect our interests. If necessary, we suggest that you employ associate counsel to assist you in this matter.

"After you have had an opportunity to communicate with plaintiff's attorney, we should appreciate your advising us as to the number of the policy involved, the name of the insured and the nature of the action. Upon receipt of this information we shall promptly forward our file to you.

"Yours very truly,
"Harry Cole Bates
"General Counsel."

* * * * *

"Harry P. Daily John P. Woods
"Daily & Woods
"Attorneys at Law
"Merchants National Bank Building
"Fort Smith, Ark.
"May 9, 1938.

"Mr. Fred Allred
"Circuit Clerk
"Benton County,
"Bentonville, Ark.

"In Re: Relly Duty v. Metropolitan Life Ins. Co.

"Dear Sir:

"Please send us copy of the complaint in the captioned case.

"Also, please notify us the date of the convening of the next jury term of your circuit court.

"For your convenience, we enclose a stamped addressed envelope.

"Yours very truly,
"Daily & Woods
"J. S. Daily.

"JSD:IB."

* * * * *

"May 11, 1938

"Mr. Harry Cole Bates, General Counsel
"Metropolitan Life Insurance Company,
"New York, N. Y.

"Dear Mr. Bates:

"Re: Rella Duty v. Metro.
"(HDG-15371)

"We enclose herewith copy of the complaint filed in the captioned case.

"The next regular term of the Benton circuit court is the third Monday in September. The clerk notifies us that judge has made no announcement for an adjourned jury term before that date. However, under a recent act of our Legislature, the judge can convene court on five days notice, and we, therefore, should file some pleading

before the service matures. We, therefore, suggest that your file come forward immediately.

"Yours very truly,

"Daily & Woods

"jsd;a."

* * * * *

"Metropolitan Life Insurance Company
"Frederick H. Ecker, Chairman of the Board
"Leroy A. Lincoln, President
"New York City

"May 24, 1938

"In Re: Rella Duty v. Metropolitan
"(HDG-15371) Policy No. 2770
"GLHD, Serial No. 5874, John R. Duty, Insured.
"Daily & Woods, Esqs.,
"Attorneys at Law,
"Merchants National Bank Building,
"Fort Smith, Arkansas.

"Gentlemen:

"We acknowledge receipt of your letter of May 11th and are enclosing herewith our original file relating to the subject matter of this suit, together with a copy of the certificate issued to John R. Duty and a copy of the master policy.

"Due to the absence of Mr. Guthrie, the attorney in charge of this case, we are unable to write you in detail regarding this matter. We will, however, write you more fully at the later date.

"Meanwhile, we should appreciate receiving your comments and suggestions.

"Yours very truly,

"Harry Cole Bates
"General Counsel

"HDG:DS
"Encls."

* * * * *

Mr. Fred Allred testified that he was circuit clerk of Benton county, Arkansas; that he had in his hand law record "H" of the circuit court; when asked to turn to the record or adjournment order under which the court

purported to have reconvened May 1, 1938, he said: "May 16, 1938, order by the court that court adjourned until May 31, 1938." He testified that on May 31st and on June 3rd, when Mr. Rice examined their records, those words were not on there; they were not that near up with their work, but had the calendar circled on that date; the typewritten words of the court order were written after May 31, 1938; the court did not make it a written order on his desk docket; they just circle the calendar to show when court is to meet again; he made the order on May 16th; witness does not know whether he heard it or whether the judge told him or the girl; they circled the calendar; there was nothing on the record to show that the court had adjourned until May 31st until it was put on the record, after May 31st; thinks they had it marked on the calendar when Mr. Rice came in. He was then asked if, when Mr. Rice examined the records on June 3rd or 4th, there was nothing on the record to show when court adjourned to; the court held this evidence incompetent.

Mr. Jeff Rice, an attorney at Bentonville, testified that he was an attorney and that subsequent to May 31, 1938, made an inspection of the records in the office of Mr. Allred, clerk, for the purpose of finding the last adjourning order entered in that record; he made the inspection on June 3rd, when asked what was the last adjourning order of the court appearing on the record, objection was made and sustained. The appellant then offered to prove that Jeff Rice, on June 3rd, inspected the record of the Benton circuit court, and the last adjourning order was one in which court adjourned until May 16th. Mr. Rice also testified that he did not know whether he was in Bentonville on May 31st, but does not believe he was in court; he heard there was a day of court; heard that Judge Combs was going to be there and hold court that morning.

Mr. Allred was recalled and testified that Mr. Lindsey was absent from Benton county on May 31st, and he understood he was away then at the hospital; does not

know when he left, but sometime prior to May 31st, and returned sometime after that date.

The appellant then offered to introduce the policy and other exhibits and other evidence to show that it had a meritorious defense, but the court declined to permit them to introduce any evidence as to a meritorious defense.

Appellant first contends for a reversal because it says:

"The plaintiff's evidence established an unavoidable casualty or misfortune within the meaning of paragraph 7, § 8246, of Pope's Digest."

Paragraph 7 of § 8246 of Pope's Digest reads as follows: "For unavoidable casualty or misfortune preventing the party from appearing or defending."

The evidence shows that there was no record made either by the judge or the clerk to indicate that court had adjourned to the 31st day of May. No one could examine the record and tell what day court would convene. The clerk testified that when the court would adjourn to a certain date, there would be no notation or record on the judge's docket indicating when court would convene, but that the judge would announce the date, and the clerk, instead of putting it on the record at that time, would circle his calendar. That evidently means that he would draw a circle around the day on the calendar when court would meet. But there is no evidence tending to show where he kept his calendar, and if there had been, it would not convey the information to any person that court would meet on a certain date because there was nothing on the calendar, according to the evidence, except a circle around the date.

"The law requires a party to keep himself informed of the progress of the case, and he must find out when his case is set for trial or when it is likely to be reached. However, the negligence of an attorney may be excusable when attributable to an honest mistake, an accident, or any cause which is not incompatible with probabilities on his part; and under such circumstances it is proper to set aside a judgment taken by default. 34 C. J. 309.

This court, in the case of *Leaming* v. *McMillan,* 59 Ark. 162, 26 S. W. 820, 43 Am. St. Rep. 26, quoted with approval from the case of *Tidwell* v. *Witherspoon,* 18 Fla. 282, as follows:

" 'The neglect of an attorney to prepare and file a plea, caused by his being summoned to a distant place on account of the serious illness of his wife, even though he might have made arrangements with another attorney to prepare it, or might have notified his client, yet did not do so because of his anxiety for his family, is not such neglect as should operate to the prejudice of his client.' And in this case the judgment by default was opened up."

The court stated in the case of *Leaming* v. *McMillan, supra*: "It appears from the statements of the case, that the failure of the plaintiff, Darling, to appear at the term of the court when the judgment of dismissal was rendered was caused by an unavoidable casualty, and that the non-attendance of himself and counsel was excusable under the circumstances."

Where a suit was brought under the section relied on by appellant here, the trial court set aside the default judgment, and said, among other things: " 'An Act of the court shall prejudice no man, is a mixim founded,' says Mr. Broom, 'upon justice and good sense.' Broom's Legal Mixims, p. 99. And while the facts may not bring the present case technically within this ancient maxim, the principle it announces should, by analogy at least, be and is applied here to sustain the judgment of the court, which is accordingly affirmed." *Thweatt* v. *Knights & Daughters of Tabor,* 128 Ark. 269, 193 S. W. 508.

In the instant case the undisputed evidence shows that there was no record of the adjournment and no one could examine the records and ascertain when court would meet, or ascertain that there would be an adjourned term. Moreover, the evidence shows that the attorneys for appellant had information that the attorney for appellee was ill and had either gone to the Mayo Clinic at Rochester, Minnesota, or was going immediately. The attorney, also, testified that he talked with the

clerk over the telephone after default judgment was had, and asked the clerk why he did not notify him that court was going to meet on that date, and the clerk said that he did not know it himself.

A majority of the court is of the opinion that the evidence shows unavoidable casualty or misfortune preventing the appellant from appearing and defending.

Mr. Justice Humphreys and the writer do not agree with the majority in this holding.

As to whether the attorneys for appellant were guilty of negligence, it may be said that they were required to do just what a man of ordinary prudence would have done under the circumstances, and if they did this, they were not guilty of negligence.

The court would not permit appellant to introduce evidence of a meritorious defense. Of course if there was no unavoidable casualty or misfortune, it would not be proper to introduce this evidence, but since a majority of the court holds that there was unavoidable casualty and misfortune, this evidence was proper, because, in order to get the judgment set aside it is necessary that the appellant show a meritorious defense.

It follows from what we have said, that the judgment of the circuit court must be reversed, and the judgment is reversed and the cause remanded with directions to proceed with the trial of the case according to law and not inconsistent with this opinion.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* JOHNSON.

4-5410 126 S. W. 2d 931

Opinion delivered April 3, 1939.

Huie & Huie; House, Moses & Holmes and *Eugene R. Warren,* for appellant.

G. W. Lookadoo and *J. H. Lookadoo,* for appellee.

GRIFFIN SMITH, C. J. Appellee's judgment for $3,000 was rendered on a jury's verdict finding that such amount should be paid to compensate personal injuries appellee sustained when she boarded appellant's bus.

The six assignments of errors urged are: (1) That no liability was shown, and therefore a verdict should have been instructed for the defendant. (2) That defendant's motion for a continuance should have been granted. (3) That the court arbitrarily limited the defendant to thirty minutes within which to produce witnesses for examination, such witnesses or affiants having executed affidavits to the effect that defendant could not secure a fair trial in Clark county. (4) That the court arbitrarily refused to allow defendant's attorneys to examine the jury panel. (5) That defendant was prejudiced by the court's announcement that "We are going to finish this trial today or tonight, and you can act accordingly." (6) That defendant's supplemental motion for a new trial should have been granted.

We are of the opinion that there was sufficient evidence to go to the jury on the question of negligence. Assignments 2, 3, 5, and 6 will not be discussed because the judgment must be reversed on the fourth assign-

ment—"The court arbitrarily refused to allow defendant's attorneys to examine the jury panel."

The bill of exceptions shows the following proceedings:

"THE COURT: Gentlemen, are any of you witnesses in this case? (No answer.) THE COURT: Do you know anything at all about the facts in this case? (No answer.) THE COURT: Have you formed or expressed an opinion as to the merits of this case? (No answer.) THE COURT: Are any of you related by blood or marriage or by any existing contract with the plaintiff, Mrs. Earl Johnson, or with the defendant, Missouri Pacific Transportation Company? (No answer.) THE COURT: Gentlemen, have you any bias or prejudice for or against either party? (No answer.) THE COURT: Is there anything at all in your minds that would hinder you in any manner or degree in fairly arriving at a fair and impartial verdict in this case? (No answer.) THE COURT: Is there any reason at all, if selected on this jury, why you could not do equal justice to either side? (No answer.)

"MR. HUIE (one of the attorneys for defendant): I would like the privilege of examining each juror individually. THE COURT: That will be denied. The court will examine them on any question you want. (The defendant objected to the above ruling of the court and at the time asked that its exceptions be noted of record, which was accordingly done).

"THE COURT: Do you care to have the court ask any questions? MR. HUIE: Will the court ask the jury as a whole, or individually, if they are under any obligation to the attorneys for the plaintiff? THE COURT: This is addressed to each of the jury: Are any of you under any obligations to either of the attorneys for the plaintiff, Mr. J. H. Lookadoo or Mr. G. W. Lookadoo? (No answer).

"MR. HUIE: I would like to ask if either of the attorneys for the plaintiff has befriended any one of the jurors in such a nature that he would feel more kindly in this case toward rendering a decision in favor of one who had represented him. THE COURT: Gentlemen of the jury, is there any personal relation, or has there been,

between any of you and the attorneys for the plaintiff that would cause you to lean or be baised, or have a leaning of mind toward that side of the case? (Addressing Mr. Huie): Does that meet it? MR. HUIE: Yes, that is it in substance. (No answer).

"MR. HUIE: I would like to ask this question: How many of the jurors have served in cases against corporations in the last two or three years and where there was always rendered a verdict in favor of the plaintiff against a corporation? THE COURT: I will not ask a question like that. The records are open here, and you can look at the records. (Objection and exceptions).

"MR. HUIE: Ask whether or not, where the plaintiff is a private individual and the defendant is a corporation, they would lean more toward the side of the individual than they would toward the corporation. THE COURT: Gentlemen of the jury, the plaintiff is a natural person: that is, just a person. The defendant is a corporation: a person created by law. Now, this is a suit between a person and a corporation. Can you, and will you, if accepted on this jury, try the case and render to both parties, regardless of the character of the entity, the same fair and impartial trial and give each side the same consideration as you would if both were corporations, or both were natural persons? (No answer).

"MR. HUIE: Ask whether or not any of the jurors have been, or are, under any obligation to either one of the attorneys for the plaintiff? THE COURT: Well, Gentlemen, I will ask if any of you have ever been obligated to either of the attorneys for the plaintiff in this case, or if there is anything in your mind that would prevent you in any manner or degree from rendering fair justice in this case? You are all sworn to try the case according to the law and evidence: are you willing to do that? THE COURT: They say they are. Is that all? Is that all? Is there anything else? (No response).

Appellee relies upon § 16 of Initiated Act No. 3, which appears as § 3996 of Pope's Digest, to support the conduct of the trial court in refusing to permit attorneys for the defendant to interrogate members of the jury

panel. The section of the Act is : "In all cases, both civil and criminal, the court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Other questions may be asked by the court, or by the attorneys in the case, in the discretion of the court."

In *Baldwin et al., Trustee Missouri Pacific Railroad Company* v. *Hunnicutt,*[1] (supplemental opinion on rehearing, pages 445-446) there is a discussion of the contention made by counsel for appellee that they "did not know of any provision of law in this state that entitles either party to a civil suit to have each proposed juror stand and be separately interrogated by counsel." The opinion directs attention to § 6380 of Crawford & Moses' Digest, now § 8342 of Pope's Digest, and says: "This court has recognized the right of litigants in civil cases to examine the jurors separately." *St. L., I. M. & S. R. Co.* v. *Aiken.*[2] Trial of the cause upon which appeal in the Hunnicutt Case was predicated occurred prior to adoption of Initiated Act No. 3. We said in that case: "The discretion which rests in the trial court does not relate to the right to examine jurors separately, but only to the *extent* of the examination of each separate juror." Otherwise expressed, it was meant that the trial court did not have the right to absolutely deny separate examinations, but the extent to which such examinations might be carried was a matter resting within the sound discretion of the court.

The opinion in the Hunnicutt Case quotes with approval the following declaration of the law, as construed by Corpus Juris:[3] "The extent to which parties should be allowed to go in examining jurors as to their qualifications cannot well be governed by any fixed rules. The examination is conducted under the supervision and direction of the trial court, and the nature and extent of the examination and what questions may or may not be answered must necessarily be left largely to the sound

[1] 192 Ark. 441, 93 S. W. 2d 131, 192 Ark. 445, 93 S. W. 2d 133.

[2] 100 Ark. 437, 140 S. W. 698.

[3] Corpus Juris, v. 35, p. 389, § 439.

discretion of the court, the exercise of which will not be interfered with unless clearly abused. In practice, considerable latitude is and generally ought to be indulged; the questions ought to be confined to matters directly affecting the legal qualifications of the juror, and all questions ought to be allowed which are pertinent to test the juror's competency. But such examination ought not to be permitted to take an indefinitely wide range concerning merely collateral matters. . ."

The last paragraph of the Hunnicutt opinion (page 447) states: "We are, therefore, of the opinion that litigants in civil cases, as well as in criminal cases, have the right to examine the jurors separately in order to determine whether such jurors are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, subject of course to the right of the court to control the extent of such examination, acting in its sound discretion."

We do not think it was the purpose of Initiated Act No. 3 to change this rule. There is no express language to that effect, nor is such purpose to be implied from the phraseology. The first sentence of § 16 affirmatively imposes upon the trial court the duty of examining prospective jurors "upon all matters set forth in the statutes as disqualifications." This the court *shall* do, without suggestion from counsel on either side of the controversy, and the juror must respond, even though silence may be construed to denote acquiescence.

But—

"Further questions may be asked by the court, or by attorneys in the case, in the discretion of the court."

All trial lawyers, and all students of the science of jurisprudence, know that *general* questions directed to the jury panel, or to individual jurors, by a judge who at the beginning of the trial has no special information regarding the issues, or the relationship of the parties, or the attending circumstances, sometimes fail to elicit answers which may cause even the most conscientious juror to reveal an existing prejudicial status.

What *are* the further questions that may be asked by the court, or by the attorneys in the case? The answer is that they include any pertinent inquiry respectfully addressed through which qualification may be determined, or by which counsel, regardless of the juror's qualification, may secure information upon which to predicate peremptory challenge. Discretion of the court, to which reference is made in the last sentence of § 16 of the initiated Act, goes to the proposition of curbing improper questioning. It does not invest trial courts with an arbitrary, all-powerful authority to transform discretion into prohibition; nor does it require that in the process of ascertaining the desired facts counsel must utilize the court as a conduit through which communication must be megaphoned to jurymen by way of the dais.

There is nothing in the initiated Act that changes the practical application of rules so well known to the practice.

Some of the questions asked by counsel for appellant were improper and the court correctly excluded them. For example, it was not essential that the defendant should know "how many of the jurors had served in cases against corporations in the last two or three years where there was always rendered a verdict in favor of the plaintiff against a corporation."

Yet, before this question was asked, the court had definitely declined to permit the defendant's attorney (Mr. Huie) to examine each juror individually.

For this error the judgment is reversed. The cause is remanded for a new trial.

McCLENDON *v.* STATE.

4121 126 S. W. 2d 928

Opinion delivered April 3, 1939.

C. C. Hollensworth, Clinton Campbell, J. Mack Tarpley and *Aubert Martin,* for appellant.

Jack Holt, Attorney General and *Jno. P. Streepey,* Asst. Atty. General, for appellee.

HUMPHREYS, J. On the 25th day of May, 1938, the prosecuting attorney of the 10th judicial district of Arkansas filed information in Bradley county charging appellant with murder in the first degree, committed by striking and cutting Richard Reed, with an ax on November 3, 1937, from which wounds the said Richard Reed died on March 14, 1938.

On November 7, 1938, appellant was tried in said county and convicted of murder in the first degree and on the 8th day of May was adjudged to serve for life in the penitentiary as punishment for the crime, from which an appeal has been duly prosecuted to this court.

The testimony introduced on the trial of the cause is as follows: Judge Williams, Judge being his given name, testified, in substance, that he was working for Mr. Reed and went with him to appellant's house to collect $10; that the first visit was about 10:30 a. m. at which time appellant told Mr. Reed to come back about noon and he would pay Reed the debt; that they went back at about 11:30 a. m. and were invited into the house by Exa, appellant's wife, and after entering the kitchen saw appellant behind the stove cooking; that Exa said her husband was not going to pay the debt until they sold their furniture, whereupon, Reed, addressing appellant, said "Come go with me, Jim," (Referring to appellant)

meaning that he wanted him to go with him to Bradley's store where there was something due him for work he had done; that appellant said, "I will be ready in a few minutes"; that Exa told us to get out of the house, that Jim was not going and then threw a pan of corn bread which hit Mr. Reed; that he tried to ward off the bread and then grabbed her and tried to keep her from hitting Mr. Reed and while he had hold of her appellant came from behind the stove and hit at him with a pole-ax and that he threw up his arm and caught part of the lick on top of his head; that Mr. Reed told them not to fight and said, "I will give you the debt," at which time appellant ran around witness and hit Mr. Reed on the side of the head with the ax, and ran out of the house; that witness also ran out of the house and had a neighbor call the sheriff.

Witness admitted on cross-examination that he had sworn on a trial in February that neither he nor Reed had a pistol when they went to appellant's home which testimony was admitted to have been false as Mr. Reed had a pistol which he had gotten from a friend that morning before they went to appellant's house, but after the admission said that neither he nor Mr. Reed drew the pistol or attempted to use it during the fight.

Mrs. Richard Reed (widow of the deceased) testified that she saw her husband at the hospital on November 3, 1937, a short time after he had been taken over there and that he had a wound on the side of his head from the effects of which he died on the 14th day of March,1938.

C. W. Hickman, sheriff of the county and his deputy, J. J. Johnson, who arrested appellant and his wife, testified that appellant admitted to them he hit Mr. Reed on the head with the ax which he got off the porch just outside the kitchen door, and when asked why he did not keep going instead of getting the ax he replied that he was mad.

J. H. Crawford, the town marshal, testified that he went with Williams to appellant's home, in search of appellant and his wife, and found an ax either on the outside or in the house; that he took the ax and kept it in

his locker until the trial at which time he brought it to court; that he found a broken pot containing beans on the table in the kitchen, a skillet and lots of dough on the floor and a broken stick like a broom handle in the kitchen, and that he did not remember whether Williams told him that he snapped a pistol at appellant.

The physicians who operated upon and treated Mr. Reed testified that in their opinion Mr. Reed died on March 14, 1938, as a result from the wound he received on November 3, and that he did not die from any independent cause.

Exa McClendon, appellant's wife, who was sixteen years of age at the time of the difficulty and seventeen years of age at the time she gave her testimony, testified, in substance, that Mr. Reed and Williams came to their home three times during the morning the difficulty occurred and that on the first and second visits Mr. Reed talked to her husband about collecting a debt he owed Mr. Reed and that there was no dispute or any differences between them at that time; that on the third visit Williams went into the kitchen and told her husband the sheriff had sent him out to bring him down town; that Williams had a pistol in his pocket and while her husband was taking some bread out of the stove Mr. Reed came in the door and said, "Get him, Judge," and that Williams drew the pistol on her husband; that she threw a pan of bread she had in her hand down on the floor and grabbed the barrel of the pistol and held it until her brother, Jeems, who came in from his work about that time, got near them; that Williams snapped the pistol at her husband but it failed to fire; that Williams kept telling her to get back or he would shoot; that Jeems took the pistol away from Williams and when she tried to pass out of the kitchen through the door Mr. Reed hit her with a stick and that she ran out into the yard; that she did not see her husband get the ax, but it was just outside the kitchen door on the porch where they kept their wood.

Jeems McClendon, a brother of appellant, testified, in substance, that when he came in from his work about 11:30 o'clock Williams, Exa and appellant were scuf-

fling over a pistol and that Mr. Reed had a stick in his hand and was threatening to get the law; that he took the pistol away from Williams, and that during the altercation Mr. Reed hit appellant, Exa and himself with the stick; that after he took the pistol he ran out to a neighbor's house and telephoned for the sheriff and waited there until the sheriff came and gave him the pistol; that he did not see the ax or his brother hit Mr. Reed.

Appellant testified, in substance, that Reed and Williams came to his house three times and that on the second visit witness promised to go to the mill and pay Mr. Reed about 5:30 o'clock; that they came back again the third time and Williams came in and told witness the sheriff had requested him to bring him down town and that he refused to go and that about that time Mr. Reed walked in the kitchen door and asked witness whether he was going and when he said "no" Reed hollered to Williams, "Get him" and Williams began to cuss, drew a pistol and snapped it at witness three times whereupon Exa threw a pan of bread down on the floor and grabbed the barrel of the pistol and while the struggle was going on over the pistol Williams took a stick from him with which he had hit Williams, Exa and himself and was going to hit her again when he reached out the door on the porch and got the ax with which he struck at Williams, but missed him and accidentally hit Mr. Reed; that he was mad and crying and did what he did in defense of his wife and himself; that during the scuffle Jeems, his brother, took the pistol away from Williams; that he then ran out of the house and left.

Appellant assigns as error the insufficiency of the evidence to sustain a verdict for murder in the first degree.

Murder in the first degree is defined by § 2969 of Pope's Digest as follows:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the at-

tempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree."

It was said by CHIEF JUSTICE SCOTT in *Bivens* v. *State,* 11 Ark. 460, that: "The distinctive feature of this particular class of cases of murder is a wilful, deliberate, malicious and premeditated intent to take a life. . . . It is indispensable that the evidence should show that the killing with malice was preceded by a clearly formed design to kill—a clear intent to take life."

It was said by CHIEF JUSTICE ENGLISH in the case of *Fitzpatrick* v. *State,* 37 Ark. 238, that, "To constitute murder in the first degree there must be a specific intent to take life beforehand and carried out with deliberation."

These declarations of law were approved in the case of *Howard* v. *State,* 82 Ark. 97, 100 S. W. 756. In the last cited case this court set aside the judgment of murder in the first degree and affirmed it for murder in the second degree.

This court also decided in the case of *Harris* v. *State,* 119 Ark. 85, 177 S. W. 421 that, "In the absence of premeditation and deliberation the killing can not be murder in the first degree."

After reading the evidence in the instant case carefully and giving same its strongest probative force in favor of the finding of the jury, we hold that it is not sufficient to sustain the judgment for murder in the first degree under the law above set forth.

There is no evidence in the record tending to show any enmity between appellant and deceased prior to the difficulty resulting in the injury to deceased. All the evidence is to the effect that appellant and deceased were on good terms. Deceased had extended credit to appellant for his groceries and appellant had agreed to go with deceased and Williams to the Bradley store and give him an order for the money he owed him.

According to the testimony of the state the difficulty occurred when Exa threw a pan of bread at deceased and ordered them out of the house; that at that time Williams tried to prevent the bread from hitting

deceased and grabbed and was holding her when appellant came up from behind the stove and struck at Williams with the ax then ran around him and struck deceased with the ax from the back on the side of his head when he was walking toward the door.

Williams did not directly deny that Jeems took the pistol away from him.

There is no question that a sudden fight occurred between the parties a few moments after Williams and Reed entered the kitchen. The fight was carried on with most anything they could get their hands on as evidenced by a broken pot of beans on the table, a pan of bread or dough on the floor and a stick broken half in two and an ax which were all found at or near the scene of the difficulty. Even according to the evidence of Williams, who admitted he had been guilty of perjury, the fight began suddenly and continued without interruption until the injury was inflicted by appellant on Mr. Reed. We do not think it has been shown beyond a reasonable doubt that the killing was the result of malice, and certainly it does not show beyond a reasonable doubt that it was the result of deliberation and premeditation on the part of appellant. Appellant had no grudge against deceased, but he and deceased were friends until the difficulty arose. During the progress of the fight there was no time for him to meditate or deliberate so we have concluded that the injury inflicted upon deceased causing his subsequent death was the result of a sudden quarrel between deceased and Williams on the one part and appellant's wife on the other, in appellant's own home where he had a right to be and where deceased and Williams, an admitted perjurer and willing participant in the fight, had no right to go armed with a pistol for the purpose of enforcing the collection of a debt.

We think that when the evidence on the part of the state is viewed in the most favorable light to the state, the highest degree of homicide which it can possibly support is voluntary manslaughter.

Manslaughter is defined by § 2980 of Pope's Digest as follows:

"Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without deliberation."

Voluntary manslaughter is defined by § 2981 of Pope's Digest as follows:

"Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible."

Appellant also contends that it is not shown beyond a reasonable doubt that the deceased died on March 14, 1938, from the effects of the wound which he received on November 3, 1937. This contention is met by the testimony of the physicians who attended the deceased after the wound was inflicted and up to the time deceased died. They both testified that in their opinion his death was the result of the injury and was not the result of any independent cause.

The judgment will, therefore, be reversed and the cause remanded for a new trial, unless the attorney general elects within fifteen days to have the appellant sentenced for voluntary manslaughter, in which event the trial court is directed to sentence appellant for that crime for seven years, which is the highest punishment fixed by statute for voluntary manslaughter.

RAILWAY EXPRESS AGENCY, INC. *v.* H. ROUW COMPANY.

4-5367 127 S. W. 2d 251

Opinion delivered April 3, 1939.

Warner & Warner and *Paul E. Gutensohn,* for appellant.

Howell & Howell, for appellee.

HOLT, J. This action was commenced by the appellee against appellant in the Crawford circuit court on October 18, 1937, to recover $2,957.96 alleged damages on ten separate shipments of strawberries in carload lots. These cars were shipped from Judsonia, Arkansas, to Pittsburg, Pennsylvania; Judsonia, Arkansas, to Buffalo, New York; McRae, Arkansas, to Cincinnati, Ohio; Bald Knob, Arkansas, to Denver, Colorado; Bald Knob, Arkansas, to Buffalo, New York; Judsonia, Arkansas, to Buffalo, New York; Russell, Arkansas, to Cleveland, Ohio; Judsonia, Arkansas, to Cleveland, Ohio; Exeter, Missouri, to Cleveland, Ohio; Ward, Arkansas, to Syracuse, New York. All of these shipments were made during May of 1936. Appellee recovered a verdict in the sum of $2,957.96, the total sum sued for.

The complaint contained ten separate causes joined in separate counts. The allegations in each count are identical except the date of shipment, car number, origin of shipment, destination, and amount of damage alleged. It will be necessary, therefore, to copy the material allegations in the first count of the complaint only, which are: That appellant "then and there received and accepted said strawberries for transportation and issued and delivered to the appellee its original express receipt contract, and for a valuable consideration thereinafter to be paid it agreed to carry and transport said strawberries under the provisions of said contract and its duty as a common carrier of freight and merchandise . . ." Copy of express receipt contract is hereto attached marked Exhibit "A" and made a part of this complaint. Appellee further alleges that the appellant violated its express receipt contract, and also its duty to the appellee as a common carrier by delivering the said strawberries at destination in a soft, wet, rotten and otherwise deteriorated condition, etc.

Thereafter on April 4, 1938, appellant filed its demurrer and answer. The demurrer was overruled. Appellant specifically denied each and every material allegation in the complaint, and pleaded specially that by the terms of the shipping contract it was provided that, unless caused in whole or in part by its own negligence or that of its agents, appellant should not be liable for loss, damage or delay caused by the act or default of the shipper or owner, or the nature of the property, or the inherent vice therein, or improper or insufficient packing, securing, or addressing, or the act of God; that if any loss, damage, or delay occurred in said shipments, or either of them, which appellant denied, it occurred while said cars and each of them were stopped and held in transit or after reaching destination upon request of the shipper or owner, or resulted from one of the excepted causes set forth in said shipping contract, and each of them; that appellant was not an insurer of the safe transportation of said perishable shipments respectively, and that it performed its full duty under the

terms and provisions of said respective contracts of shipment.

The evidence on these ten different shipments is so voluminous, the record containing some 2,500 pages, that it cannot be set out within the compass of this opinion; however, we have carefully considered it and shall set out that which we deem controlling as follows:

The uniform express receipt contract referred to in the complaint and introduced in evidence contains the following provisions: "Paragraph 1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee and all carriers handling this shipment and shall apply to any reconsignment, or return thereof . . . Paragraph 4. Unless in whole or in part by its own negligence, or that of its agents, the company shall not be liable for loss, damage or delay caused by: (a) The act or default of the shipper or owner. (b) The nature of the property, or defect or inherent vice therein. (c) Improper or insufficient packing, securing, or addressing." Paragraph 18 from Classification 24, Packing Requirements, provides: "All shipments must be so prepared or packed as to insure safe transportation with ordinary care on the part of the express company." Section 23 of Classification 24, Refrigeration—Carload Shipments of Perishable Commodities, provided in substance that the express company has arranged for a limited number of refrigerator cars, and, to the extent available, these cars will be furnished on application of shippers; that cars will be handled only by trains designated by the railroad companies; that consignor is required to deliver to express agent written memorandum of load in car, commodity, weight, name of consignee, destination, and any such operation instructions as requesting ice bunkers to be left open, proportion of salt to ice when car re-iced, loading and unloading in transit, etc. That refrigeration being a separate and distinct service of transportation, and not included in express rate, cost of ice and salt must be assumed by owner in addition to charge for transportation.

The record further reflects that the express refrigerator cars used in nine of these shipments were first iced to bunker capacity, from 12,000 to 14,000 pounds of ice being placed in each car, by appellant in North Little Rock, Arkansas, and they were then delivered at the points of origin of the shipments in either Judsonia, McRae, Bald Knob, Russell, Rogers or Ward, Arkansas. In count IX the initial icing to bunker capacity of 13,900 pounds took place at Rogers, Arkansas, and the car then delivered to Exeter, Missouri, for loading by the shipper. Each one of these cars was re-iced to capacity at these shipping points, the cars thoroughly inspected, accepted by the agent, or agents, of the shipper and in each instance was loaded by and under the supervision of appellee, the shipper. When the berries were loaded into each of these cars for shipment they appeared to be in good condition. At the time each of these cars started from the original shipping point their final destination was unknown. In most instances the consignee was the shipper, appellee. These shipments either went first to St. Louis, Missouri, to what is known as the Eastern Gateway, or to Kansas City, Missouri, the Western Gateway, where diversion orders were given by the shipper.

Delays in the movement of nine of these shipments of from three to ninety hours were caused solely by the shipper in giving diversion orders to appellant of the various cars. In one of the shipments, wherein a delay of approximately thirty hours occurred, six hours of this delay, the evidence shows, was the fault of appellant in changing car wheels in St. Louis.

The record further reflects that a sufficient number of icing stations was provided by appellant along the line of each shipment, and that all of these cars were re-iced to bunker capacity at each of these stations, that the temperature inside these cars for the safe transportation of the berries might range from 49 degrees at the top to 42 degrees at the bottom of each car, and that this temperature was maintained in each one of these shipments.

The commodity temperature at destination of car in Count I was 44 over 43½ (meaning 44 degrees at the top

and 43½ degrees at the bottom); in Count II 47 over 42; in Count III 45 over 41 at Cincinnati and 42 over 40 at Louisville; in Count IV 48 over 44 at Kansas City and 45 over 41 at Denver; in Count V by consignees 46 over 42; in Count VI on joint inspection 47 over 40, but by appellant's employee 44 over 40; in Count VII 46 over 43 and by consignee two days after arrival 44 over 40; in Count VIII 42 over 38; in Count IX 43 over 40, and by consignee's inspection 42 over 38; in Count X by appellant's agent on arrival 42 over 38 and twelve hours after arrival by a R.P.I.A. inspector 49 over 41.

The record further discloses that consignees were promptly notified of arrival of the cars at destinations by appellant, and that unloading began promptly; that at destination the berries in the car in Count I showed disease of 3 to 10 per cent. gray mold; in Count II a tan rot average 8 per cent.; in Count III 0 to 4 per cent. gray mold at Louisville and 3 to 10 per cent. overripe at Cincinnati; in Count IV less than 1 per cent. decay at Kansas City; at Denver one crate out of 32, 30 per cent. gray mold, other good, and 3 to 20 per cent. pale, sandy, bird-pecked; in Count V evidence shows the berries were not good quality and 1 to 2 per cent. leather rot, 4½ per cent. botrytis; in Count VI average 2.7 per cent. tan rot, 15 per cent. white shoulders or average 3 per cent. defects; in Count VII most crates 1 to 3 per cent. leather rot in all stages; in Count VIII 4 to 6 per cent. leather rot, early stages, gray mold, botrytis, poor quality; in Count IX 1 to 3 per cent. leather rot, average 8 per cent. ripe and soft; in Count X 1 per cent. cottony botrytis, 2 to 3 per cent. bruised, and 10 to 15 per cent. surface bruised by dividers.

There is evidence that the diseased condition of the berries at their destination was due to their inherent weakness, field disease, and was present in the berries, though not observable when they were gathered from the fields; that these diseases would develop under the temperatures in which the berries were shipped and the only way to prevent such development would be to freeze the berries.

A Mr. Cole, a resident of Van Buren, Arkansas, who has had twenty odd years experience in buying and shipping strawberries, testified that, in his opinion, berries in question in each of these shipments could not have been carried safely above a temperature of 43 degrees, that they would break down at a temperature of 45 degrees. He had no personal knowledge of any of these shipments, was not present when they were loaded, knew nothing about the cars in which they were shipped, and did not claim to possess scientific knowledge, his evidence being based on his experience.

The refrigerator cars used were of approved type and construction. Appellee's witness, Robinson, kept a record of his inspections at the loading points, upon which he relied. These were introduced in evidence as exhibits, and each one stated "if car equipment is defective in anyway (examine close) notify railway of damage in writing." None of his reports show a defect of any kind in the cars or equipment. The cars were inspected at each re-icing station, and the berries appeared to be in good condition at these points. Diversion orders were promptly effected by appellant when received in every instance except in one instance of a six-hour delay in St. Louis for change of car wheels. In every instance, the ice in each car was found to be in good order and sufficient in quantity upon arrival at destination, and the temperature inside the cars adequate.

On this state of the record, at the out-set, appellant earnestly insists that appellee, in each of the ten counts in its complaint, has elected to base any right to recover damages on contract (*ex contractu*) and not in tort (*ex delicto*) and, therefore, since each action was based on contract, appellant was exempted from liability due to the specified causes set forth in paragraph 4 of the express receipt contract, *supra,* and, therefore, the burden rested on appellee to show affirmatively that any loss or damage was either not caused by any act within the exceptions in paragraph 4, or that it was caused by appellant's negligence in fact.

We are of the opinion that the appellant is correct in this contention. While it is true that appellee had the choice of bringing his action on contract or in tort, he must make an election, and in determining this we must gather his intention from the four corners of his complaint, or from a construction of the allegations set out therein. In the instant case it seems to be clear that appellee based his suit on contract. The trial court adopted this view as evidenced by certain instructions which it gave.

Instruction 13 contained this provision: ". . . the plaintiff has based its right to recover for each of said shipments upon the alleged violation by defendant of an express contract of shipment covering each car of berries. The right of plaintiff to recover herein is governed by the respective shipping contracts." And in instruction 15, the court said in substance that it was not sufficient for appellee to prove merely that the berries were delivered to appellant in good condition and delivered by it in damaged condition "but the burden rests upon plaintiff to prove that the defendant is liable according to the terms and provisions of said shipping contracts . . ."

In 1 C. J. S., § 49, p. 1118, the rule is stated as follows: "If the complaint shows that it is based upon the contract of shipment, the action is in contract, provided, it has sometimes been stated, the allegations in regard to the agreement include an averment of consideration, and its character as such is not changed or affected by the fact that there are also allegations of negligence; but if it appears that the complaint is based upon the breach of legal duty as distinguished from the contractual duty, the action is in tort, even though the complaint sets forth the contract of shipment, which is ordinarily treated as matter of inducement or explanation."

In a comparatively recent case, that of *Southern Pacific R. Co.* v. *Gonzalez,* 48 Ariz. 260, 61 Pac. 2d 377, 106 A. L. R. 1012, the principles which we think control here are set forth in a somewhat exhaustive opinion, which reviews the authorities from early times. In this case the

court held that the action to recover damages to a shipment of tomatoes was based on contract, although negligence was alleged and in its opinion said: "Plaintiff contends that his action sounds in contract and not in tort . . . Under the common law, the obligation of a common carrier was long supposed to rest entirely upon a public duty imposed by law as a matter of public policy, which was an obligation to carry safely without excuse or exception, save for such losses as might be occasioned by the act of God or the public enemy. The idea of contract or the obligations resulting from it were never associated with the question of a carrier's responsibility. Actions for a violation of this obligation were, therefore, necessarily *ex delicto* and not *ex contractu.*

"About 1750, however, in the case of *Dale* v. *Hall,* 1 Wils. 281, there was an innovation upon this doctrine, the court holding, in substance, that there was a contract, express or implied, which created the relation of shipper and carrier, and that a shipper could sue either upon his contract in assumpsit, or on the case for the breach of a public duty. Hutchinson on Carr., 3d ed., vol. 3, 1569, *et seq.;* Angell on Carr., par. 422; *Spence* v. *Norfolk & Western R. Co.,* 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578. From that time on, actions were based sometimes on one and sometimes on the other theory. There are still, however, well-recognized differences existing between an action *ex contractu* and that of *ex delicto,* which are important in determining whether the one or the other should be brought . . . It is frequently, however, very difficult to determine to which class a complaint belongs. In such cases of doubt, the general rule for this, as well as other actions where the question becomes important, is set forth by us in *Anderson* v. *Thude,* 42 Ariz. 271, 25 P. 2d 272, as follows: 'It is the rule that if the complaint may be construed either as one in tort or one on contract, it will be presumed to be the latter. *Consolidated Flour Mills Co.* v. *Muegge,* 127 Okla. 295, 260 P. 745; *Nathan* v. *Locke,* 108 Cal. App. 158, 287 P. 550, 291 P. 286' . . .

"Plaintiff apparently had some doubts himself as to which form of action should be brought, for his complaint, in paragraph 5, very carefully alleges an agreement, upon consideration, to 'safely, securely, expeditiously and with due care' carry the tomatoes to their destination, which clearly sets up a contractual obligation. On the other hand, in paragraph 7, he claims that the defendants 'negligently caused the bunkers in the car into which the said tomatoes were loaded to be filled with ice,' etc. . . . Nor did plaintiff see fit to set forth either all or part of the contract on which he claims to rely in *haec verba*. The only contract which appears in the evidence is the bill of lading issued by the Mexican company, under the terms of which the American company accepted the Canadian car for transportation." See, also, *Am. Ex. Co.* v. *Lankford*, 1 Ind. T. 233, 39 S. W. 817.

In the instant case appellee alleged and proved the shipping contract entered into and thereby committed itself to an action on contract. Since the action was based on contract it exempted appellant from liability due to the specified causes set forth in paragraph 4, *supra*. The burden rested on appellee to show affirmatively that the loss resulted from a cause for which appellant was responsible.

In 9 Am. Jur., § 835, p. 942, the author says: "It has also been held that where the complaint itself discloses that the shipment was carried under a special contract which exempts the carrier from liability for loss due to specified causes, the burden rests upon the plaintiff to show affirmatively that the loss resulted from a cause for which the carrier is responsible."

It was, therefore, not sufficient merely to show that these berries, in each of these shipments, were delivered to appellant at the point of origin in good condition and delivered at destination in a damaged condition. That would only prove common law liability which was not alleged and was not sufficient under the shipping contracts. We hold that appellee has failed to discharge the burden imposed upon it by substantial testi-

mony and, therefore, is not entitled to recover on any of ten shipments involved in this case. To entitle appellee to recover it was required to prove liability as set forth in, or reasonably implied by the terms of the contract and subject to all exemptions stated therein.

On the evidence before us in this record as relating to all of these ten shipments, even if we test appellee's right to recover, on appellant's common law liability, which only requires appellee to show that it delivered the berries to appellant in a good condition, and that they were delivered at destination points in a damaged condition, in order to establish a *prima facie* case of negligence against appellant, still we hold that appellant has successfully overcome this *prima facie* case made by appellee, and that the evidence falls far short of being of that substantial nature required by the decisions of this court to afford a recovery.

In the instant case, appellant undertook to transport for appellee strawberries, a perishable commodity, and the rule is well settled that, in so doing, appellant was not an insurer, but was required to use ordinary care in the transporting and in its handling of the berries and in the furnishing of refrigerator cars for that purpose. In 13 C. J. S., § 79, p. 152, it is stated: "With respect to perishable goods which themselves contain the elements of destruction governing their loss or deterioration, the carrier is not an insurer, and is no more liable for destruction or injury resulting solely from the inherent infirmity in the goods than for loss entailed solely by an act of God or of the public enemy, or by the carelessness of the shipper . . . The measure of the carrier's duty is to exercise reasonable care and diligence to protect the goods from loss or injury while in its custody, taking into consideration the character of the commodity, the condition of the weather, and the time necessary to complete the transportation, and it is generally said that the carrier is liable for only such deterioration as is attributable to its negligence."

The same principle is declared in 4 R. C. L., § 375, p. 919: "The methods of handling and transporting fruit

are well understood, and carriers accept freight for transportation with the understanding and expectation that they will observe proper care, as that is understood by the shipper and carrier of such articles. Carriers are not insurers in such cases; but each one is charged with the duty of exercising ordinary care to protect fruit from injury while it is in its charge, and this duty requires the carrier to use such care in order to prevent the fruit from decaying, as well as from being damaged by other means."

The shipper assumed the responsibility of loading, and did load, each of these shipments at points of origin. In 9 Am. Jur., § 725, at page 866, it is said: "When a shipper assumes the responsibility of loading a car and seeing that it is properly prepared for the transportation of the particular article which he is loading, the general rule seems to be that he assumes responsibility for all defects in package and loading which are necessarily invisible to the agent of the carrier who accepts the freight or which he cannot discern by ordinary observation or such inspection as he can readily make."

See, also, *So. Pac. Co.* v. *Itule* (Ariz.), 74 Pac. 2d, 38, 115 A. L. R. 1268, wherein the court said:

"We think the fairer and more logical rule is that in cases of the shipment of perishable fruits and vegetables, when the carrier shows affirmatively that it handled them in the method requested by the shipper, and that it exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chose, that it has satisfied the requirements of the law in regard to the quantum of proof required to establish a defense to the action." We think appellant performed the duty required of it in transporting each one of these shipments and that there is no substantial evidence in this record to the contrary.

In *Ry. Ex. Co.* v. *H. Rouw Co.,* 185 Ark. 526, 48 S. W. 2d 220, the court held: "A carrier which holds itself out as proposing to provide means of preserving perishable goods must exercise ordinary care in adopting means of transportation and furnishing such equipment." In

Ry. Ex. Co. v. *H. Rouw Co.*, 184 Ark. 482, 42 S. W. 2d 261, this court held (quoting syllabus): "The duty of a carrier transporting strawberries is to exercise ordinary care to ice and re-ice the car properly. . . . The duty of a carrier transporting strawberries is to exercise ordinary care merely in furnishing shipping facilities."

Therefore, testing the liability of appellant on each of these shipments for loss, by negligence as at common law, we think that each of the ten counts in the instant case is ruled by the recent case of *Ry. Ex. Agency* v. *S. L. Robinson & Co.*, 184 Ark. 660, 43 S. W. 2d 543, wherein the plaintiff was allowed to amend his complaint and rely solely for negligence upon the liability of the carrier as at common law. The evidence in that case showed that the berries were received in good condition and delivered at destination in a poor condition. This court in that case said: "Counsel for appellees claim that they amended their complaint and relied solely on liability for loss by negligence of the carrier as at common law. Inasmuch as we have reached the conclusion that the carrier has overcome the *prima facie* case made by the shipper, we shall treat the complaint as amended as contended for by appellees. . . .

"The carrier did not content itself with introducing witnesses as to the general condition of the shipment of strawberries while in its hands, but introduced all persons employed by it who had part in the different transactions during transit. We do not mean that all the operatives of the train were introduced as witnesses, but we do mean that the carrier followed the shipment step by step from the place of shipment to the place of delivery. It was shown by competent evidence that a refrigerator car of the most approved type was furnished the shipper within which to carry the berries. The condition of the car and its material, both as to its equipment and construction, were detailed by the witnesses. It was shown that the carrier had a sufficient number of stations along the route for re-icing the car and that the car was properly inspected and well iced at all these stations. The evidence shows that the car of strawberries was in

good condition at all these points. The car was diverted by the shipper from Kansas City, Missouri, to Chicago, Illinois. As soon as it arrived at its destination, the consignee was notified. An examination of the berries was made when they arrived at their destination, and they were found to be full ripe and watery. None of the crates were broken or damaged. One inspector testified that the berries contained brown rot which is a disease of berries known as botrytis. This exists from water-soaked berries, causing a dry and leathery rot. Botrytis in these berries originated from the berries getting water-soaked, forming a dry leathery rot. This resulted from the inherent nature and infirmities of the berries. Another inspector testified that brown rot, called botrytis, is an inherent field disease. The condition existed when the berries were loaded, although it might not then be visible. . . .

"The testimony of the witnesses for the appellant was reasonable and consistent in itself, and we think entirely overcame the presumption of negligence in favor of the shipper caused by proof that the berries were received in good condition at the point of shipment, and were in a decayed condition at the time of reaching their destination. . . . It is true that A. H. Welch, a witness for the shipper, testified that the berries were bruised when inspected by him at the place of destination in Chicago. He said that he did not know, however, what caused this; but the explanation given by the witnesses for the carrier explains it. On account of their diseased condition they became soft and watery, and this, in the very nature of things, would cause them to become bruised."

Just as in the Robinson Case, *supra,* appellant in each of the shipments in the instant case followed them step by step from points of origin to their destination and we think there is no substantial evidence in this record showing that appellant failed to exercise that degree of care required of it in its handling of each one of these shipments.

On the whole case, we conclude, therefore, that the trial court erred, at the conclusion of the introduction

of all the evidence in the case, in its refusal to instruct a verdict for the appellant, and since each one of these ten cases seems to have been fully developed, the judgments rendered in each is reversed and each cause of action dismissed.

[redacted]

McALLISTER *v.* WRIGHT, TRUSTEE.

4-5426 127 S. W. 2d 645

Opinion delivered April 3, 1939.

[redacted]

W. P. Beard and *W. A. Leach,* for appellant.

C. A. Walls and *Ector R. Johnson,* for appellee.

SMITH, J. On January 6, 1936, appellee, as trustee for the Union Trust Company, filed suit to foreclose a deed of trust executed to the trust company by W. K. Oldham and wife. On February 18, 1936, an amendment to the complaint was filed alleging that appellant, C. W. McAllister, claimed some interest in the lands described in the deed of trust sought to be foreclosed in which

amended complaint it was prayed that McAllister be summoned to answer and that his interest, whatever it may be, be adjudged junior and subordinate to the lien of the deed of trust.

On February 26, 1936, McAllister filed a separate answer and cross-complaint, in which he alleged ownership of some of the lands described in the deed of trust, under a purchase from the state in January, 1936, as "forfeited lands," and he exhibited deeds therefor from the State Land Commissioner. The deeds to McAllister from the State Land Commissioner were based upon the forfeiture and sale of the lands to the state on June 12, 1933, for the nonpayment of the taxes due thereon for the year 1932.

The plaintiff trustee filed a "Separate answer to the cross-complaint of defendant McAllister," in which it was alleged that this tax sale was void for numerous reasons, and it was prayed that the deeds from the State Land Commissioner to McAllister, based thereon, be canceled as clouds upon plaintiff's title, full tender having been made McAllister.

It very clearly appears that the sale of these lands for the 1932 taxes due thereon was void for one or more of the several reasons alleged by plaintiff trustee; but Act 142 of the Acts of 1935, page 402, was in effect when the pleadings, above referred to, were filed, and, as was said in the recent case of *Kansas City Life Insurance Co.* v. *Moss,* 196 Ark. 563, 118 S. W. 2d 873, "said Act was applicable in this case, because its provisions were in force and had been invoked, or were available, for the defense in the pending suit at the time of its repeal by and under the doctrine announced in the case of *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. 2d 445. The defense under said act was not destroyed but continued in force under § 13284 of Pope's Digest."

We have a number of cases construing this act 142 of the Acts of 1935, the first being the case of *Carle* v. *Gehl,* cited in the case of *Kansas City Life Insurance Co.* v. *Moss,* from which we have just quoted, and which is one of the latest cases in which that act was construed.

These and the other cases are to the effect that "irregularities, informalities or omissions" in a tax sale which do not "go or extend to the power to make the sale of the property, or prevent the exercise of that power to sell," are cured by this act 142.

Section 1 of Act 142 provides that "Whenever the state and county taxes have not been paid upon any real or personal property within the time provided by law, and publication of the notice of the sale has been given under a valid and proper description, as provided by law, the sale of any real or personal property for the nonpayment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

Without reviewing the defects alleged and shown to exist in the sale for the taxes of 1932, it may be said that they were such "irregularities, informalities and omissions" as would be cured by Act 142 if that act applies to the sale here under review. It will be observed that for this act to apply to and cure a tax sale which would otherwise be void, it is essential that the taxes have not been paid and that "publication of the notice of the sale has been given under a valid and proper description, as provided by law."

Here, the testimony shows that no record was made showing publication of the notice of sale, and the undisputed testimony of the Deputy County Court Clerk, the custodian of the tax records, and that of an experienced abstractor of land titles who had intimate knowledge of the tax and other records of that county affecting land titles, confirms this fact.

There is no record which shows when the delinquent list was filed, or when it was recorded, and there is no record showing that any notice of the sale was published. It is true that §§ 5 and 6 of Act 250 of the Acts of 1933 were in force when the sale was made. The effect of these sections was considered and announced in the recent case of *Hirsch and Schuman* v. *Dabbs and Mivelaz, ante* p. 756, 126 S. W. 2d 116, and what was there said need not be here repeated. Under the portion of this Act 250 held valid in the case of *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909, it was not required that the "notice of delinquent tax sale" should describe the lands which were delinquent, but they were referred to as being "contained and described in the list or record on file in the office of the clerk of the county court." Whether this was a "valid and proper description" of the delinquent lands within the meaning of Act 142 is a question which we need not here decide, as no notice of this sale was published.

It is argued that under Act 250 it is no longer necessary to make a record showing the date and manner of the publication of the notice of sale. This contention was made in the Hirsch Case, *supra,* but that contention was not sustained. On the contrary, it was held that the provisions of § 10085, C. & M. Digest, requiring the clerk of the county court to record the list and notice of sale, stating "in what newspaper said list was published and the date of publication, and for what length of time the same was published . . .," had not been repealed, and this record was not made.

In the recent case of *Emerson* v. *Voight,* 196 Ark. 129, 116 S. W. 2d 348, the notice of sale of delinquent lands was published, but the date of the last publication of the notice was less than two weeks before the day of sale. It was there held that as there was no publication of the notice conforming to law, this failure was not cured by Act 142.

It is argued that upon the production of the deeds from the State Land Commissioner based upon the sale for the 1932 taxes, a presumption arises that the sale was

conducted in a manner conforming to law. This is true. But this presumption is only *prima facie,* and may be shown to be untrue, and, as we have said, the testimony shows, as the court below found, that there was no publication of the notice of sale.

This fact alone would render the sale void, and operates to prevent the curative provisions of Act 142 from applying.

The right of the trustee to question the validity of the sale is raised. The trustee made tender to the tax purchaser, the sufficiency of which is not questioned, and the title of the trustee to the lands described in the deed of trust sufficiently supports his right to question the tax sale. Upon filing the suit to foreclose, a receiver was appointed, who has since been in possession of the land, and this possession is, of course, for the benefit of all parties in interest. The case of *Britt* v. *Harper,* 132 Ark. 193, 200 S. W. 787, is authority for granting the relief by canceling the deeds from the State Land Commissioner, as was done, based, as those deeds were, upon an invalid tax sale. In that case it was held that "A mortgagee in possession has the right to take the necessary and proper action to protect that possession, and may maintain an action to cancel an invalid sale of the land for taxes."

This suit is, in effect, one to redeem, and when a sufficient tender for that purpose was made and refused, nothing remained to do but to file suit to cancel the deeds and thus enforce the right of redemption, and the effect of canceling the commissioner's deeds was to permit a redemption.

This relief was prayed by the owner of the equitable title to land which had been forfeited to the state for the non-payment of the taxes due thereon in the case of *Woodward* v. *Campbell, Commissioner,* 39 Ark. 580. The lands there forfeited to the state had been purchased from the state with levee bonds. The sale by the state was held ineffective for the reason that payment for the lands of the state in levee bonds was no payment and the purchaser acquired no rights thereby. In holding that the equitable owner had the right to redeem and have the

sale by the state canceled, it was there said: "Statutes providing for redemption from tax sales always receive a liberal construction. Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on the land, amounts to such an ownership as will entitle the party holding it to redeem. Certainly a party claiming the land under an executory contract to purchase it is the owner within the meaning of the act. Cooley on Taxation, 366; *Rice* v. *Nelson,* 27 Iowa 148; *Rogers* v. *Rutter,* 11 Gray 410." See, also, *McMillen* v. *East Arkansas Investment Co.*, 196 Ark. 317, 117 S. W. 2d 724, and also *Emerson* v. *Voight, supra,* in which last cited case a deed of the Commissioner of State Lands was canceled because the sale on which the deed was based was void.

The decree of the court below, from which is this appeal, conforms to the views here expressed, and it is, therefore, affirmed.

DICKSON AND JOHNSON *v.* STATE.

4110 127 S. W. 2d 126

Opinion delivered April 3, 1939.

[redacted]

H. A. Tucker, Jay M. Rowland, Roy Mitchell and *E. G. Thacker,* for appellants.

Jack Holt, Attorney General and *Jno. P. Streepey,* Asst. Atty. General, for appellee.

BAKER, J. The indictment in this case by the grand jury of Garland county was against Joe Anderson, Lucille Anderson, Alfred (Pug) Dickson, and Clarence (Bill) Johnson charging the crime of murder in the first degree. It was charged that the four of them entered into a conspiracy by which they agreed with each other to commit the crime of robbery upon one Eldon Cooley, and that in furtherance of this design and while in pursuance thereof one of the defendants, the particular one being unknown to the grand jury, killed and murdered the said Eldon Cooley by shooting him.

Joe Anderson and Lucille Anderson were tried together and both convicted. Upon an appeal decided January 30, 1939, this court affirmed the conviction of Joe Anderson, but reversed and remanded for a new trial the case as against Lucille Anderson. *Anderson* v. *State, ante* p. 600, 124 S. W. 2d 216.

Upon this appeal by Dickson and Johnson the questions are not exactly identical with those in the Anderson Case, *supra.* It was there urged particularly that the confessions made by Dickson and Johnson were not properly admissible in evidence against Anderson and his wife, Lucille Anderson, but it was held under the facts presented that there was no prejudicial error as to Joe Anderson and his conviction was affirmed. Upon this particular case, upon trial in the circuit court, both of the defendants were found guilty of murder in the first degree and punishment in each case was death.

The appellants have furnished us with an elaborate argument and contention in which they insist a reversal in each of these cases is justified. The attorney general has prepared a much more elaborate abstract of the testimony, and we think that the issues involved upon this appeal have been, by both appellants and appellee, forcefully presented for our consideration. It may be said

that there are only two propositions of sufficient importance to justify comment. The first is that the appellants contend that the evidence is insufficient to sustain a conviction. The second question is somewhat unusual, that is to say, that the appellants contend that even though it may be determined that the evidence was sufficient to show a conspiracy to rob Eldon Cooley, the conspiracy ended and its purposes had been fully consummated prior to the time Cooley was killed, and that therefore, to justify a conviction of murder in the first degree the burden was upon the state to prove that these appellants participated in the murder. Both of these propositions are questions of fact and may be settled in determining the sufficiency of evidence.

For the reason that most of the facts are stated in the Anderson Case, *supra,* only such of them will be repeated as may be deemed necessary to state the issues upon the appeal and to preserve the continuity of such facts as must be of controlling effect.

Each of the appellants testified in the circuit court that he had prior to the time of his trial made a voluntary statement which had been offered in evidence without objection. The said statement made by each was offered against the other upon a showing that it had been reduced to writing and read in the presence of both of them and that neither questioned the accuracy of either statement. They only claimed that explanations should be made of certain matters set out in the statements given. It should be said, however, in his testimony appellant Johnson asserted that some of the matters in his signed statement were not true and he said that the reason therefor was the fact that he was so uneducated or illiterate as to be unable to "follow through" when the statement was read to him and the further fact that he was scared or frightened.. Both of these defendants testified in the case and went into minute details in explanation of all matters set forth in their respective statements and the statements given by the other, as well as explanations, corrections or denials of the testimony of other witnesses.

Without resorting to the well known rule that the appellee has the right upon appeal to have the most favorable conclusion of which the evidence may be susceptible to sustain the verdict and judgment of the court, it may be here said that it is without substantial dispute that Joe Anderson, who had never lived in or around Hot Springs, and was unacquainted with local conditions there, reached the home of appellant Johnson, who lived in the country five or six miles from the business district of Hot Springs, about midnight of Tuesday, September 6, 1938. On Wednesday Johnson and Anderson visited the business district of the city. Johnson was in one of the Steuart stores. Anderson, if not in the store, was at or near the front of it some time during the day. On Thursday morning, perhaps around eight or nine o'clock, Anderson and Johnson visited Dickson, who was living with one of his sisters in Hot Springs. He was found to be at work moving some old lumber in the yard. When he had finished, the three of them talked a little while before Dickson went into the bath room, into which Dickson was followed by the other two. All three of them testified about what occurred on that visit. Without giving conclusions as to more material matters resort will be had to evidence of witnesses.

The cases upon appeal were tried immediately following the trial and conviction of Anderson and his wife, and Anderson was called in this case to testify on behalf of the state. He said at the time he was introduced by Johnson to Dickson, Johnson assured him Dickson was a good man to do business with. It is argued by appellants that this remark had reference to the fact that Anderson had offered to furnish money to enable Johnson and Dickson to open a dance hall and beer parlor combined, and that the parties were discussing this matter of business and the remark was applicable to it. Anderson said they were discussing "getting money." When asked to explain what he meant by "getting money," and if they meant "stick-ups" or robberies, he said that was the idea.

He asked about large chain stores in that community and said that Dickson told him of two chain stores operat-

ing in Hot Springs. One being Jett's and the other Steuart's. While Dickson does not deny that this conversation took place regarding the large chain stores, he made his explanation upon the trial saying that the information given Anderson was in response to an idle or apparently disinterested question made by Anderson, and without knowing that Anderson was seeking information to perpetrate a robbery.

All of these matters were gone into by testimony by the three parties who knew about it. Explanations were duly given. The arguments presented upon these matters assumes the correctness of appellants' theory, and, therefore, the insufficiency of proof in that regard. Much other evidence as to surrounding conditions and circumstances was introduced for consideration of the jury. We think the jury may well have reached a decision contrary to the contention appellants make.

Johnson and Anderson both testified that they had served time in the United States prison together, that there was an understanding, if not agreement, that when Anderson had served his time, Johnson having been released first, Anderson would visit him, and the visit made was in accordance with that understanding.

At the time that Cooley, the collector for Steuart's chain stores, reached a particular store, in taking up the day's receipts, Johnson and Anderson were near by. Johnson's explanation is that Anderson had been expecting mail and had been to the postoffice two or three times during the day preceding and the day on which the murder was committed. Johnson's own statement is to the effect that Anderson had said a Mr. Wilson who brought him to the community, would return that day and bring some extra baggage and deliver to him some money and that if he did not get the money that way he would "take it." Although Johnson says that he had advised Anderson that he was not interested in Anderson's proposed robberies he was present, or near by, when the car driven by Cooley in his collection rounds stopped at the Steuart store. He says that Anderson started toward this car remarking, "That is Mr. Wilson now."

Defending his assumed position, Johnson says that he argued with Anderson that this was one of Steuart's cars, and he insisted that he believed it to be such, although upon cross-examination, when he apparently realized the danger of this admission, that he had pointed out the collector's car to Anderson, he then stated that he had never seen the Steuart car prior to that time. Anderson testified that he and Dickson met this car when Cooley had made his collections at that particular store and that Dickson got into the car in the driver's seat and that he (Anderson) made Cooley sit by Dickson while he sat in the back seat, that Dickson drove the car five or six miles out in the country to the place where they robbed Cooley and then stripped him of his clothes in order to delay him in getting to a telephone or otherwise reporting the robbery. Anderson said that after they had taken the money from Cooley, which was done almost immediately after they entered the car, and had driven to the country and stripped Cooley, he returned to the car leaving Dickson with Cooley, that he, Anderson, was too far away to see what took place, but heard several gun-shots. Dickson immediately returned to the car and they drove down near town and parked the car in a side road where its discovery might be delayed. He also testified that he walked to a place where he found Herbert Johnson and asked him to take him to the home of Clarence (Bill) Johnson, where he had been staying during the two days he had been in town. Clarence (Bill) Johnson testified that after he had pointed out the car to Anderson he went to the home of Doc Weldon, where he found his wife and his uncle, Alfred (Pug) Dickson, and that the three of them left a few minutes later, and walked the five or six miles out in the country to his home. Dickson and Johnson, appellants, both admitted they had been at appellant Johnson's home about one hour when Anderson and his wife came in, having been brought out by Herbert Johnson in an automobile.

The effect of their testimony is that after Anderson came in he and his wife began to pack their grips or bags and insisted that Herbert Johnson take them to Little Rock. While they were arguing about going to Little

Rock cars began to pass along the road near the house and Anderson gave up the idea of attempting to go to Little Rock, saying the road had gotten "too hot."

Johnson says he was very drunk and sick and that Anderson asked him how much he, Anderson, owed Johnson for staying with him the two days he had been there, and his answer was that whatever he, Anderson, thought was right. Anderson then gave him some money. While he insists he did not know what sum of money he received, it seems to be undisputed that this amount was given by Johnson to his wife, who later identified the amount was sixteen dollars. Anderson also delivered over, either to Dickson or to Johnson for Dickson, two five dollar bills, which Johnson gave to Dickson. Later in the night, or next morning, Dickson says he returned these two bills to Johnson, who gave them to his wife to put away as she had put away the sixteen dollars the night before.

This money, according to Mrs. Johnson, was concealed in a meal barrel or can, and was kept there until Johnson, or Mrs. Johnson, advised the officers where it might be found.

A few minutes after Anderson and his wife had reached the Johnson home on that night, lights were extinguished, but none of the parties slept except Clarence (Bill) Johnson, who explained that he was too drunk to know what was going on. Mrs. Johnson and Dickson say they were very much frightened by Anderson who went about from yard to house and from room to room, during almost the whole of the night. Anderson and his wife left the Johnson home early the next morning. They went out the back way where they secreted themselves in the woods, and remained hidden until Sunday morning following, when they went to the home of Dora Bunch. This was the same house or home in which Dickson had been living at the time Anderson met him. It is significant that although Dickson had been living at the home of his sister, Mrs. Bunch, for some time, he left there on Thursday afternoon and had another sister drive him to the home of Clarence (Bill) Johnson, where he intended to meet Anderson. He explains this trip as one

he made to investigate the dance hall proposition, that he and Johnson expected to operate upon money furnished by Anderson. His sister, who took him to the home of Johnson, stayed only about five minutes and then drove back to Hot Springs. Accompanying them was a Mr. Wright, who returned with Dickson's sister to town, leaving Dickson at the home of Clarence (Bill) Johnson, where he admits they discussed for a few minutes some of the details of the enterprise in which they were about to engage.

He admits that during this time Anderson took him outside and showed him two pistols or revolvers. One of them had a short or "snub-nosed" barrel and the other a long barrel. He testified that Anderson put both these pistols in his belt a few minutes later when they returned to town. Anderson said that Dickson selected the short or "snub-nosed" revolver and armed himself with it before they returned to town. It seems that both these were of 38 caliber. Anderson said he took another pistol on that occasion when they came to town. He had obtained it from Herbert Johnson, and it was a 32 caliber. The evidence discloses further that a post-mortem was made on Cooley and from his body was taken two 38 caliber bullets. He had been shot three times, and either of two of the shots would have been instantly fatal.

Dickson and Johnson rely upon alibis. Dickson's position in that regard is stronger than Johnson's. The main facts in regard to this alibi are to the effect that within twenty-five or thirty minutes after Dickson had reached the home of Clarence (Bill) Johnson on Thursday afternoon, Johnson and his wife, Anderson and his wife and Dickson got into a coupe driven by Herbert Johnson and returned to the city of Hot Springs. This was perhaps about five-thirty o'clock. Dickson says that after he got into town he and Hazel Johnson, Clarence (Bill) Johnson's wife, went to the home of Doc Weldon where they remained until about eight o'clock that night. At this particular home during the time that Dickson and Mrs. Johnson were there several visitors came. These were used as witnesses to show the fact Dickson was there, and according to the testimony he

had been there from some time about five-thirty o'clock until about eight o'clock. About ten minutes before eight o'clock Clarence (Bill) Johnson came in and the three of them then left to walk the five or six miles back to the home of Clarence (Bill) Johnson. It is somewhat remarkable that although Dickson lived in Hot Springs at the home of Dora Bunch, his sister, he left there on Thursday afternoon and did not return, but went to Clarence (Bill) Johnson's home twice, once late Thursday afternoon and started on a return about eight o'clock at night and remained there until he was arrested Friday morning. He gave as his only excuse for going back that night his desire to visit his nephew.

Dickson offered evidence to contradict the statement of Anderson that he was driving the car, showing by a physician that he was practically blind in his right eye. He testified that he was at one time so blind he had to be led wherever he went. The doctor, who testified about his blindness in his right eye, gave no evidence of a positive character as to his ability to see with his left eye. The evidence, as given by them, discloses that Dickson, Clarence (Bill) Johnson and Johnson's wife returned to the home of Johnson, going through a narrow passageway, which they knew about, crossing the creek on stepping stones, instead of going on the highway that a short time later was "too hot." Just how nearly blind Dickson was was one of the elements of fact and circumstances that was submitted to the jury, who knew according to his own testimony that he was able to travel this narrow passageway at night, and cross the creek on stepping stones, in order to return to the country where he met Anderson an hour later, who was in possession of the money, ten dollars of which was delivered to Dickson and sixteen dollars to Johnson.

When Anderson was arrested Sunday morning after he returned to the home of Dora Bunch, it was found he had $149.70 in his possession. The evidence discloses that Mr. Cooley had collected from the several stores considerably more than that amount, but there was no evidence as to how much was in money and how much was in checks. Anderson said when he returned to the John-

son home on that night he delivered to Dickson the checks as being worthless for the reason they could not use them under the circumstances. He said that Dickson burned these checks in the cook stove on that occasion. He, Anderson, carried the money back to the Johnson home in a bag with the checks and other papers, just as they came from Cooley's hands.

The officers found, when they searched the Johnson home after Johnson and his wife had been arrested, one of the report slips made by one of the Steuart stores and given to Cooley with the collection he had taken up. Several witnesses identified this as having been found at the Johnson home. It was said to have been found in the chimney corner. It is not clear whether this was inside the home in the chimney corner, or on the outside in the corner. There was no doubt about the positive identification of this report slip as being part of the property taken from the possession of Cooley.

On Friday morning after Anderson and his wife had left, Dickson and Johnson both say that they agreed that the two of them and Johnson's wife would stay there at the house, at least until they could see Mr. Young, a police officer, whom they regarded as their friend. Certainly they did deny that Anderson and his wife had been in the home until two or three days later. A sufficient length of time had elapsed within which Anderson might have escaped, although Dickson says he knew escape was impossible as he had gone into the hills and would have to return to the roads and highways where he would be picked up. Perhaps a more detailed statement of the evidence in this record is unnecessary.

We prefer to discuss both propositions relied upon by appellants as a single issue, as we think that will tend to shorten the presentation of all matters controlling upon this appeal. In this discussion we are keeping in mind the fact as argued in appellant's brief that Dickson, Johnson and Anderson, according to Anderson's testimony, were accomplices, and in all we say we give that question due consideration, but we are not forgetful of any of the other material facts, or of the evidence given by each of the parties in his own behalf. In fact, there

is in reality but a single issue; the sufficiency of the evidence under the circumstances.

The contention made is that at the time Cooley was shot and murdered the evidence in this case discloses that the robbery had been completed, that the money was then in the possession of Anderson, and had been since the time he had entered the car and made Cooley enter the car holding upon him a pistol with which he said he was armed. The fact that Anderson was armed is not disputed by either one of the appellants. It is true that Anderson took charge, or physical possession, of the money immediately after Cooley left the place of business to return to the automobile which he was driving in making his collections, but we think it unreasonable to say that the robbery had then been completed by that possessory act.

Robbers would accomplish very little in taking the money and attempting to escape, leaving the victim to spread immediate alarm. The idea is to get possession of the money and prevent an alarm so that possession of it might be kept or retained. The keeping or retention of it was an object of their plans as much so as getting the money. And in furtherance of this plan Mr. Cooley was driven to the country, and in order that they might have more time to escape, he was stripped of his clothing so that he would be reluctant to enter a home or get to a telephone in the immediate community.

We do not know what theory either one of the robbers might have had to cause the slaying of Cooley, but we think it highly probable that the jury considered the fact that Anderson had been in the community only two days, and most of that time had been spent in the country so Cooley could not, and did not, recognize him, but it is highly probable that he knew both Dickson and Johnson and some word from him indicated his recognition of one or the other, if not both, of them causing his slaying. It seems obvious that at the time he was being stripped it was not the intention of his captors to kill him. No blood was found in the automobile, nor on the clothing, but only on the ground where he had fallen after the fatal shots. If he did recognize one of those

robbing him, then a natural furtherance of the scheme followed by them to that extent, no doubt, made the recognized robber feel that his only safety lay in Cooley's destruction.

The jury had before it all this evidence, Dickson's alibi and the fact that Johnson did not return until after the time within which the robbery might have been committed, and it might well have found that all of the parties testifying in regard to the time Dickson was in Doc Weldon's home were mistaken as to the hour. The only witness who fixed a time with any degree of certainty was one who said that after he left Doc Weldon's home and returned to his own home, he took the members of his family to a show that was presumed to open about seven-thirty o'clock. There was no watch or clock in the Weldon home, so the witnesses who testified had no means of giving the time with any degree of exactness. Nor is there any way of fixing any definite time that Cooley was kidnapped and taken to the country. It was not impossible, perhaps, it may well be said not improbable that both Johnson and Dickson were present when Cooley was killed.

We agree with appellants' contention that Anderson in his testimony given in this case was more interested in establishing a defense for his wife than he was in aiding the court to reach exact justice. It may be said in that regard that Anderson had already been convicted. He was perhaps attempting to shield himself by fixing guilt on others. He was the selected company and "pal" of Clarence (Bill) Johnson. He had chosen Dickson as "a man to be relied upon" and Dickson was relying upon him. Dickson says, even according to his own theory, and his idea of self-preservation, that when Johnson had told him that he had pointed out the Steuart car to Anderson and Anderson had driven it away, he was not concerned about this matter in the least, although he knew a robbery was in the making.

It is most probably true as argued by appellants that Anderson did not tell the whole truth untainted with falsehood. Each of the other parties admitted that he

had attempted deception in certain respects, so the jury was not bound by any complete statement, or detail thereof, made by either one of them, but had the right and duty to choose from all these statements that part of the evidence which they believed to be true, the most plausible in conformity with the facts that were established, or undisputed, and determine therefrom their verdict.

The jury, no doubt, found there was a conspiracy and the evidence fully supports a finding from the foregoing facts that the conspiracy had not ended prior to the death of Cooley, but all acts were in the performance of an agreement or understanding among the parties. The testimony of Anderson was corroborated by many physical facts, most of which were admitted as true by each of the appellants. Besides, as the record shows, each testified, and such evidence was a corroboration sufficient to justify conviction.

The foregoing is not an extension of the rule announced by this court in *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849. The court there held that the conspiracy was not complete upon the mere taking of the money, but that the defendant and his confederates, as a part of the act of conspiracy, got into an automobile and left the scene of the robbery and that was a part of the organized scheme they had planned. In other words, the escape was a part of their planning and scheming as much as taking the money. It was, also, held in *Ringer* v. *State,* 74 Ark. 262, 85 S. W. 410, that "if the act he intended to do was criminal then the law holds him responsible for what he did, even though such result was not intended." *Wilson* v. *State,* 188 Ark. 846, 68 S. W. 2d 100.

We have but recently held that the testimony of a defendant may in itself be a sufficient corroboration of the evidence of an accomplice. *Morris* v. *State, ante* p. 778, 126 S. W. 2d 93; *Morris* v. *State, ante* p. 695, 123 S. W. 2d 513.

That rule is applicable here, and each of these appellants has given such testimony as tended to connect him positively with the commission of this crime. Their ef-

forts to make some explanation of their conduct properly submitted to the jury, were determined adversely to their contention and all questions of fact were conclusively decided against them by the jury under a proper submission thereof.

There is no other method whereby disputed matters of fact may be settled. The jury system is the only protection of organized society, the state, from the violation of both public and individual rights. But those charged with criminal acts are so favored as to be clothed with a presumption of innocence until guilt appears beyond a reasonable doubt. In this case, both of the appellants were tried by a jury of their neighbors in the county where both were reared. They made their own explanations of their conduct as established by evidence and their own admissions. Upon this trial one appeared as a man of middle age, making a puerile, puny and apologetic struggle against the stern mandate of the law whose milder restraints he had previously scorned. The other is a very young man, not inexperienced in crime. He is a nephew of the older man. In his desperation occasioned by undeniable situations, not only by evidence he could not contradict successfully, but by his own statements, he resorted apparently to evasion, sought refuge in a feigned forgetfulness, claimed by him to have been induced by voluntary drunkenness.

There remains one other contention that may be mentioned. The appellants argue, and with much vehemence, that this court cannot determine from this record several different propositions, which they deem vital upon the trial of this case. We are not trying this case *de novo*. We consider the facts only to determine if there is sufficient evidence in addition to that of accomplices, to support the verdicts.

We have carefully considered this view of the case, not only the record as made upon the trial, but every contention and argument presented by appellants, and we find no error; but we have determined that the evidence is of substantial nature and ample to support the judgments of the circuit court. The judgments are, therefore, affirmed.

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