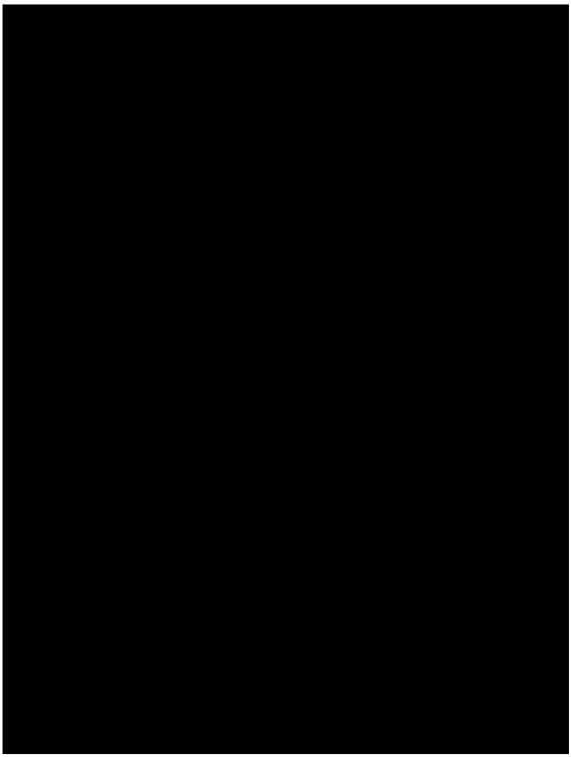

[redacted]

Missouri Pacific Railroad Company *v.* Lemons.

4-5431 127 S. W. 2d 120

Opinion delivered April 10, 1939.

R. E. Wiley and *E. W. Moorhead,* for appellant.
Surrey E. Gilliam, for appellee.

MEHAFFY, J. This action was instituted by the appellee against the appellant in the Union circuit court to recover for damages alleged to have been caused by one of the trains of appellant striking the truck in which appellee was riding at a railroad crossing in El Dorado, Arkansas.

The appellee, W. O. Lemons, testified that he was injured in a crossing accident on May 18, 1936; he was 56 years old and had lived in El Dorado since 1925; had been employed by various oil companies and had farmed two years; did hard manual labor and was in good health; he had been injured once before, but had had no trouble working since that injury; before the depression he had made about $140 a month, but at the time of his injury he was making $36 a month; was working for the WPA and had gone in a truck with Frank Vines to return a borrowed water hose; rode in the front seat while Frank Vines drove the truck; he had never driven a truck of this kind and knew nothing about it; about 3:35 in the afternoon they came to the crossing and when they got within 50 or 60 feet of the railroad crossing Vines stopped the truck; appellee looked up and down the track both ways and listened; he could see a considerable distance both ways; did not see any train or hear any bell or whistle; it was upgrade to the tracks; as the truck got on the tracks it stalled and appellee looked toward the north and saw the train coming; Vines was trying to start the truck; witness tried to open the door, but could not, and the train hit the truck and knocked appellee out; the front wheels had just gone over the track when the truck stopped; when the train hit, the truck had been pushed forward a little; was nearly off the tracks; if the train had slowed up a little they would have gotten off; never heard the application of any brakes on the train and did not hear a bell or whistle; does not think the train slowed down at all; when witness

first saw the train it was 800 or 900 feet away; has been under the treatment of a doctor ever since the injury; was dazed at the time of the accident; had a gash over his eye and his arm was hurt, his side and leg, and the side of his head; suffered a lot of pain; has been in bed the biggest part of the time, unable to do any work; before he was injured he weighed 158 pounds and now weighs 135. Witness testified on cross-examination that the truck stopped about the center of the track; that after they started up the grade the truck stopped on the grade, but witness did not see the train coming; he could see down the track a long way; his eyesight was good at the time; he looked down the track and there was no train coming; he did not see the train while the truck was moving; he looked all the way up until he got on the track; the truck went dead on the track and Mr. Vines was trying to do something and witness looked back and saw the train; this was after the truck stopped.

Frank Vines testified to substantially the same things testified to by appellee. Witnesses then testified as to the extent of appellee's injury, and Glen Corn, conductor on the train, testified that he was riding in the coach and the first he knew about it was when the brakes went on; the train stopped and he found they had hit a truck; just before they hit the truck they were going ten or 15 miles an hour; the train could have been stopped in 175 yards; heard the bell but no whistle; the track is reasonably straight at the crossing; ordinarily brakes would take hold three or four seconds after they were applied.

T. T. Simmons the fireman on the train, testified that he remembered the collision, and that just before the collision he was on the seat box on the left side of the engine looking out, ringing the bell; saw the truck come off the pavement approaching the crossing when the train was about 150 feet from the crossing and the truck was about the same distance; the truck stopped about five feet from the tracks and he thought it was going to let them go by; the driver seemed to be changing shifts, or something, and then he attempted to cross and as far as wit-

ness could tell he went across, passed out of his sight; he hollered to the engineer that they were going to hit a truck and he applied the brakes; the train stopped just over the crossing; the truck stopped on the side on the incline and then proceeded on across. When witness first saw the truck, it was making about 25 miles an hour; the engineer was on the right side of the engine; the boiler cut him off from seeing a truck on the left; did not see the truck stop at the bottom of the incline; train was about 150 or 160 feet long; truck was going about 20 or 25 miles an hour; when it stopped it was about five feet from the track; when it came on to a dead stop the train was about 40 feet from the crossing; truck could have gotten across if it had kept going like it was when he saw it; it almost got across before it was struck; the engineer had reduced the speed back at the yard board and after reducing the speed the train was going about 25 miles an hour; the engineer would have had to put on emergency to stop the train between the time when witness first saw the truck and the time when they reached the crossing; did not put on the brakes when they first saw the truck 150 feet from the crossing.

The engineer testified that the first thing he saw was the front wheels of a truck moving slowly over the track and he was then within 25 or 30 feet of the crossing; that he cut off the steam and applied the brakes; he sounded no whistle; the bell was ringing; did not hear the fireman holler at him and if he had he could not have stopped the train; he could have slowed it down and the truck might have had time to go across.

W. E. Hickman, chief of police in El Dorado, testified that Vines told him he thought he was hit by a freight train.

The court gave a number of instructions at the request of each party. The jury returned a verdict against the Missouri Pacific Railroad Company and the trustee in favor of appellee for the sum of $3,000. The case is here on appeal.

It is not necessary to set out the instructions, as it is not contended that the jury were not properly instructed.

Appellant's first contention is that a verdict should have been directed for the appellant, and to sustain this contention appellant cites and relies on a number of cases.

The first case relied on is *Missouri Pacific Railroad Co. et al.* v. *Brewer,* 193 Ark. 754, 102 S. W. 2d 538. In that case there was a verdict for the defendant railway company, and the trial court granted a new trial. This court held that the new trial should not have been granted. The court said in that case: "The physical facts not only dispute plaintiff's testimony relating to the precaution he took before driving upon the crossing, but completely refute it. If he had used his sense of sight, or hearing, as he said he did, he was bound to have both heard and seen the approaching train. Certainly this is true if he had continued to look and listen during the time he was moving toward the crossing." The court also said: "It is inescapable, therefore, that plaintiff neither looked nor listened, but apparently concluded that as one car had crossed in safety, he could also, and was negligent." The court also said in that case: "Where there is a substantial conflict in the testimony this court will not interfere with the judgment of the trial court as to where lies the preponderance of the testimony."

The evidence in the Brewer case was wholly different from the evidence in the instant case. The appellee testified in this case that when they got within 50 or 60 feet of the crossing they stopped, looked and listened, and there was no train in sight and they heard no alarm, either bell or whistle, nor any noise of the train. Appellee testified that going up the grade he continued to look both ways to see if a train was coming and did not see any train. Appellee testified that the truck came to a stop when it got on top of the track; stopped dead. He also testified that after the truck had stopped he looked and saw the train coming. Vines, driver of the truck, had in the meantime got the truck started and it got very nearly across the track; so nearly across that the engine of the train struck the rear wheel of the truck. The testimony, also, showed that the appellee, while listening, heard no noise of the train and when it

came, he did not hear the brakes applied or anything to indicate that the brakes had been applied. He does not think the train slowed down any, and says that if it had, they could have gotten off the track. The evidence is ample to justify the jury in finding that both Vines and appellee were keeping a lookout for the train and the evidence shows that when the appellee saw the train coming, after the truck had stalled on the track, that the train was 800 or 900 feet away. If the jury believed this evidence, which they had a right to do, they were justified in finding that the train could have stopped or its speed checked in time to have avoided the collision after the engine men could have seen the truck.

Appellant calls attention to several other cases, but the law is so well settled in this state, it is unnecessary to discuss these cases. Appellant calls attention to the well established rule of this court that the enginemen of a train, while keeping a lookout, may assume that a person, before starting across the track, will exercise due care for his own safety, and ordinarily no duty rests upon the railroad employees to give an alarm until it reasonably appears that such person is entering or about to enter a place of danger; but if there is anything in the appearance or conduct of the person crossing the track to indicate to the trainmen that the person is entering a place of danger, or that he is in a perilous position and unaware of his danger, then it is the duty of the trainmen to take such precaution as is necessary to avoid injuring him. It is true, the engine men have a right to assume that persons about to cross the track will not be guilty of negligence unless there is something to indicate the contrary. Everyone has a right to assume that others will perform their duty when there are no facts indicating the contrary; but there is no presumption that a person will not go on the track when the facts indicate that he is going on it. On the other hand, the traveler has a right to assume that the trainmen will not be guilty of negligence and that they will perform the duties imposed upon the railroad company by law. They have a right to assume that there will be a bell rung or

whistle sounded before the train reaches the crossing, unless they know that it is not giving the alarms.

In this case the engineer did not see the truck, and it is undisputed that the speed of the train was not checked. But if appellee was guilty of negligence contributing to his injury, he would not be denied a recovery if there was substantial evidence to show that the statutory duty was not exercised by the railroad company; or if by keeping a proper lookout, appellee's peril could have been discovered in time to avoid the accident by exercise of reasonable care.

We think the jury was justified in finding that the appellee was not guilty of negligence, but if they should find that he was guilty of negligence, it would not bar his recovery.

There is no question of law involved in the case; that is, there is no dispute about the law, but it is purely a question of fact, and the only question is: Is there substantial evidence to support the verdict?

The appellant relies largely on the case of *Jamell* v. *St. L. S. W. Ry Co.*, 178 Ark. 578, 11 S. W. 2d 449. The court said in that case: "In the case at bar the fireman, who was keeping a lookout on the engine of the passenger train, testified that he saw the plaintiff drive up to the edge of the ties at the public crossing where the accident occurred, and then back down the grade again. He then supposed that the plaintiff would not attempt to run up the grade again until after the train had passed. The plaintiff admitted that he did not look for the approach of the passenger train, and admitted that he could have seen it if he had looked. The track was straight at that point, and the reason that the plaintiff did not see the approaching train was that he did not look. When he admits that he did not look, when, if he had looked, he could have stopped his car in time to have avoided the accident, he cannot recover because his own negligence directly contributed to the happening of the accident, and there was no negligence whatever on the part of the defendant, because the fireman was justified, under the circumstances, in believing that the defendant, when he backed

his car down the grade just before the accident would not ride up the grade again in front of a rapidly approaching train."

Section 11144 of Pope's Digest reads as follows: "It shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company 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 of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed."

In this case the question as to whether the appellant was guilty of negligence and as to whether the appellee was guilty of contributory negligence were questions of fact for the jury. The jury is the judge of the credibility of the witnesses and the weight of their testimony, and where there is substantial evidence to sustain its finding, it is conclusive. There was substantial evidence in this case to support the verdict, and the judgment is therefore affirmed.

HUNTER *v.* HUNTER.

4-5437 127 S. W. 2d 249

Opinion delivered April 10, 1939.

Scipio A. Jones, for appellant.

Tom F. Digby, for appellee.

HUMPHREYS, J. K. Hunter, a widower, married Minnie, one of the appellees herein, in 1916.

At that time he was the owner of lots 4 and 5 in block 18, East Argenta Addition to the city of North Little Rock, Arkansas.

K. Hunter resided upon the property and after the marriage he and Minnie resided upon the property until his death in April or May, 1938, and Minnie has continued to reside thereon since his death.

Two houses were upon the property when they married and afterwards they built two more houses on it.

K. Hunter was threatened with a suit for slander soon after their marriage and in order to protect said property from being levied upon in the event a judgment should be obtained against him, he and Minnie executed a deed thereto to his children, by a former wife, five in number. James Hunter is the only surviving child by his former marriage, four of them having died and the record reflects that two of them were dead at the time of the execution of the deed. The deed was a warranty deed in form duly executed and acknowledged and recites a consideration of $1. K. Hunter took the deed to Lucinda Washington, an aunt of James Hunter, and directed her to deliver it to James, which she did sometime in the year 1933. Lucinda Washington died in 1936. James Hunter had the deed recorded on March 31, 1938, a short time after K. Hunter, his father, died.

On January 11, 1935, K. Hunter executed a deed for the same lots to Minnie Hunter which she had recorded on the same day.

The taxes were not paid upon the property and it forfeited to the state and L. A. Bland loaned them money to redeem same and on February 11, 1917, K. Hunter and Minnie, his wife, executed a mortgage for the sum of $175, which was not recorded. On September 13, 1937, they executed a mortgage to L. A. Bland for $305 which included the amount due upon the first mortgage and upon which they have paid $10 a month since September 13, 1937.

On April 7, 1938, James Hunter executed a mortgage to Scipio A. Jones to secure the payment of the sum of $250.

On May 2, 1938, Minnie Hunter and L. A. Bland brought suit against James Hunter and Scipio A. Jones to cancel the deed executed by K. Hunter and Minnie Hunter to James Hunter and his sisters and brothers on the 16th day of August, 1917, as a cloud upon Minnie Hunter's title to said land on the ground that same was void and also to cancel the mortgage executed by James Hunter to Scipio Jones.

James Hunter and Scipio Jones filed an answer denying the material allegations in the complaint and pleading that the deed executed by K. Hunter and Minnie Hunter on January 11, 1935, was void.

The cause was submitted to the trial court upon the pleadings and evidence introduced by the respective parties from which the court found that the deed executed by K. Hunter and Minnie Hunter, his wife, to James Hunter and others on August 16, 1917, was void and that the mortgage executed by James Hunter to Scipio Jones on April 11, 1938, was void and set the deed and mortgage aside as a cloud upon the title of Minnie Hunter and vested the title absolutely in Minnie Hunter, from which finding and decree an appeal has been duly prosecuted to this court.

The question involved on this appeal is whether K. Hunter and Minnie Hunter intended by their conveyance of August 16, 1917, to convey the legal title to said lots to the grantees therein and, if so, whether there was a delivery of the deed. If such was their intention and the deed was delivered it passed the legal title to the grantees,

and the grantors had no further interest therein. The questions of intent by the grantors and the delivery of the deed are questions of fact.

The rule is that a conveyance of land by deed passes title thereto from the grantor to the grantee if so drawn as to convey a present title if delivered and accepted by the grantee. This court said in the case of *Russell* v. *May,* 77 Ark. 89, 90 S. W. 617, that: "A delivery of a deed is essential to its validity. It cannot take effect without delivery, and what is a delivery depends upon the intention of the grantor. Any disposal of a deed, accompanied by acts, words or circumstances, which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery." This rule was reiterated by this court in the case of *Faulkner* v. *Feazel,* 113 Ark. 289, 168 S. W. 568. This court also said in the case of *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402, that: "It is well settled in this state that, if a deed duly executed and so drawn as to convey a present title, is deposited by the grantor with a third person with directions to deliver it to the grantee after the death of the grantor, and the grantor reserves no dominion or control over the deed, the deed is not an attempted testamentary disposition, but is effective as a conveyance of the title as of the date when the deed is deposited." This court also said in the same case that: "It is well settled in this state that the acts and declarations of the grantor or of the person in possession of the tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. It has always been held by this court that the declarations of a grantor against the title of his grantee, made in the latter's absence, are not admissible in evidence to defeat the title of the grantee."

The deed in the instant case from K. Hunter and Minnie Hunter of date August 16, 1917, was a warranty deed in form, duly executed and acknowledged and conveyed the land in controversy to James Hunter and other children of K. Hunter so it is unnecessary to set out the deed *in extenso.* The only evidence in the record as to

the purpose for which it was executed comes from Appellee, Minnie Hunter, and the only evidence as to the delivery of the deed to a third party for the grantees named therein comes from Louis Washington.

Appellee testified that her husband, K. Hunter, being threatened with a suit for slander asked her to join in the execution of the deed to his children, and that it was made to head off the suit; that it was not her intention, when she joined her husband in the execution of the deed, to actually convey title, but that it was for the purpose of evading the possibility of a judgment coming out of the threatened law suit, and that the deed was not placed on record; that later her husband told her that James Hunter had gotten the deed, and appeared very much wrought up over this situation, and expressed a desire for the return of his deed, and later made nearly daily trips to the barber shop, begging his son, James, for the return of the deed; that she accompanied her husband the last time he went to the barber shop and heard him demand the return of the deed and that James refused to return it to his father; that James assured them the deed had not been recorded and they went to the court house and searched the record and found that it had not been recorded; that subsequent to the discovery that the deed had not been recorded her husband, K. Hunter, made a deed therefor to her in 1935.

Louis Washington testified that the deed from K. Hunter and Minnie Hunter to Hunter's children was brought by K. Hunter, who left it with him and his wife, Lucinda; that Lucinda was a sister-in-law of K. Hunter; at the time he delivered the deed, K. Hunter told his wife he wanted her to keep the deed and give it to James Hunter, since he did not know whether he would ever see him or not any more, and for her not to give it to anybody else but him; that Lucinda delivered the deed to James in 1933 before K. Hunter died; that James came here from Chicago and when he came to see them she presented the deed to him and said that his father gave her the deed to keep and turn over to him, and said she was sick and weak and would probably pass out before

she ever saw him again and that she gave the deed to him at that time; that his wife died February 3, 1936. On cross-examination witness said that he disremembered whether K. Hunter told his wife to keep the deed until he died and give it to James or whether he told her to give it to James before he died but that he told her to be sure to give it to James and no one else; that at the time the deed was delivered to James Hunter all the grantees therein except James Hunter were dead.

James Hunter testified that he received the deed from Lucinda Washington, who was an aunt of his; that his father came to see him several times and told him to keep the deed that the property was for him and he wanted him to have it; that after he received the deed his father told him to keep the deed and not to give it up; that his father told him he wanted to stay on the property during his lifetime and that he had a settlement or agreement with his wife; that his father never told him about having executed the deed in 1935 to his wife and of having recorded it; that after his father died he recorded his deed and executed a mortgage on the property to Scipio Jones for $250.

We think the evidence in this case brings it well within the rules of law heretofore announced by this court and set out herein.

According to a preponderance of the testimony the grantors intended to part with the title when they executed the deed so as to protect the property against any judgment which might be recovered against K. Hunter for slander and that the intention was to convey a present title and that the conveyance became an effective conveyance when K. Hunter turned the deed over to Lucinda Washington to give to James Hunter without any reservation and without retaining dominion or control over the deed. The delivery of the deed to Lucinda Washington was as effective as if it had been handed to James himself.

K. Hunter lived many years after he and his wife executed the deed for the land to James Hunter and others and knew that the deed was in James' possession and

did not bring any suit to set aside or cancel the deed. In fact no contention is now made that James practiced any kind of fraud in obtaining the deed. According to the testimony of Minnie Hunter he requested his son to return the deed to him and on one occasion demanded the return of the deed, but this was long before he died and her testimony could not be construed as indicating that James Hunter had perpetrated any fraud in obtaining possession of the deed.

Our interpretation of the testimony under the law is that the title of the property passed to the grantees in the deed when the deed was turned over to Lucinda Washington for James Hunter. It was a delivery to her for him and became effective as a conveyance on that date.

The decree of the court is, therefore, reversed and remanded with directions to uphold the validity of the deed executed by K. Hunter and Minnie Hunter on August 16, 1917, to the grantees therein and the mortgage thereon from James Hunter to Scipio Jones and to quiet the title to said lots in James Hunter.

ARNOLD *v.* SNELLGROVE.

4-5432 127 S. W. 2d 125

Opinion delivered April 10, 1939.

Nat T. Dyer, for appellant.

John C. Ashley, for appellee.

McHaney, J. Arnold School District was created by special Act 164 of 1907 out of school districts No. 26 in Baxter county and No. 83 in Izard county, Arkansas, contrary to the statement of appellants that it was so created out of districts No. 63 in Baxter and No. 67 in Izard. See Acts 1907, p. 397. But for the purpose of this opinion we adopt the numbers used by the parties. This action was brought by appellants, eleven qualified electors of Baxter county and of said district, to dissolve said Arnold School District and attach the territory thereof in each county to other districts. Their petition for this purpose was addressed to the Baxter county court and to the county judge of Izard county, and was filed only with the clerk of the Baxter county court. Based on such petition the Baxter county court made and entered an order directing the county examiner of Baxter county to publish a notice of the filing of said petition, by publication in the Baxter County Citizen once a week for two weeks, and of a hearing to be had on said petition in said court on March 12, 1938; and further ordered that said notice specify that a hearing thereon would be before the county judges of Baxter and Izard counties at the school house in district No. 63 in Baxter county, on said date at 10 a. m., but that said court would take entire jurisdiction thereof, on the ground that the law confers such jurisdiction. Notice was given pursuant to the order. On said date the Baxter county judge (the Izard county judge not being present) held a hearing at said school house. Appellees appeared and objected to the proceeding, by demurrer and response, on the ground, among others, of the lack of jurisdiction of the Baxter county court. The court overruled the demurrer and all other objections to the jurisdiction and found that it was to the best interest of the inhabitants that the said district be dissolved and made an order to this effect and

annexed district No. 63 in Baxter county to No. 61 of said county and created an independent district in Izard county out of that portion of Arnold School District, formerly No. 67, to be known as School District No. 67 in Izard county, and then surrendered further jurisdiction thereof to the county court of Izard county. On appeal to the circuit court, the demurrer and motion to dismiss were renewed, sustained, and the case dismissed. The case is here on appeal.

We agree with the circuit court that a proceeding to dissolve an existing school district composed of territory lying in two or more counties is governed by § 11486, Pope's Digest. While said section relates specifically to the formation of districts embracing territory in two or more counties, requiring the action of each of the county courts where a part of the district will be situated, it must necessarily be true that, to dissolve such a district once created, the formal action of the several county courts must be had in approval thereof.

It is argued by appellants that, because of the language used in the last sentence of paragraph two of said section, the Baxter county court had jurisdiction to abolish this district. That language is: "For all school purposes such district, situated in two or more counties, shall be a part of the county in which is situated the largest number of inhabitants of the territory affected." We do not agree that the dissolution of such a district is a school purpose within the meaning of said act. The object of that provision was to give such a district a domicile and for the convenient and orderly administration of the affairs of the district. County courts have no extraterritorial jurisdiction, and the Baxter court was without authority or jurisdiction to abolish this district, acting alone.

The trial court correctly so held and its judgment must be affirmed.

BROOKS *v.* BALE CHEVROLET COMPANY, INC.

4-5424 127 S. W. 2d 135

Opinion delivered April 10, 1939.

Sam Robinson, Osro Cobb and *C. E. Johnson,* for appellant.

Donham & Fulk, for appellee.

GRIFFIN SMITH, C. J. This appeal is from judgment on a directed verdict in favor of the defendant.

Allegations were that on the night of June 9, 1935, appellant, while proceeding east on his motorcycle[1] on

[1] The accident occurred on that part of Highway No. 70 which is a continuation of Third Street east of North Little Rock, on the four-lane thoroughfare near Rose City.

Highway No. 70, undertook to pass a Chevrolet car belonging to appellee and at the time driven by Ray Wools; that when appellant undertook to pass the car, Wools, who was driving on the wrong side of the highway, negligently cut his car sharply to the left, striking plaintiff's motorcycle, as a consequence of which plaintiff was thrown and injured. These allegations were supported by substantial evidence.

Appellant's motorcycle was one of four such machines, three of which carried two passengers each.[2]

When the accident occurred Wools and his companions[3] were enroute to a night club—"on the Memphis highway," as Miss Livingston explained it.

Miss Livingston, a witness for appellee, was asked:

---

[2] Appellant testified: "[I] met some of the boys on the night of the accident at Seventh and Center and first rode out to Smith's dance hall on Twelfth street; [we] left the dance hall and were riding around."

Fred Inman, witness for appellant, testified in part: "There were four motorcycles in the group, three of them having a second passenger, but [appellant] had no additional passenger on his machine. Roller and Lacy had young ladies on the back of their motorcycles; [we] were out to Smith's beer garden and left about eleven o'clock; were not riding four abreast; were going between 35 and 40 miles an hour. Brooks got within about thirty feet of the [Wools] car and pulled his motorcycle to the left, five feet beyond the center line and started to go by the car, [and the Wools] car swerved to the left about six feet as Brooks started to go by."

[3] Miss Livingston testified in part: ". . . Mr. Wools was driving very slowly, much slower than people ordinarily drive—about twenty miles an hour—when the car was struck by a motorcycle. He was driving on the right side of a four-lane highway. . . Suddenly we heard the noise of the motorcycles. They came up and were gone, and in the meantime one hit us. The motorcycles were going at such a fast rate of speed that they were gone before we knew it, and one of the motorcycles hit the automobile on the left side, at the rear end. We stopped, and the boy with me got out. . . . It is not true that Mr. Wools suddenly swerved his car in such a manner as to cause the collision. . . . I estimate the speed of those motorcycles at from 50 to 60 miles an hour. Some of them went on; some came back. The motorcycles in front were going so fast they didn't know there had been an accident until it took them time to turn around and come back. . . . Apparently all of those motorcycles passed us at the same time."

"Did you hear any conversation in which [Wools] tried to sell Sosbee a car that night? A. No, he didn't try to sell him a car that night. Q. Was it your understanding you were just going out for pleasure? A. O, yes, of course."

On cross examination the witness was asked: "What was it that Wools said to Sosbee about selling him an automobile? A. He said, 'When are you going to let me sell you a car?' Q. What did Sosbee say? A. I don't really remember. He didn't say anything: maybe like a man would say 'tomorrow'—he was indefinite."

Appellant undertakes to predicate liability upon the remarks exchanged between Wools and Sosbee, the theory being that Wools was a salesman; that he was on twenty-four hour duty; that on the night in question the car in which the young people were riding was a demonstration unit, and that Wools was engaged in the master's business when the wreck occurred.

Plaintiff's witness Trotter testified that for twelve years he had sold automobiles, and was working for appellee in June, 1935; that Wools was a new car salesman, and that regular sales meetings were held with officials of the company each morning. It was sought to show by this witness that the company had instructed Wools and other salesmen at such meetings to attempt to demonstrate cars and to make sales at night.[4] Other witnesses were offered by whom it was proposed to establish the same facts. On motion of the defendant the evidence was excluded.

Plaintiff offered to prove by Charles Cole, of Batesville, that Wools had discussed the accident and attending circumstances and had stated that he was trying to sell

[4] It was alleged that directions on the part of Bale Chevrolet Company officials was that salesmen should "catch the men and their wives together, or find it more convenient to the prospective customer to see him after work hours; that said officials considered the nighttime as one of the best times in which to make sales to all classes of prospective customers; that they were instructed to pick up people who were waiting for street cars and pursue any and all means at any time, hour of the day or night in making friends and contacts with the public in an effort to promote sales."

Sosbee a car the night of the accident. The court ruled that the evidence was competent only in rebuttal. Wools did not testify.

It is insisted that error was committed in excluding the testimony of Trotter and other salesmen, and that further error was committed in excluding Cole's testimony.

Competency of the testimony of Trotter and others is urged on authority of *Ward* v. *Young,* 42 Ark. 542, where it was said: "Relevant testimony is that which conduces to the proof of a hypothesis, which, if sustained, would logically influence the issue. Hence, it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable."[5]

It is also contended that *Casteel* v. *Yantis-Harper Tire Company*[6] is in point.

The trial court correctly directed a verdict. If the only questions were whether Wools was negligent in operating the car and his consequent responsibility for the accident, we would hold that the evidence was sufficient to go to the jury, although such evidence is sharply contradicted by Miss Livingston. Neither Wools, Sosbee, nor either of the other three occupants of the automobile testified. Miss Livingston was not an interested party. Her testimony was that the group started about eleven o'clock Saturday night, and that the accident occurred about midnight—"at 12:30 or 1:00 o'clock." One of appellant's witnesses testified that the time was 11:30 or 12:00 o'clock.

There is no dispute of one essential fact: that is, those in the Wools party were on their way to a night club. Although Wools asked Sosbee "when are you going to let me sell you a car?" there is no evidence that Sosbee had the slightest intention of making a purchase. Even if we should assume that Wools was under general instructions to be on the alert at all times for prospective customers, Wools' remark and Sosbee's answer cannot be interpreted as anything more than an inquiry

[5] The quotation is from a headnote, rather than from the text of the opinion.

[6] 183 Ark. 912, 39 S. W. 2d 306.

prompted by a fleeting impulse; an inquiry directed in circumstances which in all respects negatived any idea that the car in which they were riding was being used for demonstration purposes.

It is true that if an automobile causing an accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time the employee was acting within the scope of his employment and in furtherance of the master's business.[7]

But this is only a *prima facie* presumption or inference—a presumption or inference deducible from the naked facts of physical ownership, contract of employment, and permissive or directed operation.

When, as in the instant case, it is shown by undisputed evidence that five young people met at half past ten o'clock on Saturday night, drove from one to two hours without important purpose, then directed their course to a night club and were well on their way to that objective when the accident occurred, presumption of pursuit of the master's business must give way to the obvious facts.

Miss Livingston's testimony that she had a "date" with Sosbee is not questioned. She assigned as a reason for their late start that Sosbee had to work until 10:30. Wools, Gault, and a lady other than Miss Livingston were in the front seat. The only evidence explaining the purpose of the drive is that given by Miss Livingston, who affirms that she was filling an engagement. Where they drove and how they went—these matters were only incidental to the objective of entertainment. Miss Livingston's father is principal of the Bauxite school. The daughter had formerly taught at the David O. Dodd school on the Hot Springs Highway. Her character is not questioned.

Why, then, should we say that a jury, because of the incidental remark about selling a car, ought to have the right to speculate or engage in conjecture over the

[7] *Mullins* v. *Ritchie Grocery Company*, 183 Ark. 218, 35 S. W. 2d 1010.

meaning of a question asked by Wools *after* the party had assembled and was under way? To do so would be to permit the undisputed objective to be disregarded in favor of conclusions lacking in those substantial qualities which the law makes essential to a verdict of liabilty.

No foundation was laid for introduction of the evidence proposed through the witness Cole. In the absence of testimony by Wools, who might have been called by the plaintiff, the declarations were hearsay.

Affirmed.

CHURCHILL *v.* HERRINGTON.

4-5436 127 S. W. 2d 123

Opinion delivered April 10, 1939.

Chas. F. Cole, for appellant.

J. Paul Ward, W. D. Murphy, Jr., for appellee.

SMITH, J. This appeal is from the decree of the Independence chancery court quieting the title to a small lot

of land in appellee, and enjoining appellant from interfering with appellee's possession of the lot. This decree was entered at an adjourned day of the June, 1938, term of the court. At the prior term of the court an order had been made giving appellee thirty days in which to remove certain buildings he had erected on the land, otherwise a writ of possession to issue, but that order was vacated in effect by another order made at a later day of the same term setting the case down for final submission at the next regular or adjourned term of the court. It is insisted that this last order was ineffective to vacate the first one; but we do not think so. Both orders were entered at the same term of court, and the court had the power, during the term, to make any order which appeared appropriate.

It appears that on August 17, 1923, N. A. Winston owned a tract of land of which the disputed lot was a part, and on that day mortgaged the land to Bessie E. Stone to secure an indebtedness due her. A decree was rendered February 12, 1934, foreclosing this mortgage, and pursuant to this decree of foreclosure the land was sold by the commissioner in chancery to Mrs. Stone. This sale was duly approved and confirmed. Mrs. Stone conveyed the lot to D. P. Churchill, who seeks to dispossess appellee from the lot here in question.

Appellee claims to have bought the land from Winston prior to the execution of the mortgage to Mrs. Stone, and the testimony shows that he entered into possession of the lot prior to the execution of the mortgage to Mrs. Stone. The question is sharply disputed whether Winston ever executed a deed to appellee. If executed, the deed was lost without having been placed of record. Appellee testified that the deed was executed and delivered, and that he went into possession of the lot under it. Two witnesses testifed that they saw in appellee's possession a deed to him from Winston, but they did not know what land it conveyed. There is no contention that appellee ever purchased from Winston any land except the lot here in controversy. The court found the fact to be "that the deed was either made or was an oversight on the part of Winston."

Appellee testified that he took possession of the lot the last of 1922 or the first of 1923, and that he had since been continuously in possession of it, and that he advised Churchill of his possession and ownership of the lot before Churchill purchased the land of which the lot was a part from Mrs. Stone. This fact is denied by Churchill. There appears to be no controversy as to the boundaries of the lot which appellee claims. This lot was directly across the road from another tract of land which appellee owned, and the testimony shows that appellee has been continuously in possession since the date of his alleged purchase. Winston admits making a contract for the sale of the lot for a consideration which was paid, but denied having any recollection of ever having made a deed to appellee, and the effect of that testimony is to deny having made a deed to him. But, as we have said, appellee took possession of the lot under the contract, and has since continuously occupied and claimed to own it. He placed valuable improvements on the lot, and placed a fence around three sides of it.

The court made a finding of fact in favor of appellee, and this finding, which we cannot say is contrary to the preponderance of the evidence, is conclusive of the litigation.

In the case of *American Bldg. & Loan Assn.* v. *Warren,* 101 Ark. 163, 141 S. W. 765, it was said: "Ordinarily, possession by a person under a contract of purchase, although unrecorded, is notice of his equitable rights and interests in the property. Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property. Generally, actual, visible and exclusive possession is notice to the world of the title and interest of the possessor in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor; and if he does not do so, notice thereof will be imputed to him." A number of cases are there cited to support this proposition of law.

The decree does not appear to be contrary to the preponderance of the evidence, and it is, therefore, affirmed.

RICHEY *v.* CRABTREE.

4-5442 127 S. W. 2d 269

Opinion delivered April 17, 1939.

Kenneth C. Coffelt, for appellant.

McDaniel & Crow, for appellee.

McHANEY, J. This action was brought at law by appellee against appellant Albert Richey in unlawful detainer to recover the possession of a certain 40-acre tract of land in Saline county, which he claimed to own as the sole surviving heir-at-law of his aunt, Mrs. Lizzie Wright, deceased. Said appellant answered and claimed the right of possession through appellant, J. B. Richey, who, it was alleged, secured a deed to said land from Mrs. Lizzie Wright, dated May 13, 1936, five days before her death. Appellee then filed an amended complaint, making appellant J. B. Richey a party defendant, and attacking the validity of said deed for lack of consideration and for lack of mental capacity of Mrs. Wright to make same. He moved to transfer to equity and prayed a cancellation of said deed in addition to his prayer for possession. Trial

resulted in a decree for appellee, awarding the relief prayed. The case is here on appeal.

The trial court found that Mrs. Wright was quite old and had been in feeble health, both in body and mind for some time prior to her death, and that "due to her age, physical and mental condition, she was incapable of contracting" and "that there was no good and valid consideration for said property and therefore said deed is void and should be set aside." A decree was entered accordingly, possession was awarded appellee as the only heir-at-law of Mrs. Wright, as also damages for the rental value while appellants were in the wrongful possession.

Appellants contend there is no evidence to support the findings and decree. They have not properly abstracted the record and but for the supplemental abstract furnished by appellee, we would have to dismiss or affirm for non-compliance with Rule 9. We think the evidence sufficient to support both findings of the trial court. Appellee's witness, Dr. C. W. Jones, testified that Mrs. Wright had pellagra; that she had mental and intestinal symptoms, and the matter of sending her to the State Hospital for Nervous Diseases was discussed with her family; that she was in a highly nervous condition which is a sign of emotional instability that goes with this disease; and that she was not capable of transacting business of any importance. Other witnesses testified that she did not appear to be mentally right. The deed recited a consideration of one dollar "and maintenance and support during my life and decent burial at my death, paid and [to] be performed by J. B. Richey." The undisputed proof is that this undertaking was not performed. Said Richey, so far as this record discloses, and he did not testify himself or offer any witness in his behalf, paid nothing toward her support, during the short period of her life, between the date of the deed and her death, and he paid nothing on funeral expenses or the expenses of her last illness. While the right to cancel for failure of consideration might be said to be personal to the grantor and not to extend to the heir, see *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98; *Long* v. *Long,* 104

Ark. 562, 149 S. W. 662; *Jeffery* v. *Patton*, 182 Ark. 449, 31 S. W. 2d 738, still the fact of such failure is rather cogent evidence of fraud in the procurement of the deed under the facts and circumstances here presented.

The decree is accordingly affirmed.

WARD *v.* BAILEY, GOVERNOR.

4-5521 127 S. W. 2d 272

Opinion delivered April 17, 1939.

E. Chas. Eichenbaum, for appellant.

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

GRIFFIN SMITH, C. J. Appellant is a citizen and taxpayer owning a refunding bond issued by the state under authority of act 11, approved February 12, 1934.[1] He asserts invalidity of act 223, approved March 10, 1939. Appellees are the Governor, Lieutenant-Governor, Attorney General, Secretary of State, Treasurer of State, State Bank Commissioner, and State Comptroller, constituting the State Investment Board. The chancellor sustained a demurrer to the complaint.

[1] Pope's Digest, § 11237 *et seq.*

Specifically, it is alleged that act 223 [hereafter referred to as the act] is ineffectual because enacted after appropriations aggregating $2,500,000 had been made by the Fifty-second General Assembly; that the bill, not having received a vote equal to three-fourths of all members elected to each branch of the legislature, failed because of § 2 of Amendment 19 to our Constitution.

It is asserted that §§ 2 and 3 are invalid because certain obligations to be refunded did not, as originally executed, carry a pledge of the full faith and credit of the state; that when bonds are sold to raise funds for payment of the old issues, the state's indebtedness will have been increased, and the transactions will offend against Amendment 20 to the Constitution.

Invalidity of § 4 is affirmed because it undertakes to exempt bond income from taxation, in contravention, as it is said, of § 6, Art. XVI, of the Constitution.

Appellant thinks § 7 is unsound because of the method provided for sale of bonds, the directions being ". . . . too indefinite to invest the Board with proper ministerial powers."

That § 9 undertakes to create in the State Treasury accounts ". . . which are not within the scope of the sovereign power, and are in contravention of Articles V and VI of the Constitution."

That § 10 is void because it provides for the repurchase of bonds to be held in trust for the benefit of various state funds used in making such purchase, ". . . whereas a purchase, exchange, or receipt of state obligations by the state or any agency thereof is, in effect, a cancellation of said bonds so purchased, exchanged, or received, and the cancellation of said obligations outstanding is an unfair discrimination, pursuant to act 11 of 1934."

Complaint is made of § 11 and its invalidity is urged on the ground that ". . . the language therein used in defining the total amount of money made available to the state for investment is too indefinite to permit the enforcement of said section; . . . that the said act, in making available 50 per cent. of the available daily state fund balances on the records of the Treasurer of

State for the two years preceding the date of advertising is too indefinite to permit enforcement thereof."

Section 18, appellant declares, is in conflict with § 4, Art. XVI, of the Constitution,[2] in that appropriations for fees and services are not definitely fixed.

Powers delegated to the Investment Board by § 19 are not, according to the complaint, functions of government, but are merely commercial transactions, ". . . and clearly in contravention of the Constitution of Arkansas; [and] further, § 19 is invalid for the reason that, in effect, it provides for a pyramiding of the state's indebtedness, constituting an increase of the state's obligations."

Generally, it is alleged that §§ 1 through 21 ". . . are invalid and unconstitutional [because of the reasons specifically assigned], and that investment of the funds in pursuance of the act constitutes a use in contravention of Art. XVI, § 11, of the state Constitution; [and] the act in its entirety is invalid for the reason that the effect of same on the Bond Redemption Fund as set up in act 11 of 1934 . . . will be to deprive said fund of amounts heretofore specifically allocated for the purpose of said Bond Redemption Fund, . . . and for the further reason that the act provides an unwise, speculative venture by the State of Arkansas in the commercial marts, which your plaintiff believes to be against the public policy and definitely proscribed by constitutional limitations."[3]

[2] Section 4, Art. XVI, of the Constitution is quoted in full in the seventh subdivision of this opinion.

[3] Act 223 is entitled: "An Act to Provide for Issuance of State Penitentiary Refunding Bonds to Retire Outstanding Penitentiary Funding Notes, Issued Under Authority of Act 246 of 1933, and Outstanding Penitentiary Warrants; for the Issuance of Arkansas State Teachers Refunding Bonds to Retire Outstanding Arkansas State Teachers Certificates of Indebtedness Issued Under the Provisions of Act 89 of 1935; for the Issuance of State Permanent School Refunding Bonds to Retire Permanent School Bonds Issued Under the Provisions of Acts 128 of 1917 and 356 of 1921 and State Debt Board Notes Issued Under the Provisions of Act 337 of 1935; for Investment of a Limited Amount of Cash Balances in the State Treasury in Obligations of the State; for Revenues to Service the Bonds Issued Hereunder; for Appropriations to Carry Out the Provisions of this Act; and for Other Purposes."

First—Was Act 223 Legally Passed?—The official calendar of the Fifty-second General Assembly (1939) shows introduction of House Bill No. 216 and its passage by the House February 1 by a vote of 72 to 14; adoption of emergency clause by the same vote. In the Senate two amendments were adopted. There was a ruling by the Lieutenant Governor that 27 votes were necessary to passage. The vote was 25 to 5, with notice of reconsideration. On reconsideration the bill was passed, as amended, by a vote of 32 to 2; emergency clause adopted 30 to 2. It was returned to the House as amended and as passed by the Senate. Senate amendments were concurred in February 17. The bill was ordered engrossed February 20. It was reported correctly engrossed February 21; read the third time; passed February 22 by a vote of 76 to 13; emergency clause adopted by the same vote.

The bill was regularly passed in each branch by a vote of three-fourths of all members elected thereto.

Second—Bonds of the Penitentiary, State Teachers College, and Permanent School Fund.—Act 246, approved March 29, 1933, authorized the State Debt Board to issue bonds or notes for the purpose of paying obligations of the State Penitentiary then evidenced by warrants. The bonds, dated January 1, 1934, drew interest at the rate of 3 per cent. per annum, and mature October 1, 1939. By § 8 of the 1933 act it was provided that "The bonds issued pursuant hereto shall be registered with the Treasurer of state, [and] shall carry on the face thereof a pledge of the full credit of the State of Arkansas." The total of such bonds was $308,272. Warrants unfunded amounted to $5,247.67, the two items being $313,519.67.

Act 223 directs issuance of State Penitentiary Refunding Bonds in an amount equal to the combined indebtedness of 1934 penitentiary bonds and the outstanding warrants. Such refunding bonds may be sold, and the proceeds applied in payment of the old bonds and warrants; or, in the alternative, refunding bonds may be exchanged for the old obligations.

While the bonds issued in 1934 and the old warrants are primary obligations of the penitentiary, the credit of the state was pledged to their payment. Act 246 ex-

pressing the pledge was passed prior to effective date of Amendment 20. Therefore, issuance of the new bonds does not come within the prohibition of the amendment.

By act 199[4] of 1925 the Treasurer of State was directed to transfer $100,000 from the Permanent School Fund and place it to the credit of the State Normal Fund. Arkansas State Teachers College issued its note, at 5 per cent. interest. Interest from 1928 to 1934, inclusive, was not paid. The creative debt, with interest of $35,000 to September 1, 1934, was funded under authority of act 89 of 1935. The original debt to the Permanent School Fund, with interest, was an obligation incurred by direct legislative action. There was an implied commitment that the state would repay the School Fund.

It is urged that payment should be made by the college, as distinguished from the state, and that such payment should come from the institution's apportionment of the cigarette tax. This tax was allocated by act 19 of 1931. The inceptive debt and the promise to pay interest were outstanding before the cigarette tax was dedicated to the building funds. We do not agree that the debt was one other than of state responsibility. [The funded debt of $135,000 had been reduced to $124,000 as of December 31, 1938.]

Act 89 also provided for the funding of a $10,000 indebtedness of the college incurred for materials used in making repairs to buildings, equipment, and utility lines under the federal relief program during 1934 and 1935; also for issuance of $25,000 in certificates of indebtedness to pay residue for construction of a library building. The State Comptroller's report for 1938 shows that unpaid balances of the two items amounted to $6,500 as of December 31, 1938.

---

[4] Act 199 of 1925 required the State Debt Board, composed of the Governor, Secretary of State, and Treasurer of State, to issue a certificate for $100,000, ". . . and [to] deposit said certificate in the Treasury to the credit of the Permanent School Fund," etc. Section 3 required "The interest and payments on this certificate [to] be paid out of the State Normal Fund, and a sufficient portion of the millage tax levied and collected for the maintenance and operation of the State Teachers College is hereby pledged for these purposes."

Authority for construction of the library building is derived from act 133 of 1933, the appropriation having been made from the permanent building fund of the college (the cigarette tax). The state did not, even impliedly, obligate itself to payment of this indebtedness, either by act 133 or by act 89. The balance of $6,500 cannot be included in the refunding operations of act 223. To do so would increase the state's indebtedness without a vote of the people, in violation of Amendment 20.

Act 223 authorized issuance of State Permanent School Refunding Bonds aggregating $397,284.42.

In 1917, when 5 per cent. Permanent School Fund Bonds were substituted for 3 per cent. bonds, total securities amounted to $1,134,500. In 1929-30, $1,000,000 of Revolving Loan Fund Bonds were sold and proceeds ($996,311.68) deposited in the treasury. The continuing bond account should have been the difference between $1,134,500 and $996,000. Therefore, interest-bearing bonds chargeable to the treasurer, and standing to the credit of the Permanent School Fund, were $138,500.[5]

In 1921[6] general revenue was used by the penitentiary as an instrumentality for borrowing from the Permanent School Fund, and the State Debt Board deposited 5 per cent bonds amounting to $180,000. These two items —$138,500 and $180,000—constitute the claim of $318,-500 acknowledged by the state to be due the Permanent School Fund.

Act 337 of 1935 directed the State Comptroller ". . . to report in writing to the State Debt Board a detailed account of his findings with reference to the Permanent School Fund accounts, and to recommend adjustments necessary to balance the accounts and estab-

[5] Act 128 of 1917 directed substitution of 5 per cent. bonds for 3 per cent. bonds "now held in the treasury to the credit of the school fund." A property tax of ⅛th of a mill was levied as an "interest sinking fund" for the purpose of paying the annual interest on the Permanent School Fund.

[6] Act 356 of 1921 directed the Treasurer of State to transfer $180,000 from the Permanent School Fund to the General Revenue Fund, interest to be paid from the State Sinking Fund. Act 357 of 1921 directed the Treasurer to transfer $180,000 from the General Revenue Fund to the "Special Penitentiary Fund."

lish the true amount of Permanent School Fund Bonds which are outstanding."

The report was made September 1, 1935. Among other recommendations was one for issuance of $78,784.42 of State Debt Board Notes to the Common School Fund in payment of interest on Permanent School Fund Bonds to September 1, 1934. The State Debt Board duly received and approved the report.

It will be observed that the transactions involving $138,500, $180,000, and $78,784.42, were acts of the State Debt Board. Subject matter in each instance was an indebtedness existing prior to adoption of Amendment 20. Hence, these obligations may be treated in the manner provided by act 223, without violating the amendment.

Third—Tax Exemptions.—Article XVI, § 6, of our Constitution is: "All laws exempting property from taxation other than as provided in this Constitution shall be void."

Section 4 of act 223, in respect of State Penitentiary Refunding Bonds, Arkansas State Teachers Refunding Bonds, and State Permanent School Refunding Bonds, provides that they shall be the negotiable, direct, general obligations of the state for the payment of which, principal and interest, the full faith and credit of the state and all of its resources are pledged, [and] "The income from such refunding bonds shall be non-taxable . . ."

Appellee construes this provision to exempt income from such bonds from the income tax law of 1929 [act 118]. Under this construction the exemption is valid. The Legislature cannot, however, exempt from general taxation bonds or the income therefrom. Bonds are property within the meaning of our Constitution. Bond earnings, if paid, become money in possession, and are therefore property; if unpaid, the interest enhances the value of such bonds and appreciates their worth as property.

Fourth—Indefinite Directions to Investment Board.—The General Assembly has clearly directed how Penitentiary Refunding Bonds, State Teachers Refunding Bonds, and Permanent School Refunding Bonds shall be sold. There are provisions for notice by publication, description of the bonds, exaction of a deposit by bidders

as evidence of good faith, etc. The right is conferred upon the board to reject unsatisfactory bids, and to exchange new bonds for the old bonds in lieu of payment. Sales may not be made at less than par and accrued interest.

Some discretion is vested in the board, including the determination of bond maturities, but interest rates cannot exceed three per cent. Appellant's objections are not sustained.

Fifth—Repurchase of Bonds.—Section 10 of the act empowers the board to purchase [from an appropriation of $4,000,000 carried in § 18] ". . . State of Arkansas interest-bearing, direct general obligation bonds, executed by state officials, for which the faith and credit of the state are pledged." There is this direction:

"The board shall, as soon as practicable, and from time to time, give notice by publication that it desires to purchase for the state, bonds of the character which it is authorized by this act to purchase. Not more than thirty days nor less than twenty days prior to the time of the offer of bonds for sale to the state, the board shall cause to be published . . . notice requesting offers to sell bonds to the state and fixing the time and place at the State Capitol Building in the city of Little Rock, at which such offers will be received.

"On the date and time fixed for the purchase of bonds the board, or one or more members thereof, shall open and carefully compare the offers made. All bonds shall be purchased with primary regard to the best interest of the state's credit standing and revenues.

"No purchase, exchange or receipt of state obligations by the State Investment Board shall ever be construed as a cancellation of the obligations so purchased, exchanged or received and all state bonds and other obligations purchased and received by the State Investment Board under the terms of this act shall be held in trust for the use and benefit of the various state funds used in such purchases, this trust being subject only to the right to hypothecate, sell or exchange such obligations under the provisions of this act."

A limitation of the board's authority to exercise the powers conferred by § 10 is found in § 11, where it is enacted that "The total amount of moneys hereby made available to the board for investment shall not exceed, in the aggregate, fifty per cent. of the average daily state fund balances on the records of the treasurer of state for the two years preceding the dates of advertising for the purchase of bonds. The board shall decide upon the maximum amount to be used in the purchase of bonds on any advertised offering date and such amount shall be specified in the notice. The funds to be used in the purchase of bonds, referred to in this section, are moneys which may hereafter be deposited in banks to the credit of the treasurer of state."

Appellant's objection is that when the state purchases bonds, the effect is a cancellation, and this, he says, ". . . is an unfair discrimination, pursuant to act 11 of 1934."

Actually, the question involved is whether, in directing the investment of treasury cash balances in bonds of the state, the Legislature has infringed upon § 11 of art. 16 of the Constitution, which provides: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no money arising from a tax levied for one purpose shall be used for any other purpose."

This court, in *Collins* v. *Humphrey*,[7] (opinion by Chief Justice HART), held that the restrictions of art. 16, § 11, are applicable to all subjects of taxation, and not alone to property taxes, saying: "It was intended that no money arising from a tax levied for one purpose shall be used for any other purpose . . . In other words, the Legislature has no power to divert a fund after the tax has been levied and collected, and transfer it to another and separate purpose. If it could transfer the funds thus levied and collected, it might seriously embarrass the administration of the state government." The opinion contains this further statement: "Our Constitution has set aside certain revenue raised from property taxes to be held sacred for the benefit of common schools,

[7] 181 Ark. 609, 27 S. W. 2d 102.

and the Legislature is without power to divert it. The funds here sought to be diverted from the common schools is not set aside by the Constitution for that purpose. The application of the taxes raised under both the Severance Tax Law and the Income Tax Act of 1929 is left entirely to the control of the Legislature, there being no restriction of their application in the Constitution."

Clearly, the purpose in authorizing purchase by the state of its own general obligation bonds was to provide a method by which treasury cash balances would earn an income. Section 12 of the act directs that "The interest received from all bonds in the Bond Purchase Account [created in the treasury] shall be credited by the treasurer to the State Sinking Fund.[8] All moneys credited to the State Sinking Fund during any fiscal year in excess of the debt service requirements for such year shall be transferred . . . to the Excess Par Value Bond Account. The principal amount of any bonds, when paid, shall be charged to the Bond Purchase Account and credited to the Cash Account in the state treasury. In the event the State Depository Board determines it to be necessary to sell any bonds in the Bond Purchase Account for the purpose of increasing the Cash Account in the state treasury to meet unusual demands for such cash [§ 13], then such State Depository Board shall notify the State Investment Board to that effect and set out the amount of cash needed. Thereupon, the board shall decide which of the bonds in the Bond Purchase Account shall be offered for sale." Notice shall be given, etc. The board determines the best bid. There is no restriction against a less-than-par sale.

Section 18, in addition to appropriating $313,519.67 to facilitate handling of penitentiary bonds, contains this provision:

"After the effective date of this act, all moneys collected and paid into the state treasury shall, for the purpose of this act, be deemed to be revenues available for investment in the manner provided herein. There is here-

[8] From the State Sinking Fund interest on certain obligations is paid; if the Sinking Fund is insufficient, recourse is had to the General Revenue Fund.

by appropriated out of such revenues for the purpose of investment the sum of $4,000,000."

Is the use to be made of the four million dollars (or any part of it) a diversion of moneys collected for a specific purpose? Does it result in applying such funds to a purpose impliedly prohibited by § 11 of art. 16 of our Constitution?

The authority conferred by § 11, making available to the board for investment purposes an amount ". . . not to exceed, in the aggregate, 50 per cent. of the average *state fund balances* [based] on the records of the state treasurer for the two years preceding the date of advertising for the purchase of bonds," must be construed in connection with the appropriation of $4,000,000. Each is a limitation upon the other. If the average [state fund] balances exceeds $8,000,000, still not more than $4,000,000 may be used. If, on the other hand, such balances are less than $8,000,000, the full sum of $4,000,000 cannot be used.

The term "state fund balances" is obviously used in § 11 to carry a particular meaning. The question arises, Are we to construe this language to include the general revenue alone (which, admittedly, is a state fund, not created under a tax levied for a specific purpose), or are we to say that public school funds, game commission revenues, funds arising from ad valorem taxes for the express benefit of certain institutions or agencies, and others of like significance, are not state fund balances, and therefore are not within the purview of the investment provision?

Shall we adopt a restrictive construction, and say that because act 11 of 1934 dedicates certain funds as highway revenues and in effect makes the state a trustee, the general cash balances in the treasury must not be used for purposes expressed in § 10 of act 223? Or, shall we say that bonds purchased in the manner proposed are cash items in the treasury, permissively substituted for the actual money originating in tax sources?

If we adopt the latter construction, there is a possible loss to tax funds. If the contingency recognized in § 13 should arise, and it became necessary as an emer-

gency measure to sell the investment bonds, there might not be a ready market nor a par bid; yet, under existing laws, the treasurer places millions of dollars with banks, without interest, and the only guarantee of demand availability is the bank's stability, plus $5,000 deposit insurance of the federal government.

The Legislature, unless prohibited by the Constitution, has a right to declare the fiscal policy we have discussed, and under the scheme of investment, large sums of money may be earned for the state. Certainly there is no express denial of the state's right to purchase its bonds, and if the plan of § 10 is to be condemned, that condemnation must be implied.

The accepted rule of construction is that ". . . an act of the General Assembly is presumed to be framed in accordance with the Constitution, and it should not be held invalid for repugnance thereto unless such conflict be clear and unmistakable."—*Dobson* v. *State*, 69 Ark. 376, 63 S. W. 796. "The courts have nothing to do with the wisdom or expediency of a statute."—*Fort Smith* v. *Scruggs*, 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921, 91 Am. St. 100. "The mere fact that a statute may seem to be more or less unreasonable and unwise does not justify a court in annulling it, as courts do not supervise legislation and keep it within the bounds of propriety and common sense."—*Little Rock* v. *North Little Rock*, 72 Ark. 195, 79 S. W. 785.

These expressions are in accord with the course of construction and operation of statutes. Citation of authority to reinforce such canons would be cumulative.

For the moment we suspend discussion of the state's right to purchase its bonds, and will turn our attention to § 19 of the act, wherein it is provided:

"The State Investment Board is further authorized and empowered to borrow money from a bank, trust company, or any other lending agency, or from any federal agency and secure the payment of the same by pledging the bonds, or any portion thereof, purchased under the provisions of § 10 of this act. Such money so borrowed shall be used to purchase bonds in the manner and of the kind and character described in said § 10, and the

bonds so purchased by the board may be pledged as herein provided for borrowing more money with which to purchase additional bonds and such operation of borrowing money, pledging bonds as security for money borrowed and purchasing additional bonds may be repeated from time to time as in the discretion of the Board may seem advisable.

"No money shall be borrowed at a greater rate of interest than the lowest rate of interest drawn by any of the bonds so pledged, and no money shall be so borrowed for a greater length of time than six months, but loans may be renewed from time to time with the same or like security and for the same length of time as the original loan. Interest may be paid on the money thus borrowed out of interest payments on the bonds so pledged. At no time shall the money so borrowed exceed the principal of bonds pledged, and no evidences of debt or pledges of securities under this section shall be construed as increasing the state's existing outstanding indebtedness. For the purposes of this section there is hereby appropriated for the use of the State Investment Board the sum of $6,000,000."

Here the Board is empowered to invest and reinvest. Assuming that under authority of § 10, the state acquires $4,000,000 of bonds: the Board may take these securities and pledge them for additional funds. The language used is that the Board may "borrow," and that ". . . such money so borrowed shall be used to purchase bonds in the manner and of the kind and character described in § 10."

With $4,000,000 of bonds representing money paid from state fund balances in making purchases (but theoretically held in the treasury in substitution) the Board may borrow from a bank, trust company, or other lending agency, and execute the state's promise of repayment. The promise is redeemable in not more than six months, but ". . . loans may be renewed from time to time with the same or like security and for the same length of time as the original loan."

The difficulty here encountered is twofold: If the Board pledges $4,000,000 of bonds for $3,500,000 of new

money [a purely arbitrary figure adapted to this opinion], the new money must be deposited in the treasury, and it is subject to use in buying more bonds. But the treasury, in the first instance, [if we assume the lending agency will require margins in bonds in excess of loans, and if we further assume the bonds were purchased at approximate par] will have paid out $4,000,000, and when the treasurer parts with such bonds he receives only that percentage the lending agency is willing to advance.

In the case of a $4,000,000 bond hypothecation for an assumed $3,500,000 loan of new money, there would be a shortage of $500,000 in the treasurer's accounts. This condition is not sterilized by language of § 10 that the trust created in the bonds is ". . . subject only to the right to hypothecate, sell or exchange such bonds under the provisions of this act."

If it be urged that no such shortage in fact exists; that the primary bonds are still constructively in the treasurer's custody (but pledged for $3,500,000 new money), the contradiction is that under its pledge the lender has a right to sell if the state fails to repay the loan. From proceeds the lender may first reimburse itself.

The pyramiding process under § 19 may go on indefinitely but for the limitation of the appropriation to $6,000,000. The result would be that as an incident to each transaction there will be an increase of the treasurer's contingent loss on the initial venture—this to continue as long as new money acquired from time to time does not equal the purchase price of the pledged bonds.

We now return to a consideration of the status of bonds purchased under authority of § 10.

Accepting, as we do, the theory that when bonds are treated as cash the constitutional prohibition against diversion will not have been violated if highway revenues dedicated under act 11 of 1934, and the common school funds, are excluded from use, this theory becomes a fantasy if the board may cause the bonds to be taken from the treasury without substituting an equivalent—either cash, or par value securities of acceptable character.

We know that common school funds, and other funds which under the organic law cannot be taken for alien purposes, are included in the average daily balances referred to in § 11. We know that highway revenues, heretofore in effect declared to be trust funds, are a part of the balances from which the $4,000,000 appropriation is made, because it is enacted that ". . . *all* moneys collected and paid into the state treasury shall, for the purpose of this act, be deemed to be revenues available for investment." Nothing is excepted.

But we must not assume that mere availability of the appropriation will cause the Board to utilize highway trust funds in the purchase of bonds, nor that the Board will take from the school fund moneys constitutionally protected.

By act 11 of 1934 [9] the state assumed definite obligations in exchange for considerations agreed upon. The act is too voluminous to be analyzed here; but certainly it contains commitments in respect of funds which clothe such funds with the attributes of a trust.

If it be urged that the power of a state to violate its trust is inherent in the General Assembly (though the obligations of the contract cannot be impaired), the answer is that the Legislature has no power to divert a fund after the tax has been levied and the money collected, and, as Judge HART said in the Collins-Humphrey Case, "transfer it to another and separate purpose." The 1934 refunding law enumerates the purposes for which highway revenues may be used, and by affirmative declaration excludes all other uses. To permit use of highway funds in buying bonds (including highway bonds) in a manner contrary to the refunding law would violate the obligations incurred when the state guaranteed that such

[9] The last paragraph of § 2 of act 11 of 1934 is: "The transfer or appropriation of any money from the State Highway Fund, or from the State Highway Revenues, or of any funds arising from motor vehicle licenses, fees or taxes, or from taxes on gasoline, to or for any purpose other than as specified in this act, and expenses of collection, shall be deemed to be an immediate default on the part of the State with respect to the obligations authorized to be issued hereunder."

revenues would be kept intact within certain created accounts.

However, there *are* available funds for the Board's utilization, and the enactment is not invalid *per se*. We hold, therefore, that the Board may proceed under the plan of § 10 and purchase bonds with $4,000,000, or take for such purpose a sum not in excess of 50 per cent. of the balances as defined, exclusive of the school and highway revenues as herein identified.

Sixth—Sections 10 and 19 in Conflict.—As has heretofore been shown, bonds purchased from "state fund balances" shall be held in trust. When bonds are pledged to lending agencies the trust is violated because the lender has authority to sell the collateral; and this is true notwithstanding express authority under the act to make the pledge. Possession and dispossession cannot concurrently exist.

If loans should be made on notes or other forms of promise executed by the Board, the created status is that of borrower and lender, the primary obligation being the state's promise to pay, the collateral being secondary to the promise. For bookkeeping purposes, the debt of the state has been increased to the extent of the note or notes—and in fact, these new obligations are *bonds* within accepted definitions. The lender cannot sue the state, but the state may legally give its promise unless the particular promise is prohibited by the organic law. If the promise is broken, obligations of the contract remain, but without facility of enforcement. The trust fund, then, is in reality all the lender may administer upon in the event of state default.

But Amendment 20 says the state shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the state "*or any of its revenues for any purpose whatsoever.*"

If money is taken from state fund balances and invested in bonds in trust, and if these bonds are cash items in substitution of the actual money, and if the state cannot pledge (for new debt purposes) "*any of its revenues for any purpose whatsoever,*" and if a note or promise executed by the Board is a bond—then how can

it be said that revenues of the state are not being pledged in a manner contrary to the purposes of Amendment 20?

Seventh—The Appropriation of $5,000.—Section 18 carries an appropriation of $5,000 from the State Sinking Fund for the biennial period ending June 30, 1941, ". . . for the purpose of paying for legal notices, printing and lithographing bonds, approving opinions, and for all other expenses incidental to carrying out the provisions of [the] act."

This is not an omnibus appropriation of the kind prohibited by § 30 of art. 5 of the Constitution. The money is made available to the Board for payment of necessary expenses, but these expenses must not include salaries and fees. In order to pay salaries and fees there must have been compliance with § 4 of art. 16 of the Constitution, which provides: "The General Assembly shall fix the salaries and fees of all officers of the state, and no greater salary or fee than that fixed by law shall be paid to any officer, employee, or other person; . . . and the number and salaries of the clerks and employees of the different departments of the state shall be fixed by law."[10]

Eighth—Bonds Not to Be Cancelled.—While ordinarily a purchase by the state of its own bonds would have the effect of cancellation, it is within the power of the Legislature to permit such bonds to be bought and held in trust (as the act provides) for the benefit of the several funds from which purchase money is taken. There is at least the fiction of an existing indebtedness. If purchase did, in fact, effect cancellation, then to that extent the state's debt would be reduced. If after cancellation the bond should be sold, the state's debt would be increased. Since there is no cancellation, but merely an acquirement in trust, we think the Legislature did not transcend its authority in declaring the policy.

The decree is modified to conform to this opinion, and as so modified it is affirmed.

SMITH, MEHAFFY and MCHANEY, JJ., dissent as to modification.

---

[10] *Nixon* v. *Allen*, 150 Ark. 244, 234 S. W. 45; *Pulaski County* v. *Caple*, 191 Ark. 340, 86 S. W. 2d 4.

YORK *v.* CHAPPELL.

4-5441 127 S. W. 2d 266

Opinion delivered April 17, 1939.

Northcutt & Northcutt, for appellant.

Oscar E. Ellis, for appellee.

HUMPHREYS, J. One of the appellees, Lula Bell Chappell, brought a suit against appellant in the chancery court of Fulton county to cancel a donation certificate and a donation deed issued by the state of Arkansas to appellant for a hundred and fifty acre tract of land in said county particularly described as follows:

"Southeast quarter of the northeast quarter except a strip 100 yards wide north and south off of the north end thereof; also the east half of the southeast quarter, all in section 35 and the southwest quarter of the northeast quarter of section 36, all in township 20 north of range 8 west of the 5th P. M. in Arkansas"; and for the

value of rents for the years 1936 and 1937 in the sum of $100 and value of timber removed therefrom in the sum of $150, alleging that the certificate and deed were void because said land was not subject to donation, setting out particularly the reasons why said certificate and deed were void.

Appellant filed an answer to the complaint in which he denied the reasons alleged by Lula Bell Chappell why the donation certificate and deed should be canceled, but did not deny that she was the original owner of the land. In addition to asking for a dismissal of the complaint he prayed that in the event the court should cancel same as void he be given as betterments for improvements made thereon in the total sum of $280.75 for work done, labor hired, material furnished, etc., and filed an itemized statement as an exhibit to the answer.

Thereafter, the other appellee, Mattie York, filed a motion to be made a party plaintiff with Lula Bell Chappell on the ground that she and Lula Bell Chappell owned the land jointly having bought same and obtained a warranty deed thereto from Louis H. Whitaker and wife, Mary Whitaker, on January 13, 1913, which deed was duly recorded in Fulton county, Arkansas, and attached said deed as an exhibit to the motion, and in the motion she adopted the allegations and matters set up in the complaint filed by Lula Bell Chappell as their joint cause of action.

Thereafter Lula Bell Chappell and Mattie York filed an amendment alleging that appellant had occupied the land for the years 1936 and 1937 and that the rental value per year thereon was $50 and that appellant had removed timber from the land worth $150, and requested judgment for same and denied that they were indebted to him for any improvements made thereon.

Appellant filed no answer or reply to the amendment to the complaint.

On July 1, 1938, the cause was heard upon the pleadings, the exhibits thereto and the depositions taken and filed in the case by the respective parties from which the court found that appellees were the original owners of the land and that the land was not subject to donation on

February 14, 1936, when appellant obtained his donation certificate from the state and that it and the donation deed issued thereon on March 9, 1938, were void and should be canceled, and further found that appellant entered upon the property immediately after obtaining the certificate and made improvements thereon to the extent of the sum of $75 and was entitled to a lien on the land for said sum and ordered the sale of the land to pay said amount.

Appellant and appellee saved exceptions to the decree in so far as adverse to them and each prayed and was granted an appeal to the Supreme Court and the cause is before us for trial *de novo.*

Appellant contends that the decree should be reversed because the record is insufficient to show that appellee owned the land or that same was not subject to donation at the time he obtained his certificate and deed and found that the judgment was erroneous in not allowing him more than $75 for improvements.

Appellees contend that that part of the judgment allowing $75 for improvements is error and that the court should have allowed them $250 for rent on the land for the years 1936 and 1937 and for timber removed by appellant from the land.

The lands in question had been forfeited to the state for the nonpayment of taxes and were not subject to donation if any part of them had been in cultivation within a period of five years prior to the date application to donate them was made.

Section 5 of act 128 of the Acts of 1933 is as follows: "No lands which are enclosed or which have improvements situated thereon of a value in excess of $200 shall be subject to donation and proof that these conditions do not exist must be furnished by the prospective donee upon certificate of the county judge, circuit clerk, county surveyor and one disinterested citizen of the county in which the land sought to be donated is located." Section 6 of said act provides, in part, that "It is the intention of this act to provide for the donation only of wild and unimproved lands for home making purposes . . ."

The contention that appellees were not the original owners of the land is without merit. They alleged ownership and their deed thereto was attached as an exhibit and when the court found that they were the owners of the land the testimony supported the finding.

We deem it unnecessary to set out the evidence relative to the character of the land *in toto*. Suffice it to say that the evidence is overwhelming that a part of the land was fenced and that there was a log house and other improvements on the land when appellant applied for and obtained his donation certificate on the 14th day of February, 1936. There is practically no dispute that a part of it was cultivated during the year 1933 by a man by the name of Lawrence who was residing in the log house at that time and that he repaired damage done to this house by a storm in that year. The evidence also shows without dispute that Lawrence obtained a crop loan from the Government on his crop in 1933. The clerk and recorder of the county testified that the crop mortgage was executed on March 22, 1933, and a copy of the mortgage appears in the record and shows that there were sixty acres in cultivation at that time. The evidence also shows without dispute that a man by the name of John Brunk, who lived on the adjoining farm, used the lands for pasture all the time until appellant obtained his certificate of donation. A decided weight of the evidence reflects that the land was not wild and unimproved at the time appellant applied for his certificate of donation. There is another potent fact which indicates that the land was not wild and unimproved appearing in the record and that is the fact that appellant himself resides in the log house which was on the property at the time he entered the premises under his donation certificate.

The only evidence offered by appellant tending to show the contrary is his own and that of several witnesses introduced by him who state that at the time he applied for his donation certificate and entered same thereunder that the lands appeared to have been out of cultivation for six or seven years.

We have concluded after a careful reading of the testimony that the finding of the chancellor is sustained

by the great weight thereof to the effect that the lands had been under cultivation within five years prior to the date of his donation certificate and that same was not wild and unimproved land.

No proof was offered by appellant to the effect that the improvements he made thereon during his occupancy of same enhanced the value of the land. The evidence is undisputed that he raised a crop upon the land in 1936 and 1937 and that he sold 100 ricks of wood for which he received $1.25 per rick. It was alleged that the rental value of the place per year was $50 and that the value of the timber removed was $150. No denial of either allegation was made by appellant in his pleadings.

In the absence of any testimony showing that the improvements appellant made on the place enhanced the value of the land, and in view of the fact that he occupied it two years and raised crops thereon and cut and removed considerable timber therefrom, the court should have offset the improvements with the value of the rents and timber.

We think the court erred under the evidence in the instant case in allowing appellant $75 for improvements and declaring a lien on the land to pay same without taking into account the value of the rents and the value of timber removed by him from the lands. The equitable thing to have done would have been to offset the improvements with the rental value and timber removed by appellant. In other respects the decree is correct. The judgment is, therefore, modified by disallowing appellant $75 for improvements and, as modified, is affirmed.

JOHNSON *v.* RUSSELL, MAYOR.

4-5535 127 S. W. 2d 260

Opinion delivered April 17, 1939.

H. G. Leathers, for appellant.

Claude A. Fuller, for appellee.

HOLT, J. On the 5th day of January, 1939, appellant, O. F. Johnson, an aggrieved property owner, brought suit in the Carroll chancery court, Western District, to enjoin the City Commissioners of the city of Eureka Springs, Arkansas, and their contractor, from proceeding with the construction of a sewage disposal plant.

On January 24, 1939, the court sustained a demurrer to appellant's complaint and in its decree dismissed the complaint for want of equity. Appellant refused to plead further, elected to stand on his complaint and prayed an appeal to this court, which was granted. Subsequently on February 18, 1939, appellant's attorney made the following entry on the docket of the trial court: "Plaintiff's prayer for appeal withdrawn and case dismissed without prejudice, in vacation, by H. G. Leathers, attorney for plaintiff, this 18th day of February, 1939."

On the same date, subsequent to the above dismissal, appellant Johnson, the same plaintiff who filed the complaint referred to above, filed another suit in the same court between the same parties setting forth allegations substantially the same as in his first complaint and

praying the same relief. The material portions of these allegations are: "That A. J. Russell is Mayor of the city of Eureka Springs, Arkansas, and Ray Freeman is the city clerk of said city; that A. J. Russell, Ray Freeman and Joe Morris are commissioners of the city of Eureka Springs, Arkansas; that they and each of them were acting as such at all times hereinafter mentioned and set forth, and that on, or about, the 29th day of December, 1938, they and each of them acting as such, entered into a purported contract with one H. Perkins of Fayetteville, Arkansas, for the construction of a sewage disposal plant for the use and benefit of the city of Eureka Springs, Arkansas.

"Plaintiff states that there was, in fact, no contract for the installation of said sewage disposal plant for the reason that the defendants were without the ability to contract, not having been vested with that authority by proper ordinance, and that any purported contract entered into by them was by their own volition and that they are now, and have been for some time proceeding with the work to the detriment and to the expense of the taxpayers of Eureka Springs, Arkansas, without any legal authorization whatever, and without any authority of law, they have usurped the authority to contract for and build a sewage disposal plant at a cost far in excess of the needs of Eureka Springs, Arkansas, all at the cost of, to the detriment of, the taxpayers of Eureka Springs, Arkansas," and if allowed to proceed, "will work an irreparable loss on the taxpayers for which they have no adequate remedy at law."

"Petitioner will show the court that a sewage disposal plant adequate to take care of the needs of the city of Eureka Springs, Arkansas, could be built for approximately $8,000.00; that said disposal plant would be of the proper type, the proper capacity, and in every way a sufficient disposal to meet adequately all the needs of Eureka Springs at this time, or an increase in population up to ten thousand."

To this latter complaint on appellees' motion to make more definite and certain, appellant added the

following amendment: "That in compliance with the defendants' motion to make more specific and certain the complaint of the plaintiff, plaintiff files herewith and marks exhibits ....
the minutes of a special meeting of the City Commissioners held on December 23, 1938, at which time bids were received from contractors and the contract awarded to defendant H. L. Perkins.

"The minutes of a special meeting of the City Commissioners held on December 27, 1938, at which time an ordinance was introduced establishing just and equitable rates for sewer charges, etc.

"Ordinances number 696 and 697 passed by City Commissioners.

"Minutes of meeting of the Sewer Committee."

The record reflects that three other citizens of Eureka Springs, Perry C. Mark, Chas. E. Border and R. R. Thompson, were allowed to intervene and be made parties plaintiffs along with appellant, Johnson.

To this latter complaint as amended, appellees filed a demurrer alleging, among other things, that the complaint as amended did not state facts sufficient to constitute a cause of action.

The court entered a decree sustaining the demurrer, and appellants electing to stand on their complaint, the court entered a final order dismissing appellants' complaint for want of equity, and from this decree comes this appeal.

This record reflects that the city of Eureka Springs, Arkansas, is operated under a commission form of government under Act 305 of 1915, p. 1249, as amended by Act 439, p. 1984, of the General Assembly of 1917. A J. Russell, Ray Freeman and Joe A. Morris are the acting commissioners. A. J. Russell was designated as Mayor. Under the aforesaid authority these three Commissioners constitute all committees and are the Commissioners of all improvement districts and other agencies of the city government.

In the fall of 1938, the city of Eureka Springs, Arkansas, made application to the Public Works Adminis-

tration for a loan and grant for the purpose of remodeling and building a sewage disposal plant on property owned by the city. The Public Works Administration approved the city's application for a grant of $12,273 and agreed to accept bonds in the sum of $15,000, said bonds to be retired from a fund collected monthly from the property owners and users of the sewer system. In pursuance to said agreement, the appellees selected an engineer, who drew plans and specifications, which were approved by the Federal Government, selected a bank as depository, and an attorney to represent the city. Appellees advertised for bids for the construction of the sewage disposal plant and received the following bids: Ottinger Brothers, Minton, Oklahoma, . . $26,590.10; Don P. Pray, Monette, Missouri, . . $22,105.00; and H. L. Perkins, Fayetteville, Arkansas, . . $21,534.55. The contract was let to the lowest responsible bidder, H. L. Perkins of Fayetteville, Arkansas.

The record further discloses that appellees proceeded under Act 132, p. 405, of the Acts of Arkansas for 1933, authorizing cities to construct, own, equip, operate, maintain and improve works for the collection and treatment, purification and disposal of sewage, which is generally known as an act to provide means whereby cities could obtain loans and grants from the Public Works Administration and retire the bonds purchased by the Federal Government, solely from the revenue realized from such improvements.

Section 4 of said Act 132 of 1933 provides as follows: "Before any city or town shall construct or acquire any works under this Act, the Municipal Council shall enact an ordinance or ordinances which shall (a) set forth a brief and general description of the works proposed to be constructed or purchased, and, if the same are to be constructed, a reference to the preliminary report or plans and specifications which shall theretofore have been prepared and filed with the Clerk or Recorder by an engineer chosen by such Council; (b) set forth the cost thereof estimated by the engineer chosen as aforesaid, on the purchase price if the works

are to be purchased; (c) order the construction or acquisition of such works, in which connection the ordinance will recite that the terms of the construction or acquisition, so far as they are not set out in such ordinance, will thereafter be fixed by the Council or Sewer Committee; (d) state the names of the members of the Sewer Committee to have charge of such works and the construction or acquisition thereof; (e) direct that revenue bonds of the city or town shall be issued pursuant to this Act in such an amount as may be found necessary to pay the cost of the works; and (f) contain such other provisions as may be necessary in the premises."

At the out-set we may say that we would affirm this case for the failure of appellant to supply this court with the proper abstract of the record as required under Rule 9 of this court, except for the fact that appellees have fairly suplied these omissions.

It is the contention of appellants that appellees failed to comply with the terms of Act 132 of 1933, supra, or with the law governing, and were acting wholly without power, and that the trial court committed error in sustaining appellees' demurrer to the second complaint as amended and filed herein. We cannot agree with appellants in this contention.

That appellees under Act 132, and the commission form of government act, supra, had the power to do exactly what they have undertaken to do in this case, we think, cannot be questioned. Certainly appellants in their complaint have failed to point out any lack of such power on the part of appellees. Appellants' complaint, as amended with its exhibits thereto, shows a strict compliance with these acts, and, therefore, we think the trial court correctly sustained appellees' demurrer in this case.

This court in *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5, said: "The power of cities and towns to install sewage systems and waterworks is universally recognized. The health, as well as the comfort and convenience of persons living together in close relation and in large numbers require the existence of such powers,

and a sewage system would be valueless unless the power inhered to require all property owners to make physical connections with the sewers. . . . A sewer is a permanent improvement, and, if properly maintained, lasts indefinitely. It adds to the value of the fee as well as to the value of the mere right of occupancy, and the property thus served pays the installments of cost as they mature." This court further said, in the Jernigan Case, speaking of Act 131 and Act 132 of 1933, one relating to waterworks and one to sewer systems: "These acts are both complete and capable of being executed in accordance with the legislative intent expressly declared . . . and the acts must therefore be upheld, notwithstanding this exemption and its consequent unconstitutionality as applied to persons or agencies whose property would otherwise be subject to taxation." See, also, *Snodgrass* v. *Pocahontas*, 189 Ark. 819, 75 S. W. 2d 223, and *Ringgold* v. *Bailey*, 193 Ark. 1, 97 S. W. 2d 80.

Appellants also contend that the cost of the proposed plant is excessive and unnecessarily burdensome. As we have said, appellees had the power to build a plant. They let the contract under competitive bidding, to the lowest bidder. Appellants allege no fraud of any kind. The powers of appellees, in the premises, are largely discretionary, and unless they abuse these powers, injunctive relief will not be granted. In 32 C. J. at page 242, the text-writer says: "Where public officials are intrusted with discretionary power in certain matters, their exercise of such discretion will not be controlled by injunction in the absence of any showing that their action is fraudulent or in bad faith, or that it amounts to an abuse of the discretion so vested in them; . . ."

We are of the opinion, therefore, that appellees have acted within their powers, that the trial court committed no error in sustaining appellees' demurrer, and on the whole case, that its decree should be affirmed, and it is so ordered.

McLEOD, SHERIFF *v.* SHAVER.

4-5449 127 S. W. 2d 258

Opinion delivered April 17, 1939.

[redacted]

T. A. French and *V. E. Upton,* for appellant.

F. G. Taylor and *DeWitt M. Hines,* for appellee.

BAKER, J. This case was a suit brought by the appellee to enjoin Dan McLeod, Sheriff and Collector of Clay county, from collecting a peddler's license from John B. Shaver, who was operating what is known or called a rolling-store in that county. It is the contention of the appellee that the act authorizing the collection of peddler's license for each county against peddlers engaged in the same business as appellee was repealed by Act 63 of the Acts of 1929 and that the first fifty-one sections of Act 63 were expressly repealed by Act 119 of 1929; that no part of the law fixing peddlers' licenses had been re-enacted; that, therefore, the sheriff was attempting to enforce an unjust or illegal exaction and was subject to be enjoined on account thereof. The serious question that arises in this case is to determine whether section 6 of the original Act 114, of Acts of 1883, which section is now brought forward as section 13574 of Pope's Digest was repealed by Act 63 aforesaid. If that section or provision of the statutes, for the collection of license fees against peddlers, was repealed, the repeal is by implication, and since repeals by implication are not favored, it is necessary that we analyze

to some extent the law as presented here upon this appeal.

Act 63 of the Acts of 1929 is a restatement of the law in this state imposing different forms of privilege taxes. It gathers up the several different subjects in which privilege taxes have been assessed or imposed and codifies the same in this new Act 63. In fact, it may be said that this Act 63 is so extensive that it covers approximately eighty-eight pages of the book wherein it is published. Section 26 is devoted to a privilege tax to be imposed upon peddlers.

On account of the fact that it would unduly extend this opinion to copy from this Act, let it be said that the general definitions given in Act 63 of 1929 are not essentially different from what they were in the statutes and decisions upon the same subject, since the original act was passed. It was, beyond question, the same subject-matter. Section 26 of Act 63, p. 178, provides that if the peddler goes on foot, selling his wares, he shall pay to the State the sum of $250. If he travel otherwise than on foot, he shall pay the sum of $500. No provision is made for a separate tax by any county or town, but this fact was not a matter that was overlooked. That is certain. The legislature evidently had in mind the old statutes or enactment of 1883 which provided that the peddler should pay a county license of $25. The peddler's license to be issued under Act 63 was under the following provisions: "A peddler's license shall not be transferrable and any person so licensed shall indorse his name on the said license and such license shall confer authority to sell at any house or place within the county or city within which the license was granted." (page 177). It will be observed that the legislature expressly provided that it authorized peddlers to operate in the county or city where issued. It certainly was not intended to authorize the licensee to so act in any county and then to charge in addition thereto a $25 fee for further license upon the same privilege in the same county. Act 63 gives complete right or authority only to have that right denied by Act 114 of 1883 according to ap-

pellant's contention. We must hold that under the cannons of construction, long recognized by all the courts, if the legislature take up the subject and treat it anew and cover the whole field of legislation, though it may not by express terms refer to any prior statute, the new or last statute must be declared to be the law and the oldest statute be regarded as having been repealed by implication. Particularly, is this true if the two Acts are repugnant to each other. In this instance, the last authorizes the peddler to sell in any county of the State by paying the fees provided for in Act 63. *State, ex rel Trimble* v. *Cantas,* 191 Ark. 22, 82 S. W. 2d 847.

Section 6 of the Act of 1883, page 199, requires fee of $25 and this is in express conflict with the above provisions of Act 63. It must be apparent, even upon casual reading, that since the two are repugnant the last must prevail as the law of the land, the first being repealed by implication. Since it is generally presumed that the legislature meant to tax the privilege of peddling an anomalous situation arises by reason of the fact that ten days after the passage of Act 63 of 1929 the legislature passed Act 119 of the Acts of 1929, the only effect of which was to repeal the first 51 sections of Act 63 aforesaid and this, of course, includes section 26, which was at that time the only authority providing for a tax upon peddlers.

It is argued now that we had impliedly, at least, if not expressly upheld the $25 tax upon peddlers in a very recent case of *Gill and Hamrick* v. *State,* 195 Ark. 846, 114 S. W. 2d 837. It is true that in that case we affirmed a conviction of Gill. This affirmance was upon the case presented to us at that time, that is to say the facts as presented upon the appeal presented a question of law as to the violation of this peddler's statute, section 6 aforesaid of Act 114 of Acts of 1883, page 199, and the question of the repeal did not arise by reason of any matter presented therein. It is most probably true that had our attention been called at that time to Act 63 of 1929 and Act 119 of 1929 we would have held that there was no authority to impose this tax, but in that

case the authority to impose the tax was not called to our attention. The defense there was not that said section had been repealed. So it must appear that the question here on this appeal was not then before us for decision, except impliedly so. The rule is that decisions on appeal settle or determine only such questions as are presented. See *L. R. Traction Co.* v. *Kimbro,* 75 Ark. 211, 216 (on rehearing), 87 S. W. 121, 644; *Dickson* v. *Board of Directors,* 151 Ark. 22, 235 S. W. 45.

No question is raised here that the court may not enjoin illegal exactions, at least not seriously insisted upon.

We think it necessarily follows from the foregoing statement that the chancellor's opinion and decree were correct.

Affirmed.

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* LANGSTON.

4-5444 127 S. W. 2d 263

Opinion delivered April 17, 1939.

J. Paul Ward and *John Sherrill,* for appellant.

Fred M. Pickens, for appellee.

BAKER, J. The appellee is a farmer, living in what was known as Battle Axe neighborhood, in Jackson county. It was alleged that in December of 1937 he drank a

bottle of Coca-Cola, prepared and put up by appellant, and that in this bottle at the time he drank from it there were about two or three teaspoonfuls of finely ground or powdered glass; that after he drank he discovered particles of glass in his mouth, became very much frightened and was taken at once to a physician who examined his mouth and throat and found a roughened and "sandpapered" condition, as described by the physician and that from the small or tiny cuts, or abrasions blood was oozing. The doctor prescribed for him at the time. He had already become much nauseated, was attempting to vomit and continued ill, according to his contention, for many months thereafter.

There was a recovery by the appellee in the sum of $2,500. From the judgment is this appeal.

This case followed the usual course of many others of the same type and character and the same argument is made upon this appeal as has been presented to this court time and again. Unless we were intending to modify or change the rule of decision announced so frequently, it could not be of any value to the parties or to the courts to re-examine or analyze anew the question of the sufficiency of the evidence tending to show negligence or of the effectiveness of the defense pleaded, and the evidence offered in support of it. For that reason it is sufficient to say that we adhere to the decisions of this court, beginning with the case of *Coca-Cola Bottling Company* v. *McBride,* 180 Ark. 193, 20 S. W. 2d 862. Some of the other well considered cases upon the same subject might be read with interest by any one curious to review these authorities. *Coca-Cola Bottling Co.* v. *Bennett,* 184 Ark. 329, 42 S. W. 2d 213; *Coca-Cola Bottling Co.* v. *Jordan,* 186 Ark. 1006, 54 S. W. 2d 403; *Coca-Cola Bottling Co.* v. *Strather,* 192 Ark. 999, 96 S. W. 2d 14; *Coca-Cola Bottling Co.* v. *Raymond,* 193 Ark. 419, 100 S. W. 2d 963; *Coca-Cola Bottling Co.* v. *Massey,* 193 Ark. 423, 100 S. W. 2d 681; *Coca-Cola Bottling Co.* v. *Morrison,* 194 Ark. 248, 106 S. W. 2d 601.

The appellant urges that the court erred in failing to give an instruction requested by the Coca-Cola Bot-

tling Company, the effect of which we prefer to state rather than copy. This instruction told the jury, had it been given, that the bottling company was not required to guarantee or insure the plaintiff against glass in Coca-Cola sold to him. It only required the use of ordinary care in the selection of materials used in the preparation and bottling of the said drink and inspecting the same, that if it did this, there was no liability regardless of the condition in which the plaintiff may have found the drink at the time he bought it. While this instruction is, at least, somewhat contradictory of the doctrine that we have heretofore announced or that has been constantly followed throughout the years, we suggest that every phase of this particular instruction that might properly be given was covered by other instructions. The court, in several instructions, was careful to state to the jury, it seems with some degree of emphasis, that there was no liability unless there was negligence on the part of the bottling company in the preparation, manufacture, or putting up of this drink which it sold. Not only did the court make it clear that recovery could be had only by reason of the negligence, but the trial court further advised the jury that whatever presumption of negligence might appear from any stated condition, that presumption might be overcome or be met by proof.

We think it sufficient to say that every phase of instruction No. 2, refused by the court, as offered by the appellant, which the appellant was entitled to have given to the jury, was fully covered by the instructions given, and there was consequently no error. *American Equitable Ins. Co.* v. *Showers,* 195 Ark. 521, 113 S. W. 2d 91.

It was also urged that the court erred in not permitting one of the physicians, who testified for the appellant, to verify his assertions that the mere intaking or swallowing of glass was not dangerous and who offered, as a part of his evidence, to take from this particular bottle a spoonful of the glass in the bottle and swallow it in the presence of the jury. It was strongly urged that it was error on the part of the court not to permit this demonstration. We do not think so. It may be said that, perhaps, no particular substance, medicine or poison,

would affect two people exactly alike. It is possibly true that the tiny cuts or scratches made by the glass in the man's throat did not amount to very much. The theory may be true that after it was taken into the stomach it became mixed there with the food and other matter there contained so that it did not do the damage that ordinarily laymen might expect.

On the other hand, we must recognize the principle that one who takes into his mouth some matter which he thinks is deleterious, injurious, poisonous, there may be ensuing fright, there may be great mental and consequent physical suffering. Common or ordinary experience and observation among laymen, or people generally is to the effect that consequent nausea is so great and long continued as to produce extreme anguish and bodily distress. Whatever may be the psychic equation of this condition matters little until the patient may have had time for proper treatment and assurances to have restored natural balances and adjustments. It is possible that doctors or other experts might define this condition as largely psychic. However that might be, if the effect is such as to impair bodily functions, as to turn a man who was ordinarily healthy into a practical invalid for a time, then those who are to blame for the condition that brings about this impaired state of health must be held responsible therefor when such facts are established according to proper legal procedure. It may be that the doctor could have taken into his mouth a teaspoonful of the glass and swallowed the same without any kind of damage or injury, apparent then to the jury or the court. No evil consequences might have followed later, but even if that had been done, it would have been no more convincing of the rights of the parties involved in this litigation than it would have been had a professional glass eater appeared before the court and jury and put on his show.

We are inclined to regard people who have litigation, nothing to the contrary appearing, as ordinary human beings, affected as ordinary men and women are under the same or similar conditions; that if the conditions are sufficient to cause fright or distress, added to injury, or im-

paired functional conditions, so as to bring on suffering and impaired health, then such ordinary people must be the objects of solicitude, rather than exceptions that might be pointed to as glass eaters, or those who might not have any squeamishness about swallowing flies, bugs, or spiders, or the modern collegiate who gulps live goldfish or lizards, or otherwise demonstrates gymnastic or freakish gormandizing.

We think, therefore, there was no error in the court's action denying the appellant the coveted privilege to show that one of the physicians was willing to eat some glass in the presence of the court and jury.

The only other matter of any importance brought forward by the motion for new trial, and arguments set forth in the briefs, is the extent of the injuries received and the consequent amount of recovery. It may be said that it is hardly contended in this case that the appellee was permanently injured. It was insisted at the time of the trial he had not fully recovered. The doctors who testified, it seemed, were in practical accord or agreement that his illness would not continue for a great length of time. None was willing to assert positively, from study or experience that all his troubles were attributable to the fact that he had been so unfortunate as to swallow the glass. Even the doctor who had seen the patient frequently and made close observations of conditions did not state categorically that appellee's condition was connected with or attributable entirely to that misfortune. The appellee, however, has not suffered any extremely great loss, except his pain and suffering and that appears from the record made. He is a farmer and he shows himself that there was no great loss in what he would have earned or produced. The evidence supports a finding of pain and suffering continued over a considerable period, but not so serious as might be deemed sufficient to warrant an extraordinarily large recovery. There have been several cases very similar to this one. They control in this matter. *Coca-Cola Bottling Co.* v. *Raymond, supra; Coca-Cola Bottling Co.* v. *Massey, supra; Coca-Cola Bottling Co.* v. *Morrison,*

supra; Coca-Cola Bottling Co. v. *Eudy,* 193 Ark. 436, 100 S. W. 2d 683.

In the foregoing cases, conditions were not seriously at variance with the facts in the instant case. The greatest recovery that we have found warranted in any of those cases was for $1,000. The amounts above that sum we have held to be highly speculative and not supported by substantial evidence. We think it true in the instant case that the recovery is excessive. We hold plaintiff is entitled to receive not exceeding $1,000. If within fifteen days plaintiff will enter a remittitur of $1,500, the judgment for the remaining $1,000, will be affirmed, otherwise the cause will be remanded for a new trial.

HUMPHREYS and MEHAFFY, JJ., dissent from the order reducing the judgment.

[redacted]

HARRISON *v.* HARRISON.

4-5445 127 S. W. 2d 270

Opinion delivered April 17, 1939.

[redacted]

R. H. Peace, for appellant.

B. Ball, J. Mack Tarpley and *Aubert Martin,* for appellees.

MEHAFFY, J. On March 5, 1936, appellees instituted this action against the appellant in the Bradley chancery court, asking that a receiver be appointed and that their interest in the lands described be adjudicated.

The complaint alleged that appellee, Mrs. Carrie Harrison, and William Henry Harrison were married in Bradley county in March, 1927, and as a result of this union three children were born. These three children are minors, and, with Mrs. Carrie Harrison, are the appellees herein. William Henry Harrison had been married twice prior to his marriage with appellee. His first wife died and his second wife obtained a divorce. The appellants are children by William Henry Harrison and his first wife. The said William Henry Harrison was the owner of the land described in the complaint. On March 26, 1927, the said William Henry Harrison conveyed by deed the land described in the complaint to Jeppie Harrison, Winnie Castleberry, and Verna Harrison, his children by the first wife. It is alleged that the deed was not in good faith or with intention of passing title, but was made for the purpose of preventing other persons, particularly his former wife, from obtaining an interest therein; that said Harrison at all times after said deed was made retained possession of said lands, farmed same and derived all the benefits therefrom; that after his marriage to appellee, he acknowledged ownership of said lands, and announced his intention of removing the cloud which said deed cast thereon; that at the time of appellee's marriage to said Harrison he claimed to own said land and she never knew that he had made a deed until after his death, which occurred in July, 1935; that the children, appellees, were born after said deed was made. Verna Harrison, one of the grantees in said deed, died prior to the death of his father; that said conveyance was a fraud upon the rights of appellees and should be cancelled and held for naught and that Carrie Harrison should be awarded dower and homestead and that the minor children, appellees, should be given a full three-fifths interest in the described lands; that Jeppie Harrison is assuming ownership and control to the exclusion of appellees; Carrie Harrison has no lands to cultivate

and said Jeppie Harrison is making every effort to exclude her from the use of any of said property.

The appellants filed answer and intervention denying the material allegations in the complaint. They allege that said land was deeded to them in good faith. They admit assuming ownership and admit that Verna Harrison died unmarried, intestate and without issue before the death of William Henry Harrison. Both parties asked for a partition of said lands. A clause in the deed is as follows:

"To have and to hold the same unto the said Jeppie Harrison, Verna Harrison and Winnie Castleberry and unto their heirs and assigns, from and after my death, excepting all timber on said lands as above stated. It is understood that this deed is to take effect and be in force from and after the death of the grantor herein, the grantor to have the use and occupancy of said land to use them as his own, to use and sell timber," etc.

The undisputed evidence shows that the deed was made on March 26, 1927, and was filed for record at 3:40 o'clock on that day, and that William Henry Harrison and Carrie Harrison were married on the night of March 26, 1927. The evidence also shows that the land described was the homestead of William Henry Harrison and appellee, Carrie Harrison, and that she and her minor children still reside on said land. Appellant, Jeppie Harrison, is 38 years old. He learned of the deed about a month after his father's third marriage. He did not pay for the deed. W. H. Harrison lived with his first wife twenty years and they had four children.

There was introduced testimony as to divorce proceedings between W. H. Harrison and his second wife. We deem it unnecessary to set out this testimony. In the first place, the last marriage is presumed to be legal. Then, the testimony of Judge D. L. Purkins, who was attorney for the second wife in the divorce case, and other evidence is ample to sustain the chancellor in his finding: "That the marriage contract by and between W. H. Harrison and Mattie, his second wife, was legally annulled by the Bradley chancery court on the 26th day

of September, 1926, there can be no doubt. The original opinion of the court and the original decree in which judgment for divorce and settlement of property rights are before the court, both instruments bearing the signature of the presiding judge. This decree has been in force and effect since its rendition and may not be defeated because of any misprison of the clerk of the court."

The evidence was sufficient to show that a divorce had been granted the second wife and the marriage of W. H. Harrison to appellee, Carrie Harrison, was valid.

Appellants' next contention is that the deed to appellants should be held as a valid conveyance. It is true that some of the testimony was incompetent and irrelevant, but the undisputed facts are that the deed was made on the same day of the marriage, but was made a few hours before the marriage; appellee was taken to this land as her home; that she and Harrison occupied the place as a home for nearly ten years and were occupying it as a home at the time of his death, and during the time they occupied the home W. H. Harrison had exclusive control of the land and managed it just as the owner. There is no evidence that she knew anything about the deed until after his death. Their children were born there.

The Chancellor in his opinion stated: "Regardless of the motive that impelled W. H. Harrison to execute the deed, or Carrie Forest Harrison to contract her marriage, the grantees took no title to the land that would exclude the widow of her dower and homestead, or the children born of the union of their inheritance. To hold otherwise would result in an unconscionable wrong, not only to rights arising under the marital contract, but to the children born of such union."

The law is well settled in this state that if, shortly before marriage, the future husband conveys away his real estate, without the knowledge of his betrothed, the courts will set aside such conveyance. This court said in the case of *Roberts* v. *Roberts, Admx.*, 131 Ark. 90, 96, 198 S. W. 697: "In 9 Ruling Case Law, page 591, it was said: 'That the wife's right of dower is a substantial property right, entitled to protection by the courts, is

perhaps most strikingly shown in action by her to set aside conveyances made by the husband for the purpose of defeating her expectation (though not yet vested even as an inchoate right) of dower. If shortly before a marriage, the future husband conveys away his real estate without consideration, and without the consent or knowledge of his betrothed, with the purpose and result of unfairly depriving her of dower, the courts will set aside the conveyance as a fraud upon her rights; and even the fact that it was made for a valuable consideration will not save it, if the grantee participated in the intent to defraud the wife.' Numerous cases are cited which support the text.

"In our recent case of *West* v. *West,* 120 Ark. 500, 179 S. W. 1017, we stated our own views on this subject in the following language: 'This brings us to a consideration of the law governing cases of this character. The general rule is that if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife. Perry on Trusts and Trustees, (6th Ed.) vol. 1, § 213; Bishop on the Law of Married Women, vol. 2, § 350; *Smith* v. *Smith,* 2 Halstead Ch. (N. J.) 515; *Leach* v. *Duvall,* 8 Bush. (Ky.) 201; *Dearmond* v. *Dearmond,* 10 Ind. 191; *Collins* v. *Collins,* 98 Md. 473, 57 Atl. 597, 103 Am. St. Rep. 408, (1 Ann. Cas. 856) and case note'."

This rule has recently been approved in the case of *O'Connor* v. *Patton,* 171 Ark. 626, 286 S. W. 822.

We think the chancellor's decree is supported by a preponderance of the evidence, and it is, therefore. affirmed.

CALLICOTT *v.* DIXIE LIFE & ACCIDENT INSURANCE COMPANY.

4-5429 127 S. W. 2d 620

Opinion delivered April 24, 1939.

Bradley & Patten, for appellant.

Brickhouse & Brickhouse, for appellee.

MEHAFFY, J. On September 24, 1937, the appellee issued a policy on the life of William F. Harrelson, and his sister, Mrs. Jimmie Callicott was named beneficiary. The policy provided that in the event of the death of insured, while the same was in full force and effect, appellee would pay to the beneficiary the sum of $270 in cash. The insured died on December 27, 1937; proof of death was made, and the appellant denied liability.

This action was begun to collect on said policy, and the appellant prayed judgment in the sum of $270 with interest at the rate of 6% from January 1, 1938, the statutory penalty of 12%, and attorneys' fees. The answer denied every material allegation, but admitted issuing the policy; alleged that the application was signed by Mrs. Jimmie Callicott, sister of the insured. It was also alleged in the answer that the policy provided that: "the company assumes no obligation herein until the inspection fee and the first premiums are paid in full, and this policy is delivered and accepted by the original owner while all the lives insured hereunder are alive and

in good health." That at the time said policy was delivered the insured was living in Hot Springs and suffering from acute cardiac dilitation and chronic myocarditis, and suffered from heart trouble since childhood. There was tendered the premiums that had been paid, and it was asked that the complaint be dismissed.

The appellant testified as follows: "That her name was Mrs. Jimmie Callicott; that she was the plaintiff in the suit and had a brother, William F. Harrelson, who was insured by the defendant, identifying the policy of W. F. 2837. The policy was introduced and will be abstracted hereinafter; that she had paid the premiums on the policy herself and same were paid through the time that her brother died and identifying the premium receipt book which was introduced and will be abstracted hereinafter; that the inspection fee and the first monthly premium were paid at the time the policy was delivered; that she was working in the Arcade Building in Little Rock and had never seen Mrs. Keener, the representative of the company, prior to the time she was solicited for insurance by Mrs. Keener; that at that time she was not interested in a policy because she had a brother to support and that then Mrs. Keener wanted to write a policy on her brother; that her brother lived with her in Little Rock at 319 S. Martin Street; that the agreement was not reached then, that later the representative of the company returned to see her and that at that time she discussed the condition of her brother fully with the representative of the company and informed her 'he had heart trouble and while he was up and around all the time, heart trouble was a fatal and unfortunate disease and so hadn't considered it. She thought I could insure him. I told her that the doctors—our doctors—had said that perhaps he would live to be older than I, that it was an uncertain thing'; that this information was conveyed to the representative of the company while said representative was trying to write the policy; at that time no agreement was reached; that the representative of the company returned several times, insisting that she take out the policy on her brother and that an application was

finally executed for the policy. Witness did not fill out the application, that no question was asked by Mrs. Keener at the time the application was filled out, but on the contrary the representative filled in the application and merely asked her to sign it, which she did; that it was not read over to her and that she did not read it nor know its contents and that when the policy was delivered some time later, the inspection fee and premiums were paid thereon; that upon the death of her brother in December, 1937, she called at the office and executed proofs of his death and that they refused to pay."

CROSS-EXAMINATION

"That her brother had been sick practically all of his life and had heart trouble when he was a little fellow; that prior to this time she had not taken out any insurance on his life, nor anyone else; that her sister also had a burial policy on her brother. And in answer to a question whether he was strong or emaciated, weak and that sort of thing, replied: 'He was in a little improved condition as to what he had been, but he always had been up and around and had taken exercise. He had gotten out a little, never stayed in bed. He was always up but had a little crookedness in his spine. I don't know just what it was. He was having it attended to; Dr. Murphy said that would improve his heart condition'; that Dr. Murphy had treated him for two years and was treating him at that time; that her brother did guide service on Lake Hamilton and Hot Springs and that was about all the work he did, that he frequently visited Hot Springs; that he would come to her office in the Arcade Building where she worked and while there would rest and relax, but did not lie down; that she went to the company's office and had it changed from a designated mortician to an undesignated one because she found out her sister had a burial policy and that she understood the company would not permit two burial policies, so she had it changed, that she didn't know how long he would live but he had lived twenty years; that she had the policy down at the shop with her for a long time, but

finally took it home and put it in a shoe box. And in reply to the following questions said:

"Q. Now, Mrs. Callicott, to be frank about it, your brother was really a sick man at the time this policy was taken out, wasn't he?"

"A. Yes, sir, he was—he seemed to be doing better. He was stronger and better and we had very great hopes of his improvement."

"Dr. Murphy gave her these hopes. That she had not discussed the taking out of the policy with him, but later when the company wrote to him about the policy change that she then discussed it with him and told him that if he got sick she thought the policy would pay the hospital bill for three weeks and it would help her with the expenses; that she and Mrs. Terrell did not read the policy together. The witness denied that she had told Mrs. Terrell that she would not tell her brother because of the shock. Said that she did not remember about discussing the policy with Mrs. Terrell relative to the two-year uncontestible clause; that she had a sister living in Hot Springs part of the time, but that her brother did not stay with her sister over there, but when he was doing guide service would stay with some friends and that he died at the home of Mrs. A. G. Dean. She stated that the question relative to kidneys, liver, skin, blood, genital organs, heart, bladder, rheumatism, cancer, dropsy, rupture, paralysis, bronchitis, syphilis, female trouble, asthma, ulcers or any other diseases or ailments not mentioned herein was not read to her nor did she know it was in the application. The witness stated that in her discussions with the representative of the company, she had told the representative that her brother had heart trouble, but that he was in better condition and was really better; that she was familiar with the coroner, but that she did not know of what her brother died, and that when she told Mrs. Keener, representative of the insurance company, about his condition that she assumed the agent would put down the correct answers."

The above is the testimony in full of appellant, as set out in her abstract.

Mrs. A. M. Patrick testified that she was present when the policy was delivered by Mrs. Keener to Mrs. Callicott; that she heard Mrs. Callicott say to Mrs. Keener that she was surprised it was going through in her brother's condition.

Mrs. Bertha Terrell testified that she operated a shop in the Arcade Building where Mrs. Callicott and Mrs. Patrick worked; that she was present when Mrs. Keener of the Dixie Life & Accident Insurance Company solicited insurance from her and Mrs. Callicott; that she heard Mrs. Keener ask Mrs. Callicott a question relative to the health of her brother, and Mrs. Callicott said that he was as well as he ever was; that she and Mrs. Callicott read the policy over together; there was a two-year uncontestible clause and Mrs. Callicott stated that she was going to keep from her brother the fact of taking insurance on him because it would be a shock to him.

The policy was introduced in evidence and also the receipt book showing that the premiums had been paid through January 1, 1938. At the close of the testimony the court directed a verdict and the jury returned the following verdict: "We, the jury, acting under instructions of the Court, find for the defendant." Judgment was entered and motion for new trial was filed and overruled, and the case is here on appeal.

The appellant urges first, that she had informed the soliciting agent of the true condition of her brother, and that such knowledge acquired by the representative in the performance of her duty, was knowledge of the company.

Knowledge of the agent of the insurer, obtained while performing the duties of his agency in receiving applications and delivering policies, is imputed to the insurer. The undisputed evidence in this case shows that the appellant told the representative of the insurance company the condition of her brother's health. It is not contended that she made any false statements, and, therefore, the representative of the company knew all the facts with reference to insured's health, and this was knowledge of the company. *Supreme Forest Woodmen*

Circle v. *Sneed,* 190 Ark. 112, 77 S. W. 2d 636; *Mid-Continent Life Ins. Co.* v. *Parker,* 181 Ark. 213, 25 S. W. 2d 10.

This court has many times held that where an applicant states all the facts to the representative of the company taking the application, the knowledge thus obtained by the representative is knowledge of the company. *United Fidelity Life Ins. Co.* v. *Taylor,* 188 Ark. 1168, 68 S. W. 2d 1011.

It is contended, however, by the appellee, that the policy was void because the consent of the insured was not obtained; that the policy was taken without his knowledge or consent. The evidence conclusively shows this to be true, and this would make the policy voidable. One who takes out a policy of insurance on the life of his brother without the knowledge or consent of the latter, cannot maintain an action against the company on the policy. 14 R. C. L. 889.

It is against public policy to allow one person to have insurance on the life of another without the knowledge of the latter. It is not only the general rule that the consent of the insured must be had, but that is the rule in this jurisdiction, and this case is ruled by the case of *Amer. Benefit Life Ins. Ass'n* v. *Armstrong,* 183 Ark. 47, 34 S. W. 2d 1082. In that case the court said: "It must be remembered that the plaintiff beneficiary made the application for this policy, and paid the premium thereon, and that it was issued upon her application. If she had not authority to make this application, the policy would be void on that account."

In the instant case the application was made by the appellant in Little Rock without the knowledge or consent of her brother who was in Hot Springs. She claims, however, that after the policy had been issued she told her brother about it; but her own statement shows that she did not tell him she had insurance on his life, but that she had a policy that would enable him to go to the hospital if he were sick, and help her pay the expenses. There was no consent or knowledge on the part of the insured as to there being a policy on his life.

The judgment of the circuit court is affirmed.

COOK *v.* RHEA.

4-5540 127 S. W. 2d 634

Opinion delivered April 24, 1939.

Ohmer C. Burnside, for appellant.

W. W. Grubbs, for appellee.

SMITH, J. Appellant and appellee were rival candidates for the office of county examiner for Chicot county in the election held in the county seat of that county on Saturday, January 14, 1939, pursuant to § 11669, Pope's Digest, which reads in part as follows: "On the first, second or third Saturday in January in every odd year hereafter the County Judge in every county in the State of Arkansas shall call a meeting of duly licensed teachers residing in the respective county or engaged in teaching in the county. Said meeting shall be at a court house in the county. The purpose of this meeting shall be to vote upon the candidates for the office of County Examiner. At the beginning of the meeting the County Judge shall compile a roll of the qualified per-

sons present, said roll to consist of duly licensed teachers who reside in the county or actually engage in teaching in the county. After this roll is compiled, the names of the candidates for County Examiner shall be presented to the group after which the qualified persons present shall cast secret votes for the candidates nominated. The votes shall be counted by tellers appointed by the County Judge, one teller being appointed to represent each candidate. If there are more than two candidates and one does not receive a majority of all votes cast on the first ballot, the two candidates receiving the highest number of votes shall be voted upon by a second ballot in the same manner as prescribed for the first ballot. The candidate receiving the majority vote on the second ballot shall be the winner. In case of a tie vote balloting will continue until one candidate receives the majority vote. In no instance shall a teacher vote in more than one county during one year. . . ."

It will be observed that this section does not expressly require the use of printed ballots, but does require the school teachers of the county who attend the meeting or election to ". . . cast secret votes for the candidates nominated" and although the use of printed ballots is not required, such ballots were provided for use at the election. The printed ballots read as follows:

No.
Official Ballot

Saturday, January 14, 1939
Court House, Lake Village, Arkansas

Cross out or scratch off the one for
whom you do not wish to vote

For County Examiner
(Vote for One)
Mrs. Robert W. Rhea
E. W. Cook

The tellers holding the election excluded three ballots, and counted the remainder, and the result of their

count was to give appellant, Cook, 79 votes and appellee, Mrs. Rhea, 78. At the trial of the election contest in the circuit court, from which is this appeal, the excluded ballots were marked Exhibits 1, 2 and 3, respectively. The circuit court excluded ballot made Exhibit 1, but counted ballots made Exhibits 2 and 3, and the result of that action was to increase the vote of Mrs. Rhea from 78 to 80, thus giving her a majority of all the votes cast at the election and declaring her to have been elected.

It was stipulated that in the two prior elections held under act 184 of the acts of 1935, page 495, of which § 11669, Pope's Digest, is a part, no printed ballots were provided, and that blank slips of paper were handed to the voter, with directions to write thereon the name of the person for whom the teacher wished to vote, and that the voting in said two prior elections was held in this manner. It was also stipulated that when the teachers assembled to hold the election here contested, the county judge called the meeting to order, and exhibited one of the printed ballots and explained that they contained the printed names of the candidates, and that the voters would cross out or scratch off the name of the candidate for whom they did not wish to vote, and that if they did not wish to vote for either of the candidates whose names were printed on the ballots, they might write in the name of some third person and scratch off the names of the other two.

It is conceded by appellant that ballot marked Exhibit 1 was properly excluded by the court; and we concur in that view. On this ballot, above the name of Mrs. Robert W. Rhea, but not through or across the name, appears a short irregular line, and the letter "S" in the abbreviation "Mrs." is bisected by a short dash, about the length of the hyphen used in punctuation. The marking of this ballot was such that the court below was fully warranted in finding that the elector teacher who cast it had not indicated an intention to erase the name of either candidate appearing on the ballot, and it was properly excluded from the count.

The teachers voting the ballots marked Exhibits 2 and 3 did not use the printed side of the ballot, and did not cross out or scratch off the name of either candidate there printed, but on the reverse side of the ballot they each wrote the name of Mrs. Rhea. These ballots, indorsed with the initials of one of the tellers, was folded to conceal the name of the candidate voted for, so that each was a secret ballot.

Why those teachers casting ballots 2 and 3 did not use the printed ballot does not appear. They may have been belated arrivals who did not hear the announcement of the county judge as to how the election would be held, but who, remembering how the former elections had been held, neglected to observe and read the ballot furnished them by the tellers when they voted. But the right of these elector teachers to vote is not questioned, nor is there any doubt as to the candidate for whom they intended to vote. They each wrote the name of Mrs. Rhea on the ballot. The insistence is that they did not express their intention in the manner required by law, and that the ballots should not be counted for that reason.

While it is probably true, as appellant contends, that the General Election Law governs the manner in which the election should have been held insofar as it is applicable, it is also true that § 11669, Pope's Digest, requires only that the choice of candidates be made by secret ballot, and the teachers casting ballots 2 and 3 cast secret ballots, and, as we have said, there is no doubt as to the candidate for whom they intended to vote.

Had blank pieces of paper been used in this election, as was done at the two prior elections held pursuant to this section of Pope's Digest, it would hardly be contended that the election was a nullity, as the law does not require the use of printed ballots.

The selection of the county examiner is as much in the nature of a convention as it is of an election. The statute refers to it as a "meeting", presided over by the county judge, at the beginning of which that official compiles a roll of the qualified electors present. It is not required that the "meeting" shall remain in session dur-

ing the hours and for the length of time during which the poll of voters must remain open in ordinary elections. The statute contemplates that candidates may be placed in nomination, and it would, no doubt, be proper and within the contemplation of the act for nominating speeches to be made extolling the qualifications of suggested persons to fill the office, all under the supervision of the county judge as chairman of the meeting. Thereafter the teachers vote by secret ballot for the persons nominated, or for other eligible persons, and tellers are appointed by the county judge to count the votes, and if no one receives a majority, a second ballot is taken, at which only the two candidates receiving the highest number of votes shall be voted upon. This is a proceeding for which the General Election Law makes no provision. One or the other, or both, of those persons may not have had their names printed on the ballot, in which event no use could be made of the printed ballot except to write on the blank side thereof the name of the one of the two of these highest candidates preferred by the elector, and this was the manner in which the electors who cast ballots numbered 2 and 3 had voted in this case.

We conclude, therefore, that the court below was correct in holding that appellee had received a majority of the votes cast at the election or meeting and had been elected, and the judgment must be affirmed. It is so ordered.

HORNE *v.* FISH.

4-5443 127 S. W. 2d 623

Opinion delivered April 24, 1939.

Reinberger & Reinberger and *E. D. Dupree, Jr.*, for appellant.

E. W. Brockman, for appellee.

BAKER, J. This suit was filed as a contest of the result of the primary election in 1938. The parties were opposing candidates for the office of county judge. The result of the said primary election, as certified by the

election officers, was 985 votes for Horne and 923 votes for Fish. Upon a trial of this case the court found that there were 530 illegal votes cast for Horne, 445 illegal votes cast for Fish, and Fish was declared the nominee of the party and his name was ordered placed upon the ballot as such. From the judgment of the trial court, declaring W. A. Fish the nominee, and also declaring J. M. Horne, the contestee, disqualified from holding office, this appeal has been taken. Although the record in this case is extremely voluminous, matters have been so well presented by counsel that the issues now submitted upon this appeal are comparatively few.

In order to shorten this discussion, we think it may be said that this contest has taken the usual or conventional form of such contests and that upon this appeal only the following matters are presented: (1) did contestant W. A. Fish receive the highest number of legal votes cast in the August primary? (2) was the contestee, J. M. Horne, who had been duly certified as the nominee by the committee, properly held to be ineligible to hold an office?

We approach the first one of these questions, giving due consideration to the doctrine announced in the cases of *Sweptston* v. *Barton,* 39 Ark. 549, and *Bohlinger* v. *Christian,* 189 Ark. 839, 75 S. W. 2d 230. We recognize the principle therein announced and again reassert that even though the contestee, J. M. Horne, might be held disqualified to hold the office, this fact alone would not entitle the contestant, W. A. Fish, to the nomination. Unless Fish received a majority of the legal votes cast in the primary election he could not properly have been declared the nominee, even though Horne, his sole opponent, might have been disqualified. The trial court approached the issues in this case upon that theory and there remains for our determination several questions of the proper qualifications of electors, under conditions arising from the proof in this case, which will be set out under the several subdivisions upon which the appeal has been taken.

Appellant argues as the first proposition that the duplicate ballots were inadmissible in evidence and that

the court erred in directing or ordering the opening of these ballots to determine for whom the voters had cast their ballots. This contention, by the appellant, gives us the most serious problem of all those argued upon appeal. The evidence shows that these duplicate ballots were deposited, in ballot boxes made of cardboard, about 10 x 10 x 10 inches in size. These boxes were sealed with a heavy cloth which was glued or pasted at all corners and edges and the only opening was a slot in the top, through which the ballots were inserted or pushed into the box, and at the side of this slot there was a gummed flap with which the opening was closed after the ballots had been cast. These boxes had properly been delivered to the treasurer of the county who testified that he kept them for a day or two in a vault at the courthouse and during that period he watched or guarded them because other people had access to the vault; that thereafter he moved them to his home where he placed them in an unused closet where they were locked with an ordinary rim lock. The door was also fastened by driving two nails through the edge of the door into the door casing.

It is argued most forcefully that these ballots had not been preserved and protected as provided for by § 4758 of Pope's Digest which is to the effect that the election commissioners shall provide for each precinct a good and sufficient ballot box with a lock and key. There is, also, a further provision, under § 4759, which is a part of act 123 of 1935, in regard to the duplicate ballot boxes, not strictly followed. The effect of that section is that the duplicate ballots, after they are voted, or deposited in the duplicate ballot box, be preserved by sealing with a standard make and numbered seal by the person who delivered the election supplies to the election officers and that a record be made of the number upon each seal showing to which precinct the box bearing said number was delivered. The record signed by the person sealing the ballot boxes and verified by him ought to have been filed with the county clerk as a permanent record. These requirements were not met.

As to the duty of the county treasurer, the said section provides further that these duplicate boxes should

be delivered to the county treasurer who should safely keep said ballot boxes under the same penalties prescribed therein for failure of the county clerk "to safely keep the returns received by him."

There is a most forceful argument to the effect that if these ballot boxes are not of the kind described and provided for by the law the purity and integrity of the ballots must be deemed and treated impeached and that they may not be resorted to for a determination of the number of votes cast for any candidates, but that resort must be had to the certificates of the election officers to determine such questions.

While we are unwilling to assert in the face of this record that there was a substantial compliance with the law prescribing and providing for the kind of ballot box that might be used for the deposit of the duplicate ballots, we think in this case, under the record, there was no prejudice to the rights of any party. The facts are undisputed as they have been presented on this appeal. As these ballot boxes have been described to us, they were made of cardboard, covered at all edges with a strip of cloth or tape, having only one opening, and that was the place where the ballots were inserted into the box. It will readily appear, we think, to any fair-minded person that after this one opening had been sealed with a gummed flap the ballots could not have been tampered with in any respect, unless by someone cutting into or breaking open such ballot boxes, and the force or violence sufficient to open any of the boxes must necessarily have appeared later, even upon a casual examination. It is true it might have been an easy matter to have opened any one of the boxes, but it is equally true that if the boxes had been made of tin, with lids, hasps and locks, they too might have been opened by the use of an ordinary can opener or a pocket knife. In like manner, the ordinary wooden box, so frequently used, might easily be pried open by one desiring to do so, by the use of an ordinary chisel or screw driver. Any method, however, that might have been employed to open any one of the boxes, or almost any kind of box, would have left some mark indicating that fact. We understand, of course, that a new paper box of the same kind, size and shape

might have been substituted, but the same is true about any other kind of box that might have been used. While these boxes did not have locks and keys, they were sufficiently sealed. Moreover, while they were not numbered, nor was there a record of the number filed or left in the office of the county clerk, they were positively identified by undisputed evidence by the county treasurer into whose possession they had been given as the ballot boxes delivered to him by the proper election officers and each one was in like manner identified as the duplicate ballot box of the particular voting precinct containing duplicate ballots cast in that precinct. The court was careful in hearing all of the introductory evidence prior to the opening and examination of duplicate ballots taken from the said boxes, and it is not questioned by appellant that the proof then was undisputed, that there was no evidence that the integrity of the ballots had been destroyed, or even affected, except the sole and only contention that these ballot boxes were of weak and flimsy material and construction. Admitting the full force of appellant's argument, we think it sufficient to say that it affirmatively appears here that the integrity and purity of the ballots must be deemed as unimpeached. So, giving full force to the foregoing statutes, we must hold that appellant's rights, on account of the facts established, were not in any manner prejudiced.

We do not think in this holding that we are impairing to any extent the rule announced in the case of *Powell v. Holman,* 50 Ark. 85, 6 S. W. 505. In that case it was found that after the ballots were counted, they were deposited for the night in a hall used by several civic orders and clubs, where they were locked in a wardrobe, but were left unguarded. On the next day, after the vote had been canvassed and abstracted by the clerk, the ballots were placed in a room which was an exposed and unsafe place, affording opportunity for tampering with the ballots, and they remained there for a week. The distinction in that case and in the instant case must be apparent. Here, after the ballots were placed in the vault, the treasurer, who had charge of them, guarded them as long as they remained there. This was because others had access to

the vault. Thereafter, he removed them to his home where he placed them in an unusued closet, which was not only locked, but the door was nailed. Of course, it was not impossible for someone who was determined to do so to break in and get to the ballots, but the law does not require that degree of care. It is a matter of common knowledge that even the strongest vaults are sometimes illegally broken into and entered. It is apparent, we think, that it was highly improbable, if not impossible, that any of these ballots could have been in any manner contaminated. Therefore, we must say the ruling of the court was correct. This is especially true since we think it affirmatively appears that the ballot boxes were guarded with more than ordinary care and that it affirmatively appears further that no suspicion could arise that there was any substitution or change in any manner.

The next proposition that gives us concern is the fact that there were a great number of people who were assessed as delinquent taxpayers. It is argued that the court erred in declaring the ballots of these delinquent voters void, for the sole reason that § 4695 of Pope's Digest had not been complied with. In this case many of those who were delinquent in the matter of assessment signed orders directing or authorizing someone else to make an assessment for them, and, in addition, they signed orders authorizing certain people to pay poll taxes for them and to receive poll tax receipts. These assessments and payments were alleged to have been made in accordance with the foregoing statutes. But this is what happened. Although there was an effort made to assess these delinquents by having them sign orders authorizing some particular person to make the assessment, in many instances those receiving these orders erased or marked out the name of one authorized to make such assessment and substituted another name therefor. The same statement may be said to be true in regard to parties authorizing particular ones to pay poll taxes for them. However, even if these orders were given authorizing the assessment of a poll tax, or if the assessment blanks were properly filled out they were not delivered to the assessor, nor were they delivered to the county clerk, nor

was there a separate list made and certified by the assessor or by the county clerk as to these delinquent assessments, as required by law. (Section 4693, Pope's Digest.)

But those agents attempting to assess and pay for such delinquents probably, as a matter of expediency, delivered the so-called assessment sheets to the collector's office where the names of all those who had in such manner been assessed as delinquents were entered upon the tax books by the collector, or by one of his deputies, or by someone acting in that capacity, and all such names so entered were written in with red ink. There was, therefore, no difficulty in identifying those who had been assessed in that manner.

It is argued now that this was a substantial compliance with the laws with regard to assessments. The foregoing general statement must be taken as applying substantially to everyone of those assessed as a delinquent. There is a possibility that there may have been a few who were assessed properly as delinquents, but the particular ones questioned here were those whose names were placed upon the books, as above stated, in red ink and by the tax collector, or his deputy, or someone employed in that office.

The applicable law may be found in Pope's Digest, § 4695. It is stated there that it shall be unlawful for any person to cast a ballot in any election held as set forth in § 4691 of Pope's Digest, unless such person shall have previously assessed and paid a poll tax, which assessment and payment shall have been made by the person casting the vote, or by someone authorized by such person to assess and pay the tax aforesaid.

A further provision, § 4695, Pope's Digest, is that where the assessment and payment shall have been made by an agent such agent must exhibit to the assessing officer and collecting officer authority in writing from the person or persons desiring assessment to be made of the poll tax to be paid, and it was the duty of the assessing officer and collecting officer to file and keep such written authority for a period of two years.

Section 4698 of Pope's Digest provides especially that it shall be unlawful for any collecting officer in the state at any time after the poll tax records have been delivered to him by the county clerk for the purpose of collecting personal taxes to add to said tax books the name of any person whose taxes have not been previously assessed as provided by law, and that it shall be unlawful for such collecting officer to issue a poll tax receipt to any such person whose name does not appear on the tax books in the manner provided by law. Such is the mandate of the statutes of the state, and perhaps it would add nothing to enter upon any extended discussion of the right or power or authority of the sheriff or collector to add names to the tax lists.

This court has already passed upon and determined substantially the question under consideration. In the case of *Cain* v. *Carllee,* 168 Ark. 64, 269 S. W. 57, it was held that one who was delinquent might procure himself to be properly assessed by complying with § 3738, Crawford & Moses Digest (now § 4693, Pope's Digest) and have his name placed upon the books as a voter. But a substantial compliance with the statute was necessary, the reason being that this was done to protect the revenue and to prevent fraud in elections, and it was there expressly held, as stated by the statute, that the county collector did not have the power to assess a poll tax, collect it and deliver receipt to the elector. This is substantially in conformity to the announcement in *Craig* v. *Sims,* 160 Ark. 269, 255 S. W. 1, and *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74.

Again it was held that the tax collector was without power to issue a poll tax receipt that would qualify one to vote unless properly assessed. *Morrow* v. *Strait,* 186 Ark. 384, 53 S. W. 2d 857.

The matter was, also, discussed, perhaps somewhat more fully in the case of *Collins* v. *Jones,* 186 Ark. 442, 54 S. W. 2d 400.

It has, also, been determined that there are two methods of assessing the delinquent. They are held to be not inconsistent, but supplementary. One may apply,

also, to the assessor. *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. 2d 631.

All these statutes and cited authorities must make it clear that the tax collector's assessment was no assessment.

Not only was the ruling of the judge in conformity with the statute, but justified by all our decisions in which these statutes have been discussed. To protect the public revenue, to prevent fraud in elections, these statutes should be and must be substantially followed. They are perfectly reasonable and in conformity with the principles of checks and balances prevailing in the various departments of state and county governments.

This is the only single proposition urged by the appellant in which it is contended that, if the court's ruling were reversed in this regard, the result of the election would be changed. Since it appears that the court's ruling in this respect is without error it must be approved.

The only reason for discussing the remaining alleged errors is the fact that, if the court's ruling as to all of them should be changed, the result of the election might be affected thereby.

The next proposition that is submitted is that the court erred in regard to his ruling concerning first voters. Little need be said in regard to that proposition, except that it is at least passively admitted, if not expressly so, that the statutes were not followed. In some instances, there appeared upon the tally sheets the name of a voter and after it a notation, by insertion of the words "first voter." There was no separate list made of these first voters, whose affidavits were attached to the ballots cast by them. In a few instances, however, we do not know how many, some affidavits were attached to ballots, but in no case does it appear that there was ever a separate list. It is argued that this was a sufficient compliance, under the ruling in the case of *Robinson* v. *Knowlton,* 183 Ark. 1127, 40 S. W. 2d 450. It is true that the court said in that case that the statutes providing for contesting of elections should be liberally construed, and that the purpose of the contest is to determine what candidate

received the greatest number of (legal) votes. But we find nothing in that decision that justifies the flouting of the statutory requirement that might have been so easily met, of making a separate list of the so-called first voters. The argument offered in this regard begs the question, that is to say, it is argued that, in the absence of fraud and upon a positive showing that the voter had done all he could, it would be unwise and unjust to hold that the failure of an election officer to perform a regulatory act would void that person's vote. It is the same argument that has been frequently made, that courts, by their rulings, disfranchise those who seek to cast their vote in good faith for their choice in an election. Resort to such argument indicates the weakness of the position. For twenty-five years the people of this state, by initiated acts and by legislative enactments, have not only cried out and protested against fraud in elections, but they have sought remedies, even invoked penalties to prevent the circumvention or thwarting of the will of the people expressed at the polls. Where efforts have been made to comply substantially with the law, though such efforts may not be in exact conformity with the statute itself, there may be in some instances reason and excuse to overlook such noncompliance, particularly when such failure may not be in violation of a mandatory statute, or may not, in itself, be used in aid of fraudulent conduct. It is not shown that there were any substantial number of such ballots, or that they would materially affect the court's ruling if counted. There certainly was no prejudice, if ever it should be determined that the court's ruling was erroneous which we do not hold.

In one voting precinct, Kimbro, the election officers failed to tabulate the vote cast. There were only fifteen ballots, and these were preserved and entered into this contest, where the unchallenged votes, or those determined to be legal were counted. It is urged, contrary to appellant's theory in presenting the matter above discussed, that these ballots should have been ignored, although there is no suggestion of fraud, nor is there any implication of any error in the court's count or tabulation

It is, also, argued seriously, upon another matter, that the court, of its own motion, had erroneously required the ballots withdrawn from the ballot boxes and counted after contestee had announced the withdrawal of his challenge as to these particular votes or ballots. We state the conditions as we understand them to be. The ballots were not called for or produced by order of the court until proof was offered and ruled upon by the court to show that these certain ballots were illegal. After this was done appellant sought to dismiss that phase of his complaint, desiring to avoid an inspection of these ballots to determine for whom they had voted. The trial court announced that it was his duty to determine which one of the rival candidates had received the highest number of legal votes, and that neither party would be permitted to withdraw a challenge as to any ballots after the evidence had been heard in regard thereto, and the invalidity of such ballots had been determined.

The theory of the appellant is that he might abandon any phase of his case at any time before judgment. Let it be conceded that ordinarily such a rule might prevail in the prosecution of private litigation. Whatever may be the law in that regard, where only individual rights are concerned, such a law would be hopelessly unsound in an election contest wherein the public is vitally interested in the officers to be elected.

Appellant, also, argues that the court erred in permitting the contestant, after he had rested, to reopen his case and offer additional names, concerning which proof already in evidence before the court was applicable. We will dispose of this matter by saying there was no abuse of discretion on the part of the court in so proceeding. Appellant does not even urge surprise, lack of preparation, or any other deficiency, or condition that might have operated to his prejudice or required time or investigation and examination caused by this ruling.

The final matter argued upon this appeal is to us a most serious one, but, like the trial court, we have no desire to avoid the responsibility imposed by law in a

matter so vitally important to a healthy, wholesome condition of state and county politics. Without enlarging upon this record, let it be said that it was not only charged and proven, but it was also admitted by Mr. Horne that he bought and paid for many poll tax receipts, for those who were not members of his family, nor were they for parties who had authorized him so to do by any written order. On the night of June 15, he gave his check for $293 to the tax collector, who testified that this money was for poll tax receipts issued and the penalty upon some of them. At that time, there was delivered to Mr. Horne, according to the tax collector, fifty or seventy-five receipts in an envelope. Mr. Horne says there were only twenty-five or thirty of these receipts. That admission confesses the whole charge without regard to the attempted explanations that Mr. Horne owed several different parties who procured poll tax receipts and had them charged to Mr. Horne, who paid these charges, because he owed the particular debts to his friends who were interested in the same manner, if not to the same extent that he was in the result of the election.

This is the second time a matter of this kind has come before the court, the first case being *Lady* v. *Smith,* 196 Ark. 1059, 121 S. W. 2d 99. We affirmed the decision of the lower court in that case. We would have to affirm this decision upon this point if there were no other evidence here except that of the appellant himself. See § 4700, Pope's Digest.

Upon the whole case we find no prejudicial error. Judgment of the trial court is accordingly affirmed.

BUCKSTAFF BATH HOUSE COMPANY *v.* MCKINLEY, COMMR.

4-5435 127 S. W. 2d 802

Opinion delivered April 10, 1939.

E. R. Parham, for appellant.
Walter L. Pope, for appellee.

GRIFFIN SMITH, C. J. Appellant denies it is subject to the provisions of Act No. 155, approved February 26, 1937,[1] and refused to pay the tax alleged by appellees to be due for the 1937 calendar year.

Injunctive relief was sought to prevent E. I. McKinley, as Commissioner of the Department of Labor, and W. A. Rooksberry, as Director of the Division of Unemployment Compensation of the [Arkansas] Department of Labor, from levying and collecting assessments provided for by the act. Appellant insists that, although it is an Arkansas corporation, its place of business is within the United States Government Reservation at Hot Springs, in Garland County. It admits that during the period in question it had in its employ fifteen persons engaged in performing services in the operation of its bathhouse ". . . for which plaintiff became liable as an employer and paid the aggregate sum of $9,029.80." During the same period fifteen attendants ". . . performed services at [plaintiff's] bathhouse, who received the aggregate sum of $9,445.55 in the manner and according to the terms of the rules and regulations promulgated by the United States Department of the Interior, . . . and that during said period nine people performed services in the massage department, receiving in the aggregate the sum of $4,885.44, in accordance with rules and regulations of the Department of the Interior."

Appellant's first position is that because of its situation within the boundaries of a government reservation, jurisdictional supervision, regulation, control, etc., have not been surrendered to the State of Arkansas to an extent permitting assessment of the unemployment tax, notwithstanding that consent of the United States was given the State to tax, as personal property, all structures and other personal property in private ownership within the Reservation.

Appellant, at its own expense, erected a bathhouse and equipped it according to specifications approved

[1] Pope's Digest, §§ 8549 to 8569.

by the Secretary of the Interior. It operates the business under a lease executed in 1931.

Secondly, appellant says that it is an instrumentality of the United States Government, engaged in the distribution and conservation of medicinal waters of the Reservation to the extent authorized by acts of Congress relating thereto and rules of the Department of the Interior, and that as such instrumentality it is exempt from the contributions specified in act 155 of the Arkansas General Assembly; that ". . . compensation for services performed by attendants and massagers does not constitute employment or wages within the meaning of said Act."

It is further urged that collection of the tax or contribution would be violative of Art. 4, § 3, of the Constitution of the United States.

Department of the Interior regulations for bathhouses, made a part of contracts under which waters of the Reservation are allocated, show a retention by the Department of certain elements of control.[2]

---

[2] Regulations of the Department of the Interior provide that bathhouses shall be allowed such number of tubs as the Secretary of the Interior may deem necessary for the public service. Charges shall be fixed by the Secretary. Tickets shall be sold at specified rates and only to persons intending to use them for bathing. Tickets are redeemable according to a scale fixed by the Department of the Interior. No complimentary tickets may be issued, nor any sale of bath equipment on the premises. No person shall be allowed to bathe without a ticket registered in the office of the superintendent [of the Reservation]. The rate of charges for massages and tickets are fixed at varying amounts, providing for that portion of the ticket [or interest therein] which shall belong to the attendant or masseur. All attendants, masseurs, etc., are required to undergo physical examinations. Drumming and soliciting are prohibited. Regulations as to the use and sale of bath mitts, towels, sheets, blankets, etc., are included. Approval of the superintendent required for the employment of any person in the bathhouses of Hot Springs National Park. Bath attendants prohibited from performing their work on the premises without having passed a written examination, a physical examination, and without paying their privilege fee to the department. They may charge for their services not exceeding 20 cents for a single bath, and $4 for a course of baths. Superintendent authorized to collect a fee of $6 for examination of bath attendants. Masseurs similarly regulated. Bathhouse required to furnish the superintendent with daily

We must first determine whether collection of the tax laid by Act 155 is a legitimate exercise of the State's governmental functions.

Having found that "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the State," and that "Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action," it was the General Assembly's considered judgment that ". . . the public good, and the general welfare of the citizens of this state require the enactment of [the Unemployment Compensation Law] under the police power of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

An excise tax is levied on wages paid to employees, to be paid by the employer at the rate of 1.8% for 1937, and 2.7% after December 31, 1937. Future rates are to be based on benefit experience.

The National Social Security Act[3], Title IX, levies a tax on every employer (with stated exceptions) of eight or more. Payments covering the 1936 calendar year were 1%, due January 1, 1937. For 1937 the rate was 2%; and 3% thereafter. The term "employment" excludes agricultural labor, domestic services in private homes, and other small classes.

Allowable credits are provided by § 1102. Against the tax so imposed, the amount of contributions (with respect to employment during the taxable year paid by such taxpayer into any unemployment fund under a state law having the approval of the National Social Security Board) not to exceed 90%, may be deducted by the taxpayer.

Effect of these provisions is this: The Arkansas rate for 1937, being 1.8%, and the Federal rate being 2%, the taxpayer in reporting to the Federal Government

and monthly reports of activities. No stock in an incorporated bath house may be transferred without consent of the director of the National Park Service.

[3] Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C. A., c. 7 (Supp.), § 301.

took credit for the payment made to the State, and remitted two tenths of one per cent to Washington. For 1938 credit was taken for 2.7%, and three tenths of one per cent was sent to the Federal treasury.

All remittances on pay rolls involving less than eight persons, made directly to the Unemployment Compensation Division of the Arkansas Department of Labor, go into the treasury at Washington and earn 3% interest. Remittances on pay rolls of eight or more covering the tax assessed by Act 155, although made to the State Unemployment Division, are likewise sent to the National Treasury and become a trust fund for the benefit of employees within the classification of eight or more. If there be no state unemployment compensation law of a character meeting approval of the National Social Security Board, the full amount levied under Title IX is collected by the Federal Bureau of Internal Revenue and is deposited generally in the U. S. Treasury without credit to the state wherein the collection is made.

Appellant admits it was liable to the United States for unemployment compensation tax levied under Title IX of the Social Security Act,[4] and that such tax has been paid.

The three questions for determination are:

(1) Did the Federal Government authorize the State to assess and collect taxes of the character herein discussed?

(2) Is appellant a governmental instrumentality or agency, and therefore excused?

(3) Are appellant's employees independent contractors?

By Act of March 3, 1891,[5] the Congress of the United States extended the Federal Government's consent ". . . for the taxation, under the authority of the laws of the state of Arkansas applicable to the equal taxation of personal property in that state, as personal property

[4] U. S. Code Annotated, Title 42—The Public Health and Welfare.

[5]..... U. S. C. Annotated, p. 365.

[of] all structures and other property in private ownership on the Hot Springs Reservation."

Ex Parte Gaines,[6] decided more than a year after Congress had extended the authority just referred to, declared the law to be: "When the Government parts with its title, or any interest therein, the property or interest which the Government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, whatever it may be, may be taxed, subject however to all the rights and interests which the United States retains in the property . . . The interest of the lessee in the land is not the property of the United States, and it is not a means employed by the Government to obtain a governmental end. The power to tax that interest does not involve, therefore, the power to destroy or disturb any interest of the United States Government."[7]

The tax laid by Act 155 is not a tax on personal property; nor is it, in *any* sense, a property tax. But the Congress seemingly intended (and this construction is strengthened by the Gaines Case) to permit the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the right to enforce restrictions under the federal laws and under rules promulgated by the Interior Department.

Lands were leased; and individuals, corporations, partnerships, etc., were permitted to erect buildings and to engage in activities for profit and amusement. Healing properties of the medicinal waters were recognized, and the use of such waters was circumscribed in order that opportunity might be afforded the public to enjoy the benefits.

But the Government, *per se*, did not engage in the business of operating appellant's bathhouse. On the

[6] 56 Ark. 227; 19 S. W. 602. Opinion dated May 21, 1892.

[7] *The Little Rock & Fort Smith Ry.* v. *R. W. Worthen, Collector, et al.*, 46 Ark. 312. See third headnote. This case is cited in Ex Parte Gaines.

contrary, it leased the site and fixed the fees to be charged by operators. The extent to which such regulations were carried is shown in the second footnote to this opinion.

Constitutionality of the National Social Security Act was assailed in *Stewart Machine Company* v. *Davis*,[8] The controversy reached the Supreme Court of the United States, where in an opinion written by Mr. Justice Cardozo[9] it was said: "The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment."

Carmichael v. *Southern Coal Company*[10] is another case in point. The opinion, written by Mr. Justice Stone, contains the following statements:

"This court has long and consistently recognized that the public purposes of a state, for which it may raise funds for taxation, embrace expenditures for its general welfare . . . The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of

[8] 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. Petitioner was an Alabama corporation. It paid its tax of $46.14 and filed a refund claim with the Commissioner of Internal Revenue, and sued to recover, asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the district court gave judgment for the defendant, dismissing the complaint. The circuit court of appeals for the fifth circuit affirmed. 89 F. 2d 207. Certiorari was granted.

[9] Mr. Justice CARDOZO, in the Steward Machine Company-Davis Case, stated that the decision of the court of appeals was in accord with judgments of the Supreme Judicial Court of Massachusetts, the Supreme Court of California, and the Supreme Court of Alabama. It was in conflict with a judgment of the circuit court of appeals for the first circuit, from which one judge dissented. (See page 573, 301 U. S.). 57 S. Ct. 883, 81 L. Ed. 1245, 109 A. L. R. 1219.

[10] 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327. [The Arkansas Unemployment Compensation Law is said to be almost identical with the Alabama law.]

the possible methods . . . When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals."

Although constitutionality of the Arkansas statute is not directly questioned in the appeal before us, this is the first case reaching this court in which payment of the tax is involved. Necessarily if we hold that appellant must pay the State's demand, we have upheld the validity of Act 155. For this reason the decisions quoted from have been cited.

The Legislature had the right to require that employers make contributions in the manner provided by Act 155. The National Social Security Act denominates the contribution "an excise tax levied on employers." That the required payment is referred to in our Act 155 as a "contribution" is of no significance. It is a compulsory contribution, and therefore a tax.

In its original sense an excise was something cut off from the price paid on a sale of goods, as a contribution to the support of the government. In its broader meaning it now seems to include every form of taxation which is not a burden laid directly upon persons or property—every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.[11]

In *State* v. *Handlin*[12] it was said [with respect to the inheritance Act of May 17, 1907]: "We . . . hold that the tax provided by this Act upon the privilege of succeeding to inheritances and estates was well within the power of the legislature to impose, being included within its express powers to 'tax privileges in such manner as may be deemed proper'."

[11] Ballentine's Law Dictionary, pp. 460-461. "An interesting review of the authorities discussing the meaning of the word 'excise' will be found in Mr. Justice BREWER'S opinion in *Patton* v. *Brady*, 184 U. S. 608, 46 L. Ed. 713, 22 Supp. Ct. Rep. 493.

[12] 100 Ark. 175, 139 S. W. 1112.

Quoting from Judge Cooley,[13] Chief Justice McCulloch said: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes."

Individuals, firms, and corporations engaged in business are privileged to do so because of the protection extended by government. Enforcement of contracts generally is a matter of constant judicial address. The State's welfare is best served when those of its citizens who must labor are able to find employment at profitable wages and in healthful surroundings. The contribution exacted by Act 155 becomes cumulative for use when the worker finds himself industrially adrift. His misfortune is not one affecting the individual alone. It extends to the entire community. If unemployment cannot be avoided, at least its tragic consequences can be ameliorated. Such is the purpose of the statute in question.

In the instant case, if it be urged that the tax is laid against the privilege of paying employees, or upon the right of an employer to engage labor (and therefore unrelated to personal property as appellant insists and beyond the grant of authority expressed in the Act of 1891, and not to be reasonably implied from the nature of the grant), the answer is that the Federal Government has enacted a similar tax; and appellant, having more than eight employees, comes within the classification from which unemployment compensation is exacted. We are asked to say that the Congress has not conferred upon Arkansas the right to impose the excise in question, while at the same time the National Social Security Act imposes a similar tax on employers in each of the forty-eight states. Conceding, as we must, that authority of the State to collect the tax does not come from the Social

[13] Ex Parte Byles, 93 Ark. 612, 126 S. W. 94; 37 L. R. A., N. S., 774, error dismissed, 1912, 225 U. S. 717, 32 S. Ct. 836, 56 L. Ed. 1270.

Security Act of Congress, yet the power conferred by Act of 1891 to tax personal property impliedly carried with it the right to tax the use of such property to the same extent and in manner similar to property not within the Reservation.

It is next insisted by appellant that it possesses all of the characteristics necessary to classification as a governmental agency or instrumentality, and, as such, is exempt from the tax.

The rule announced in Cooley on Taxation [14] is that "A corporation cannot escape state taxation merely because it was created by the federal government, nor because it was subsidized by it, nor because it was employed by the federal government, wholly or in part, unless it is really an agency or instrumentality for the exercise of the constitutional powers of the United States."

Imposition of the tax here does not in any sense interfere with the Government's business. On the contrary, the expressed social policies of the government are sustained and promoted.

Finally, appellant urges that its employees are independent contractors. In its complaint it alleged they were employees. There was a declaration that "The employees, bath attendants and massage operators . . . are residents of the state of Arkansas, and . . . unemployment compensation for the year 1937 has been paid to the United States for their salaries, wages, and com-

[14] Fourth Edition, v. 2, p. 1300. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 25 S. Ct. 50, 49 L. Ed. 242; *Fidelity & Deposit Company* v. *Pennsylvania*, 240 U. S. 319, 36 S. Ct. 298, 60 L. Ed. 664; *James* v. *Dravo Contracting Company*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318; *Union Pacific Railroad Company* v. *Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Trinity Farm Construction Company* v. *Grosjean*, 291 U. S. 466, 54 S. Ct. 469-70, 78 L. Ed. 918.

Mr. Justice STONE of the Supreme Court of the United States has excellently reviewed the subject of immunity of Federal agencies and instrumentalities from state taxation. See *Mark Graves et als., Commissioners* v. *People of the State of New York, etc.*, Law Edition Advance Opinions, v. 83, p. 577. The opinion sustains the views we have expressed in the instant case.

missions.'' If it now be urged that language of the complaint was inadvertent, still we think the record establishes the relationship of master and servant, and the point must be overruled. The means and methods by which the work was done were subject to directions of appellant.

Action of the chancellor in sustaining the demurrer to appellant's complaint was correct, and the decree dismissing the complaint is affirmed.

FULLER *v.* WILKINSON.

4-5428 128 S. W. 2d 251

Opinion delivered April 17, 1939.

J. T. Cheairs, for appellant.

Carneal Warfield, for appellee.

SMITH, J. The tract of land here in controversy was sold to the state in 1931 for the nonpayment of the 1930 taxes due thereon. Included in the taxes for the nonpayment of which the land was sold was the county road tax of three mills. This road tax had not been voted by the electors at the preceding general election, and there was, therefore, no authority for the extension of this tax against the land.

Under the authority of act 119 of the Acts of 1935, p. 318, this tax sale to the state was confirmed in a decree rendered April 6, 1936, and more than one year thereafter this suit in ejectment was brought by the purchaser of the state's title. Appellant, the owner of the land at the time of the tax sale, answered that the confirmation decree was void, and the cause was transferred to equity. The chancery court upheld the confirmation decree, for the reason that it had not been attacked within one year after the date of its rendition, and this appeal is from that decree.

For the reversal of this decree it is insisted that the confirmation decree was ineffective to cure the defect in the tax sale, the defect being jurisdictional, inasmuch as there was no authority in law for the extension of the road tax.

This act, 119 of the Acts of 1935, is similar to and in some of its recitals is identical with act 296 of the Acts of 1929, p. 1235, indicating that the act 296 served as a model in drafting act 119. The chief difference between the acts appears in § 9 of each of the acts. Section 9 of act 296 provides that "the decree of the court confirming the sale to the state shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of any informality or illegality

in the proceedings" (leading up to and incident to the tax sale). The same numbered section appearing in act 119 omits the words "any informality or illegality" appearing in the first act, and provides that "the decree of the chancery court confirming the sale to the state of such real property, as aforesaid, shall operate as a complete bar against any and all persons, firms, corporations, *quasi*-corporations, associations, and trustees who may thereafter claim said property (sold for taxes) except as hereinafter provided; and the title to said property shall be considered as confirmed and complete in the state forever," with a saving clause in favor of infants and certain persons under other disabilities during the continuance of the disability and until one year after its removal.

It is obvious that something was intended by act 119 which act 296 did not accomplish, otherwise there was no point in passing the later act, and that this something was to make the confirmation decrees rendered pursuant to act 119 impervious to attack upon any ground, which a decree of confirmation could cure save only by the persons under one of the disabilities there enumerated.

We have had frequent occasion to construe this act 296 and the effect of confirmation decrees rendered pursuant to its provisions. In the first of those cases, that of *State* v. *Delinquent Lands,* 182 Ark. 648, 32 S. W. 2d 1061, it was held (to quote the headnote in that case) that "Acts 1929, No. 296, providing for confirmation of lands sold to the state, and that the decree of confirmation in favor of the state shall be a bar against any and all persons who may thereafter claim said lands in consequence of 'any informality or illegality' in the forfeiture proceeding, does not mean that the confirmation shall be a bar against claimants of land on other grounds." The later cases are also to the effect that confirmation decrees rendered pursuant to the provisions of act 296 cured only informalities and illegalities.

Now, act 119 is not thus restricted, and we think the effect of confirmation decrees rendered pursuant to its provisions is to cure all tax sales where there was not

lacking power to sell, that is, all sales for taxes which were due and had not been paid.

It is argued that not even this limitation may be placed upon the effect of decrees confirming tax sales under act 119, which are not attacked within one year after the date of their rendition, for the reason that the act provides that period of time within which the decrees may be attacked, and that after the expiration of this period of limitation the sales may not be attacked upon any ground.

This view would, no doubt, be correct if it be true that act 119 should be construed as enacting a statute of limitation allowing one year within which the confirmation decrees may be attacked, and making them impervious to attack for any reason after that time.

This is the effect of the opinion in the case of *Ross v. Royal,* 77 Ark. 324, 91 S. W. 178. That opinion points out the distinction between such legislation as § 5061, Kirby's Digest, (§ 8925, Pope's Digest) and § 7114, Kirby's Digest, (§ 13883, Pope's Digest).

The last mentioned section provides that "all actions to test the validity of any proceeding . . . . in the sale of lands or lots delinquent for taxes, or proceedings whereby it is sought to avoid any (tax) sale . . . . , shall be commenced within two years from the date of sale, and not afterward."

Cases were cited in *Ross* v. *Royal, supra,* holding that this statute begins to run from the date of sale, and applies only to mere irregularities in and technical objections to tax sales, and not to jurisdictional or fundamental defects in the sales which render them absolutely void, whereas § 5061, Kirby's Digest, was there upheld as a statute of limitation, which, when it was applicable and had run, concluded any inquiry into the validity of the sale.

This § 5061, Kirby's Digest, (§ 8925, Pope's Digest) provides that "no action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs and assigns, who may hold such land by virtue of a purchase thereof at a sale by the collector, or

commissioner of state lands, for the nonpayment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the nonpayment of taxes, or who may hold such land under a donation deed from the state, or who shall have held two years actual adverse possession under a donation certificate from the state, shall be maintained, unless it appears that the plaintiff, his ancestors, predecessors, or grantors, was seized or possessed of the lands in question within two years next before the commencement of such suit or action."

In the opinion in this case of *Ross* v. *Royal* it was said: "The statute under consideration is plainly a statute of limitation, and begins to run, not from the date of the sale, but from the date actual possession is taken under the deed. *Haggart* v. *Ramney,* 73 Ark. 344, 84 S. W. 703; *McCann* v. *Smith,* 65 Ark. 305, 45 S. W. 1057. Actual possession of land taken and held continuously for the statutory period of two years under a clerk's tax deed or donation deed issued by the Commissioner of State Lands bars an action for recovery, whether the sale be merely irregular, or void on account of jurisdictional defects.

"In *Turner* v. *New York,* [168 U. S. 90, 18 S. Ct. 38, 42 L. Ed. 392] the Supreme Court of the United States held that the statute of New York 'providing that deeds from the Comptroller of the State of Lands in the forest preserve sold for nonpayment of taxes shall, after having been recorded for two years, and in any action brought more than six months after the act takes effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, is a statute of limitation, and does not deprive the former owner of such lands of his property without due process of law." In *Saranac Land & Timber Co.* v. *Comptroller,* [177 U. S. 318, 20 S. Ct. 642, 44 L. Ed. 786] Mr. Justice McKenna, delivering the opinion of the court, in summing up the effect of the decision in *Turner* v. *New York, supra,* says: 'The decision establishes the following propositions:

"1. That statutes of limitations are within the constitutional power of the legislature of a state to enact.

"2. That the limitation of six months is not unreasonable.

"The New York Court of Appeals in *Meigs* v. *Roberts,* 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322, had the same statute under consideration, the question being whether it applied to mere irregularities or jurisdictional defects, and in discussing the difference between the effect of curative statutes and statutes of limitations said: 'But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principal does not apply to a statute of limitation, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.'

"We do not think that it can be said that the period of two years fixed by the statute is unreasonable. Under it no action can be barred in less time than four years after the tax sale, because two years time is given for redemption before a deed can be executed completing the sale, and there must be actual adverse occupancy for the full period of two years under the deed."

The tax sale involved in that case was made on a day not appointed by law, yet, under § 5061, Kirby's Digest, which was construed as a statute of limitation, the sale was held impervious to attack, although it had been previously held in the case of *Allen* v. *Ozark Land Co.,* 55 Ark. 549, 18 S. W. 1042, that a sale for taxes on a day not authorized by law would be regarded as "an entire omission to sell" within the provisions of the law regulating such sales.

If, therefore, section 9 of act 119 is to be construed as enacting a statute of limitation requiring confirmation decrees to be attacked within one year after the date of their rendition, and not later, the decree here under review must be upheld, as it was not attacked within that

time. But, as was pointed out in the portion of the opinion in the case of *Ross* v. *Royal, supra,* which we have copied, such legislation, to be upheld as a statute of limitation, must provide a reasonable period of time within which, after the statute has begun to run, the person to be concluded by its operation may act to prevent the bar of the statute from falling.

We copy § 9 of act 119 in full: "Section 9. The decree of the chancery court confirming the sale to the state of such real property, as aforesaid, shall operate as a complete bar against any and all persons, firms, corporations, *quasi*-corporations, associations, and trustees who may thereafter claim said property except as hereinafter provided; and the title to said property shall be considered as confirmed and complete in the state forever; saving, however, to infants, persons of unsound mind, imprisoned beyond the seas, or out of the jurisdiction of the United States, the right to appear and contest the state's title to said land within one year after the disabilities are removed. The owner of any lands embraced in the decree may, within one year from its rendition, have the same set aside in so far 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."

Does this act allow any period of time, reasonable or otherwise, within which all affected landowners may show cause why the decree should not become final and impervious to attack? The act provides that "the title to said property shall be considered as confirmed and complete in the state forever," that is, at the time of and upon the date of the rendition of the confirmation decree. It appears to be the purpose and effect of the act to give finality and conclusive effect to the decree of confirmation, not one year after the date of its rendition, but upon its rendition. It is true that certain owners, who can

make the showing that they had no knowledge of the pendency of this suit and who have a meritorious defense to the complaint upon which the decree was rendered, are allowed one year for that purpose, but only such persons are allowed that time. All others are concluded from the date of the rendition of the decree, and as to them the decree is as final upon the date of its rendition as it ever becomes.

We held in the recent case of *Hirsch* v. *Dabbs and Schuman* v. *Mivelaz,* 197 Ark. 756, 126 S. W. 2d 116, that it was a meritorious defense, within the meaning of the act, for the owner to show that the tax sale was void for any reason, whether the defect in the tax sale was jurisdictional or not. Except as against those owners who are unaware of the pendency of the confirmation suit, the decree of confirmation is conclusive from the date of its rendition as to all defects which the decree could cure, so that the statute is not one of limitations, as it did not give a year or any other period of time within which the confirmation decree might be attacked except only as to those owners who were unaware of the pendency of the confirmation suit and are able to show that the original tax sale was invalid.

We conclude, therefore, that the confirmation decree has not been rendered impervious to attack through a statute of limitations.

We think the purpose of this act 119, and of the decree of confirmation rendered pursuant to its provisions, was to cure any and all defects in the sale not related to the power to sell, and that it was beyond the prerogative of the legislature to supply this lack of power, and that the taxing officers were unauthorized to sell land for taxes which were not chargeable against the land. We think this is the effect of the opinion of this court in the case of *Radcliffe* v. *Scruggs,* 46 Ark. 96.

The case of *Caldwell* v. *Martin,* 55 Ark. 470, 18 S. W. 633, involved the effect of a confirmation decree rendered under the authority of the revised statutes. In that case Judge Hemingway said that legislation was valid which authorized the confirmation of tax sales which were absolutely void, but he also said: "Whether

a distinction can be taken between sales that are void for a fundamental defect, and such as are void for a departure from a statutory provision not fundamental, and, if so, whether the curative powers of a decree are confined to sales of the latter class, is a question we need not determine in this cause." In that case there had been a failure to advertise the land for sale, but it was there held that the confirmation decree cured this defect, for the reason that it was within the power of the legislature to authorize a sale for taxes without advertisement of the sale. But it was not and is not within the power of the legislature to authorize a sale for taxes which are not due and which are not a charge upon the land. And while it is true, as appears from what we have already said, that the legislature has the power to enact such a statute of limitations, under which, when it has run and the bar thereof has fallen, a decree of confirmation may not be attacked for any reason, it is also true that the legislature has not, by act 119, enacted such a statute of limitations.

The decree of confirmation is, therefore, open to the attack here made upon it, that is, that the tax sale which it undertook to cure was void for the want of power to make it, the land having been sold for taxes not due on the land.

The decree must, therefore, be reversed, and the cause will be remanded with directions to permit appellant landowner to redeem, as he attempts to do.

SMITH, J. (on rehearing). Appellee cites, in support of his petition for rehearing, cases which, like *Burcham* v. *Terry,* 55 Ark. 398, 18 S. W. 458, 29 Am. Ct. Rep. 42, discuss the effect of sales made pursuant to decrees rendered under the authority of Act 39 of the Acts of 1881, pages 63 *et seq.,* commonly known as the Overdue Tax Act. It is insisted that we have not followed the principle announced in those cases, and that the instant case impairs their authority. We have no such intention, and we think the original opinion in this case does not accomplish that result.

In the case of *Burcham* v. *Terry, supra,* Judge Hughes, speaking for the court, said: "The chancery court that rendered the decree under which they were sold to the state had jurisdiction of the subject matter of the suit, which was a proceeding *in rem.* That illegal taxes had been assessed against the lands, and that they had been assessed for taxation for years when they were not liable for taxes, were matters of defense which might have been shown in the overdue tax suit, but they cannot be shown in a collateral suit. These matters might have been litigated in the overdue tax suit, and the decree in that suit is conclusive here as to all matters that could have been litigated in that suit except the question of jurisdiction. *Mayo* v. *Ah Loy,* 32 Cal., 477, 91 Am. Dec. 595. This case falls within the principle decided in *McCarter* v. *Neil,* 50 Ark. 188, 6 S. W. 731, and *Williamson* v. *Mimms,* 49 Ark. 336, 5 S. W. 320. 1 Black on Judgments, § 245."

An examination of this Overdue Tax Act will disclose that it did not attempt to give finality to the decrees rendered pursuant to its provisions at the time of their rendition, nor did it attempt to give finality to sales which such decrees ordered, even after they had been made and confirmed. Section 11 of this Overdue Tax Act provides that "The owner of any lands thus sold may redeem from the purchaser at any time within the period fixed by law for the redemption of lands sold for taxes, on the payment of the sums required to be paid by law in making redemption in other cases, and on payment of the costs of the proceedings had under this act, in so far as they may have been adjudged against the lands sought to be redeemed." The two years thus allowed for redemption in the Overdue Tax Act became in effect and of the nature of a statute of limitation, making the sales impervious to attack after the expiration of the two years allowed for redemption, upon any ground, save only the jurisdiction of the court ordering and confirming such sales.

The original opinion in this case pointed out, however, that Act 119 of the Acts of 1935 was not to be con-

strued as enacting a statute of limitation requiring confirmation decrees rendered pursuant to its provisions to be attacked within one year after the date of their rendition, and not later. Act 119 did not allow any and all persons a year, or any other time, within which to redeem after the rendition of the confirmation decree. As was said in the original opinion, "It appears to be the purpose and effect of the act (119) to give finality and conclusive effect to the decree of confirmation, not one year after the date of its rendition, but upon its rendition," although it was provided that certain owners, who could make the showing that they had no knowledge of the pendency of the suit and who had a meritorious defense to the complaint upon which the decree was rendered, were allowed one year within which to make that showing. It was not, therefore, a statute of limitation, and did not cure tax sales where the power to make them was lacking.

Act 119 of the Acts of 1935 differs from the Overdue Tax Act in this very material respect. The original opinion here recognized the power of the General Assembly to enact such a statute of limitation. Had it done so, decrees rendered pursuant to its provisions would, like decrees rendered under the Overdue Tax Act, have been impervious to any attack, save only that the court was without jurisdiction to render the decree. The case of *Burcham* v. *Terry* and other cases called to our attention would, in that event, have application, but, for the reasons herein stated, they do not apply.

CARSON v. STATE.

4120 128 S. W. 2d 373

Opinion delivered April 24, 1939.

Joe N. Wills and *Milton McLees,* for appellant.

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

McHaney, J. Appellant was charged by information with murder in the first degree for the shooting and killing of J. B. Keller, a guard who attempted to prevent his escape from the State Hospital for Nervous Diseases, in which he was confined for observation on another charge. On his motion for a continuance, suggesting his insanity, the court made an order committing him to the said State Hospital for Nervous Diseases for observation and report. At his own suggestion and on his own motion, the court later made an order removing him from said hospital and recommitting him to the county jail. He also moved the court for a separate sanity hearing and that his trial for murder be postponed until a jury should determine his sanity. This motion was overruled. He was put to trial September 19, 1938, and the jury returned a verdict that he was insane at the time of trial. The court, on further consideration, determined that error had been committed in submitting to the jury

the question of appellant's sanity at the time of the trial, declared a mistrial, and, acting under the provisions of §§ 12555-12558 of Pope's Digest, recommitted him to said State Hospital to be there confined as an insane person until declared by the physicians thereof to be restored to reason, when he should be, on demand, returned to the sheriff of Pulaski county to be again confined in the county jail.

On October 31, 1938, after the hospital authorities had again reported appellant sane, he entered his plea of guilty to murder in the first degree, and the court made the following docket entry: "10/31/38 Plea of guilty by Joel Carson, alias Jewell Carson, to murder in the first degree. Death penalty waived by prosecuting attorney. By agreement and by consent of court the jury is waived. Case passed for judgment—defendant to be returned immediately to the state of Oklahoma to complete his unexpired sentence in the Oklahoma state penitentiary, with the understanding that this record shall show defendant is to be held and delivered to Arkansas authorities upon expiration of his sentence in Oklahoma or upon his release therefrom for any reason, thereupon he is to be returned to the court and sentenced to life imprisonment upon the above indictment and plea of guilty."

On November 22, 1938, appellant filed another motion for a separate sanity hearing, alleging he was then insane. Also a motion to set aside his plea of guilty on the ground he was insane at the time of entering said plea. Also a plea of former jeopardy was interposed. These motions and plea were overruled. The court found that the plea of guilty had been accepted, and that the case had been passed for judgment on certain conditions which were not fulfilled to the satisfaction of the court. Appellant was put to trial on his plea of guilt, a jury being impaneled to hear evidence and determine the degree of the offense charged. Such trial resulted in a verdict of guilty of murder in the first degree, with the death penalty, on which judgment was accordingly entered.

To reverse this judgment, appellant first contends that the court erred in denying him the right to withdraw his plea of guilty. The statute provides, § 3901, Pope's Digest, that: "The plea of guilty can only be put in by the defendant himself in open court." The next section, 3902, says: "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

It has long been the rule, construing the statute, that the right to withdraw a plea of guilty rests in the sound discretion of the trial court and that its action in this regard will be reversed only when it clearly appears that its discretion has been abused. *Green* v. *State,* 88 Ark. 290, 114 S. W. 477; *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723; *Estes* v. *State,* 180 Ark. 633, 22 S. W. 2d 36. The discretion of the trial court to permit the withdrawal of the plea of guilty will be indulged in favor of the proper exercise thereof. *McLain* v. *State,* 165 Ark. 48, 262 S. W. 987.

Appellant bases his whole argument, under this assignment, on the assumption that the plea of guilty was entered on condition and that under the law, a conditional plea cannot be made. Assuming the correctness of this conclusion, as a matter of law, still if the premise is false, the conclusion does not follow. There was no conditional plea of guilty. It appears to be unconditional, and only the suspension of sentence was conditional. The court had the right to postpone sentence on the plea. *McPherson* v. *State,* 187 Ark. 872, 63 S. W. 2d 282. It did not have the right to waive the impaneling of a jury to determine the degree of the crime. Section 4041, Pope's Digest, provides: ". . . but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of the crime shall be found by such jury." This statute has many times been held to be mandatory. *Banks* v. *State,* 143 Ark. 154, 219 S. W. 1015; *Wells* v. *State,* 193 Ark. 1092, 104 S. W. 2d 451. So, neither the prosecuting attorney nor the court could waive the impaneling of a jury and the jury alone could fix the degree of the crime. Section 3912 of the digest provides: "In all criminal cases except where a sen-

tence of death may be imposed, trial by a jury may be waived by the defendant, provided the prosecuting attorney gives his assent to such waiver. Such waiver and the assent thereto shall be made in open court and entered of record. . . ." So it will be seen that in this case not even appellant could waive the jury. The prosecuting attorney could make a recommendation to the jury, as he did in this case, but the jury could and did in this case disregard same. We, therefore, conclude that the court did not err in refusing to permit appellant to withdraw his plea, or at least we cannot say that such refusal was an abuse of discretion.

It is next urged that the court erred in holding that the question of present sanity was not an issue and in denying him a separate trial on such issue. We cannot agree. Insanity is a defense, and, if we are correct in holding that appellant properly entered his plea of guilt and that no error was committed in refusing permission to withdraw same, of course, the question of his present sanity was not an issue.

It is finally argued that the court erred in refusing his plea of former jeopardy. At the first trial, the court submitted three issues: (1) Whether appellant was guilty of some degree of murder; (2) whether he was insane at the time the crime was alleged to have been committed; and (3) whether he was insane at the time of trial. The jury found him insane at the time of trial and nothing more, and thereafter the court declared a mistrial. This was not sufficient to support the plea of former jeopardy. The rule is stated in 15 Am. Jur., p. 51, as follows: "One found by the jury to be insane at time of trial cannot plead former jeopardy when arraigned a second time on the same charge, although the jury at the same time returned a verdict of guilty which was set aside by the court." Our statute, § 3881 of Pope's Digest, is persuasive to this same effect.

No error appearing, the judgment is affirmed.

SMITH, HUMPHREYS, and HOLT, JJ., dissent.

SMITH, J. (dissenting). The majority correctly say that it is within the sound judicial discretion of the trial

court to refuse to permit an unconditional plea of guilty to be withdrawn. But it is not and cannot be contended that the court is without power to permit the withdrawal of a plea of guilty which is unconditional. Section 3902, Pope's Digest, provides that "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted." The law is, therefore, that, even though appellant's plea of guilty was absolute and unconditional, it was within the power of the court to permit its withdrawal and the entry of a plea of not guilty.

But appellant's plea was not absolute and unconditional, as appears from the notation upon the court's docket copied in the majority opinion. These conditions were, as that entry recites: 1. The death penalty would be waived. 2. The jury would be waived. 3. Appellant would be returned immediately to the State of Oklahoma, there to complete service of an unexpired sentence. 4. That the records of the Oklahoma penitentiary should show that appellant would be held and delivered to the Arkansas authorities on his release for any reason by the Oklahoma authorities. 5. That upon such contingency appellant would be returned to this state and sentenced by the court below to life imprisonment.

The agreement to waive a jury trial of itself shows that it was agreed that a death sentence would be waived, as such a sentence can be imposed only upon the verdict of a jury.

In the case of *Hudspeth* v. *State,* 188 Ark. 323, 66 S. W. 2d 691, the defendant asked to be allowed to withdraw a plea of guilty previously entered. He alleged an agreement between himself and the prosecuting attorney that all the indictments against him except one should be dismissed, and that the prosecuting attorney was refusing to abide by this agreement, wherefore he asked leave to withdraw his plea of guilty. In denying this prayer the court said: "A conditional plea of guilty is not authorized, and the court could not accept such a plea. (Citing cases). It is within the discretion of the court to permit a plea of guilty to be withdrawn. The record does

not show that the plea was entered conditionally. The evidence is in conflict as to what took place, and we think there was no abuse of discretion in refusing to permit appellant to withdraw his plea of guilty." In other words, it was found, as a fact, that the plea of guilty had not been conditionally entered, and that it was within the discretion of the court to refuse to permit the withdrawal of a plea which had been unconditionally entered. The clear implication of that case is that permission to withdraw the plea of guilty should have been granted had it been found that it was conditionally entered, and certainly so if the prosecuting attorney refused to abide by the condition upon which it had been entered.

It occurs to me that as a matter of good sportsmanship, if nothing else, the state should either have performed the conditions under which the plea of guilty was entered or should have permitted its withdrawal. Indeed, it is difficult to understand the logic by which the majority reach the conclusion that there was an unconditional plea of guilty. To say that it was not conditional is to contradict the solemn record of the proceedings of the court. If it were void because it was conditional, for the reason that conditional pleas may not be entered, then it should be held void for all purposes. It does not appear to me to be fair, or to be authorized by law, to say that the plea is binding as an admission of guilt and at the same time ignore the conditions upon which it was entered.

The record recites that "The court accepted the plea of guilty to murder in the first degree and passed the case for judgment upon certain conditions which have not been fulfilled to the satisfaction of the court. In addition to the condition to be found in the record there is implied condition that the defendant will not violate the law while under suspension of sentence. The court is satisfied that the defendant has violated this implied condition." in view of this additional recital, how can it be questioned that the plea was conditional?

That the court was attempting to exercise a power which it did not possess was expressly held in the case of

Wolfe v. *State,* 102 Ark. 295, 144 S. W. 208, Ann. Cas. 1914A, 448, to which case I shall later refer. But let it be first observed that the court's action was prompted by appellant's violation of an "implied condition" not to further violate the law. It was not said, and is not contended, that such a condition was expressed or agreed upon. We do not know what this act of violation was, as he has at all times been confined. But if he was and is insane, that mental condition would be a valid defense, not only to the charge of homicide, but also to any subsequent charge. Appellant has never interposed any defense except that of insanity, and that defense has been submitted to only one jury, and that jury found, under testimony not before us (except only that the physicians at the State Hospital pronounced him sane), that appellant was insane at the present time. In other words, the jury found, notwithstanding the report of the hospital physicians, as follows: "We, the jury, find the defendant insane at the present time."

But, to return to the Wolfe Case, above referred to, it was there said: "There is no authority in the statute 'for a plea of guilty to be entered and received on any kind of condition, or for judgment to be suspended on condition'. *Joiner* v. *State*, 94 Ark. 198, 126 S. W. 723."

In this Wolfe case the defendant confessed his guilt and entered a plea of guilty, but upon condition that fines would not be imposed under this plea unless he subsequently violated the law. It was found by the trial court—and that finding was not questioned by this court—that the defendant had, subsequent to the entry of his plea of guilty, violated the law, and the trial court imposed fines under this plea. In holding that it was error to impose fines pursuant to this plea, it was there said: "In the case, since the court finds that the appellant's pleas of guilty were entered upon condition, it results that they were not such pleas of guilty as the law authorizes or contemplates, and therefore the court was not justified in inflicting punishment upon such pleas." The judgment imposing fines under the pleas was reversed and the cause was remanded with directions to allow the

defendant to withdraw his plea of guilty and to enter a plea of not guilty. That case cannot be distinguished from the instant case.

In the case of *Miller* v. *State,* 160 Ark. 245, 254 S. W. 487, we quoted with approval the following statement of the law appearing in 16 C. J., pp. 397, 398, § 730: " 'The withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. Therefore, the court ordinarily will permit a plea of guilty to be withdrawn if it fairly appears that defendant was in ignorance of his rights and of the consequence of his act, or was influenced unduly and improperly, either by hope or by fear, in the making of it, or if it appears that the plea was entered under some mistake or misapprehension. Ordinarily it will not be granted, however, where the plea was entered voluntarily without any undue influence, or where no reason whatever is assigned for the change.' See *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723; *Cox* v. *State,* 114 Ark. 234, 169 S. W. 789. See, also, *Wolfe* v. *State,* 102 Ark. 295, 144 S. W., Am. Cas., 1914A, 448; 8 R. C. L. 111-112, §§ 77 and 78."

In the chapter on Criminal Law in 14 Am. Jur., § 287, p. 961, it is said: "The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury."

As has already been said in this opinion, and as is also stated in the majority opinion, the court set aside the verdict of the jury finding appellant insane at the time of the trial notwithstanding the opinion to the contrary expressed in the report of the staff of the State

Hospital for Nervous Diseases. The court did this under what I think was a misapprehension of the purpose and effect of Initiated Act No. 3, Acts of 1937, p. 1384. We copy the following statement of the trial judge appearing in the record: "Unless and until a contrary ruling shall have been made by the Supreme Court the court stands committed to its decision that Initiated Act No. 3 meant to repeal by implication the common law and statutory rule granting separate sanity hearings and to vest in the Staff of the State Hospital the decision as to present insanity. This in no way impairs the defense of insanity during a trial on the merits.

"Since the last reference of the question of defendant's present mental condition, under Act No. 3, was made subsequently to the mistrial referred to, and since the report on this reference again held the defendant sane, and since also the court is of the opinion *that this question is not a jury matter,* the plea of guilty to murder which has since been entered by defendant was in the opinion of the court properly received."

The view of the trial judge appears to have been that only the Staff of the State Hospital may pass upon the present sanity of an accused person, and not the jury, and that the jury may pass upon the sanity of the accused only at the time of the commission of the offense "during a trial upon the merits." The purpose of the act was not to deprive juries of the right to pass upon this question of fact. Indeed, such legislation would violate the provisions of our Constitution, which makes juries triers of questions of fact, and it is certainly a question of fact whether the accused is sane at this time. It was rather the purpose of the Act No. 3 to furnish the juries the assistance which the Hospital Staff might afford, rather than to take from the juries the right to hear and decide the question of sanity at the time of the trial. It was no doubt this misapprehension of the purpose and effect of Act No. 3 which led the trial court into what I conceive to be error.

Acting under this misapprehension the trial which thereafter followed was, to say the least of it, perfunctory.

The defendant had only one defense, and that was insanity, both now and at the time of the homicide. He was, of course, guilty of murder in the first degree, if he was sane at the time of the killing. But he had the right to have the jury pass on that question, and this right was denied him. The court charged the jury as follows:

"Gentlemen of the jury, upon the plea of guilty the court will instruct you all defenses have been excluded, also the defense of insanity. The question of sanity does not arise in this proceeding for the consideration of the jury."

Appellant had been found insane at the present time, and the jury at the trial from which this appeal comes was not permitted to pass upon the question of his sanity at the time of the homicide. He was put to trial without being allowed to offer his only defense, and this action is upheld because, as the majority say, he had entered a plea of guilty, which was an admission of sanity. *Non sequitur*. The attorney for the accused entered this plea because there was held forth to his client the promise of continued life over the probability of immediate death, and if this promise and agreement was not to be kept, he should have been allowed to withdraw the plea. Under the authority of the Wolfe and Hudspeth cases, *supra,* he had the right to do this, and it was not within the discretion of the court to deny him that right, because his plea was conditional. But, even though the court had the discretion to deny this right, it was, under the facts of this case, an abuse of discretion to deny the right to withdraw the plea.

The judgment should, therefore, in my opinion, be reversed, and the cause remanded, with directions to permit appellant to withdraw his plea, and to submit the question of his sanity to the jury.

PUCKETT *v.* NEEDHAM.

4-5452 127 S. W. 2d 800

Opinion delivered April 24, 1939.

Tom F. Digby, for appellant.

Chas. S. Harley and *Gerland P. Patten,* for appellee.

GRIFFIN SMITH, C. J. The appeal questions correctness of an order setting aside that part of a former decree adjudicating property rights, sustaining liens on interventions, and confirming the commissioner's report of sale, etc. We sustain the action of the chancellor.

Clark Needham sued for divorce in an action filed January 14, 1936. The complaint asked that title to certain real property be divested out of Goldina Needham and vested in plaintiff. Summons was served January 15. Five interveners, claiming to have performed labor and to have supplied materials in constructing or repairing a residence on the property, requested priority liens. A sixth intervener (April 25, 1936) alleged he held a tort

judgment rendered against Goldina Needham in January, 1936, and prayed that a lien be declared on the property described in Clark Needham's complaint.

Decree was rendered June 11, 1936. The husband was granted a divorce; title to the property was vested in him; the five interveners were given first liens, and the judgment creditor was given an inferior lien. Sale was decreed. Appellants H. S. Puckett and Mary D. Puckett, husband and wife, were purchasers at the sale July 31, 1936, for $450. Such sum was paid into the registry of the court and distributed to the interveners, the commissioner's deed having been approved.

In October of the same year, Goldina Needham filed her petition in chancery court to set aside the decree and order of confirmation. She alleged that she had an adequate defense; that as to the five interveners claiming for materials and labor, payment had been made. There was the further allegation that at the time the judgments and decree were rendered, the petitioner was a prisoner, confined in a federal penitentiary at Alderson, West Virginia; that no defense was made by her or in her behalf, and that the proceedings were void. The court acquiesced.

In March, 1937, answer was filed by Goldina Needham. There were denials of all allegations of the complaint on which Clark Needham obtained divorce and as a consequence of which title to the property was taken from the then defendant. Appellants (Mr. and Mrs. Puckett) were made cross-defendants. Recovery of rents during the period appellants had been in possession was asked. The former proceedings (other than the decree of divorce) were vacated. Title to the property was reinvested in Goldina Needham. She was also given judgment for $70 rental value.

This appeal is from the final decree in Goldina Needham's favor.

Section 56 of the Civil Code[1] provides that "No judgment can be rendered against a prisoner in the penitentiary until after a defense has been made for him by

[1] Pope's Digest, § 1337.

his attorney, or, if there is none, by a person appointed by the court to defend for him."

It is conceded that when the decree in question was rendered Goldina Needham was in federal prison. This situation was not called to the court's attention—for the reason, presumably, that the attorneys were not aware of the defendant's status. Certainly the court was not; for, if that fact had been known, an attorney would have been appointed to represent the defendant.

There is this paragraph in appellants' brief: "The action of the court in setting aside the original decree, as we understood it, was based solely upon [§ 1337 of Pope's Digest]. So far as we have been able to determine, the question presented here has never been determined by our court, and is, therefore, one of first impression. However, it will be noted from the data submitted . . . that service of summons issued upon the complaint was had on the defendant Goldina Needham in Pulaski county on January 15, 1936, and that although the decree was not rendered until June 11, 1936, at which time the defendant was a prisoner in the penitentiary, her time for filing an answer to the complaint had long since expired, and although she remained in Pulaski county from the date of service of the summons on January 15, 1936, until May 11, 1936, she failed to file an answer or make any defense to the action whatever." [2]

Appellants contend that failure of the court to appoint an attorney to defend for Goldina Needham was an irregularity; that the decree and judgments were not void, and that confirmation cured. We do not agree with this construction of the statute. Summons was served on the defendant while she was in the Pulaski county jail. The judgments and decree were in consequence of her apparent default. She had no attorney; or, if she did, he did not appear. An attorney *ad litem* appointed by the court, as the statute contemplates, if diligent, would have ascertained the fact of the defendant's prison

[2] Goldina Needham testified that when she was arrested in Pulaski county about January 6, 1936, she was placed in jail, and that she remained there until transferred to federal prison in May of the same year.

status. Under the statute, the *fact* of confinement in the penitentiary deprives the court of jurisdiction until answer is filed by the defendant's attorney, or until the attorney appointed by the court has made proper defense.

In *McLaughlin* v. *McLaughlin,* a Missouri case,[3] an applicable statute provided that sentence in the penitentiary for less than life suspended civil rights during the term. Another statute authorized the court to appoint a trustee of the estate of a convict so sentenced, with power to settle accounts between the convict and his creditors. It was held that, where the estate of a convict is attacked, a trustee must be in court as a party; and where, in a suit for divorce by the wife of a convict, alimony is sought, the trustee must be made a party so far as the suit may affect the prisoner's property, but not insofar as the suit may affect the granting of a divorce. Hence, a judgment awarding the wife of a convict a divorce and title to the real estate of the convict, rendered in a suit in which the trustee for the convict was not a party, was held void as to the real estate.

While in Missouri the convict's civil rights are suspended, such is not the case in Arkansas. And yet, the state's solicitude for the convict's property rights shows a purpose to meticulously refrain from infringing upon such. This is shown by the statute (§ 1372 of Pope's Digest) which provides that "Where the defendant is a prisoner in the penitentiary, a copy of the complaint [in a civil suit] must accompany the summons, and the service must be upon the keeper of the penitentiary, who shall deliver the copies of the complaint and summons to the defendant. And a copy of the summons must also be delivered to the wife of the prisoner; or, if he has no wife, left at the place where he resides, or claimed to reside, prior to his confinement, with some person of the age of 16 years."

This statute, of course, is not involved in the instant case, but it serves to emphasize the state's policy in dealing with those whose liberty has been restrained by its processes.

[3] 228 Mo. 635, 129 S. W. 21, 37 Am. St. Rep. 680.

We do not agree with appellant that the proceeding was one characterized by irregularity alone, or that confirmation cured the vice. The chancellor, without knowledge that Goldina Needham was in prison, rendered a judgment taking her property. When the chancellor discovered the true condition, he very promptly and very properly held that the former decree was void.

Affirmed.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
v. HOLDER.

4-5448 127 S. W. 2d 807.

Opinion delivered April 24, 1939.

Joseph R. Brown and *James B. McDonough,* for appellant.

Lake & Lake and *Shaver, Shaver & Williams,* for appellee.

HOLT, J. Appellee recovered a judgment against appellant in the Little River circuit court for damages alleged to have been sustained by him while assisting in the unloading of a switch tie from a gondola freight car at Neal Springs, Arkansas, at about 2:30 p.m. on June 9, 1937.

In his complaint appellee (plaintiff below) charged that he was injured when he, with two members of a sec-

tion crew, lifted one end of a switch tie over the side of a coal car and alleged negligence on the part of appellant (defendant below) as follows: "In the removal of said timber the foreman directed the plaintiff and the other two members of said crew to raise one end of said timber to the top of the side of said gondola car, which they did, and the said foreman placed and held an iron bar between the end of said timber and the side of said car to prevent it from falling back into the car, then directed the plaintiff and the other two members of said crew to lift the other end of the timber and place same on top of the car for the purpose of rolling it from said car onto the ground. In obedience to said order, the plaintiff and the other two members of said crew attempted to lift said timber as directed, the plaintiff being at the end thereof, and because of the excessive weight of the timber and the pressure of the same against the side of the car by holding the iron bar between the side of the car and the other end of the timber, the plaintiff and his co-workers were required to and did exert extraordinary and unusual strength and force in lifting said timber and as a result thereof he received the injuries." He further alleged that his injury was due to appellant's negligence in failing to furnish more men to unload the switch ties.

Appellant demurred to appellee's complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled this demurrer.

Appellant answered denying every material allegation in the complaint and affirmatively pleaded contributory negligence and assumption of risk on the part of appellee, and, in addition, a complete release executed by appellee for a consideration of $350 paid to him by appellant. Trial to a jury resulted in a verdict in favor of appellee in the sum of $2,650, which represented the amount sued for, less the amount of the release settlement. From a judgment thereon comes this appeal.

The evidence, as presented by this record, stated in its most favorable light to appellee, is substantially as follows: Appellee testified that he was ordered to lift

with Tollett and Ponder, the two other section crew members, the north end of the switch tie in question to the top of the coal car, which was about four feet high; that foreman, Todd, held the north end of the tie by inserting a lining bar thereunder; that he, with the other two section men lifted the south end of the tie to the top of the car and pushed it over, and that when they had the south end of the tie about knee high he, appellee, "received a pulling over my hips in the small of my back with pain and it grew worse."

The record further reflects that appellee did not tell foreman, Todd, he was hurt and continued working the rest of that day, but next morning appellee's wife telephoned Todd that appellee had a catch in his hip. Appellee, Ponder and Tollett, complained about the ties being heavy, but not to the foreman. Appellee admitted he knew the bar was under the north end of the tie when he, with the other two men, lifted the south end, and that he knew how heavy the tie was.

Appellee's witness, G. W. Strickland, testified the timber appellee said he overexerted himself lifting, weighed 1,098 pounds. Witness had had many years' experience in trucking timbers, and had previously worked two days unloading ties for the Rock Island Railroad and one-half day for the Kansas City Southern. Pine timber weighed 4.3 pounds to the board foot and oak 9 pounds. Witness used the latter weight in computing the weight of the timber appellee said he overexerted himself lifting.

Division engineer, P. G. McCarthy, testified that an oak board foot weighed 4½ pounds and pine from 4 to 4.3 pounds.

Appellant's witnesses, Ponder and Tollett, the two members of the section crew who assisted appellee in lifting the tie at the time he claimed to be hurt, testified that they did not overexert themselves at the time they lifted the tie in question; that they frequently lifted rails and the motor car, which were heavier than switch ties; that the switch ties were unloaded June 9 in the usual and customary way. They denied that they complained

of the switch ties being heavy, and Tollett testified the heaviest tie unloaded on June 9, 1937, the day of the alleged injury, weighed from 300 to 400 pounds, and that the tie in question weighed 375 pounds.

Witness Waldrop, who had worked as section foreman for appellant for twenty years, testified that the switch tie in question weighed about 380 pounds. Both Todd and Waldrop testified the section crew lifted the motor car on and off the track several times each day, and it weighed 1,100 to 1,200 pounds, and that the tie in question was unloaded in the usual and customary way.

Appellant's witness, R. M. Blades, road master for twelve years, testified that the tie in question weighed 380 pounds, and that it was unloaded in the usual and customary way. P. G. McCarthy, appellant's division engineer, corroborated Blades' testimony.

Appellant's foregoing witnesses also testified that switch ties were not shipped on flat cars, because it was difficult to keep them in place, and it was customary to ship creosoted switch ties in coal cars, and that a section crew was composed of three men and the foreman.

On this state of the record appellant earnestly contends that the evidence is not of that substantial character sufficient to support a verdict for appellee, and that the trial court erred at the close of the testimony in refusing to instruct a verdict for appellant. We think that appellant is correct in this contention.

At the time of the alleged injury, the record discloses that appellee, assisted by two helpers, was attempting to lift one end of a switch tie while the other end was being held by a foreman of the crew, up over the side of a gondola freight car, a distance of about four feet. This was a very simple operation. Appellee's knowledge of the circumstances, as disclosed by the evidence, equalled that of foreman, Todd. He needed no instructions in the lifting process, and none were given. No one knew better than appellee himself the extent of his own strength or his capacity to lift. We think appellee assumed whatever risk attended the lifting of the

tie in question, and that no negligence chargeable to appellant appears in this record.

In *Luten Bridge Co.* v. *Cook,* 182 Ark. 578, 32 S. W. 2d 438, the court said: "No one could know better than he (plaintiff) what force might safely be applied, and the danger of injuring himself if he overtaxed his strength was an obvious one, the risk of which he must be held to have assumed." And again in *Louisville & N. R. Co.* v. *Sawyers,* 169 Ky. 671, 184 S. W. 1123, the court said: "The only safe and practical rule is that each man is the best judge of his own physical strength and powers of endurance; that he knows better than any other can when the limit has been reached, and when, in following his own instinct of self-preservation, he must desist and exercise his right under the law to give up his work, if it is more than he can stand."

This court in the recent case of *Kurn* v. *Faubus,* 191 Ark. 232, 84 S. W. 2d 602, in reversing a judgment for the plaintiff said: " . . . Appellee knew his physical condition equally as well as did Garrison, even after Garrison had been apprised thereof, and appellee was the sole factor in applying his strength in the removal of the heavy box of bearings whereby he received his injury. If this were negligence, it is exclusively that of appellee, and appellants are not responsible for the resultant injury."

In 39 C. J. 801, § 1007, the text-writer announces the rule as follows: "Where the servant has equal or better means of knowledge than the master of the danger of obeying the master's orders, he assumes the risk of so doing."

In *St. L.-S. F. Ry. Co.* v. *Childers,* 197 Ark. 527, 124 S. W. 2d 964, the plaintiff, an experienced man, claimed to have been injured in removing a hand-car from the track with the crew in charge of a foreman, when the car was placed on the embankment with plaintiff at the lower end, and he tried to stop the car as it rolled down the embankment. This court held that there was no actionable negligence, and that a verdict should have been directed for the defendant, and said: "He (plaintiff)

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."

In *Choctaw, O. & G. R. Co.* v. *McDade,* 191 U. S. 64, 24 S. Ct. 24, 48 L. Ed. 96, the court held: He (employee) assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger.

In *Crawfordsville Trust Co.* v. *Nichols,* 121 Ark. 556, 181 S. W. 904, this court said: "Where the elements of danger are obvious to a person of average intelligence, using due care, an employer is not required to warn his employee to avoid the danger, which ordinary prudence would make him avoid without warning . . . Something may properly be left to the instinct of self-preservation and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved."

We conclude, therefore, that the trial court erred, at the close of all the testimony, in refusing to instruct the jury as a matter of law, that the evidence was not sufficient to support a verdict for appellee against appellant, and since the cause seems to have been fully developed, it is reversed and dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

HUMPHREYS, J. (dissenting). I cannot agree with the majority of the judges in their view that when the evidence in this case is viewed in its most favorable light to appellee no liability has been shown on the part of appellant. The evidence is in sharp conflict as to all the material issues in the case and the question of fact was submitted to the jury by the court under correct instructions. The majority of the court have clearly invaded the exclusive province of the jury and determined the question of fact as to liability themselves. There is nothing in the record that shows that the verdict was the result of passion or prejudice and where the evidence

is conflicting the question of fact as to liability was one for the jury and not for the court. My high regard for the position of a jury in our system of jurisprudence and the solemnity of a jury verdict is such that I am not willing to follow the majority into the field of the determination of questions of fact. To do this, in my humble judgment, will tend in the end to destroy the jury system or else result in a constitutional amendment preventing judges from interfering with jury verdicts at all. My high regard for the jury system and the solemnity of jury verdicts and the duties devolving upon jurors cannot be better expressed than the recent charge of Judge Gordon W. Chambers, Judge of the city court of Richmond county, Ga., to a jury which had been summoned to determine issues of fact in cases which they were to try. The charge he made them is as follows: "Gentlemen of the Jury, by being selected for jury service you have been elevated to the peerage of democracy. As such you have a noble opportunity for service, obligated by patriotic duty to God and country. This duty is deserving of the consecrated dedication of a conscientious concentration of your abilities and the just impulses of your honor.

"You are a shield of protection against false accusers, transitory passions and prejudice.

"You are determiners of truth revealing the character of our country as a land of the free and home of the brave.

"You are the preservers of liberty that walks with progress and restrains only libertine license to insure its own freedom.

"You are the protectors of all legal rights of society, citizenship and the state.

"You are guarantors of justice, constitutional and statutory, exactly, evenly and universally applied.

"You are the custodians of American civilization, for without law there can be no civilization, without courts there can be no law and without truth and independence there can be no courts.

"The only title of nobility recognized by America's loyal house is in the peerage of the jury box where trial

by peers determine the truth of issues between the state and its citizens.

"This title carries no feudal privilege or materialistic value, however, it merits the accolade of achievement —the accomplishment of the aristocracy of service.

"This high honor carries only the title as a word of address or as an adjective of description, 'Gentlemen of the Jury'."

The sentiment contained in this charge should sink into the hearts and minds of every judge in the United States so that they might have the proper regard for the solemnity of jury verdicts.

Judge Mehaffy requests that I note him as joining in this dissenting opinion, which I take pleasure in doing.

[redacted]

HIGHWAY STEEL & MANUFACTURING COMPANY *v.* KINCANNON, JUDGE.

4-5523 127 S. W. 2d 816

Opinion delivered April 24, 1939.

[redacted]

David R. Boatright and *Pryor & Pryor,* for petitioner.

Howell & Howell, for respondent.

HUMPHREYS, J. J. J. Painter, a resident of Crawford county, Arkansas, brought a suit in said county against Highway Steel & Manufacturing Company, a foreign corporation domiciled in Missouri, for $3,000 on account of personal injuries received by him through the negligent operation of its truck in Sebastian county on the public highway between Van Buren and Fort Smith, about the 30th day of December, 1938.

Leslie McBride, also a resident of Crawford county, brought suit in said county against Highway Steel & Manufacturing Company, a foreign corporation domiciled in Missouri, for $3,000 on account of personal injuries received by him through the negligent operation of its truck in Sebastian county, Arkansas, on the public highway between Van Buren and Fort Smith, about the 30th day of December, 1938.

Cy Carney and Gene McBride, doing business under the name of Van Buren Appliances, also residents of Crawford county brought suit against Highway Steel & Manufacturing Company, a foreign corporation domiciled in Missouri, for $500 on account of damage to their truck through the negligent operation of its truck in Sebastian county, Arkansas, on the public highway between Van Buren and Fort Smith about the 30th day of December, 1938.

Lula McBride, widow and administratrix of the estate of Fred McBride, deceased, Mildred McBride, and Kathleen McBride, daughters of Fred McBride, deceased, next of kin, all residents of the State of Missouri, brought suit for $30,000 against Highway Steel & Manufacturing Company, a foreign corporation domiciled in Missouri, on account of the death of Fred McBride, their father and husband, who was killed through the negligent operation of its truck in Sebastian county, Arkansas, on the public highway between Van Buren and Fort Smith about the 30th day of December, 1938.

In each of said cases a summons was issued out of the circuit court of Crawford county against Highway Steel & Manufacturing Company and served by the sheriff of Pulaski county on Crip Hall, the Secretary of

State, under and in accordance with the provisions of Act 39 of the Acts of the General Assembly of Arkansas, of 1933. In apt time Highway Steel and Manufacturing Company appeared specially in each case for the purpose of moving to quash the service of summons upon it on the ground that the summons was not served upon it in Crawford county where the suits were brought and that said Act is unconstitutional and void in denying non-resident owners of motor vehicles equal protection of the law in violation of the 14th Amendment of the Constitution of the United States, and in denying them due process of law guaranteed by the state and federal constitutions.

The motion to quash the service in each case was overruled over the objection and exception of Highway Steel & Manufacturing Company and it has filed a petition in this court in proper form for a writ prohibiting the circuit court of Crawford county and the Hon. J. O. Kincannon, judge thereof, from proceeding with the trial of the cases.

These are transitory actions and, the petitioner being a non-resident defendant, may be sued in any of the courts in this state for injuries to the person or property of another caused by its negligent operation of a motor vehicle upon the highways of this state upon service obtained in the manner provided by said act.

The act affords convenient redress to residents and non-residents alike for injuries received to persons or property while traveling on or using the highways of this state, through the negligent operation of motor vehicles on the highways of the state by any and all non-residents of the state, be he an individual, firm or corporation. The act is constitutional and was so declared in the case of *Kelso* v. *Bush,* 191 Ark. 1044, 89 S. W. 2d 594, which is identical with this case in all respects so far as the parties are concerned, although the opinion does not recite the fact. It is admitted that unless we overrule that case the application for a writ of prohibition in the instant cases must be denied. This court ruled in the *Kelso* v. *Bush case, supra,* that Act 39 of the Acts

of 1933 was not unconstitutional and void as denying non-resident owners of motor vehicles operating them on the highways in Arkansas equal protection of the law in violation of the 14th Amendment of the Constitution of the United States and as denying them due process of law guaranteed by the state and federal constitutions. The reasons assigned for upholding the validity of the Act were sound and we adhere to them and refuse to overrule the case.

The service of process upon petitioners in the four cases herein gave to the circuit court of Crawford county jurisdiction over the person of petitioner, hence, the application for a writ of prohibition is denied.

BAKER and HOLT, JJ., dissent on the ground that *Kelso* v. *Bush* is wrong and should be overruled.

OMOHUNDRO *v.* OTTENHEIMER.

4-5422 127 S. W. 2d 642

Opinion delivered April 24, 1939.

Geo. A. McConnell and *J. T. West, Jr.*, for appellant.

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

HUMPHREYS, J. This suit was brought originally in the chancery court of Pulaski county by appellees against appellant on July 8, 1937, praying for the specific performance of an alleged lease agreement entered into between the parties on the 6th day of October, 1936, in substance as follows: Appellant agreed to erect a business building at the northeast corner of Markham and Ringo streets in the city of Little Rock, Arkansas, in accordance with plans and specifications to be prepared by Frank J. Ginocchio, Jr., architect.

The business building was to be completed by February 11, 1937, or not later than sixty days thereafter. Appellees were to pay a rental of $200 a month after the occupancy of the building for a term of five years with the option of an additional five years at a rental of $220 per month.

In paragraph one of the agreement it was provided that the building "be erected by the lessor, according to plans and specifications which are to be approved by all parties."

In paragraph twelve of the agreement the lease was conditioned "upon the construction of a building according to the plans and specifications which shall be approved by all parties hereto."

Paragraph seventeen of the contract is as follows: "Plans and specifications for the building to be erected are being prepared by Frank J. Ginocchio, Jr., and will be, when completed, approved by the parties hereto, by written indorsement on the original thereof, which said original shall be retained by the said Frank J. Ginocchio,

Jr., until the building is fully completed and possession thereof delivered to and accepted by the lessee. Neither of the parties hereto shall be bound by any of the terms of this lease until said plans have been completed and approved by both of the parties."

Paragraph fourteen of the contract is as follows: "Upon failure of the lessor to deliver the premises to the lessees as herein provided on a date not later than April 1, 1937, the lessees shall be entitled to liquidated damages at the rate of $100.00 per month, for the month of April, 1937, and at the rate of $200.00 per month thereafter until such time that the property may be occupied by the lessees and the lessees shall not be liable for rent during such period."

It was alleged in the complaint that appellant failed to comply with the contract and deliver the business building to appellees.

On October 19, 1937, appellant filed an answer denying that the plans and specifications were completed or that same were approved by the parties, but that the building had been completed a few days before May 1, in substantial compliance with the plans and specifications and tendered to appellees and appellees had refused to accept same and pay rents therefor. She prayed that the answer be treated as a cross-complaint and that she be awarded a judgment for past due rents under the terms of the agreement.

On November 26, 1937, appellees filed an amendment to their complaint waiving their alleged right to a specific performance of the agreement, stating that the building was unfit for the purposes for which it was built and praying liquidated damages in the sum of $13,800.

On December 3, 1937, appellant filed an answer to the amendment to the complaint stating that the failure to complete the building was due to appellees' refusal to recognize her right to approve the plans and specifications, and denied the other allegations contained in the amendment to the complaint.

The case was transferred to the circuit court on the motion of appellees over appellant's objection.

A motion was made in the circuit court to transfer the case back to the chancery court which was refused over appellant's objection.

The cause was submitted on the pleadings, testimony introduced by the respective parties and the instructions of the court to the jury, resulting in a verdict and consequent judgment in favor of appellees against appellant for damages in the sum of $1,000 for breach of the contract on her part.

Appellant first contends for a reversal of the judgment because the appellant did not indorse her approval in writing on the plans and specifications as provided in the agreement arguing that under the terms of the agreement the written indorsement or approval of the parties on the plans and specifications prepared by Frank J. Ginocchio, Jr., was a condition precedent before the agreement should become effective. It is true that in the latter part of paragraph seventeen of the agreement it is provided that "neither of the parties hereto shall be bound by any of the terms of this lease until said plans have been completed and approved by both of the parties," but in the first part of said paragraph it is recited that the "plans and specifications for the building to be erected are being prepared by Frank J. Ginocchio, Jr., and will be, when completed, approved by the parties hereto, by written indorsement on the original thereof" and under that clause it was the duty of all the parties to indorse the plans and specifications when they were completed.

The plans and specifications were completed and appellees indorsed their approval of them in writing, but appellant omitted to do so, but, according to the evidence, appellant used the plans to obtain a permit to construct the building and used them to a large extent in constructing the building. The evidence also reflects that after the building was completed with many important changes from the original plans and specifications appellant offered to turn the building over to ap-

pellees for occupancy which they refused to accept because same was not constructed in accordance with the plans and specifications. Notwithstanding the changes that had been made by appellant she insisted that she had a right to make changes because she had not signed the original plans and specifications and that she was entitled to the benefit of the written rental agreement and demanded that they take it and pay rent for it pursuant to the written contract which had been signed by them on October 6, 1936. We think by using the plans and specifications and insisting that appellees were bound by the contract which was signed by them on October 6, 1936, she waived any provision in the contract that provided it should not be binding until the parties had signed the original plans and specifications. We also think that by using the plans and specifications in the construction of the building she clearly estopped herself from pleading that the failure to sign them by her prevented appellees from claiming damages for a breach of the agreement.

Appellant next contends that if bound by the contract she constructed the building in substantial compliance with the plans and specifications and, therefore, she did not breach the contract.

The question whether appellant breached the contract was submitted to the jury under correct instructions and the jury found that she did. The verdict of the jury is supported by substantial evidence. There is substantial evidence to the effect that in constructing the building appellant deviated from the plans and specifications approved by appellees in many vital respects without notice to or consent of the appellees. For example, she made the windows much smaller than the plans indicated and put in wood columns and wood beams instead of steel columns and steel beams and had the architect redraft the plans for the construction of the roof leaving out a monitor or Texas roof in the center thereof which was intended to provide light for the building. These and other changes appellant made were vital requirements in the original plans and specifications. Ap-

pellant is, therefore, bound by the finding of the jury on this disputed question of fact.

Lastly, appellant contends the court erred in submitting the correct rule for the measure of damages to the jury. The parties provided for the measure of damages in case of a breach of the contract in the written instrument. Paragraph fourteen in the written agreement provided for liquidated damages in case of a breach of the contract by appellant and we have already set that paragraph out in full and will not do so again. The court told the jury that "if you find for the plaintiffs, in fixing their damages you will take into consideration the liquidated damages provided in said lease of $100 a month for the month of April, 1937, and $200 per month thereafter until such time as you may find that the plaintiffs waived their rights to liquidated damages by treating the lease agreement as breached." Appellees waived their right to specific performance of the contract on November 26, 1937, and treated the contract as breached by appellant on that date. We think the court gave a correct instruction with reference to liquidated damages as it was in accordance with paragraph fourteen of the agreement. This court, in the Case of *Robbins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027, 59 A. L. R. 1128, after citing many authorities relative to the rule, said: "These cases hold that, if the contract provides for a definite sum as the liquidated or stipulated amount to be paid upon a breach thereof, then the amount so fixed upon by the parties may be sued for; and it is not necessary for the plaintiff to prove any actual loss by reason of the defendants' breach of the contract. All that is necessary to entitle the plaintiff, in such a case, to recover the stipulated sum, is to show the breach of the contract upon which the payment thereof depends. In other words, the effect of a clause for stipulated damages is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from the breach of the contract, and thereby prevent a controversy between the parties as to the amount of damages."

Two other instructions were given by the court relative to the measure of damages which were perhaps erroneous, but they are not prejudicial for the jury rendered a verdict in favor of appellees for much less than they were entitled to under paragraph fourteen of the lease agreement which provided for the amount of damages that appellees might recover in case of a breach of the contract.

There is no error in the record, hence, the judgment is affirmed.

McHaney, J., disqualified and not participating.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* BRASWELL, ADMINISTRATOR.

4-5413 127 S. W. 2d 637

Opinion delivered April 24, 1939.

A. H. Kiskaddon, C. S. Hadley and *Gaughan, McClellan* and *Gaughan,* for appellant.

Willis B. Smith and *Ben E. Carter,* for appellee.

GRIFFIN SMITH, C. J. The appeal presents three questions. First, was there support for the jury's finding that appellants' engineer could and should have discovered the perilous position of appellee's intestate in time to have averted injury if the statutory lookout had been kept? Second, did the injured man experience conscious suffering? Third, is the judgment for funeral expenses supported by law?

Appellee, administrator of the estate of F. J. Braswell, alleged the negligent killing of the intestate (his father), who at the time of the accident was 79 years of age. The only eye-witness was John Kennedy. He testified that he was engineer of appellants' passenger train out of Texarkana; that the automatic bell was in operation and the whistle was being blown. In rounding a curve "to the right" witness observed a man lying with his head on the right rail, his feet and body extending at right angle to the track. The prostrate man was first seen when the train was about 200 feet distant, a small embankment and a few bushes having prevented an earlier or a clearer view. Steam was shut off, the alarm was sounded, and brakes were put into emergency. Rate of speed was 40 or 45 miles an hour. The prone man's back was to the engine. When a stop was made the rear end of the train was about a car length past the body.

The engineer walked back to where the injured man was lying near the steps of the Cotton Belt station. Kennedy testified that "From the time the train struck Mr. Braswell until I came back to where his body was lying was about three or four minutes."

Again testifying, Kennedy said "It wasn't over two minutes when I got there. . . . [Mr. Braswell] was unconscious when I got there. . . . I would say he was living, but he was unconscious. . . . He was breathing hard, but never spoke."

"Q. If a man doesn't speak to you, do you think he is unconscious? A. No, but when he is hurt and knocked like he was, I came to the conclusion that he was unconscious. . . . It was not over six or seven minutes until the people came and moved him to the hospital."

A photograph taken by appellant's claim agent was introduced in evidence. Certain points are identified from which distances may be estimated. We think this photograph, and testimony of the witness Orr, presented a question for the jury: that is, evidence was substantial to show that if a proper lookout had been kept Braswell's perilous position would have been discovered in time to have prevented the accident. The stop was made within approximately 700 feet, and there is evidence that the prone body could have been seen at a distance of 900 feet, in spite of the curve and obstructions.

We agree with appellee that the engineer's statement that the injured man was unconscious, must be considered in the light of the reasons given for the belief. On cross-examination this witness stated it was about three or four minutes after the accident until he got back to the body. Considering the nature of the injury, the position of the body when struck, and the fact that the injured man did not speak, although he was breathing hard, the engineer concluded that the condition was one of unconsciousness.

Appellee alleged conscious pain and suffering, and therefore had the burden of proving the fact, either by direct or circumstantial evidence. The question is, Was that requirement met? We do not think it was.

Appellee directs attention to a number of our decisions and insists that the principles therein announced are applicable here.

In *Missouri Pacific Railroad Company et al.* v. *Maxwell*[1] it was said that "a father should recover a reasonable compensation for the loss of [an infant son's services], less the reasonable expenses of rearing the child. The funeral expenses amounted to about $250, and there is some evidence in the case that the child was not immediately killed, in which event its suffering must have been great." There is only a general statement in the opinion as to the purport of the evidence, without setting out in any particular what such evidence was, touching upon the issue of pain and suffering.

[1] 194 Ark. 938, 109 S. W. 2d 1254.

Recovery for pain and suffering was allowed in *St. Louis Southwestern Railway Company* v. *Rogers;*[2] in *Ashcraft* v. *Jerome Hardwood Lumber Company;*[3] in *St. Louis-San Francisco Railroad Company* v. *Pearson;*[4] in *Arkansas Light & Power Company* v. *Adcock;*[5] in *Central Coal & Coke Co.* v. *Burns,*[6] and in *St. Louis, I. M. & S. Railway Company* v. *Robertson.*[7] These cases are cited by appellee in support of his contention that the evidence was sufficient to warrant the jury in finding there was conscious suffering. In each of the cited cases, however, there was some expression or action showing coordination of mind and body.

In the Rogers Case, an injured brakeman turned over on his right side and exclaimed, "O, Lord." This occurred some minutes after the accident.

In the Ashcraft Case the workman lived thirty minutes. He "gasped and groaned, and blood came out of his mouth."

In the Pearson Case the injured fireman lived about ten minutes. He was "breathing hard. He moved his mouth and tongue, and his chest made a few moves; he was struggling a little."

In the Adcock Case a minor was injured by an electrically charged wire. After receiving the shock he exclaimed "O, me," as many as two times. After reaching the ground the young man tried to get up on his hands and knees, "then moved his arms and legs."

In the Burns Case a mine worker, after receiving an injury, was heard to cry out, and his associates found him in contact with live wires. The opinion points out that it was fairly inferable he lived fifteen minutes. "After being pulled away from the wires he moved on his all fours and tried to talk and vomit, but could not do either."

---

[2] 166 Ark. 389, 266 S. W. 281.

[3] 173 Ark. 135, 292 S. W. 386.

[4] 170 Ark. 842, 281 S. W. 910.

[5] 184 Ark. 614, 43 S. W. 2d 753.

[6] 140 Ark. 147, 215 S. W. 265.

[7] 103 Ark. 361, 146 S. W. 482.

In the Robertson Case the railway conductor shoved Clint Ruff (an alleged passenger) in such manner that Ruff fell from a freight car into Walnut Lake and was drowned. A physician testified he knew Ruff; was at Walnut Lake the night he was killed; that Ruff died from drowning; that a man falling into the water would possibly be conscious two or three minutes.

In the instant case, H. C. Hay of the East Funeral Home, testified that there were no marks on the decedent's body—"it was just on his head; . . . there was a bad lick in the back of the head; what seemed to be a fracture. I believe it was on the left side of the head, [but] it might have been in the center. . . . His nose seemed to be broken and there was a deep cut. There was blood all over his face. The lick on his head, I think, killed him."

Books on evidence, and the cases, have much to say about "speculation," and "conjecture." It is urged by those who adhere to the theory that the reasonableness of testimony, the probability of its truthfulness, the conclusions to be drawn from it, the inferences attaching to physical conditions and to the attending circumstances, are matters for sole consideration of the finders of facts, and that a verdict based upon *any* evidence found by a jury to be sufficient to sustain its actions, should not be disturbed on appeal.

The difficulty is in differentiating between *any* evidence and substantial evidence.

All judges, both trial and appellate, agree that to support a verdict the evidence must be of a convincing nature, imparting the qualities of reasonable certainty. But shall we say that in respect of such evidence the questions of certainty, of reasonableness, and of substantiality, are conclusively presumed from the verdict alone?

Must appellate judges close their eyes and their minds to the obvious fact that in a particular case the evidence, from its very nature, could not have been convincing, though it produced a given result? Shall we affirm that such evidence was *necessarily* substantial because it was favorably acted upon by the jury?

Both in theory and in practice, jurors who have been privileged to observe the witnesses, and to mark their demeanor on direct and cross-examination and under questioning of the court, are better qualified to separate truth from falsity than are judges who later examine the record for errors. The juror's situation enables him to analyze motives, to consider and compare interests and prejudices, and to weigh the relative importance of the testimony. He may apply to the issues all conclusions to be reasonably drawn from what has been said or exhibited. He may study actions and attitude, and he may mentally note and act upon what a witness has failed to say, but what has been revealed through conduct.

But in that twilight zone where a scintilla of evidence meets substantial evidence, and where they sometimes blend, jurors and judges alike find a realm of uncertainty.

It is difficult—even impossible—to lay down a constant applicable rule. Therefore, we say that on appeal all reasonable inferences should be resolved in favor of the verdict. With this pronouncement we have completed the commentary circuit, and find ourselves at the starting point of the discussion.

It would seem, however, that in any view to be taken, the issues are whether the evidence *is* substantial, and *who* is to judge of that quality. If this is not a question of law, then substantiality loses its significance, with the result that *any* testimony may suffice. If we acquiesce in this construction, there is an abdication of judicial responsibility.

Applying the foregoing principles to the case at bar, we are unable to find that conscious suffering was shown by substantial testimony.[8]

Finally, it is insisted that the verdict and judgment for funeral expenses are not supported by law.

[8] Compare *St. Louis, Iron Mountain & Southern Railway Company* v. *Dawson*, 68 Ark. 1, 56 S. W. 46; *Chicago, Rock Island & Pacific Railway* v. *White*, 112 Ark. 607, 165 S. W. 627; *Delamar & Allison* v. *Ward*, 184 Ark. 82, 41 S. W. 2d 760; *St. Louis, I. M. & S. Ry. Co.* v. *Stamps*, 84 Ark. 241, 104 S. W. 1114; *Memphis, Dallas & Gulf Railroad Company* v. *Thompson*, 138 Ark. 175, 210 S. W. 346.

Appellants objected to Instruction No. 4, generally and specifically.[9] The objection admits there was sufficient evidence to sustain the verdict complained of.

The judgment for $235 is affirmed. The judgment for conscious pain is reversed, and the cause of action therefore is dismissed.

MEHAFFY and HUMPHREYS, JJ., dissent.

SINCLAIR REFINING COMPANY *v.* BOUNDS.

4-5451 127 S. W. 2d 629.

Opinion delivered April 24, 1939.

[9] Instruction No. 4: "If you find for the plaintiff under the instructions in this case, then you should assess the damages to be recovered for the benefit of the estate of F. J. Braswell, deceased, at such amount as would reasonably have compensated him for the injuries suffered by him in his lifetime, as a result of such injuries, and in this connection you should take into consideration the pain and suffering, mental and physical, if any, as shown by the evidence, of the said F. J. Braswell prior to his death; and you should assess the damages to be recovered for the benefit of the next of kin of the said F. J. Braswell at such sum of money as you may find from the evidence will be fair and just compensation with reference to the pecuniary injuries, if any, resulting from the death of F. J. Braswell to next of kin."

The objections were: "Defendants objected generally to the action of the court in giving plaintiff's requested Instruction No. 4, and at the same time objected specifically to the giving of said Instruction No. 4 because there is not sufficient evidence in the record to justify a recovery for conscious pain, and because the testimony fails to show there was any conscious pain and suffering; and the instruction is erroneous on the measure of damages for the benefit of the next of kin because there is not sufficient evidence to sustain a verdict for the benefit of the next of kin except for the amount of funeral expenses."

V. R. Tomlinson, C. R. Starbird and *Warner & Warner,* for appellant.

Partain & Agee, for appellee.

HOLT, J. Appellee filed his complaint, in this action, in the Crawford circuit court on January 14, 1938, to recover damages in the sum of $3,000 alleged to have been caused by personal injuries sustained September 23, 1937, while employed by appellant and assisting in

installing an automobile car lift at a filling station at Alma, Arkansas.

Thereafter summons was issued and served personally upon two purported agents of appellant in Crawford county, but this service and summons were quashed upon appellant's motion filed March 7, 1938, and sustained by the court on March 29, 1938. Appellee does not question the correctness of the trial court's action in quashing this service and summons, but relies on constructive service alleged to have been had upon appellant by warning order, as will be hereinafter referred to in this opinion.

On February 16, 1938, appellee filed an affidavit and bond for attachment in the cause. The affidavit, omitting formal parts, is as follows: "Comes the plaintiff, Russell Bounds, and states upon oath that the claim upon which this action is founded is for damages due upon tort as is shown by the complaint filed herein; that such statements are true and correct; that said claims and demands are just; that he should recover the amount alleged in his complaint; that the said Sinclair Refining Company is a non-resident of the state of Arkansas and is a foreign corporation. Russell Bounds, plaintiff. By Theron Agee, one of his attorneys." Writ of attachment was issued and levied on the same date on certain property alleged to be owned by appellant and situated in Crawford county, Arkansas.

On February 16, 1938, appellee filed affidavit for warning order which states: "Theron Agee, on oath states that he is one of the attorneys for the plaintiff, Russell Bounds, and as such makes this affidavit for said plaintiff, as well as his agent, and states that he has made diligent inquiry and it is his information and belief that the defendant, Sinclair Refining Company, is a non-resident of the state of Arkansas, and that it is a foreign corporation, being incorporated in the state of Maine; that its office and last known address was and is Fair Building, 307 West Seventh Street, Fort Worth, Texas, and its principal business office 603 Fifth Avenue, New York, N. Y. This the 16th day of February, 1938. Theron Agee."

Warning order was duly issued by the circuit clerk on February 16, 1938, and an attorney appointed for the alleged non-resident defendant (appellant here).

On March 14, 1938, the non-resident attorney filed his report, and on March 29, thereafter, appellee filed proof of publication of said warning order.

Prior thereto, on March 7, 1938, appellant (defendant below) appeared specially for the purpose of a motion only, filed its motion to quash the purported personal service, on the grounds that it was not issued, served and returned as provided by law; that appellant is a corporation organized and existing under the laws of the state of Maine, and authorized to do business within the state of Arkansas, and doing business therein; that said appellant, on the date of the commencement of said action and purported service of summons, or prior thereto, or at the present time, has not kept or maintained in Crawford county a branch office or other place of business, and has never had an officer or agent upon whom service could be had in said county; that said W. H. Bryant and Ruth Taylor, upon whom purported service of summons is claimed to have been made, were not on such dates nor at the time the complaint was filed, nor before nor since said date have been, an agent of appellant in charge of its business in said county; that appellant had no agent in said county, nor place of business or branch office therein; that the said Bryant and Taylor were each respectively engaged in their private business, and operating same exclusively as owner and not as agent, or officer of appellant, in charge of its branch office or place of business. Appellant's motion to quash summons and service was sustained on March 29, 1938, as indicated *supra.*

On March 25, 1938, appellant filed its verified motion to quash the writ of attachment and, among other things, stated in said motion: "Comes now the defendant, and without waiving its motion to quash summons and service herein, and appearing specially and for the purpose of this motion only, and having first obtained leave of court to appear specially and for the purpose of this

motion only, and without entering its appearance herein, and moves the court to quash, set aside and hold for naught the purported writ of attachment issued herein, and for grounds thereof, states: That said writ of attachment and the affidavit for same filed by plaintiff and his attorneys herein, were not made and issued in conformity to the statutes and laws of the state of Arkansas in such case made and provided, and are wholly insufficient to support any attachment herein."

On the same day, March 25, 1938, appellant also filed its verified motion to quash warning order issued in said cause, which contains the following allegations: "Comes now the defendant, and, without waiving its motion to quash summons and service and motion to quash attachment, and appearing specially and for the purpose of this motion only, and having first obtained leave of court to appear specially and for the purpose of this motion only and without entering its appearance herein, moves the court to quash, set aside and hold for naught the warning order issued herein against defendant, and for grounds thereof states: That said warning order was not issued in the manner and form and upon the grounds provided by law, and is wholly insufficient to confer jurisdiction of defendant upon this court."

On March 29, 1938, appellant's motion to quash writ of attachment and its motion to quash said warning order were each overruled by the trial court, but, as stated, *supra,* the court sustained appellant's motion to quash the summons and the purported service thereon.

Thereafter on March 29, 1938, appellant filed its answer setting out, among other things, the following: ". . . without waiving its motion to quash the attachment filed by it herein, but insisting upon same, and also without waiving its motion to quash the warning order filed herein, but insisting upon the same, and being compelled to answer herein over its objections," and denied all the material allegations contained in the complaint, and set up other affirmative defenses.

The cause was first tried to a jury on March 31, 1938, and upon a mistrial resulting, it was again tried

on July 6, 1938, and before the introduction of any evidence, appellant again objected to being forced to trial and renewed its motions to quash the attachment and warning order, all of which were overruled by the trial court. The trial resulted in a judgment in favor of appellee in the sum of $2,000. From this judgment comes this appeal.

The undisputed facts in this record show that appellant is now, and has been for several years prior to this suit, a corporation organized under the laws of the state of Maine, but duly licensed to do business, and is doing business, in this state with a designated agent, John W. Newman, in the city of Little Rock. There were no agents for service in Crawford county. For the purposes of personal or constructive service, appellant is in the same position as any domestic corporation in Arkansas.

As stated above, appellee does not rely on personal service on appellant, but does rely on constructive service by warning order and also contends that appellant, though not personally served, entered its appearance in the cause, voluntarily, and that the court below was justified in rendering personal judgment against appellant, on the jury's verdict. To these views we cannot agree for reasons hereafter shown.

Appellant contends that there was no personal service on it, and, therefore, that the trial court erred in awarding a personal judgment against it. We think appellant clearly correct in this contention.

Pope's Digest, § 8226, provides: "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this state, as provided in § 1374, and who has not appeared in the action." The rule is well settled by the above section that a personal judgment cannot be rendered against a foreign corporation, such as appellant in this case, when no personal service of summons has been had upon its designated agent or its authorized agent at a branch office or other place of business in the state.

In *Brookfield* v. *Boynton L. & L. Co.*, 127 Ark. 306, 310, 192 S. W. 215, a case in point, this court said: "When

a foreign corporation has complied with the law of the state by appointing an agent upon whom summons may be served, or when it has a regular place of business within the state with employees in charge, in order to obtain a personal judgment against the company, service must be had either on its designated agent or some employee at its place of business. *Lesser Cotton Co.* v. *Yates,* 69 Ark. 396, 63 S. W. 997."

At no time during all of the proceedings in the court below did appellant enter its appearance in the cause, but appeared in each instance under protest, specifically reserving all of its rights in its motions to quash the attachment, warning order and finally in its answer.

We do not think appellee's contention that appellant entered its general appearance by requesting a physical examination of appellee, by Dr. Foster, can be sustained. Appellant's motions to quash service of summons, attachment and warning order had already been filed before appellant's examination of appellee. The request for the examination was not made to the court and, therefore, no affirmative action from the court was invoked. In 6 C. J. S., § 13, p. 42, this well-settled rule is stated as follows: "Any act of the defendant which recognizes the case as in court constitutes a general appearance, but, if any act does not do this or seeks to invoke affirmative action from the court it is not an appearance. . . . On the other hand, although an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and no affirmative action is sought from the court."

In *Robinson* v. *Bossinger,* 195 Ark. 445, 112 S. W. 637, this court said: "The defendants had the right, during the progress of the cause to a trial, to take such action as was advantageous and proper to protect the interests of their clients, and we do not think a mere agreement as to the date upon which the trial should be had can be held to be asking such affirmative relief as constituted a waiver to the objections previously and

properly saved to the refusal of the court to quash the service." And in *J. H. Hamlen & Son* v. *Allen,* 186 Ark. 1104, 57 S. W. 2d 1046, this court held, quoting syllabus: "Where a foreign corporation appeared specially for the purpose of objecting to service of process, it did not enter a general appearance by requesting and obtaining time to apply to the Supreme Court for a writ of prohibition."

We are, also, of the opinion that the court erred in overruling appellant's motion to quash the writ of attachment. Appellee, after failing to obtain personal service upon appellant, filed his affidavit and bond for attachment. This affidavit has been set out above and need not be repeated here. The only grounds for an attachment in an action for tort is § 532 of Pope's Digest, which reads as follows: "In actions for torts committed in this state, or to recover statutory penalties, a writ of attachment may be issued against the property of a defendant who is a non-resident of the state *and cannot be served in person with process in the action within the state,* in the same manner as in actions *ex contractu.* Before the clerk shall issue a writ of attachment in such an action, the plaintiff shall make an affidavit and execute a bond in the same manner as provided by law in other cases of attachment."

We think it the settled rule of law that when a statute provides for attachment it must be strictly followed. As this court said in *Bush* v. *Visant,* 40 Ark. 124, 132: "The proceedings by attachment against the property of a non-resident is statutory, out of the course of the common law, and must be strictly followed to make a valid sale of property."

The only provision in § 532 of Pope's Digest in a tort action is against "a defendant who is a non-resident of the state and cannot be served in person with process in the action within the state." It follows, therefore, that before an attachment can be obtained in a tort action the defendant must not only be a non-resident of the state but also *such a non-resident as cannot be served in person with process in the action within the state.* Appellant is

a foreign corporation doing business in this state, and authorized to do business here. It owns property in the state and has an agent here upon whom service could be had, and in all essential respects is a domestic corporation in so far as transacting business in this state is concerned.

This court said in *Yockey* v. *St. L.-S. F. Ry. Co.,* 183 Ark. 601, 37 S. W. 2d 694, that: "The defendant owns and operates a line of railroad in this state, and has voluntarily placed agents here in the conduct of its business who are authorized to receive service of summons under our statute. It has become in all essential respects a domestic corporation, in so far as transacting business in this state is concerned."

It will be observed that the affidavit of appellee, quoted *supra,* upon which attachment was issued, failed to state that appellant is a non-resident of the state *"and cannot be served in person with process in the action within the state."* We think that the affidavit for the attachment in question was fatally defective and that any attachment secured thereon is void.

In *Sannoner* v. *Jacobson,* 47 Ark. 31, 45, 14 S. W. 2d 458, this court said: "It has been frequently held that the omission of any statutory prerequisite in suing out an attachment renders the process void, and subjects the judgment that follows it to a successful collateral attack."

We are, also, of the opinion that the trial court erred in overruling appellant's motion to quash the warning order. The affidavit for the warning order in question, and on which it was based, has been set out above and need not be again repeated. We think this affidavit invalid and insufficient and the warning order issued thereon without legal effect and void. The conditions for obtaining constructive service of process are provided in § 1380 of Pope's Digest (§ 1159 of Crawford & Moses' Digest) as follows: "Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of the action, that he had made diligent inquiry, and that it is his information and belief that the

defendant is: First. *A foreign corporation, having no agent in this state.*" It will be observed that appellee's affidavit failed to contain the required allegation that appellant is "*a foreign corporation having no agent in this state.*" Appellant did have a designated agent, John W. Newman, at Little Rock. It, therefore, could be proceeded against only by personal service upon its designated agent or some other agent in the state acting for appellant, and not by constructive service.

We think the rule is properly stated in *J. H. Hamlen & Son* v. *Allen, supra.* There it is said: "The trial court correctly ruled that the attempted constructive service was void because the affidavit failed to state that petitioner had no agent in this state upon whom process might be served, when, as a matter of fact, it had appointed an agent in this state for that purpose. Section 1159 of Crawford & Moses' Digest makes such a requirement when an agent has been appointed as provided in § 1151 of Crawford & Moses' Digest. After the appointment of an agent in accordance with said § 1151, a foreign corporation can be proceeded against only by personal service upon the agent and not by constructive service upon it." See, also, *Crane* v. *Hibbard,* 66 Ark. 282, 50 S. W. 503.

On this whole record, therefore, we conclude that the trial court erred in refusing to quash the attachment and warning order, in rendering personal judgment against appellant, and in refusing to hold that there was no valid service had upon appellant, and accordingly the judgment is reversed, and the cause remanded.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BARHAM.

4-5455 128 S. W. 2d 353

Opinion delivered May 1, 1939.

R. E. Wiley and *Henry Donham,* for appellant.

W. F. Denman and *W. R. Donham,* for appellee.

HUMPHREYS, J. Appellee brought this suit in the circuit court of Nevada county against appellants to recover damages for personal injuries he received as the result of appellants' train striking his automobile at a public road crossing near Prescott on November 14, 1937. E. H. Wise, a resident of Arkansas, was the engineer in charge of and operating the train at the time of the collision. He was joined as a defendant in the suit.

The pleadings consisted of a complaint and answer which are as follows:

"Complaint

The complaint alleged that on the night of November 14, 1937, at about 10 o'clock the appellee was driving his automobile along a road called Wild Cat Road in an easterly direction; that as he approached the railroad crossing he stopped, looked and listened for the approach of a train, but, on account of a deep cut, a high embankment and a defective headlight on the engine of the locomotive, his view was practically obstructed until he was within thirty feet of the track; that he then attempted to cross the track and his car stalled thereon; that he observed appellant's passenger train, known as the Sunshine Special, approaching about five hundred feet south of the crossing; that in order to save his life he jumped from the car in which he was riding; that the train struck the car and hurled it over and struck appellee before he had time to get out of the way; that as the train approached the crossing it was traveling at a high, fast and dangerous rate of speed; that appellants carelessly and negligently failed to keep a proper lookout for persons or property on their tracks and carelessly and negligently wholly failed to ring the bell or sound the whistle on the locomotive as the train approached the crossing or to give any signal whatever to warn persons of the approach of the train, and said crossing was one of the most constantly used highways in Nevada county and many people were constantly coming and going along over said crossing, which facts were known to appellants; that the track south of said crossing for a distance of about eight hundred yards was practically straight and level and the crossing was in full and open view of appellants when the train reached a point eight hundred yards south of the crossing; that if appellants had been keeping a proper lookout they could and would have observed appellee's car on or near said track and could have discovered his perilous position in time to have brought said train to a stop before striking appellee's car; that appellants therefore failed to exercise ordinary

care for the safety of persons about to cross said crossing, in violation of duties imposed upon them by law, and that they carelessly and negligently ran said train over said crossing and struck appellee's automobile, causing him to be injured; that appellants knew, or by the exercise of ordinary care could have known, that appellee's car was stalled on the track, and they knew, because of the fact that no bell was rung or whistle sounded and the defective condition of the headlight on the engine, that the train could not be seen at a safe distance by travelers on the highway; that appellee did not know the train was approaching the crossing, yet with knowledge of appellee's peril the appellants carelessly and negligently ran said train over said crossing and struck appellee's automobile. That before the train struck the automobile, appellee upon discovering the train and in order to save his life, jumped from same; that the train struck the automobile and hurled it over and against appellee causing him to be painfully and permanently wounded; that he suffered a severe injury to his back in that the fourth, fifth and sixth lumbar vertebrae were fractured, crushed and jammed, that his left leg was completely paralyzed from his hip down, that he sustained a large hernia in his right side, that his chest and left shoulder were crushed and the muscles, tissue and ligaments thereof torn and lacerated, that he suffered and will continue to suffer for the balance of his life a severe shock and injury to his entire nervous system, that his nervous system was completely shocked and thrown out of co-ordination, all on account of the carelessness and negligence of appellants; that prior to his injuries appellee was a stout, able-bodied man . . . years of age and earning and capable of earning $..... per month; that he is now and will ever remain an invalid and cripple, unable to earn for himself and family a livelihood; that he suffers and will continue to suffer for the balance of his life great and excruciating pain and misery in his back, right side, left shoulder and chest, to his damage in the sum of $50,000 for which amount he prayed judgment."

"Answer

The answer denied each and every material allegation of the complaint and alleged that if appellee was injured it was due to his own carelessness and negligence in driving his automobile upon the track without looking or listening for the approach of the train and without exercising any care whatever for his own safety and protection; that he drove said automobile upon the track and stopped it deliberately and permitted the automobile to stand on the track until the train approached and struck it, and that, if he was struck by the automobile after same had been struck by the train, it was due to his own carelessness and negligence in failing to get out of the way when he had ample time to do so, and appellants plead said negligence on the part of appellee as a bar and defense to his right of recovery herein. The answer further alleged that if appellee was suffering from any disability as a result of injuries, that he sustained said injuries elsewhere and that he sustained no injury whatever by reason of the train striking his automobile at the time and place complained of in his complaint."

The cause was submitted to a jury upon the pleadings, evidence introduced by the parties and instructions of the court resulting in a verdict and consequent judgment against appellant for $20,000, from which is this appeal.

No objections were interposed to the introduction of any of the testimony and, although in sharp conflict in every material point, when viewed in the most favorable light to appellee, there is substantial evidence in the record tending to sustain each and every allegation in the complaint, except as to the extent of the injuries received by appellee.

Appellants' main contention for a reversal of the judgment is that the trial court committed reversible error in submitting to the jury issues involving § 11144 of Pope's Digest known as the lookout statute, and § 11135 of Pope's Digest known as the crossing-signal statute.

It is argued that under the allegations of the complaint the court should have submitted only the question whether appellants were guilty of negligence under the common law. Of course, appellants would be correct in their contention and argument if the complaint was not broad enough to allege a failure to keep a statutory lookout and to allege a violation of the crossing-signal statute.

With reference to the lookout statute the complaint alleged that appellants "carelessly and negligently failed to keep a proper lookout for persons or property" and that "if appellants had been keeping a proper lookout, they could have and would have observed appellee's car on or near the track and could have discovered his perilous position in time to have brought said train to a stop and avoided striking appellee's car."

With reference to a violation of the crossing-signal statute the complaint alleged appellants "carelessly and negligently wholly failed to ring the bell or sound the whistle on the engine of said train at or as said train approached said crossing or to give any signal whatever to warn persons of the approach of said train, although the crossing was upon one of the most constantly used highways in Nevada county, which facts were known to appellants; that no bell was rung or was being rung or that no whistle was sounded or was being sounded upon the engine of said train as it approached said public crossing."

Appellants admit that allegations in the complaint state a good joint common law cause of action against the railroad company, its trustee and engineer, E. H. Wise, but say they do not allege a violation of the lookout statute nor a violation of the statute requiring the sounding of a whistle or ringing a bell constantly for a distance of 80 rods before the train reached a crossing.

It is true the allegations do not in specific words allege a violation of the statutes, but facts are alleged sufficient to establish that the action was based upon a violation of the statute. But pleaders do not have to state conclusions. They only have to state the facts.

The allegations are not only sufficient to state a joint common law cause of action against all the appellants, but were sufficient to state a separable cause of action under both statutes against appellant railroad company and its trustee.

It was not incumbent upon the pleader to add to these allegations that the lookout statute and the crossing-signal statute were violated by appellant railroad company and its trustee.

The instructions given by the court and objected to by appellants were within the pleadings and testimony introduced, without objection, and were correct declarations of law. They were not abstract, but responsive to the evidence.

After a careful reading and consideration of the instructions together with the numerous objections made to each we have concluded the objections are without merit, and that when the instructions are read together they harmonize with each other and clearly and fairly present the material issues in the case under the pleadings and evidence, and that appellants have not been deprived of any of their defenses or rights on account of the instructions given by the court. In fact, all their rights have been carefully guarded in the instructions when read together.

The railroad company and its trustee could not defend against a failure to keep a lookout, nor under the doctrine of discovered peril by alleging that appellee was guilty of contributory negligence and the instruction so declaring was not error. The lookout statute itself abolishes contributory negligence as a defense to a failure to comply with its provisions. Neither does such a defense have a place under the doctrine of discovered peril.

The railroad company and its trustee were accorded their right to interpose such defense under the instruction given by the court relative to the crossing-signal statute in the very language of the statute itself.

All of the appellants were accorded the right to such defense in the instructions relative to the alleged common law liability.

None of the instructions deprived appellant, E. H. Wise, of the benefit of his alleged defense that appellee was guilty of contributory negligence which caused his injuries. In fact the jury was specifically told by instruction No. 14 that: "If you find from the evidence in the case that the plaintiff himself was negligent in any respect as defined in other instructions herein, which contributed to the injuries which he sustained, if any, then your verdict will be for the defendant, E. H. Wise." This instruction is not in conflict with instruction No. 4 given by the court as contended by appellants.

Practically all the instructions predicated appellee's right to recover upon a finding by the jury that his injuries were received through the negligent operation of the train. The evidence was in sharp conflict on this issue of fact, so the instructions were correct and not abstract under the claim of appellants that the undisputed evidence showed to the contrary.

We have dealt with these instructions and the many objections thereto in this general and rather summary way because to set them out herein and analyze them separately would extend this opinion to great length and would serve no useful purpose as a precedent.

Although there is substantial evidence tending to show that appellee was severely injured yet, after carefully reading all the evidence responsive to this issue, we have concluded that there is no substantial evidence tending to show that appellee was damaged on account of his injuries in a sum greater than $10,000. Any amount recovered in excess of $10,000 is not supported by substantial evidence.

Therefore, if appellee will enter a remittitur of $10,000, within fifteen days, the judgment will be affirmed for $10,000, otherwise the judgment will be reversed and the cause remanded for a new trial.

GREAT REPUBLIC LIFE INSURANCE COMPANY *v.* LANKFORD.

4-5456 127 S. W. 2d 811

Opinion delivered May 1, 1939.

Harry Neelly and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

C. E. Yingling, for appellee.

MEHAFFY, J. Appellant issued its policy to the appellee for $1,000 on March 26, 1930. The policy provided, among other things, for the payment to the insured of $10 disability benefits monthly. This action was instituted by appellee against the appellant to recover the disability benefits.

Appellee alleged that as a result of disease, he became totally and permanently disabled on or about March 16, 1937, and furnished appellant with proof of such disability, and demanded payment of the benefits due him.

Appellant filed answer denying each and every material allegation of the complaint.

There was a verdict and judgment for the sum of $222.60. The case is here on appeal.

The appellee testified in substance that his occupation was farming and stock business principally, and that he had done some timber work; his father owns a farm at West Point and they worked together; he became disabled by disease in August, 1925, when he was injured; a horse fell on him; his back hurts all the time; he is nervous and growing worse; has heart trouble, and if he exerts himself the least bit he has sharp pains about the heart; if he goes too high up he cannot stand the pressure, gets out of breath; suffers pain all the time in his back, and suffers pain in the heart from time to time; also has hemorrhoids, a bad foot, and slight rupture; when he was able to farm he engaged in all kinds of farm work; clearing land, breaking new ground, hauling hay, hauling cross ties, baling hay, and any kind of farm work; since his disability, he has been forced to curtail his activities; has not been able to plow, haul hay, break new ground, and so on; had to discontinue his farming operations and dealing in stock.

There was other evidence tending to prove the disability of appellee. Dr. Rodgers and Dr. Dunklin testified that appellee was disabled; that his blood pressure at times would be as high as 180; at other times around 140, and he has a systolic murmur of the heart and myocarditis; he had arthritis, extreme pain in the left arm; myocarditis is a weakening of the heart muscles. Both physicians testified at length as to his ailments and physical condition.

It is not contended, however, that the evidence was not sufficient to sustain the verdict and judgment. The only contention made by appellant is that the court erred in permitting appellee to ask Dr. Rodgers the following question, and erred in permitting the doctor to answer:

"Q. Doctor Rodgers. Mr. Lankford is and has been a farmer all his life, engaged in farming on a rather

small scale, according to his testimony he has until recently, late in 1935, been engaged in practically all the activities, or all the activities, in fact, in connection with his farm work, such as breaking land with a walking plow and planting and cultivating crops with walking implements then following that up, of course, with gathering the crops, cutting, hauling and baling hay, and all such work as building fences, handling livestock, riding throughout the country buying it, roping it and loading it in trucks, and he has engaged in loading and unloading and hauling cross-ties and such activities as that. I will ask you whether or not, Doctor Rodgers, basing your answer upon the examination you have made of Mr. Lankford from time to time, whether or not in your opinion his physical condition is such as to make it either impossible or inadvisable for him to engage in all or a part of those activities?''

The physician answered as follows: ''I consider Mr. Lankford disabled to do hard manual labor which involves strenuous exercise like loading cross-ties or plowing or any exercise that requires extreme strain or effort. I consider him able to ride a horse or to do light manual labor.''

''I consider that the heart condition and his arthritis are permanent and will last as long as he lives.''

Dr. Dunklin was asked, over the objections of appellant, practically the same question that was asked Dr. Rodgers, and the same objection was made to this question and answer.

Dr. Dunklin answered as follows: ''It is my opinion that this man might at times do some one or some few of his duties as you have enumerated them, but he would never be able, for instance, to hire out as a farm laborer, he will never be able to follow this routine day in and day out, he couldn't do it.''

It is earnestly insisted by the appellant that the court erred in permitting these questions to be asked and answered by the physicians, and that for that reason the

case should be reversed. This is the only ground for reversal urged by appellant.

Appellant cites and quotes from numerous authorities to sustain its contention. The authorities, however, are in conflict on this question, and, moreover, the facts in the cases relied on by appellant differ somewhat from the facts in the instant case.

Appellant introduced Dr. Dishongh, who contradicted the physicians introduced by appellee in some respects. It was, however, a question of fact for the jury as to who's opinion they would believe.

It will be observed that Dr. Rodgers stated that he considered Lankford disabled to do hard manual labor which involves strenuous exercise, but considered him able to ride a horse or do light manual labor. He also stated that he considered the arthritis and his heart condition are permanent, and will last as long as he lives.

Dr. Dunklin gave it as his opinion that appellee might, at times, do some one or some few of his duties, but would never be able to hire out as a farm laborer; would never be able to follow this routine day in and day out.

Physicians, when they testify as experts, simply give their opinions, and do not testify about one's condition except to give their opinions.

The issue to be determined by the jury in this case was whether appellee was totally and permanently disabled. Certainly an ordinary layman would not be able to say what the result of arthritis or myocarditis or the other ailments mentioned by the physicians would be; and, for that reason, it is proper to introduce the testimony of experts who know about these things and give their opinions as to the results.

The rule is stated in 11 R. C. L., 583, 584, as follows: "It has sometimes been decided, and often assumed to be an inflexible rule of law, that an expert cannot testify to his opinion upon the precise fact which is in issue before the jury. To permit that, it is said, would put the expert in place of the jury and invade their peculiar

province. Thus, it has been held also that an expert may state that a certain cause may have produced the result under consideration, but cannot state that in his opinion it did produce it. But it is evidence that this supposed rule, when stated broadly as it often has been stated, involved great confusion of thought and leads to absurd consequences. It is certainly singular that a class of evidence which is admitted when it is only slightly pertinent should be rejected when it is of the highest pertinency. Irrelevancy is made a ground of admission, and relevancy of exclusion. Such evidence invades the province of the jury no more than does direct evidence of an eye witness to a decisive fact. In either case, if the jury are satisfied of the trustworthiness of the evidence it may be conclusive of the issue; but their duty is no more invaded in one case than in the other. Every expert opinion rests on an assumption of facts; if the opinion is given upon a hypothetical question, its weight depends wholly on the jury finding that the assumed facts have been proven; if it is based on the expert's own testimony as to the facts, the truth of this testimony is no less open to their belief or disbelief; and, in addition, the soundness of the opinion itself is to be determined by the jury in consideration of its apparent reasonableness or their confidence in the skill and truthworthiness of the witness, and of any contradiction from other experts. The rule leads to absurd results in its application. Thus it is held that an expert may testify to the value of land before an alteration and to its value afterward, and that the court must charge the jury that the difference in value is the measure of the damages, but that the expert cannot express an opinion as to the amount of damages. The technicality of the distinction is illustrated by the holding that facts may be elicited from the witness, from which the ultimate conclusion inevitably follows, though the conclusion cannot be stated. The court in so declaring, however, admitted that the difference was largely one of form. And in many cases the courts have refused to recognize such a distinction and have allowed the witness to testify directly to the ultimate conclusion."

In the same section of R. C. L., it is also stated: "It seems safe to say, however, that the modern tendency is decidedly towards the more liberal practice, and that sooner or later no distinction will be made between evidential and ultimate facts as subjects of expert opinion."

If a witness is skilled in the science and practice of medicine, it is competent not only for him to give his opinion with relation to the disease, its character, etc., but he may also give his opinion as to the effects of the disease. Of course, after all, the jury is the judge of the weight to be attached to the opinions.

It would, in many cases, be useless to have the expert testify simply as to the name of the disease, without testifying as to its effects. *Tatum* v. *Mohr,* 21 Ark. 349. See, also, *Ark. Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45; *Mutual Benefit Health & Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W. 2d 812; *Safeway Stores, Inc.* v. *Ingram,* 185 Ark. 1175, 51 S. W. 2d 985.

"Dr. McBratney, who qualified as an expert, testified that he had examined and X-rayed the plaintiff. Based upon his examination and certain facts assumed from the testimony in the record, he was asked his opinion as to the cause of plaintiff's condition. Similar questions were propounded to Dr. Tibe. The court sustained objections to their testimony on the ground that the answers called for would invade the province of the jury. But if the questions propounded were such that the jury might not be capable of determining them from the evidence, then it was proper that they should have the benefit of the opinion of an expert, even though the opinion went to the matter directly in issue. The purpose of a trial is to investigate the facts so as to ascertain the truth, and the modern tendency is to regard it as more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness may be permitted to state a fact known to him because of his expert knowledge, even though his statement may involve a certain element of inference or may involve the ultimate fact to be determined by

the jury." *Cropper* v. *Titanium Pigment Co.,* 8 Fed. 2d 1038, 78 A. L. R. 737.

It is frequently urged, as in the instant case, that the evidence of the physician invades the province of the jury. As to the effect of the disease, it is not a matter about which laymen are advised. The party may have such a disease as only physicians could tell about its effects. In dealing with questions of this sort, it would frequently be impossible for physicians to make clear to the jury the effect of the disease. *Andrew D. Cody* v. *John Hancock Mutual Life Ins. Co.,* 111 W. Va. 518, 163 S. E. 4, 86 A. L. R. 354.

The court did not commit error in permitting the questions and answers of the physicians.

The judgment is affirmed.

[redacted]

TOLAND *v.* UVALDE CONSTRUCTION COMPANY.

4-5457 127 S. W. 2d 814

Opinion delivered May 1, 1939.

[redacted]

Paul H. McKnight and *Joe S. McKnight,* for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

McHANEY, J. Appellant brought this action to recover damages for personal injuries alleged to have been

sustained on July 5, 1937, while an employee of appellee, Uvalde Construction Co., through the negligence of appellee, W. W. Barnett, a fellow-servant, who, it is alleged, dropped a ladder on his foot. Appellees defended on the ground among others, that the employer had made a settlement with appellant by which it paid him $275.00 on August 31, 1937, in full settlement of his claim for damages on account of said injury, and received from him a written release, covering all damages sustained or which might be sustained by reason thereof, which it pleaded in bar of the action. It also plead that, at a later date, January 26, 1938, it paid him the further sum of $50, and received from him a further release. The case went to trial, and, at the conclusion of the evidence on behalf of appellant, the court instructed a verdict for appellees, on which judgment was rendered.

The only contention made by appellant for a reversal of the judgment is that a case was made for the jury, and that the court erred in directing a verdict against him. It is insisted that the settlements made by him and the releases executed were procured by fraud. The statement is made in his brief that "the agents of the Uvalde Construction Company went to his daughter's home where he was staying and while in a stupor and unconscious condition made with him a settlement of his claim for the sum of $275.00, they well knowing his condition at the time." This assertion is not borne out by the evidence. The release shows it was signed by him and by his own lawyer and acknowledged before a notary public. He, himself, testified that Mr. Moody was his lawyer whom he had employed to present a claim against the company. He admits signing the release. No representative of the company was present when he did so, only his own lawyer and the notary being present, and it is difficult to see how appellees could have practiced a fraud on him at that time.

He contends that he should not be bound by his release because he says Dr. Shuffield told him sometime in August, probably between the 12th and the 18th, that his foot "was only sprained or bruised and I would be

all right in a few days." But, a short time after the injury, he employed his own physician Dr. Allan, and went to St. Vincents Hospital where he was treated "eight or ten days." His daughter then sent him to the County Hospital where he was treated by Dr. May for about a week. Under these circumstances, appellant had no right to waive his own doctors, hospitals and his own attorney, and ground fraud on the supposed statement of Dr. Shuffield who treated him at the Baptist Hospital at the instance of appellee company.

In addition to this, at the solicitation of another lawyer selected by appellant, the company paid him an additional $50.00 on January 26, 1938, and took from him the following statement: "On or about the 5th day of July, 1937, I received injuries while I was in the employ of the Uvalde Construction Company in Little Rock, Arkansas.

"I did not recover from these injuries and retained the services of M. V. Moody, an attorney of Little Rock, to represent me, and on the 31st day of August, 1937, I made a full and complete settlement of my claim against the Uvalde Construction Company for all damages I had or might in the future sustain by reason of the injuries I claimed I received while in its employ for the sum of $275.00, which was paid.

"Since that time I have still had a great deal of trouble with the injuries I sustained and have made an effort through friends to secure means with which I might receive further treatment for the injuries.

"I recognize that the release I executed is a full and final release and that I have no legal claim against Uvalde Construction Company or against anyone else by reason of said injuries.

"I have recently been assisted by Mr. Otis Nixon, an attorney of Little Rock, in an effort to see if I could not secure a further payment, and a payment of $50.00 has been made to me on this date on behalf of Uvalde Construction Company and I acknowledge receipt of said sum of $50.00 and acknowledge that the said sum is paid

to me not by way of any additional sum due me on account of any legal liability for said injuries, but solely for humanitarian reasons to enable me to see if I cannot obtain a cure for the injuries I sustained. I recognize that I have no right to ask for the payment that is made and that I have no right or reason to expect any additional payments on behalf of Uvalde Construction Company or of anyone else. (End of Page one) Signed W. M. Toland.

"Signed at Little Rock, (page 2) Arkansas, this 26th day of January, 1938. (Signed) W. M. Toland.

"I have secured the foregoing payment for Mr. W. M. Toland under the circumstances as he relates them in the foregoing statement and without any compensation to myself. (Signed) Otis H. Nixon.

"(Written in pen and ink)

" 'I have read the above and foregoing to Mr. Toland and he has read the same in my presence.' Signed Otis H. Nixon."

Even though it be conceded that the first release is voidable, it must be held that the second is a ratification of the first. *Lamden* v. *St. Louis Southwestern Ry. Co.,* 115 Ark. 238, 170 S. W. 1001; *St. Louis-San Francisco Ry. Co.* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440.

No error appearing, the judgment is accordingly affirmed.

THE AMERICAN LAUNDRY MACHINERY COMPANY
v. WHITLOW, ADMINISTRATRIX.

4-5458 127 S. W. 2d 817.

Opinion delivered May 1, 1939.

[redacted]

J. S. Jameson, for appellant.

Clifton Wade, Atkinson & Atkinson and *Vol T. Lindsey,* for appellee.

BAKER, J. According to appellant's statement, Vickers Cleaners & Dyers of Fayetteville is a partnership, composed of Roy H. Vickers and G. E. Ripley, which partnership became indebted to appellant, The American Laundry Machinery Company, for laundry machinery. Two series of notes were executed, evidencing the indebtedness and also title retaining contracts. On March 13, 1938, there was owing upon one series of these notes $3,452.56. Upon the other series of notes there was owing $1,150. There were two laundry plants. One of them known as the The Model Laundry was located at Rogers in Benton county. The other plant was at Fayetteville in Washington county.

There was no dispute about the balances due upon these separate contracts. It is probably true that both of these laundry plants had been in default in the payment of installment notes as they matured. The Model Plant at Rogers, on account of the indebtedness that it owed other parties than the appellant in this case, had been placed in a receivership, and Wayne Stone had been appointed receiver and had charge of that plant. By reason of these defaults and the receivership proceedings, the appellant company placed with its Chicago attorneys, Teller, Levit, Silvertrust & Levi, both series of notes and title retaining contracts for proper action. These Chicago attorneys employed Mr. J. S. Jameson, Fayetteville, and instructed him to file interventions claiming the property covered by the title retaining contracts. On March 13th, according to the statement before us, Mr. Jameson filed intervention in the Benton chancery court, setting up, as appellant's claim, notes aggregating $3,452.56 and title retaining contract, and filed a like suit in the chancery court at Fayetteville, alleging a balance due on notes of $1,150 secured by title contracts to the laundry machinery in the plant in that county. Ray House had been appointed receiver for the laundry at Fayetteville, but the business at Fayetteville was connected with the controversy under consideration here only in an incidental way. In this controversy appellant says that neither attorney Jameson nor receiver Stone knew that the $3,452.56 series of notes were secured by any machinery other than machinery located in the Model Laundry at Rogers. Shortly after this intervention was filed, receiver Stone advised Mr. Jameson, appellant's attorney, that there was a prospective purchaser who would pay appellant $2,000 in full of its claim against the Rogers plant, and Mr. Jameson submitted the proposition on March 17th, by writing to the Chicago attorneys, and the following statement was contained in his letter:

"The receiver, Wayne Stone, for the Model Laundry at Rogers, against which there is an unpaid balance of $3,452.56, advised me today that a prospective purchaser

of the Rogers Laundry would pay us $2,000 in full of our claim, and it is my opinion that unless this machinery has more value than I think it has, it would be to your client's advantage to accept."

Mr. Jameson further states that on March 21st the Chicago attorneys advised him that they would like to know just what machinery was in the Rogers plant, since it seemed that the machinery in the two laundries had been switched. On March 23d, Mr. Jameson furnished an inventory showing the machinery in each laundry. This inventory, as we understand, was probably taken from the receiver's inventory, but this is by no means certain because Mr. Jameson states further, at another place in this record, that he visited both the plants and it was his own opinion, after visiting the Rogers plant, that the $2,000 in full of the claim against the Rogers plant was as much, if not more than could have been gotten out of the machinery located therein. Thus far the proceedings were without any suggestion of mistake or misunderstanding. The American Laundry Machinery Company had before it Mr. Jameson's letter suggesting that the receiver had the prospective purchaser who would pay $2,000 for the company's claim. We think it substantially without dispute that the parties had in mind at that time the Model Laundry at Rogers and were not including or considering the Fayetteville plant. After the American Laundry Machinery Company had received Mr. Jameson's letter, the inventories he sent them, the Chicago attorneys sent a telegram to Mr. Jameson, on March 25th, it follows:

"American versus Vickers offer of $2,000 Rogers Plant accepted (signed Teller, Levit, Silvertrust & Levi."

Mr. Jameson promptly notified receiver Stone of the receipt of this telegram, who in turn advised Mrs. Eva L. Whitlow who was the prospective purchaser, and she called on Mr. Jameson and attempted to make an agreement, whereby she would pay the $2,000 in installments and this proposition was declined.

G. E. Ripley, who is spoken of in some of the evidence as Dean Ripley, was connected with the Fayetteville plant

and he was represented by attorney Clifton Wade of Fayetteville. When Mr. Wade learned that Mrs. Whitlow had not been able to close up the matter by paying the $2,000 in installments, he proposed to attorney Jameson to purchase these notes for G. E. Ripley at the same price and asked Jameson about his authority to assign the notes, and at the same meeting examined the foregoing letter of March 17th, and the telegram of March 25th, and promptly agreed that upon assignment of the notes he would procure the $2,000 to be paid attorney Jameson who, according to his own statement, says that he supposed the assignment of the notes was equivalent to the transfer or bill of sale of the machinery. He promptly assigned the notes representing the $3,452.56, and the conditional sales contract, which did in fact cover the machinery in The Model Laundry, but it is urged now, it covered, in addition, two pieces of machinery in the Fayetteville laundry, the same being one "100-4 Roll Flat Work Ironer" and one "Huebsch hosiery table," which Mr. Jameson says he supposed secured the $1,150 series of notes involved in Washington county suit.

At the time of the transfer of these several notes and title retaining contracts by Mr. Jameson, there was prepared an assignment which amounted to a ratification, and which Mr. Jameson sent to the Chicago attorneys to have their client sign. On April 11th, three days after Mr. Jameson had made the assignment of these several instruments, the same being the date for the hearing of the suit in which Mr. Jameson had filed the intervention in the Benton chancery court, that court met and Mr. Jameson was present in court prior to the time that the case was called for trial in which the intervention for his client was pending, and, as he said, the matter, in so far as it affected the Rogers plant, had been disposed of by his assignment, he gave notice that he had no further interest in the proceeding, pending in the Benton chancery court involving the Rogers plant.

There is a bit of history connected with this payment of the $2,000 that perhaps ought to be stated, though it apparently may make very little difference in the

ultimate conclusion that may be reached. Mr. G. E. Ripley borrowed the $2,000 from his daughter and delivered this to Mr. Hilton, who appeared in the court offering this amount in settlement of the Laundry Company's claim, that is to say, this particular money was paid over to Mr. Jameson, as we understand from the record here, who retired from the case because he supposed the claim of his clients had been satisfied by this settlement and compromise. Hilton took no actual ownership, title or interest in the laundry business by this particular deal, and we think that must be conceded, but Mrs. Eva Whitlow appeared in the court, she being the one in whose interest Mr. Stone had written as being the prospective purchaser, offered a draft for $2,000 and this restored the fund that Mr. Hilton had delivered as money borrowed and paid over by Mr. Ripley.

This suit involved creditor's claims, and it involved also the said notes and the title retaining contracts transferred by Mr. Jameson, or the property represented by these documents. In addition thereto according to statements made which are not in dispute, the title of the real estate on which the laundry was located was brought into question. Mr. Whitlow, the deceased husband of Mrs. Eva Whitlow, had built this laundry building as his contribution to a partnership that had operated The Model Laundry. We are told, but the record does not disclose this as a fact, that Mr. Whitlow was denying any indebtedness to the appellant, although the amount of the indebtedness that was owing upon the machinery was not in dispute. Whatever may have been the conditions among the parties prior to this transfer of notes and title retaining contract, it may be said that many of the matters, some of which are stated and some of which are argued to some extent, we are left to our own imagination to supply by surmise and conjecture, the reason being that the appellant has not seen fit to supply them by statement or abstract of the pleadings of the parties to this suit, heard on April 11, 1938. We do not know what was involved even in the intervention of the appellant, except the statement made that appellant was seeking to

recover the property described in the title retaining contracts.

Whether there was service of summons upon those who had possession of the two pieces of property alleged to have been at Fayetteville at that time, we do not know and are not privileged to make a surmise or conjecture from anything that appears from the abstract furnished us by any of the parties interested. At this time, however, April 11th, the contract or ratification prepared by Mr. Wade, or Mr. Wade and Mr. Jameson, and sent by Mr. Jameson to Chicago had not had time to be heard from except possibly by telegraph. This is a matter also of conjecture and will not be relied upon as concluding any possible rights. We think it may be said of a certainty at this state of the proceedings, Mr. Jameson was dealing with Mr. Wade and with Mr. Lindsey, Mr. Atkinson and others interested with the utmost of good faith. There was no doubt in his mind at that time, and the evidence clearly evinces this fact, that to transfer this property, involved in litigation, in the Rogers plant, he had merely to indorse these evidences of title and deliver them over and this became a symbolic delivery of the property itself. Mr. Jameson had sent the letter above quoted in which he called attention to the fact that there was an unpaid balance of $3,452.56 against the Rogers plant; that the $2,000 was "in full of our claim." Mr. Jameson understood and we think he made it clear to his clients, or their Chicago counsel, that the parties who owed the indebtedness were insolvent; that the prospect of collection was fixed by the value or the amount that could be recovered from the machinery and not from any of the individuals who owed the indebtedness. We doubt if he could have stated his understanding in language more definite than he used. He had furnished to his clients the inventories of the two plants, because they had asked for it, stating that they thought some of the machinery had been switched.

The technical terms descriptive of this machinery might not have meant very much to Mr. Jameson, therefore, he might not have understood these descriptive

terms or any part of it. But according to his own statement his clients knew these facts and, having his letter before them, the Chicago attorneys and the laundry machinery company counsel sent the telegram that authorized the acceptance of the $2,000 for the Rogers plant. Mr. Wade, Mr. Lindsey, Mrs. Whitlow, and others interested in the plant, whoever may have been there, and who were interested in the litigation in the Benton chancery court, thoroughly understood what they were getting. They were not making any mistake. They were paying $2,000 for the "claim in full," which Mr. Jameson was holding against the Rogers plant—$3,452.56, evidenced by notes. They seemed to have had some difficulty in raising the $2,000 to make this settlement. Mrs. Whitlow first failed. It is stated now that in the settlement at the time she paid over the $2,000 restoring the money that Mr. Ripley had delivered over to Mr. Hilton she assumed the indebtedness of The Model Laundry Company, including the expense of the receivership and that this was to get a complete settlement; that she could not and would not have done this except for the fact that she was able to buy this claim for the $2,000.

It is argued with considerable force and some degree of good reason that Mr. Wade had examined the letter written by Mr. Jameson, the telegram sent by his client, or its counsel, and that on account of some lingering doubt in his mind as to Mr. Jameson's authority he prepared the ratification contract. There was no merit in argument made that Mr. Jameson stated he had authority to assign the documents. Agency or the extent or scope of it may not be so established. He had possession of his client's notes. He had made the investigations that an attorney should have made of the value of the securities in his hands, and of the property represented thereby. He had given his clients the benefit of the offer made, stating that it was "in full of our claim" and "our claim is $3,452.56." In addition to that, after this offer was made, he had furnished inventories of each of the two plants. All this having been done, he was then directed to accept the "$2,000 Rogers plant."

We think we must consider the Chicago attorneys and their client as reasonable business men, that under the offer made and under the acceptance authorized, they did not expect more than the $2,000. That much was paid to their attorney for their account. They argue now, and require Mr. Jameson to present two propositions, to reverse the decree of the chancery court, rendered on the 11th day of April, or to set aside that decree wherein these notes and title-retaining contracts were filed and canceled in the suit that they had authorized Mr. Jameson to file. These two propositions are: (1) that Mr. Jameson did not have authority to indorse and assign these notes and contracts without recourse. (2) That it was their intention, by the acceptance of the foregoing offer merely to transfer title to the property in The Model Laundry at Rogers which could have been done with a bill of sale, and that they intended to retain the notes and title retaining contracts to enforce their claim against two pieces of machinery in the Fayetteville plant; that Mr. Jameson, by his unauthorized act, transferred the property they did not intend to transfer; that he dealt with some property in the Fayetteville plant in addition to all the property in The Model Laundry at Rogers, and that by reason of this mistake there was no contract because the minds of the parties did not meet on the subject matter.

Appellant sought to reopen this decree by a motion filed about thirty days after the decree had been rendered. It is clear that Wade, Whitlow, and others were not notified immediately, but within a reasonable time, after the ratification contract had been sent by Mr. Jameson to the Chicago attorneys. Appellant, in its proceedings, offered to return the $2,000, has tendered it into court for the benefit of the parties interested and now ask that it be granted a judgment for the return of the two pieces of machinery in the Fayetteville plant, or that it have a judgment for the difference between the $2,000 and the aggregate amount of the notes—$3,452.56.

There is presented for our consideration here this motion, and the evidence taken thereon, but no part of the record upon which the decree was entered appears.

Since we are not advised as to all the matters that entered into the decree, we have extreme doubt of the propriety of considering its cancellation or modification merely because this motion states the lack of authority of Mr. Jameson and alleges the fact of a mistake as to the subject matter of the contracts. There may have appeared intervening rights superior even to those of the appellant who alleges there was no contract at all in law whereby it is presumed to have parted with its title and rights in this property involved. But assuming, without conceding there may be some merit in appellant's contention, we proceed to a discussion and settlement of that controversy. It is not contended in this case that any of the appellees are guilty of any kind of fraud, or misrepresentation. In fact, so far as the transaction is concerned, as between Mr. Jameson and those with whom he dealt in the transfer of these several notes and title retaining contract, the utmost of good faith seems to have characterized each step of the proceedings.

It is argued now that since the appellees have changed their relative positions, assumed debts and obligations, particularly Mrs. Whitlow, this decree could be modified, as prayed for by appellant, only at her great loss. Appellant says, however, this does not appear from this record, that she did not suffer any loss and that if she did, that that can make no difference for the reason that they did not part with any title by reason of Mr. Jameson's unauthorized action. This argument is unsound from two standpoints. If it is not made positively clear that Mrs. Whitlow would suffer loss, or that the parties have changed their attitude by reason of the settlement of this litigation, upon the transfer of these notes and title retaining contract wherein Mrs. Whitlow paid over $2,000, that failure is by reason of the fact that appellant has failed to abstract all the pleadings and proceedings upon which the decree was rendered and which they now seek to have modified.

We will not assume, in the face of this record that shows Mrs. Whitlow advanced $2,000, that she would be unaffected by a modification of the decree upon which the money was paid over in settlement of these several notes and contract.

The other argument made by appellant, that inasmuch as there was no contract because the minds of the parties did not meet, is clearly unsound. If we assume that there was a mistake and that Mr. Jameson acted without authority, that mistake was a unilateral mistake, not one in which any of the appellees misunderstood anything, not one in which Mr. Jameson made any mistake. Upon the face of this record he was fully authorized to do exactly what he did do. If he made a mistake that mistake appears solely upon the evidence of appellant and its own witnesses in which they say they did not authorize him to transfer the notes.

In 12 Amer. Jur. 624, § 133, it is held, as the rule sustained by practically universal authority, that a unilateral mistake alone will not justify a rescission. May it not be sufficient to say the law upon this subject is black type text book law.

They merely wanted a transfer of the property in The Model Laundry at Rogers. This was all Mrs. Whitlow got. It was what she paid for. It would be grossly inequitable to take any part of it away from her. We think there can be no doubt as to the correctness of the chancellor's finding in that respect. But it has been argued that she was already bound for this debt. Again we resort to the argument so many times stated by appellant's counsel, that the record does not disclose she had signed any of the notes, or title retaining contracts, nor is there any evidence that she had assumed any debt due to appellant. We think it incumbent upon us at this point to place the blame where it belongs, if appellant lost anything by reason of this transfer of the notes and contract. It could have been a little more explicit in the telegram, were it not meant for a complete acceptance of the propositions stated in Mr. Jameson's letter, which we have hereinbefore copied. If there was a loss, it

should be suffered by the one causing that loss and not by those entirely free from wrongdoing or culpable negligence. Appellant's conduct contributed to produce such loss. *Cureton* v. *Farmers' State Bank,* 147 Ark. 312, 227 S. W. 423; *Missouri Pacific Rd. Co.* v. *Cohn Co.,* 164 Ark. 335, 261 S. W. 895; *O'Berg* v. *Bank of Sulphur Springs,* 183 Ark. 622, 37 S. W. 2d 700. Many other citations might be set out, but this seems unnecessary.

This position is further justified when we consider, at the time of this trial of this motion, when all the parties are acquainted with every condition involved in this controversy, the trial judge asked counsel for appellant what he was claiming out of the Fayetteville plant, and he stated "$1,150." If he did not know then that these two pieces of machinery represented in the notes aggregating $3,452.56 were in that plant it was because his clients had failed to advise him of that fact. It may be said in addition that both the appellant and appellees have stated in their briefs that the balance owing, $1,150, to the appellant by the Fayetteville plant has been paid in full.

We think the chancellor was justified in finding, as he no doubt did, that the offer of $2,000 in full of the claim, about which Mr. Stone had given Mr. Jameson notice, was an offer by Mrs. Whitlow. Before she was able to accept or pay over the money, Mr. Ripley advanced this sum. By that time she had raised the money and paid it over. We think a preponderance of the evidence shows that Mr. Jameson was not mistaken in the authority he had; that he acted upon it honestly and just as a counsellor or attorney zealous for the protection of his client should have done. If there were no mistake, of course, appellant has no standing in a court of chancery. If there were a mistake, appellant itself, not its counsel, who appeared for it and filed the intervention in its behalf, was responsible therefor. The appellant, and not a blameless party, must bear the burden of its omissions, and mistakes.

Decree affirmed.

WRIGHT *v.* BURLISON.

4-5468 128 S. W. 2d 238

Opinion delivered May 1, 1939.

M. A. Matlock, for appellant.

Ezra Garner, for appellee.

HOLT, J. Peter Wilbourne, Jr., and wife on January 15, 1920, executed a mortgage in favor of the Security

Mortgage Company on 160 acres of land in Columbia county to secure a loan of $1,800.

This mortgage by proper transfer and assignment became the property of C. L. Burlison, one of the appellees herein, and on August 28, 1937, he filed his complaint in the Columbia chancery court to foreclose under its terms.

Appellant, Mandy Lee Wright, along with the mortgagors and several others, all non-residents, were made parties defendants and jurisdiction acquired on them by warning order.

Decree by default was taken by appellee on December 13, 1937, upon a failure of any of the defendants to respond and answer, and on order of the court in due course after advertisement, the Commissioner appointed sold the lands in question on January 22, 1938, to appellee Burlison for the sum of $2,400 and thereafter on January 25, 1938, a deed to the property was properly executed by the Commissioner and delivered to appellee, the purchaser.

Prior to the sale of the property and the delivery of the deed thereunder, appellant, Mandy Lee Wright, on December 23, 1937, filed her "Separate Response, Motion and Answer" in which she sought to have the default judgment vacated and set aside and the cause retried. Thereafter on January 14, 1938, appellant filed an amendment to her "Separate Response, Motion and Answer," making a part thereof a contract of sale with the Security Mortgage Company entered into on July 27, 1926.

On January 15, 1938, upon a hearing in chambers the court refused to hear the "Separate Response, Motion and Answer," as amended, filed by appellant on the ground that having previously adjourned the court for the term the court was without jurisdiction to entertain the response, motion and answer so filed. However, subsequently, on April 11, 1938, a day in the next regular term of the court, the appellant renewed her motion for a trial on her separate response, motion and answer, as amended, and this motion the court on April 25, 1938,

heard, granted same and ordered the cause redocketed for hearing. Thereafter on May 10, 1938, appellant filed her petition asking that Lizzie Bailey and B. B. Cotton be made parties defendants. This petition was granted and these parties entered their appearance and filed answers. Pursuant to this latter order the cause was tried on its merits on October 26, 1938.

After allowing appellant, Mandy Lee Wright, the opportunity to present all the testimony which she cared to offer, and after a full and complete hearing of the cause, the court found the issues in favor of appellees, dismissed appellant's complaint for want of equity and ordered confirmed the previously entered default judgment on the mortgage foreclosure, and the proceedings had thereunder. From this decree this appeal is prosecuted.

The record reflects that appellant on January 14, 1938, when she filed her amendment to her "Separate Response, Motion and Answer," made a part thereof the contract to purchase the lands in question from the Security Mortgage Company, which she had previously entered into with this company on July 27, 1926. Under the terms of this contract, appellant agreed to pay $2,500 for the land in question. Of this sum she paid $400 cash and executed five notes for the balance, the first being for $100 due October 1, 1926, the second for $500 due October 1, 1927, the third for $500 due October 1, 1928, the fourth for $500 due October 1, 1929, and the fifth for $500 due October 1, 1930. The contract also provided that appellant was to have a deed to the property upon the payment of the purchase price. It was further provided in this contract that: "Party of the first part agrees to pay all taxes or assessments against said land up to and including taxes and assessments for the year 1925. Party of the second part (appellant here) agrees to keep paid all legal taxes and assessments that are payable after January 1, 1927, which includes the taxes assessed against the property for the year of 1926. . . .

"BUT in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and

upon the strict terms and at the time above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid strictly and literally, without any default, *time being the essence of this contract,* then this contract shall from the date of such failure be null and void and all rights and interest hereby created, or then existing in favor of said second party, her heirs and assigns, or derived under this contract shall revert to and revest in said first party, its successors or assigns, without any declaration of forfeiture or act of re-entry or without any other act by said first party to be performed and without any right to said second party of reclamation or compensation for moneys paid or improvements made, as absolutely and as perfectly as if this contract had never been made."

Appellant earnestly insists that the chancellor erred in the trial of this cause in declaring that before appellant would be entitled to a trial and hearing on her separate response, motion and answer and amendment thereto, it was incumbent upon her to show a meritorious defense and also in requiring her to assume the burden of proof.

Appellant, who had been constructively summoned in this case, came in within two years from the date of judgment in the foreclosure decree, December 13, 1937, and after having made bond for costs, sought to have the decree of foreclosure vacated and set aside and also sought specific performance of the contract with the Security Mortgage Company in accordance with the terms thereof. The section of the statute under which she proceeded is 8222 of Pope's Digest which is as follows: "Where a judgment has been rendered against a defendant or defendants constructively summoned and who did not appear, such defendants or any one or more of them may at any time within two years, and not thereafter, after the rendition of the judgment appear in open court and move to have the action retried; and, security for the costs being given, such defendant or defendants shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or de-

fendants as if there had been no judgment, and upon the new trial the court may confirm, modify, or set aside the former judgment . . ."

It is true, as appellant contends, that she had the right under the above section of the statute, to come in within the two-year period, ask the court to set aside the decree of foreclosure rendered on constructive service against her, and make her defense upon giving the bond for costs required. It was not necessary for her to first show a meritorious defense, nor should she have been required to assume the burden of proof. We think, however, that no prejudice resulted to appellant by the action of the court in this regard. As we have stated, *supra*, the appellant was allowed to come in, make a complete defense and set up her rights. She was permitted to introduce her evidence and to develop her case fully. In so far as this record discloses no rights were denied her by the chancellor and even though she were required to assume the burden of proof yet we think that she has failed to show that she suffered any prejudice thereby that would require correction here where we try the cause *de novo*. In *Porter, Taylor & Co.* v. *Hanson et al.*, 36 Ark. 591, in construing the above section of the statute, this court said: "They need not show merits as a condition precedent. They risk the costs, and are entitled to have the matter of merits determined on demurrer, or evidence after the doors are opened. They have no right, however, to have the former judgment, meanwhile, vacated on motion. It remains until the case is re-tried, to be then confirmed, modified or set aside. Nevertheless, if the court should refuse to admit a defendant to make defense, and the answer which he proposes to file should not disclose any substantial right, the error would not be so prejudicial to him as to require correction. If the defense is incorporated with the motion, it may be considered to include all the defendant means to stand upon." See, also, *Pearson* v. *Vance*, 85 Ark. 272, 107 S. W. 986.

We find it unnecessary in this opinion to set out the evidence adduced at the trial. Suffice it to say that we

have carefully considered it and hold that the findings of the chancellor are not clearly against the preponderance thereof.

Appellant also contends that the court erred in denying to her specific performance of the contract in question and in holding that her rights thereunder have been forfeited. We think the court did not err in this regard.

The terms and provisions of the contract are clear and unambiguous. Time was specifically declared to be the essence of it, and upon the failure of appellant to comply with any of its terms the contract is declared to be null and void and all rights of the appellant forfeited under it. The undisputed evidence shows that she failed to pay the last two notes of $500 each falling due, the one October 1, 1929, and the other October 1, 1930, that she paid no taxes since 1930, and thereby we think forfeited her rights under the contract. In *Carpenter* v. *Thornburn,* 76 Ark. 578, 89 S. W. 1047, this court in quoting from Pomeroy's Equity Jurisprudence (4th ed.), Vol. 1, § 455, said: "It is well settled that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default." See, also, *Souter* v. *Witt,* 87 Ark. 593, 113 S. W. 800, 128 Am. St. Rep. 40, 107 A. L. R. 380, and *Comer* v. *Comer,* 181 Ark. 339, 26 S. W. 2d 89.

On the whole case we are of the opinion that the judgment of the chancellor is right. However, no deficiency judgment should be rendered against Mandy Lee Wright, appellant—this for the reason that the parties have agreed to such modification. In all other respects the judgment is affirmed.

4-5420 128 S. W. 2d 268

Opinion delivered May 1, 1939.

Thomas B. Pryor, H. L. Ponder and *H. L. Ponder, Jr.*, for appellant.

Franz E. Swaty, L. A. Hardin, J. B. Dodds and *W. R. Donham,* for appellee.

SMITH, J. Appellee Bryant was employed on September 2, 1937, by the trustee operating the Missouri Pacific Railroad at Rio Vista, White county, on the Bald Knob-Memphis branch of the railroad company. The Fisher Body Company loaded cars with logs at this point to be shipped to Memphis, Tennessee, and it was the duty of appellee to inspect those cars and make the slight repairs found necessary which could be made at that place. He had been so employed for two years prior to the date above-mentioned, but had been employed by the railroad company in various capacities for a period of nine years, during a portion of which time he was employed as foreman of the shops and yards of the railroad company at

Wynne, Arkansas. The Fisher Body Company furnished two men to assist appellee in this work, one of these being Jap Simmons, a colored man, who was a blacksmith, but appellee was in charge of the work and there was no one present in authority over him. He discharged his duties in making repairs to cars according to his own judgment.

On the date above mentioned appellee was engaged in rebrassing a flat car loaded with logs and billed to Memphis, Tennessee. To aid in this work appellee had been furnished with an aluminum jack, and when rebrassing of cars was required the jack was placed on the end of a railroad tie and under the journal box of the car, and by the use of a lever three feet in length the jack raised the car to the height required. The mechanism of the jack was inclosed in a metal casing except three cog wheels, which were on the outside of the casing.

Appellee alleged and offered testimony to the effect that while engaged in rebrassing the car in the manner stated, the jack failed to hold and slipped because of its worn and defective condition, causing the lever to fly back and strike appellee on one of his testicles, inflicting a painful and, as he says, a permanent injury, and from a judgment awarding damages to compensate that injury is this appeal.

Appellee was corroborated in his statement that he was injured in this manner by Simmons, the blacksmith, who was engaged in assisting appellee. There was offered in evidence the signed statement of Simmons and two signed statements by appellee, the effect of which was to admit that appellee's injury was not caused by any defect in the jack, but by its improper use, and one Lambert, the bookkeeper of the Fisher Body Company at Rio Vista, testified that appellee had made such an admission to him. However, appellee and Simmons repudiated these statements and explained them away to the satisfaction of the jury. This issue of fact having been submitted to and decided by the jury, we must assume that the jack was in fact defective, and that this defect caused appellee's injury.

Appellee's immediate superior was one R. Smith, the master mechanic of the railroad company, whose office was in Memphis, Tenn., and daily reports were made to Smith by appellee. Appellee's testimony in regard to the report he made on the jack is as follows: "The master mechanic was Mr. R. Smith, who lives in Memphis, Tenn. In the letter I wrote him I told him the jack was getting worn, but I did not tell him it was defective. I did not hear any more from the letter. I called Mr. Smith over the phone about two or three days before I was injured, and I think he told me he was trying to locate a jack. I was afraid the jack might become worn to the point where it would not lift and the work would pile up on me. He told me to use the jack until he got another. I didn't know the jack was dangerous, but thought it might refuse to lift. I was taking the chance on his instructions." Smith denied this testimony, but in view of the jury's verdict we must accept it as true.

It is insisted that this promise on the part of the master mechanic to replace the worn jack with another operated to relieve appellee from the assumption of the risk of injury arising out of the defective condition of the jack. It may be said, in passing, that, while this suit was brought under and is governed by the Federal Employers' Liability Act, the defense of assumption of risk remains and is available under proper conditions.

The statement of the rule in the opinion in the case of *Togo Gin Co.* v. *Hite*, 190 Ark. 454, 79 S. W. 2d 262, relating to promises to repair is applicable here. In that opinion the late Justice BUTLER, speaking for the court, said: "The assumption of risk by the appellee is sought to be relieved because of the notice to Fitzgerald and his promise to repair the defective clutch. The general rule is that the purpose and effect of a promise to repair defective machinery, or to remedy a dangerous condition, is to relieve the employee of the assumption of risk which would otherwise be cast upon him. In order to relieve the employee of assumption of risk, however, it must appear that he not only made complaint to the master and that promise of repair was given, but that

this was done with the view of removing possible danger of injury to the employee on account of the supposed defect, which he was not willing to incur, and that he was induced to remain in employment by the promise of the master to remedy such defect, and that without such promise he would not have done so. If the promise to repair is made only for the purpose of making the work less difficult to the employee, or to enable him to do more or better work, it will not have the effect of relieving him of the assumption of risk. (Citing cases.)"

It appears, from appellee's statement as to the contents of the letter which he wrote Smith, the master mechanic, and as to his conversation with him, that he did not advise that the tool was unsafe or that there was danger of injury in using it. It was apprehended only that the jack would cease to lift the cars and that work would pile up. There was no request to repair the jack, nor was there any promise that it would be repaired, but if the promise to replace the old jack with a new one should be treated as in the nature of a promise to repair, it was made only for the purpose of making the work less difficult to the employee or to enable him to do more and better work, and, as said by Judge BUTLER, such a promise "will not have the effect of relieving him (the employee to whom the promise was made) of the assumption of risk."

It is argued that the jack was in fact a defective tool, and that the defect was not open to observation, and had not been discovered by its use, as it had never slipped before, but that inasmuch as the master mechanic had been advised that the tool was old and worn, an inspection of the jack should have been made, and that the master was negligent in failing to inspect and repair the jack or to furnish another. We do not think so under the undisputed testimony in this case. It will be remembered that appellee had no immediate superior on the job. He was his own boss. It was he who reported the matter in the use of the jack, and he only had the opportunity to observe its condition. The jack was a heavy tool used in lifting much heavier objects. It had been in

daily use by appellee for two years, and appellee was, and was known to be, a skilled mechanic, thoroughly familiar with the use of the jack. He did not intimate to the master mechanic that the jack had become unsafe or that danger attended its continued use. The master mechanic had no information about the jack except that communicated to him by appellee, and that information was that another jack would better enable appellee to discharge his duty without allowing the work to pile up on him.

We conclude, therefore, as a matter of law, that the master did nothing which relieved appellee of the assumption of the risk of danger from the use of the jack, and there can, therefore, be no recovery of damages in this case.

The judgment must, therefore, be reversed, and as the cause appears to have been fully developed, it will be dismissed.

SPLAWN, ADMINISTRATRIX *v.* WRIGHT.

4-5477 128 S. W. 2d 248

Opinion delivered May 8, 1939.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Bob Bailey and *Ohmer Burnside,* for appellee.

HOLT, J. This appeal comes from a judgment of $10,000.00 in favor of appellee against appellant for injuries received by appellee on December 4, 1937, while a guest in the automobile of appellant's intestate, Jack Splawn.

The principal allegations of negligence relied upon by appellee in her complaint are that Jack Splawn, driver of the automobile in question, was guilty of willful misconduct, or willful and wanton operation of his automobile, in driving "at a very excessive, fast and dangerous rate of speed over a road made slick and rough by recent rains"; in not "stopping or slowing down said automobile when so requested by the plaintiff"; and "by attempting to turn on the heater in said automobile while traveling at a high, excessive and dangerous rate of speed."

Appellant answered, denying every material allegation in the complaint, and further alleged as a defense that appellee was at the time of her injuries a guest in the automobile of her intestate, Jack Splawn, and specifically pleaded §§ 1302-4 of Pope's Digest of the Statutes of Arkansas in bar of appellee's alleged cause of action.

The evidence as reflected by this record, stated in its most favorable light to appellee, is substantially as follows: Appellee was twenty-eight years of age and a

school teacher at Dyess Colony at the time of the accident, earning $75.00 per month. She lived in a teacherage at the Colony with five other teachers. She was acquainted with Jack Splawn, who was a bookkeeper at the Colony.

About nine o'clock on the night in question, appellee, along with two other young lady teachers and two young men, including Mr. Splawn, went driving in an automobile driven by Splawn. It was turning cold, raining and foggy. She was in the middle of the back seat between one of the other young ladies and a Mr. Sisk. Mr. Splawn was driving the car, a tudor Ford V-8, and one of the other ladies was on the front seat with him. They had ridden only a short distance when Mr. Sisk suggested changing places with appellee, and quoting appellee, ". . . as we changed the road was slick and we had come around a curve while changing and the car threw me to one side. I said, 'Jack, be careful, you're driving too fast.' He didn't pay any attention. In a few seconds he reached down to turn on the heater or to adjust it and lost control of the car." Appellee spoke loud enough to Jack Splawn for him to hear her. After rounding the curve they then proceeded to travel at a speed of from forty to forty-five miles per hour on the straight gravel road for a distance of about a quarter of a mile, when one of the ladies exclaimed, "Look out"; that immediately the car plunged into a bridge railing, causing injuries to appellee. Her leg was broken and she was otherwise hurt, and Mr. Splawn, the driver, was killed.

The point of the accident was about one mile from the teacherage. It was always muddy when it was raining and appellee asked Splawn to be careful because the car had skidded and that is what threw her to one side. They had just turned the curve at that time. The curve was about a quarter of a mile from the bridge where the accident happened. Mr. Splawn was not drunk. The gravel road was about twenty-six feet wide and the bridge on which the collision occurred is approximately eighteen feet wide. Two cars can pass on it with room to spare.

J. E. Terry, witness for appellee, testified: "A. At the time I went up there, or at the time I left the house I will say, it was misting and drizzling and the visibility was bad. Most any speed would have been hazardous. You couldn't see far. . . . The car had not been moved from the point of the accident at the time I got to the scene. . . . Q. Did you notice the path or trajectory of the car as it left the road preceding the hitting of the bridge? A. Yes, sir. Q. The marks were plainly observable in the road when you got there? A. Yes, sir, they were. Q. Was there a gradual veering off from the center of the road to the point where the bridge was struck? A. Yes, sir. Q. About how far back would you say those marks extended? A. From where they just began veering off, somewhere in the neighborhood of a hundred yards, I guess. Q. That is your best estimate about it? A. Yes, sir. Q. That was just a gradual slow veering to the point of the impact? A. Yes, sir. Q. You don't know how slow the veering was to the point of the impact? A. No, sir. Q. Just a gradual straight line? A. Yes, sir."

On this state of the record appellant urges here but one error: The failure of the trial court to direct a verdict in her favor. Appellant earnestly insists that the sole proximate cause of the injuries to appellee was the simple negligence of Jack Splawn in reaching to adjust the heater on the extreme right side of the car in question.

It is undisputed in this case that at the time of the collision of the car with the bridge railing appellee was a guest in the automobile of appellant's intestate.

Sections 1302-4, Pope's Digest of Arkansas, commonly called the Guest Statute, which apply here, provide: "That no person transported as a guest in any automotive vehicle upon the public highways of this state shall have a cause of action against the owner or operator of such vehicle for damages on account of any injury, death or loss occasioned by the operation of such automotive vehicle unless such vehicle was willfully and wantonly operated in disregard of the rights of the others.

"The term guest as used in this act shall mean self-invited guest or guest at suffrance."

Under the provisions of this statute before appellee can recover she must show by substantial testimony that appellant's intestate, Jack Splawn, at the time of the collision willfully and wantonly operated his automobile in disregard of appellee's rights. Whether an automobile is being operated in such a manner as to amount to wanton and willful conduct in disregard of the rights of others must be determined by the facts and circumstances in each individual case.

In the instant case, giving to appellee's testimony its strongest probative force in her favor and indulging every inference reasonably deducible therefrom, we think the most that can be said of it is that, Splawn, the driver of the car, was guilty of nothing more than a simple act of negligence by reaching to the right to adjust the heater in the front of the car.

It is undisputed that Splawn had not been drinking, that the road was straight for a quarter of a mile to the bridge, that the car was traveling not to exceed forty-five miles per hour in wet gravel at the time, and that the path or tracks of the car for 100 yards before it left the road just preceding the striking of the bridge railing, gradually veered, in practically a straight line, from the center of the road to the point where the bridge was struck. And in appellee's own words, "We had only driven a short distance when Mr. Sisk said, 'Let's change places, Charlie Mae,' and as we changed the road was slick and we had come around a curve while changing and the car threw me to one side. I said, 'Jack, be careful, you're driving too fast.' He didn't pay any attention. In a few seconds he reached down to turn on the heater or to adjust it and lost control of the car." We think this testimony falls far short of that degree of negligence that would be required to support a verdict for willful and wanton operation of the car on the part of Splawn, the driver.

In the recent case of *Ward* v. *George*, 195 Ark. 216, 112 S. W. 2d 30, where the facts are similar to the instant case, this court said: "After breakfast, it was a little early to start for the high school, and the four boys got

in the family two-seated automobile. Appellant and one of the visitors occupied the front seat. Appellee and the other visitor occupied the rear seat. They drove to the high school building, but did not stop. No one suggested that they stop, nor did any member of the party protest against continuing their drive. They drove across the bridge about half a mile from the place of the accident, and appellee asked appellant to drive slower. As they drove along, a cow came into the road. Appellant applied his brakes and the car skidded into a ditch and appellee was injured. . . . There was no evidence tending to prove a willful and wanton operation of the car, and the court so instructed the jury. The testimony was to the effect that appellant was guilty of ordinary negligence only." To show ordinary or simple negligence is not enough, in fact it would not be sufficient if gross negligence were shown.

This court has laid down the rule that in order to sustain a recovery under our Guest Statute, *supra,* the negligence must be of a greater degree than even gross negligence, that it must be willful or wanton. In the recent case of *Froman* v. *J. R. Kelley Stave & Heading Co.,* 196 Ark. 808, 120 S. W. 2d 164, the difference between gross and willful and wanton negligence is very clearly defined. We quote from the opinion as follows: "The Supreme Court of Vermont points out the distinction in the case of *Sorrell* v. *White,* 103 Vt. 277, 153 Atl. 359, in an opinion which comports with our own decisions on the question. Malcom, in his work on Automobile Guest Law, quotes from that case as follows: '. . . Our inquiry must be directed to the difference between gross negligence and willful negligence. There is a distinction between them. Willful negligence is a greater degree of negligence than gross.

" 'To be willfully negligent, one must be conscious of his conduct, and, although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.

"'. . . Willful negligence means a failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.

"'Herein, we think, lies the distinction between gross and willful negligence as intended by the statute. Gross negligence falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. . . . Willful negligence involves the element of conduct equivalent to a so-called constructive intent.

"'It must be admitted that this distinction is somewhat artificial, but artificiality is unavoidable when one attempts to define a phrase which in itself is a contradiction.'

"Our case of *Hodges* v. *Smith,* 175 Ark. 101, 298 S. W. 1023, was an automobile case, although it did not involve our Guest Statute. In that case a judgment had been recovered for both compensatory and punitive damages. In reversing so much of the judgment as awarded punitive damages, Judge HART said: 'It is earnestly insisted, however, by counsel for the defendant, that the court erred in submitting to the jury the question of punitive damages, and in this contention we think counsel are correct. In *St. L. S. W. Ry. Co.* v. *Owings,* 135 Ark. 56, 204 S. W. 1146, it was held that negligence alone, however gross, is not sufficient to justify the award of punitive damages. There must be some element of wantonness or such a conscious indifference to the consequences that malice might be inferred. In other words, in order to warrant a submission of the question of punitive damages, there must be an element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto.' In the case at bar there is no element of wantonness or willfulness on the part of the person driving the car which overtook the plaintiff and ran into his car and thereby caused the injuries complained of."

The Court of Appeals of Louisiana on April 1, 1938, in the case of *Surgan* v. *Parker,* 181 So. 86, wherein the facts were much stronger against appellant than in the instant case, in passing upon the question of liability of

the driver of the automobile in question, the liability being controlled by our Guest Statute, *supra,* the accident having happened in Arkansas, among other things, said: "Cases will rarely arise in which it can be shown to a court's satisfaction that collisions or upsets of automobiles, with resultant injury to guests, occur because of 'willful misconduct' of the operator. Those who operate automobiles should have (and when mentally normal, do have) a conscious desire to avert injury to themselves in such operation, at least co-extensive with that not to injure their guests; and since to operate a car in a willfully negligent manner offers a threat to security from injury as great to the operator as it does to the guest, evidence to prove that grade of negligence should be unusually strong and convincing before the operator can and will be convicted of such."

We have carefully examined the authorities relied upon by appellee, but are of the opinion that they do not control here.

Upon the whole case, we conclude that the trial court erred in refusing to instruct a verdict for appellant, at the close of all the testimony, and since the case seems to have been fully developed, the judgment is accordingly reversed and dismissed.

MEHAFFY, J., dissents.

WHEATLEY *v.* SMITH.

4-5463 128 S. W. 2d 356

Opinion delivered May 8, 1939.

C. T. Cotham, for appellant.

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

GRIFFIN SMITH, C. J. Sam G. Smith, Porter Wilson, and Hamp Williams, sold the Best Theatre in Hot Springs to Mrs. M. Hoy, the purchaser having executed a principal note for $9,211.98, dated November 15, 1930. This note was pledged to Community Bank collaterally with obligations of Smith and Wilson.[1] Mrs. Hoy's note was secured by a mortgage on the theatre equipment; also by deed in trust on real property she owned in Hot Springs.

At the time Mrs. Hoy purchased the theatre she was working for H. E. Wheatley, who was in the oil business. Wheatley contends that for a year or more he managed the theatre for Mrs. Hoy. Mrs. Hoy testified her arrangement with Wheatley was that he would take the theatre and run it. She did not have any interest in the property. It was bought for Wheatley and for Mrs. Howe. There was an agreement between them that as soon as payments on the note had been sufficient [to satisfy Smith, Wilson, and Williams] the realty would be released. The promise to release was signed February 4, 1931.[2]

The balance due on Mrs. Hoy's note at date of suit was $3,393.14, with interest from September 1, 1936.

---

[1] Installment payments on the note were to be made at the rate of $200 per month for twelve months, $250 per month for twelve months, $300 per month for twelve months, with a final payment of $511.98 falling due Nov. 16, 1933.

[2] The agreement signed by Wheatley and Mrs. Howe reads: "This is to certify that the lot belonging to Mrs. M. Hoy and put up as collateral on The Best Theatre will be released as soon as possible."

Although Wheatley's testimony is at variance with that of Mrs. Hoy as to the time he and Mrs. Howe took the property in their own rights, we think the evidence sufficient to sustain the chancellor's finding that Mrs. Hoy was acting for Wheatley and Mrs. Howe, although perhaps Smith, Wilson, and Williams were not informed of this fact.

In March, 1934, the theatre was destroyed by fire. Insurance of $2,900 was collected. Loss was payable to Smith, Wilson, and Williams. Plaintiffs in the suit from which this appeal comes were Smith and Wilson, Mrs. Hamp Williams, and J. O. Langley, trustee. They are hereafter referred to as appellees.

By agreement, $1,000 of the insurance money was applied on Mrs. Hoy's note. The remaining $1,900 was released to Wheatley and Mrs. Howe, hereafter referred to as the appellants.

With the released nineteen hundred dollars, appellants re-entered business at the New Strand Theatre, considerable money having been spent in equipping and remodeling.

It is contended by appellants that they are not obligated on Mrs. Hoy's note; that there was no written promise to pay—although, as stated in their brief, . . . "pursuant to an agreement with Mrs. Hoy (not in writing), Mr. Wheatley and Mrs. Howe did, about a year and a half after the original sale to Mrs. Hoy, purchase her right, title and interest in the Best Theatre, and as between them and Mrs. Hoy, agreed to assume the mortgage indebtedness on the Best Theatre to the appellees."

Wheatley insists Mrs. Hoy bought the theatre November 30, 1930; that some unnamed man operated it fifteen days; that on November 15 Mrs. Hoy took charge, and he (Wheatley) assumed his duties as manager. Because of the condition of a part of the equipment, repairs and replacements were necessary. These were immediately contracted for by Wheatley, on his own account.

First payment on Mrs. Hoy's note was made January 24, 1931, $200 principal and $77.80 interest. This payment was made by Wheatley, and thereafter all pay-

ments were made by him, or at his direction. Mrs. Howe did not testify.

There is evidence that when appellants requested use of the insurance money, they declared their inability, without such, to continue in the show business, stating that the only way they could pay the Hoy note was from earnings incident to the show business.

In the light of all circumstances; the fact of Mrs. Hoy's employment by Wheatley in his oil business; her testimony to the effect that she was merely an agency through which the title passed; the commitment of Wheatley and Mrs. Howe 81 days after Mrs. Hoy's note was executed that the mortgaged lot would be protected; the payments by appellants; the purchase by Wheatley of new machinery or equipment in his own name and his mortgage to secure the debt therefor, it is our view that Wheatley and Mrs. Howe were the real parties in interest, and that the chancellor did not err in holding them liable with Mrs. Hoy, who has not appealed.

Affirmed, both on appeal and cross-appeal.

WESTERN UNION TELEGRAPH COMPANY *v.* PONDER.

4-5472 128 S. W. 2d 246

Opinion delivered May 8, 1939.

Francis R. Stark and *Kirsch & Cathey,* for appellant.

W. J. Schoonover, Jno. P. Streepey and *Walter L. Pope,* for appellees.

HOLT, J. On December 6, 1937, appellee, Mrs. M. C. Ponder, mother of DeWitt Henslee, and DeWitt Henslee by his mother as next friend, filed suits against appellant in the Randolph circuit court seeking to recover $3,000.00 damages in each suit.

The complaints upon which the actions were based alleged that during a part of 1935, all of 1936, and a part of 1937, Henslee, a minor, was employed by appellant in Little Rock and North Little as a messenger boy, and while in the course of his employment, about August 30, 1936, sustained personal injuries which were the basis for damages in both suits.

The grounds of negligence alleged in the complaints are that DeWitt Henslee was required by appellant to carry an excessive load of paint on the occasion in question and that by reason of the excessive load and the manner in which he was required to carry it, he suffered injuries. Henslee died on February 10, 1938, and the suit brought by him was revived in the name of his mother, Mrs. M. C. Ponder, as special administratrix *ad litem* of his estate.

Appellant answered in each case with a general denial of all allegations therein and affirmatively pleaded assumed risk on the part of Henslee and that if he sustained any injury it was the result of violation of instructions.

The evidence stated in its most favorable light to appellees, is substantially as follows: Appellee, DeWitt Henslee, was born April 5, 1919, and began work for appellant on August 26, 1935. He was injured about September 1, 1936, being at the time about the age of 17 years and five months and weighing 165 pounds and was about six feet tall. His duties were that of a messenger boy for appellant and in addition he was re-

quired to deliver paint on call from Fulmer's store at 407 West 8th Street, Little Rock, to the Critz Chevrolet Company in North Little Rock. On the occasion of his alleged injury he was carrying a bag, supported by a strap that went over his shoulders and across the back of his neck with the contents or weight resting on his back. As to the articles carried at the time in question, Henslee testified a short time before his death by deposition as follows: "Q. What load were you carrying at that time? A. I was carrying two gallons of paint and two quarts and one half gallon, one pint." The evidence showed that these articles weighed not to exceed 36 pounds. Henslee in making the delivery of this paint testified that as he was climbing the grade of the Main Street Bridge he hunched his shoulders and something tore loose in his neck; that when he got back to the office there was a small knot on his neck; that there was no customary way of carrying the bag, but that he would carry it on his back to keep from falling or being pulled over; that all of the boys carried the bags on their backs; that he had instructions from appellant to hurry over and get the package no matter how much it was, to carry it on and deliver it; that the injury to his neck kept getting larger and it pained him in his head; that he bled 45 minutes in the nose one day; that it nearly burst his ear drums and finally caused a crossed eye; that he quit working a week before Mother's Day (May, 1937); that his suffering became so great that he sometimes would take as many as 200 aspirins a month; that his weight began going down so that in four or five months he had to quit; that he weighed 130 when he quit and at the time the deposition was taken he weighed 105 pounds.

There was evidence to the effect that 20 pounds was supposed to be the maximum load for a boy to carry on a bicycle. One witness testified that he never carried more than two gallons and two or three pints, which would weigh about 25 pounds.

Mr. Poindexter testified for appellant that he objected to the boys carrying the bags on their backs with

the straps over the neck and shoulders; that it was dangerous; that it would bind the neck and make it hard to hold and that the bag would shift one way or the other as he pedaled the bicycle.

There was medical testimony on the part of appellees to the effect that the alleged injury to young Henslee's neck was caused by the strap which bore the weight of the sack of paint on his back, and that it produced a malignant condition known as sarcoma which brought about his death.

The causes were consolidated for trial, submitted to a jury and verdicts returned for $1,000.00 in each case. From a judgment on these verdicts comes this appeal.

On this record appellant earnestly contends that there is no substantial evidence to establish negligence on the part of appellant or to establish any causal connection between any alleged negligence on the part of appellant and the physical condition of Henslee which could be the basis of damages in either case, and that, therefore, the trial court erred in refusing to direct a verdict in appellant's favor. We are of the view that the appellant is correct in this contention.

The undisputed testimony in this case shows that appellee, DeWitt Henslee, at the time of his alleged injury, was a boy over 17 years of age. He was in excellent health, weighed 165 pounds, was six feet tall and had been working for appellant almost constantly for more than a year prior to the date on which he claimed to have been injured. He was engaged at the time in the comparatively simple duty of carrying a package on his back weighing 36 pounds, on a bicycle, and as he was proceeding upgrade over the Main Street Bridge he felt the strap holding his pack press against and injure his neck.

Under these circumstances, what duty was there required of appellant that it failed to perform, and wherein was it guilty of negligence? What instructions should have appellant given Henslee that would have

made the performance of the simple task assigned any safer? This record shows that Henslee was thoroughly experienced in the duties assigned and we think no negligence has been shown. Having worked for appellant for more than a year he knew as much about the work and its performance, was as well qualified to perform it, and to appreciate its responsibilities and dangers as an adult, and no one could know better than he what weight he could safely carry, nor was he directed to carry all the paint on one trip. It was within his discretion to make more than one trip if he thought it necessary. See *Emma Cotton Seed Oil Co.* v. *Hale*, 56 Ark. 232, 19 S. W. 600. It is only where the servant by reason of his youth or inexperience in the work assigned, is not aware of, or doesn't appreciate the dangers incident to its performance that the duty rests upon the master to instruct and warn him of such dangers.

We think no negligence on the part of appellant has been shown in either of these cases and that the trial court erred in refusing to direct a verdict in favor of appellant at the close of all the evidence, and since the cases seem to have been fully developed the judgments are reversed and dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

WHITMORE *v.* MCCARROLL, COMMISSIONER OF REVENUES.

4-5465 128 S. W. 2d 244

Opinion delivered May 8, 1939.

Linwood L. Brickhouse and *Wils Davis,* for appellant.

Lester M. Ponder and *Frank Pace, Jr.,* for appellee.

HUMPHREYS, J. Appellants were each engaged in the retail liquor business in West Memphis, Arkansas, under retail domestic licenses issued to each in June, 1938, and, in addition, appellant G. G. Whitmore had a permit or license, issued on the same date, to do a retail export business. The licenses or permits were issued to them under acts 108 and 109 of the Acts of 1935 to do a domestic retail liquor business, and a license or permit was also issued to G. G. Whitmore to do a retail export liquor business by Z. M. McCarroll, Commissioner of Revenues of the state. In order to do an export business, the licensee was required to pay a tax of only 60 cents a case on liquor he exported, whereas a much larger tax was imposed on liquor for consumption in the state. Charges were preferred against all the appellants for selling liquor in case lots for consumption in the state on which the export tax only was paid, without paying the higher retail tax. They appeared in response to a citation before the Revenue Commissioner at Little Rock, where the cause was heard upon testimony introduced, from which the Commissioner found that appellants had violated acts 108 and 109 of the Acts of 1935 and act 18 of the Acts of 1938, and their licenses were revoked. Appellants took an appeal to the chancery court of Pulaski county, and obtained a temporary injunction against the Commissioner pending the appeal. On the 8th day of December, 1938, the chancellor heard the case, sustained the finding and action of the commissioner, and dissolved the injunction, and from this decree three of the appellants have duly prosecuted an appeal to this court.

There is ample testimony in the record to show that appellants were selling liquor for consumption in the state by paying only the sixty cents tax on case lots, instead of paying the regular tax required under said acts. The evidence shows that when a purchaser applied for a

case or more of liquor to W. H. Turner or R. E. Stevens at their respective places of business, they would telephone to G. G. Whitmore at his place of business to send over a case or more of liquor, which he would do, and they or each of them would collect for same in their respective stores and later pay same to G. G. Whitmore, and that the case or cases sent over had stamped or written on them "For Export." In other words, by an arrangement between them, they sold liquor to customers upon which the export tax only had been paid for consumption in the state without paying the higher tax. All of them were implicated in the sale whereby the state was deprived of the taxes it should have received.

Appellants contend that act 18 of the Acts of 1938 does not provide that the Revenue Commissioner may cancel the license or permit for violating said statutes.

The following provision is contained in subdivision "D" of § 5 of said act: "And it shall be the duty of the Commissioner of Revenues to revoke the license of any retail liquor dealer within ten days after it shall be known to said Commissioner of Revenues that said liquor dealer has in any way violated the terms of this act or the rules and regulations prescribed under this act."

The following provision also appears in said act 18: "The Commissioner of Revenues shall have the power to make and publish reasonable rules and regulations for the enforcement of the provisions of this act and the collection of the revenues thereunder."

The following provision also appears in said act 18: "Violation by any wholesale or retail dealer or manufacturer of the provisions of act No. 18 of the Special Session of the Fifty-first General Assembly, or the regulations of the Commissioner of Revenues promulgated pursuant thereto, shall be cause for revocation by the Commissioner of such wholesale or retail dealer's or manufacturer's permit."

No contention is made that acts 108 and 109 of the Acts of 1935 do not provide for the cancellation of licenses for violating the acts or regulations made by the Commissioner. The contention is made, however, that

the Commissioner cannot cancel the licenses unless the licensee or licensees has or have been first convicted through prosecution in the courts for violating the statutes.

If this construction were placed upon the acts, a licensee or licensees might, by continuances or appeals in the courts, prevent the cancellation of their licenses during the period for which they were issued. This court said in the case of *Blum* v. *Ford, Commissioner,* 194 Ark. 393, 107 S. W. 2d 340, that "This act charges the Commissioner of Revenues with the enforcement and administration of the act, and if he knows or discovers by investigation that the law is being violated by the persons having a permit, he not only has the authority, but it is his duty to revoke or cancel the permit. . . . Selling beer is a privilege, and not a right, and the state has an absolute right to control it or require the Commissioner of Revenues to administer the act and enforce it, and if necessary to accomplish these purposes, he may cancel or revoke a permit that has been issued. The state has authority at any time to revoke a license to sell liquor because it is a mere privilege and in no sense a contract right. It is a privilege to do what could not be lawfully done without the permit, and the permit or license is a matter, not of right, but, as stated in R. C. L., 'purely of legislative grace,' and may be extended, limited or denied without violating any constitutional right."

No error appearing the decree is affirmed.

LOUTHEN *v.* MCCONKEY.

4-5474 128 S. W. 2d 241

Opinion delivered May 8, 1939.

H. A. Northcutt and *Oscar E. Ellis,* for appellant.

Robert N. Maxey, for appellee.

McHaney, J. Appellees, Hazel McConkey and Gladys Hamm, are the daughters of appellant. On April 28, 1917, he and his then wife conveyed certain properties by warranty deed to each of them. The consideration in the deed to Mrs. McConkey was: "One dollar and exchange of property ($2,000)." In the deed to Mrs. Hamm the consideration was: "One dollar and exchange of other property ($2,500)." On August 19, 1918, he filed both deeds for record and they were promptly recorded in the recorder's office in Fulton county. Twenty-one years after executing these deeds, on July 1, 1938, he filed separate suits against each of his daughters for the purpose of creating and enforcing a vendor's lien on the property conveyed in each deed, in which he made the contention that the express considerations, in the one instance of $2,000 and in the other instance of $2,500 have not been paid. He alleged that he had been in the actual possession of the property conveyed by the respective deeds from the date of their execution and he undertook to sustain the position of a mortgagee in possession. His daughters defended by way of general denial of the allegations of the complaint. They asserted that no lien was retained in the deeds and denied that appellant was entitled to a lien by reason thereof and that the lands were duly and legally conveyed to them for a valid considera-

tion. The other appellees C. B. Chrenshaw and wife, intervened in the action against Mrs. McConkey claiming title to certain property in Mammoth Springs which had been conveyed to her by appellant in his deed dated April 28, 1917, and through mesne conveyances to them by deed dated October 21, 1927. They alleged that they had been the owners of said property and in the actual possession thereof, living thereon, and paying the taxes thereon since said date and prayed, as to the property claimed by them, appellant's complaint be dismissed for want of equity, and that title thereto be quieted in them. Trial resulted in a decree for appellees, in which appellant's complaint was dismissed for want of equity and from which he has appealed.

The abstract presented by appellant is not sufficient to comply with rule 9 of this court and we would be forced to affirm for such non-compliance but for the fact that appellees have, to some extent, supplied the deficiency.

It appears from the record in this case that the land formerly belonged to appellant's first wife, the mother of Mrs. McConkey and Mrs. Hamm, and that, at the time of her death, she left a will devising the property in controversy to appellant. Sometime after the death of his first wife he married again. He and his second wife, Catherine, executed the deeds to the property in controversy. As above stated appellant wrote these deeds, had them recorded and delivered them to his daughters. Appellees testified very positively that there was no agreement on their part to pay their father any money or to exchange any property with him for the property conveyed. When we consider all the facts and circumstances connected with these conveyances, that the property came from their mother, that for twenty-one years he permitted the record title to remain in his daughters without question, that he permitted Mrs. McConkey to convey a portion of the property she received in 1920, which title passed through several grantees to interveners who have been in the actual possession of it since 1927, it is difficult to understand how the court could have failed to sustain the testimony of appellees to the effect that

these deeds were gifts to them; and that there was no agreement on their part to pay any consideration either in money or by exchange of other property. These facts and circumstances are further sustained and emphasized by certain letters written by appellant, which he has not abstracted or set out in his brief. As late as December 11, 1936, appellant executed and delivered to Mrs. Hamm the following written instrument: "This is to certify that I, V. D. Louthen, have settled with Gladys Hamm, giving her her part of my estate in full and the home of 160 acres and what stock and feed and tools that we agreed on when she come here."

The decree of the trial court dismissing appellant's complaint as to Mrs. McConkey and Mrs. Hamm for want of equity and in quieting and confirming the title to the property in the interveners is correct and is in all things affirmed.

HENDERSON *v.* GLADISH.

4-5487 128 S. W. 2d 257

Opinion delivered May 8, 1939.

W. Leon Smith and *C. M. Buck,* for appellant.

Taylor & Taylor, G. B. Segraves, A. F. Barham, A. W. Young and *Holland & Barham,* for appellee.

GRIFFIN SMITH, C. J. In the democratic primary election August 9, 1938, Doyle Henderson opposed S. L. Gladish for re-election to the office of county and probate judge of Mississippi county.

The certified returns showed 3,550 votes to have been cast for Henderson and 3,560 for Gladish, the nomination of Gladish by a ten-vote majority having been declared.

Henderson duly contested.

The trial court found that 2,236 illegal votes had been cast: 1,091 for Gladish, and 1,145 for Henderson. In consequence of subtractions to conform to the court's findings, Henderson's net legal vote was adjudged to be 2,405, and that of Gladish 2,469, a majority of 64 for the latter.

Henderson appealed, but his bill of exceptions was not filed within the time allowed. On motion of Gladish it was stricken. We therefore determine whether errors appear on the face of the record.

One of the judgment recitals is: "The court finds that the report of the checkers, under the agreement of the parties and the instructions and findings of the court, is correct, and that [in the Wilson box there were cast] by voters otherwise qualified except that their [poll tax] receipts were filled in and signed with indelible pencil, 151 for Henderson and one for Gladish."

We first determine whether the court erred in its judgment that those who were otherwise qualified electors were deprived of that status by reason of the fact that the county collector, when he accepted payment of their poll tax within the time prescribed by law, issued receipts written with an indelible pencil, whereas act 123 of 1935 directs that such receipts shall be filled in and signed with pen and ink.

Appellee relies upon *Martin* v. *Gray,* 193 Ark. 32, 97 S. W. 2d 439, as authority for the trial court's ruling that 152 electors ceased to be such when they failed to acquire pen-and-ink-written receipts prior to midnight June 15, 1938.

In the Martin-Gray Case receipts had been delivered June 20, 1936, without bearing the indorsement, "This poll tax issued after June 15th." Parties holding such receipts were permitted to vote. Although testimony is not quoted at length, the bill of exceptions shows that Clarence Anderson, collector for Stone county, admitted the receipts were "mostly" delivered to John B. Gower, Luther Decker, and Brady Farris. Act 123 provides that ". . . the date written on the poll tax receipt shall be

the date of issuance." Purported written orders authorizing issuance of the receipts were handed to the collector about 11:30 the night of June 15 by Gower, Decker and Farris. Twenty-three of the so-called orders were, *prima facie,* given to Gower, twenty-six to Decker, and fifteen to Farris—a total of sixty-four. For reasons not important here, the opinion deals with only forty-six of the receipts.

The "orders" accepted by the collector were: "Mr. John B. Gower [or Decker, or Farris, as the case may have been] is authorized to pay my poll tax, and you may deliver the receipt to him."

Examples of the testimony are shown in the margin. [1]

[1] Appellant's attorney addressing Mr. Gower: "I have a bunch of orders here that you are supposed to have had, or that are supposed to have been issued to authorize you to buy poll tax receipts: were these orders given to you? A. I got some of the orders, but I don't remember whose they were. Q. Read off the first one there—who was the first one? A. The first one was signed by Ralph Rollins. Q. Did he give you that order in person? A. I don't remember whether he did or not. I had some orders for poll tax receipts. [Rollins] lived down in Belemore Township. Q. Did you go there and get the order? A. No, sir. Q. Was he in your office? A. Now, lots of those orders have been handled just like the law says.

"Q. Look at the next one. A. The next one is Togo Gray. Q. Did he issue that order to you? A. I don't know whether he did or not. Q. Where did you get the order? A. I got the orders here at the courthouse. Q. Who gave you the orders? A. He might have—some of these boys did, but I don't remember where. Q. Do you mean to tell the court that you presented an order or paid the poll tax without any written authority from the person? (No answer.)

"Q. What is the next one on the list? A. J. O. Kirkland. Q. Where were you when he gave you his order? A. I don't know; I have seen him several times. Q. Did he write that order and sign it and give it to you? A. I don't know whether he signed it or not; it was presented to me, but I don't know whether he presented it after it was written or not. Q. Do you remember who presented that order to you? A. I don't remember. Q. Did he do it, or not? A. I don't remember whether he did or not. Q. Well, if you don't remember, why did you present it to the collector for a poll tax receipt? A. I don't remember who presented these orders.

"Q. Read the next one: who is she? A. I suppose she is Charlie Kemp's wife. Q. Did she sign that order? A. I don't know whether she signed that or not. Q. Did you see her at any time before the 15th of June? A. No. Q. What are you doing with that order here with her name signed to it? A. These orders were given to me by different parties."

Other evidence was of like quality. Farris could not be located, and the court was deprived of the benefit of his version of how the transactions were handled. The trial court (Judge S. M. Bone presiding) found that the payments were illegal. On appeal this court held mandatory that part of act 123 which prohibits the collector from issuing poll tax receipts after midnight of June 15, unless such receipts are stamped as the act directs. By reference to the opinion it will be found that the collector admitted having back-dated the receipts to June 15. This was a violation of the law. But the opinion goes further, and says:

"The Eighth Amendment [to the Constitution] recognizes the competency of the Legislature to ascertain and determine the time when poll taxes should be paid. Said amendment in part provides: '. . . and who shall exhibit a poll tax receipt or other evidence that they have paid their poll taxes *at the time of collecting taxes next preceding* such election.' The language quoted, 'at the time of collecting taxes,' relates to the time determined by the legislative enactment when such taxes must be paid. If the Legislature may determine the time when poll taxes must be paid, it may likewise determine, as it has done in act 123 of 1935, what must be done to accomplish such payment. By the act referred to 'payment of a poll tax' is not consummated as a condition of voting thereon until the issuance and delivery of the poll tax receipt prior to midnight of June 15 preceding the election at which it is to be used. We see no conflict between act 123 of 1935 and the Eighth Amendment."

While payment of a poll tax is the primary consideration from which arises the right to vote, the constitutional amendment of 1920 goes a step farther and says that such tax shall be paid "at the time of collecting taxes next preceding such election."

. . . At most, the Martin-Gray Case only holds that the receipt evidencing payment of the tax must have been issued prior to midnight of June 15. It is not authority for the proposition that when the tax has admittedly been paid in a timely manner, and a receipt therefor has been

issued by the collector at the time of payment, such payment must be perpetuated in official obscurity because of a mere irregularity in the manner of writing the receipt —an irregularity which in no sense goes to the fact of timely issuance, but only to the manner of evidencing what admittedly was done. To extend the Martin-Gray Case, and make it apply to conditions such as we are dealing with in the appeal before us, would have the effect of penalizing by disfranchisement qualified electors. They were not delinquent. They did not unreasonably procrastinate. They did not, by delay, render it impossible or even impracticable for the collector to receipt them for their payments. They were not conscious of even a technical irregularity.

Act 123, approved March 19, 1935, is entitled: "An Act to Prevent Illegal or Improper Voting in Any General or Special Legalized Election in the State of Arkansas and to Supplement the Procedure in Primary Election Contests and to Provide for the Proper Assessment and Payment of Poll Taxes in the State of Arkansas, and for Other Purposes."

Section 1 makes it unlawful ". . . for any person to cast a vote in any general or special election hereafter held in the state of Arkansas, whether the same be a legal election now or hereafter provided for by law or whether the same be a general or special primary election held under the auspices of any political party in the state of Arkansas, unless the said person so casting a vote shall be a qualified elector as defined by the Constitution of Arkansas, Amendment No. 6 thereof, and § 3736 of Crawford & Moses' Digest of the Statutes of Arkansas."[2]

Section 2 makes it unlawful for any person to cast a ballot ". . . unless the said person shall have previously assessed and paid a poll tax. . . ."

The second paragraph of § 4 is: "All poll tax receipts issued by the collector shall be made out and signed with

[2] Section 3736 of Crawford & Moses' Digest is Amendment No. 6, referred to in § 1 of act 123 of 1935. Although the amendment is carried as No. 6 in Crawford & Moses' Digest, and in Applegate's "The Constitution of Arkansas," in the rearrangement of numbers it is the Eighth Amendment. See page 181 of Pope's Digest.

pen and ink. . . . The violation of any of the provisions or requirements of this section shall be deemed a misdemeanor and shall be punished by a fine of not less than $50 nor more than $200, and the violation of any of the provisions of this section shall render the person so violating the same ineligible to hold any office in this state."[3]

Section 6 provides that when an election contest has been filed by any candidate in a legalized primary election under §§ 3772 and 3773 of Crawford & Moses' Digest, ". . . . 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 persons are qualified electors and members of the party holding said primary election. . . ." The last sentence of § 6 is: "*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.*"

Section 8 prescribes a penalty ". . . in the event any person or persons shall cast a ballot in any legalized primary election held in this state when such person is not a qualified elector. . . ."

What are the requisites of an elector?

Prior to adoption of Amendment No. 8 to the Constitution of Arkansas,[4] § 1 of Art. 3 of the Constitution of

[3] Other provisions of § 4 are: The collector shall issue poll tax receipts in regular order as they appear in the books and upon forms as they are issued by the Auditor of State. The collector shall "cease issuing poll taxes after midnight of the 15th day of June of each year," and shall deliver to the county clerk the certified poll list within 15 days after June 15. "It is hereby made unlawful for any collecting officer to date such poll tax receipt, other than the correct date the same has in fact been issued; provided nothing in this section shall prohibit collecting officers from issuing poll tax receipts after June 15th of any year, and in such case the said collecting officer shall stamp across the face of such poll tax the following: 'This poll tax issued after June 15th.' When any poll tax is so issued and stamped as aforesaid, the same will not entitle the holder of the same to vote in any general or special election held thereafter in the year the said poll tax has been issued."

[4] Amendment No. 8 was adopted in 1920.

1874 conditionally made every male citizen of the United States, etc., an elector. Section 2 of that Constitution guarantees that "Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted . . . whereby rights shall be impaired or forfeited, except for the commission of a felony at common law, upon lawful conviction thereof."[5]

By § 10 of Art. 3 of the Constitution of 1874, election officers are recognized—and therefore they are constitutional officers.

Section 11 of Art. 3 is: "If any officer of any election shall unlawfully refuse or fail to receive, count or return the vote or ballot of any qualified elector, such vote or ballot shall nevertheless be counted upon the trial of any contest arising out of said election."

Amendment No. 8 to the Constitution amended § 1 of Art. 3 of the Constitution of 1874, as amended by Amendment No. 9, adopted January 14, 1900.[6] By refer-

[5] So jealous of the right of franchise were the framers of our Constitution that they prohibited the Legislature (§ 2, of Art. 3) from impairing the right to vote by declaring any crime to be a felony that was not such under the common law. (But compare Amendment No. 8.)

[6] Amendment No. 8 is as follows: "That § 1, of Art. 3, of the Constitution of the state of Arkansas, as amended by Amendment No. 9, adopted January 14, 1909, be amended so as to read as follows: '§ 1. Every citizen of the United States of the age of 21 years, who has resided in the state 12 months, in the county six months, and in the precinct, town or ward one month, next preceding any election at which they may propose to vote, except such persons as may for the commission of some felony be deprived of the right to vote by law passed by the General Assembly, and who shall exhibit a poll tax receipt or other evidence, that they have paid their poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the state of Arkansas, provided, that persons who make satisfactory proof that they have attained the age of 21 years since the time of assessing taxes next preceding said election and possess the other necessary qualifications, shall be permitted to vote, and provided, further, that the said tax receipt shall be so marked by dated stamp or written indorsement by the judges of election to whom it may be first presented as to prevent the holder thereof from voting more than once at any election. It is declared to be the purpose of this amendment to deny the right of suffrage to aliens; and

ence to Amendment No. 8 it will be seen that, aside from the exceptions mentioned therein, the right of franchise is given to citizens . . . "who shall exhibit a poll tax receipt . . . *or other evidence that they have paid their poll tax.*"

Such person . . . "shall be allowed to vote at any election . . ."

The quoted excerpts from Constitution and statute, it would seem, conclusively show that one who in other respects possesses the requisites of an elector *perfects his or her right to vote upon payment of a poll tax within the time prescribed by law.*

Possession of the receipt authorized by act 123 does not in itself invest the holder with the right to vote. The right arises when the tax is paid in a timely manner. The receipt is merely evidence of payment.

The General Assembly had the right to provide that poll tax receipts be written with pen and ink. It is a salutary, fraud-preventing safeguard in respect of which no reasonable citizen can complain. But the lawmaking body did not have power to prohibit election officers from receiving "other evidence" that the tax had been paid, nor did act 123 attempt to do so. On the contrary, the qualification of an elector is directly referable to Constitutional Amendment No. 8. Section 2 of act 123 makes the qualification "assessment and payment" of a poll tax. The constitutional amendment expressly provides for *other evidence,* and its exclusion by election officers is necessarily illegal. The officers possess a discretion in receiving or rejecting evidence other than pen-and-ink-written receipts, and if they should reject insubstantial evidence, that discretion would not be abused. To hold that one who has complied with the law by regular payment of the tax, but who becomes the victim of a careless, a designing, or an uninformed collector or deputy, would have the effect of completely disregarding the primary qualification of an elector, which, as has been shown, is the *actual timely payment of the tax.*

---

it is declared to be the purpose of this amendment to confer suffrage equally upon both men and women, without regard to sex; provided, that women shall not be compelled to serve on juries.'"

It may be urged that the citizen is negligent in accepting an irregular receipt. It is conceded that every person is presumed to know the law and that ignorance of its mandates is no excuse. Granting that *before* an election the holder of an irregular receipt may, by appropriate action, compel reissue, and that upon ascertaining the vice the elector should move for correction, nevertheless, the alternative remedy of the voter is available, and "other evidence" is not to be excluded, nor is the citizen's status as an elector destroyed through failure to adopt a remedy that at most goes to the evidence of what already exists.

A case decisive of the principle with which we are dealing is to be found in the twenty-fourth Arkansas Reports.[7] Farr's ballot was refused when he declined to subscribe to a statutory oath that he would support the Constitution of the United States and the Constitution of Arkansas, and that he had not voluntarily borne arms against the United States, or Arkansas, or aided, directly or indirectly, the so-called Confederate authorities since the eighteenth day of April, 1864.

The Constitution of 1864,[8] in effect when the election controversy arose, provided that ". . . every free white male citizen of the United States who shall have attained the age of 21 years, and who shall have been a citizen of the state six months next preceding the election, shall be deemed a qualified elector, and be entitled to vote in the county or district where he actually resides."

The oath prescribed by the General Assembly was a requirement additional to the constitutional qualifications, The opinion, written by Chief Justice YONLEY, is in part as follows:

"[The legislative requirement] is, in effect, nothing but a prohibition upon the right to vote as secured by the Constitution. . . . To admit that the Legislature may do this would be to declare that part of the Constitution which defines the qualifications of a voter, absolutely nugatory, and would turn § 2 of Art. 4 of our Constitution

[7] *Rison et al.* v. *Farr*, 24 Ark. 161, 87 Am. Dec. 52.

[8] Constitution of 1864, § 2, Art. 4.

into the merest nonsense. . . . The Legislature cannot, under color of regulating the manner of holding elections, which to some extent that body has a right to do, impose such restrictions as will have the effect of taking away the right to vote as secured by the Constitution."

An opinion written by Chief Justice COCKRILL (*Wheat* v. *Smith*)[9] has been frequently cited by this court. Wheat was elected circuit clerk of Lafayette county in 1884 for a two-year term, and held over without claiming under a subsequent election. Smith claimed that at a special election in 1887 he had been elected to fill the vacancy. The proceeding was one to oust Wheat as a usurper and to place Smith in possession of the office. Regularity of the election under which Smith claimed was made in issue, the contention being that notice of the special election had not been published in a newspaper, as required by law. The opinion, in part, is: "The courts hold that 'the voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon and have spoken.' If the law were otherwise it would '. . . always be in the power of the ministerial officer by his malfeasance to prevent a legal election.' "

This court, in *Parrish* v. *Nelson*,[10] declared the law to be that ". . . failure to comply with the law by election officers, whether the result of carelessness, ignorance, or negligence, destroys the integrity of the return, but it does not have the effect of disfranchising the voters of the district, and does not make the election void."

We said, in *Vanhoose* v. *Yingling*,[11] at page 1010: "Payment of a poll tax is essential to constitute one an elector." That case was decided in 1927, and the quoted expression had reference to the constitutional requirement of payment. Act 123 was not in effect at that time, but the abstract principle declared was that *payment, not*

[9] 50 Ark. 266, 7 S. W. 161.

[10] 186 Ark. 1118, 57 S. W. 2d 1037. See, also, *Fleming* v. *Rolfe*, 189 Ark. 865, 75 S. W. 2d 397; *Whittaker* v. *Mitchell*, 179 Ark. 993, 18 S. W. 2d 1026.

[11] 172 Ark. 1009, 291 S. W. 420.

the evidence of payment, entitles the citizen to vote. By "payment" is meant *timely* payment.

Ruling Case Law[12] is to the effect that ". . . where noncompliance with law arises, not out of an entire omission by an officer to perform his duty, but from an imperfect performance, the voters cannot be legally barred from voting, since the misfeasance or malfeasance of public officers can have no effect to impair a personal, vested constitutional right."

There is the further rule[13] that ". . . presumably all the provisions [of the statutes] have a purpose, and therefore should be observed. Before an election they must all be regarded as mandatory and their observance may be insisted upon and enforced. After an election, however, they must be regarded in a somewhat different light. It is true that questions affecting the purity of elections are of vital importance. Yet the problem is to secure a free, untrammeled vote, and a correct record and return thereof, and it is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. Hence, to hold these rules all mandatory, and essential to a valid election, would be to subordinate the substance to the form, the end to the means."

Innumerable cases from other jurisdictions might be cited in support of the rule that the mistake of an officer charged with responsibilities incident to an election, such as the issuance of poll tax receipts, will not avoid the election or have the effect of disfranchising the voter whose evidence of the right to participate in the election was irregular. *Jones* v. *State,* decided by the Supreme Court of Indiana,[14] is in point. There it was said:

"To hold that all prescribed duties of election officers are mandatory, in the sense that their nonperformance shall vitiate the election, is to ingraft upon the law the very powers for mischief it was intended to prevent. If the mistake or inadvertence of the officer shall be fatal to

[12] Vol. 9, p. 1039.

[13] Ruling Case Law, Vol. 9, p. 1091.

[14] *Jones* v. *State, ex rel. Wilson,* 153 Ind. 440, 55 N. E. 229.

the election, then his intentional wrong may so impress the ballot as to accomplish the defeat of a particular candidate or the disfranchisement of a party. And it is no answer to say that the offending officer may be punished by the criminal laws, for this punishment will not repair the injury done to those affected by his acts. It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and, from the current of authority, the following may be stated as the approved rule: All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction of the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provision affects an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission shall render it void."

Our conclusion with respect to the 152 ballots challenged on the sole ground that the voters were not qualified electors is that 151 of such ballots must be counted for Henderson, and one for Gladish.

Appellee has taken a cross-appeal, and insists that even though 151 of the 152 challenged ballots should be counted for Henderson, appellee still has a majority, and that judgment recitals reflect this fact. The court found that "all persons voting in said election upon a poll tax receipt based upon a delinquent assessment were unqualified voters." Commenting upon this declaration of the judgment, appellee says:

"This, of course, is erroneous, unless you go to the bill of exceptions to ascertain why this finding was made. Under this finding twelve votes were taken from the appellant and 123 from the appellee. Another finding is that all persons voting upon a poll tax receipt paid for and delivered after midnight of June 15, 1938, were unqualified to vote in said election. This, of course, is erroneous, for the law allows the sheriff to have poll tax re-

ceipts in his possession for five days after June 15. Under this finding six votes were taken from appellant and sixty-six from appellee. Under the finding in regard to votes out of the township, thirty-eight were taken from the appellant, and fifteen from the appellee."

There is a presumption that the court's findings of facts were supported by substantial evidence. This presumption attaches to the exceptions urged by appellee. Without referring to the bill of exceptions (stricken at appellee's request) this court cannot determine whether those who voted "upon a poll tax receipt based upon a delinquent assessment" were, or were not, qualified electors. If the delinquent assessments were made by the collector, they were invalid. Other grounds of invalidity are possible.

This court held, in *Martin* v. *Gray, supra,* that poll tax receipts issued after midnight of June 15 are invalid. That case is relied upon by appellee as authority for the exclusion of votes cast by those whose receipts were written with indelible pencil.

Questions are raised by appellee in respect of other votes, but in the absence of a bill of exceptions from which the facts might be ascertained, the judgment must be accepted as correct.

It is finally urged that findings of facts contained in the judgment are surplusage;[15] that approval of the judgment by appellee was as to form only, and that recitations relating to the merits of the controversy should be stricken, leaving the following: "It is therefore by the court ordered, considered, and decreed that the contestee was the lawful nominee of the democratic party for the office of county and probate judge of Mississippi county, Arkansas, in the primary election held in said county on the 9th day of August, 1938, and that the complaint of contestant be, and the same is, hereby dismissed."

---

[15] *Bradley* v. *Harkey,* 59 Ark. 178, 26 S. W. 827; *Dunnington* v. *Frick Co.,* 60 Ark. 250, 30 S. W. 212; *White* v. *Beal & Fletcher Grocer Co.,* 65 Ark. 278, 45 S. W. 1060; *Bluff City Lumber Company* v. *Floyd,* 70 Ark. 418, 68 S. W. 484.

Section 1534 of Pope's Digest directs that "Upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusions of law."

Findings of fact may be brought into the record by appropriate proceedings. Such findings, when made separately from the judgment, are not a part of the judgment. In the instant case, however, the facts recited in the judgment were necessary to its clarity. While it is approved by appellee as to form only, the form so approved included the findings of facts, such facts having been a part of the judgment when approved.

In any view to be taken of the case (after finding, as we must, that the voters who received receipts written with indelible pencil are not to be excluded) appellant has a clear majority of the legal votes.

The judgment is reversed, and the cause remanded with directions that appellant be declared the nominee.

SMITH, MCHANEY and BAKER, JJ., dissent.

CARLSON *v.* CARLSON.

4-5464 128 S. W. 2d 242

Opinion delivered May 8, 1939.

Franklin Wilder and *Vincent J. Narisi,* for appellant.

SMITH, J. Appellant filed suit in the Fort Smith district of Sebastian chancery court for divorce on June 20, 1938, but he was denied that relief in the decree from which is this appeal rendered October 20, 1938.

He alleged indignities rendering his condition intolerable, but the ground chiefly relied upon was his separation from his wife for a period of more than three years prior to the institution of this suit. He prayed the granting of the divorce pursuant to the seventh paragraph of act 167 of the Acts of 1937, p. 630, which reads as follows: "Seventh. Divorce from the bonds of matrimony may be obtained, in addition to the causes now provided by law, and subject to the same procedure and requirements, for the following cause: When the husband and wife have lived apart for three consecutive years without cohabitation the court shall grant an absolute decree of divorce at the suit of either party."

The suit was brought under act 71 of the Acts of 1931, p. 201, commonly referred to as the 90-Day Divorce Law, which appears as § 4386, Pope's Digest. This act permits a person previously residing in some other state to sue for a divorce in this state upon "A residence in the state for three months next before the final judgment granting a divorce in the action and a residence for two months next before the commencement of the action."

The court denied a divorce upon two grounds: (1) that appellant had not shown the residence in this state required by act 71 of the Acts of 1931, and (2) that he had

not established a ground for divorce under act 167 of the Acts of 1937.

Upon the first question the court found that appellant had been a resident of the state for two months before filing the suit in June, but that "he absented himself from the state from the latter part of June, 1938, until about the middle of October," which was only a few days before the rendition of the decree here appealed from. The testimony fully sustains this finding, and the court, therefore, properly held that appellant had not been a resident of this state for the three months' period required by law.

In the case of *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281, it was said that "Even though she (the plaintiff) moved to this state to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the court of jurisdiction, if she were actually and in good faith a *bona fide* resident for the period prescribed by the statute."

This does not mean that the plaintiff shall not, at any time during the three months' residence, leave the state for any purpose. *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. 2d 1055. He may reside here as would any other resident, but during all of this three months' period he must be a resident of this state, and not of some other. The act of 1931 does not contemplate that one may come into this state, pay three months' board, leave the state, and then return to prosecute his suit upon the theory that he has resided in the state for three months.

The court was fully warranted in finding that appellant had not been "in good faith a *bona fide* resident for the period prescribed by the statute." The statute requires actual—and not constructive—residence. *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459; *McLaughlin* v. *McLaughlin,* 193 Ark. 207, 99 S. W. 2d 571. The annotation to the case of *Hiles* v. *Hiles,* 164 Va. 131, 178 S. E. 913, 106 A. L. R. 1, discusses this question very extensively.

We are, also, of the opinion that the court was correct in finding that appellant was not entitled to a divorce under the provisions of act 167 of the Acts of 1937, even

though he had become a resident under act 71 of the Acts of 1931. The testimony as to the ground for divorce is to the following effect. Appellant's wife became and is now insane, and for more than three years prior to the institution of this suit was confined in a hospital for the insane in the state of Nebraska. Her insanity was shown to be permanent and incurable. Appellant insists that inasmuch as he and his wife had lived apart for three consecutive years without cohabitation he has ground for divorce on that account.

We do not think so. From 1873 to 1895 insanity was a ground for divorce in this state, but since the last mentioned date it has not been. In construing act 167 of the Acts of 1937 in the case of *White* v. *White,* 196 Ark. 29, 116 S. W. 2d 616, we said: "This (the act) contemplates an agreement or understanding between the parties that they will act in concert of purpose, voluntarily living apart for three years. At the end of such period either may obtain a divorce from the other by alleging and establishig mutuality of such separation."

There is involved here no act of volition on the part of the wife. She was insane, and cannot be said to have voluntarily lived apart from her husband, and there is no element of mutuality in the separation. To hold that such a separation was ground for divorce would, in effect, be a holding that insanity, continuing for the required period, was a ground for divorce, and would constitute insanity desertion. The law does not so provide.

We conclude, therefore, that the court below properly denied the prayer for divorce upon both grounds here discussed, and that decree must be and is affirmed.

HOLT, J., disqualified and not participating.

McCarroll, Commissioner of Revenues, *v.* Gregory-Robinson-Speas, Inc.

4-5518 129 S. W. 2d 254

Opinion delivered April 10, 1939.

[redacted]

Lester M. Ponder and *Frank Pace, Jr.*, for appellant.

Paul Martin, Jr., Owens, Ehrman & McHaney, for appellee.

HOLT, J. Appellant brings this appeal from a decree of the Pulaski chancery court overruling its demurrer to appellee's complaint and amendment thereto on March 9, 1939.

Appellee in its complaint, alleges as follows: "That it is a corporation, duly organized and existing under the laws of the state of Arkansas, having its principal place of business in the city of Rogers, in the state of Arkansas; that the defendant, Earl R. Wiseman, is a duly appointed, qualified and acting Commissioner of Revenues for the state of Arkansas, and in such capacity, it is his duty to administer the income tax act of 1929, or act 118 of 1929.

"That it is engaged in the business of manufacturing and selling vinegar manufactured principally from apples grown in northwestern Arkansas.

"That, on January 1, 1931, the O. L. Gregory Vinegar Company, a Texas corporation, with its places of business at Paris, Texas, and at Mobile, Alabama; the Springdale Vinegar Company, an Arkansas corporation, with its place of business at Springdale, Arkansas; the American Vinegar Manufacturing Company, an Oklahoma corporation, with its place of business at Oklahoma City, Oklahoma; and Gregory-Robinson-Speas, Inc., an Arkansas corporation, with its place of business at Rogers, Arkansas, merged and consolidated under the name of Gregory-Robinson-Speas, Inc., with its main office at Rogers, Arkansas.

"Plaintiff states that it is not, in fact, operating as a domestic corporation with branch outlets in Oklahoma, Texas and Alabama, but that it is a consolidation of several plants engaged in manufacturing vinegar. That

since January 1, 1931, it has been doing business as a multi-state corporation. That each branch or plant has separate books, separate offices and operates as a separate and distinct unit in the several states wherein the units are located. That its stockholders are residents of several states.

"That defendant, Earl R. Wiseman, as Commissioner of Revenues for the state of Arkansas, has notified plaintiff that he intends to take action to collect from it the sum of $2,195.67, which sum represents two per cent. (2%) of the net income and interest from all of the plants located in Oklahoma, Texas and Alabama for the years 1931, 1932, 1933 and 1934. Plaintiff states that it has assessed and that it has paid to defendant the income tax based on the earnings from its properties located in the state of Arkansas for all of said years. That it has paid an income tax to the state of Oklahoma for the years mentioned from income earned from properties located in that state, and it has paid to the state of Alabama an income tax for the years mentioned from income earned from properties located in that state. The state of Texas has no income tax law.

"Plaintiff states that act 220 of the Acts of 1931, page 695, exempts corporations organized under the laws of this state to do business outside this state but no intra-state business from the payment of all income and intangible property taxes. That act 118 of 1929, the Income Tax Act, is unconstitutional, in so far as it attempts to tax plaintiff's income derived from sources outside the state of Arkansas. That act 220 of 1931 is an unlawful discrimination against it and other domestic corporations having income-producing businesses both within and without the state of Arkansas. That such classification which attempts to tax income from plants outside the state denies to the plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and amounts to the taking of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and art. II, § 8, of the Constitution of the state of Arkansas.

"That said plants located outside the state of Arkansas are not engaged in any business in the state of Arkansas nor do they enjoy any police protection or other benefits from the state of Arkansas. That said plants outside the state pay income taxes to the state wherein said plants are located and where said income is earned. That the assessment by the state of Arkansas of income taxes on its plants located in other states where said taxes are payable amounts to double-taxation, contrary to the Constitutions of the United States and the state of Arkansas.

"That the plaintiff has no adequate remedy at law since, under the statutes made and provided, it cannot pay the tax and maintain an action for the recovery thereof. That, unless enjoined, the defendant will proceed with an action to enforce the payment of said void, unauthorized and unconstitutional tax on the income from its plants located outside the state of Arkansas for the years mentioned. That the plaintiff is entitled to a permanent injunction, enjoining the defendant from assessing and collecting an income tax on its properties outside the state of Arkansas.

"Wherefore, plaintiff prays that act 118 of 1929, the Income Tax Act, be declared unconstitutional and void, in so far as it attempts to tax its income from its plants located outside this state, and that said defendant be permanently enjoined from taking any action against it or any of its employees or agents to collect said tax. And the plaintiff prays for its costs herein expended, and for all other proper and equitable relief."

The amendment to this complaint further alleges: "That the defendant, Z. M. McCarroll, as Commissioner of Revenues for the state of Arkansas, has also notified plaintiff that he intends to take action to collect from it the further sum of $825, which sum represents two per cent. (2%) of the net income, interest and penalty from plaintiff's plants located outside the state of Arkansas and from business done and sales made by plaintiff outside the state of Arkansas for the year 1935. That defendant has also notified plaintiff that he intends to take

action to collect from it a two per cent. (2%) tax on all income earned by plaintiff on all business done outside the state of Arkansas for the years 1936 and 1937. That defendant is seeking to collect from plaintiff an additional income tax for the years 1931 to and including the year 1937. Plaintiff states that it has paid a two per cent. (2%) tax on its income to the state of Arkansas on its income earned within the state of Arkansas for the years 1931 to 1937, inclusive."

Appellant filed its demurrer to this complaint and the amendment thereto alleging (1) that the court has no jurisdiction of the person of appellant or the subject-matter of the action, and (2) that the complaint does not state facts sufficient to constitute a cause of action, and upon a hearing in the Pulaski chancery court the court made an order overruling the demurrer, to which action of the court appellant duly excepted, refused to plead further, elected to stand on its demurrer, prayed for and was granted an appeal to this court from the decree rendered.

In its decree, the trial court, among other things, said: "That act 118 of 1929 of the General Assembly of the state of Arkansas, the Income Tax Act, is unconstitutional and void in so far as it attempts to tax plaintiff's income from its plants located outside the state of Arkansas, and doth find that this court has jurisdiction of the person of the defendant and the subject of this action, and that the complaint and the amendment thereto do state facts sufficient to constitute a cause of action; doth overrule said demurrer and doth permanently enjoin the defendant from taking any action against the plaintiff, its employees or agents, to collect any tax on its income earned from its plants located outside the state of Arkansas."

The appellant herein having elected to stand on its demurrer, all facts properly alleged in the complaint and the amendment thereto must be taken as admitted to be true.

On this record it is, first, earnestly insisted by appellant that the trial court had no jurisdiction in this

case for the reason that appellee has failed to follow the procedure laid down in §§ 31 and 32 of art. VII of act 118 of 1929.

Appellant cites and relies upon a number of federal cases in support of this contention. We are of the opinion, however, that these cases are not controlling here, but only apply in those instances where the taxing statute is constitutional and there is a dispute as to the amount of the assessment or the construction of a valid act. These cases refer to federal income tax cases.

The Constitution of the state of Arkansas contains, we think, authority for equity jurisdiction in a case of this character in § 13 of art. XVI, which is as follows: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

In *Farrell* v. *Oliver,* 146 Ark. 599, 226 S. W. 529, this court held the above section broad enough to afford a remedy against an illegal state tax and, among other things, said: "The right of appellants to maintain this suit is challenged, but we are of the opinion that as citizens and taxpayers of one of the *counties of the state* they can maintain an action to restrain the auditor and treasurer from paying out funds without legal appropriation thereof by the Legislature.

"The Constitution (art. XVI, § 13) provides that 'any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.'

"This court has construed that provision to mean that a misapplication by a public official of funds arising from taxation constitutes an exaction from the taxpayers and empowers any citizen to maintain a suit to prevent such misapplication of funds. *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901; *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282. The provision quoted above refers, in express terms, to citizens 'of any county, city or town,' but the exactions from which a remedy is afforded are

not those limited to counties or towns, and this provision of the Constitution is broad enough to afford a remedy against state-wide exactions which are illegal. Such is the effect of our decision in *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380."

The right of any citizen or taxpayer to go into a court of equity for relief was upheld in *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43, wherein this court said: "Section 13 of art. XVI of the Constitution of 1874 provides that any citizen of any county may institute suit in behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exactions whatever. Under this section this court has uniformly upheld the jurisdiction of chancery courts, upon the application of citizens and taxpayers, to enjoin the collection of illegal taxes levied on their property."

We are of the opinion, therefore, that an individual has the right to go into a court of equity to enjoin the enforcement of any illegal tax or exaction and that this same right inures to the corporation, appellee, in the instant case, since a corporation is a person within the meaning of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

In *Covington & L. Turnpike Road Co.* v. *Sandford,* 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, the Supreme Court of the United States said: "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

We, therefore, hold that the provisions of the Arkansas State Income Tax law (act 118 of the Legislative Session of 1929) which prohibit recourse by injunctive relief, are invalid as applied to appellee in the instant case and that the chancery court had jurisdiction to hear this cause and to grant the injunction.

We come next to consider the constitutionality of the exaction by the State Revenue Commissioner of the tax in question. Is act 118 of 1929 (Income Tax Act), as

construed by appellant as applied to appellee in this case, when read in connection with act 220 of 1931, which exempts domestic corporations, doing business wholly without this state, from all income taxes, unconstitutional, because a denial of the equal protection clause of the Fourteenth Amendment to the Federal Constitution? We think that it is.

The Income Tax Act, *supra,* provides for the collection of two per cent. (2%) of the net income of all domestic corporations while requiring foreign corporations to pay only upon that portion of their net income derived from business transacted within the state.

Act 220 of the 1931 Legislature specifically provides that upon the payment of the $5 annual fee, domestic corporations doing business entirely without the state shall "be exempt from obligation of filing with any state or county official, any other return, financial statement, or other report, and from the payment of any other general, special, or other taxes (except tangible property tax) imposed upon corporations organized for the purpose of doing business within this state."

We are of the opinion that these two acts taken together impose upon appellee a discriminatory and arbitrary exaction of the tax in question and to this extent is unconstitutional and unenforceable, being violative of appellee's rights under the Fourteenth Amendment to the Constitution of the United States and art. II, § 8, of the Constitution of the state of Arkansas.

We think the identical question presented in this case has been definitely decided against appellant by the Supreme Court of the United States in the case of *F. S. Royster Guano Co.* v. *Commonwealth of Virginia,* 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989, under a state of facts practically identical with those in the instant case. This court in *Wiseman* v. *Interstate Public Service Company,* 191 Ark. 255, 85 S. W. 2d 700, in its consideration of the Royster-Virginia Case, *supra,* among other things, said: "There the Royster Company owned and operated a plant in Virginia and several plants in other states, and it was sought to collect an income tax from it

on income derived from all sources, as here, under its act of 1916. Another act of Virginia of 1916 exempted domestic corporations doing no business within the state from the income tax. It was held by the Supreme Court of the United States, that two acts must be construed together as parts of one and the same law, and that, while the equal protection of the laws clause of the Constitution does not prevent the states from resorting to classification for legislative purposes, such classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. And the state's right to collect the tax on income outside the state was denied, the Supreme Court of Virginia being reversed, on the ground that there was an arbitrary discrimination against the Royster Company amounting to a denial to it of the equal protection of the laws within the meaning of the Fourteenth Amendment."

In the instant case it is admitted that the appellee, in addition to its operations within the state of Arkansas, owns and operates plants in the states of Oklahoma, Texas and Alabama, and further that there are other corporations organized under the laws of this state doing business wholly without the state of Arkansas. These facts were not present in the Wiseman Case, *supra,* and we do not think that the decision reached in that case controls here, the facts being materially different.

We think it clear that act 220 of 1931, *supra,* relieves domestic corporations doing business entirely without the state of Arkansas from the payment of any income tax to this state, and that when this act is read in connection with the general income tax act of 1929, *supra,* that under the decision of the United States Supreme Court in the Royster Case, *supra,* the imposition of an income tax upon a domestic corporation, doing business both within and without this state, on income derived from sources outside of Arkansas denies to such domestic corporation the equal protection of the laws and amounts to the taking of its property without due process in vio-

lation of the Fourteenth Amendment to the Constitution of the United States and art. II, § 8, of the Constitution of the state of Arkansas.

We conclude, therefore, that the decree of the chancellor is correct, and accordingly it is affirmed.

LEWIS *v.* SMITH.

4-5522 129 S. W. 2d 229

Opinion delivered April 24, 1939.

C. B. Crumpler, for appellant.

Robert C. Knox, for appellee.

James D. Head and *O. E. and Earl N. Williams, amici curiae.*

GRIFFIN SMITH, C. J. We hold that county clerks, as ex-officio clerks of the probate court, continue as such under Constitutional Amendment 24, until otherwise provided by the General Assembly.

Roy H. Lewis and L. B. Smith are, respectively, county clerk and circuit clerk of Union county. To Smith's petition for mandamus to compel Lewis to surrender all books, papers, records, and documents pertaining to the probate court, Lewis demurred. The

demurrer was overruled. There was an order directing the county clerk to deliver the probate records to the circuit clerk. This was error.

To determine the relative status of the two officials, it is necessary to consider the amendment in its relation to act 3 of the Fifty-Second General Assembly (1939). Because neither the act nor the amendment appears in permanent form for distribution, essential parts are being copied at length.

Section 1 of Amendment 24 amends § 34 of art. 7 of the Constitution of 1874, and makes it read:

"In each county the judge of the court having jurisdiction in 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 facts 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 relates to appeals, and is: "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 amends § 19 of Art. 7 of the Constitution so that it will read:

"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 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."

Clearly § 1 of the amendment authorizes the General Assembly to consolidate chancery and probate courts. The question arises, Has such authority been exercised?

Sections 1 and 2 of act 3 of 1939 are to be considered. They are:

"Section 1. The jurisdiction of the probate court is consolidated with and vested in the chancery court in each and all of the respective counties of this state, and said chancery court shall have original jurisdiction in all matters of probate.

"Section 2. The terms of the various probate courts of this state, as now provided by law, are hereby abolished, and hereafter the terms of the probate court shall be the same as now provided by law for the various chancery courts of the state. The various chancery courts of the state shall be open at all times, and may be in session in two or more counties or two or more courts on the same day, and the chancellor of any circuit may hear and determine all probate matters, in any county in which he may be sitting, for any county in his circuit; and in the event of the disqualification or inability of any chancellor to open court on the first day of the term in any county in his circuit, the bar of said court may elect a special chancellor to hear and determine matters in chancery and probate on the first day of said term; provided, the disqualification or inability of said chancellor to be present and open court shall be certified to the clerk of the court on or before the first day of said term."

Section 3 provides that the reporters of the various chancery courts "as now provided by law, shall be the reporters in all matters of probate."

The amendment did not, *ipso facto,* consolidate chancery and probate courts. By § 1 it is provided that the *judge* of the court having jurisdiction in matters of

equity shall be *judge of the court of probate,* and . . . "the *General Assembly* may provide for the consolidation of chancery and probate courts." Section 2 directs that until otherwise provided by the General Assembly . . . "[appeals] shall be taken in the same manner as appeals from courts of chancery . . ."

Section 3 readopts the provisions of § 19 of Art. 7 of the Constitution of 1874 with respect to the election of county clerks and circuit clerks, and instructs that until otherwise provided by the General Assembly the county clerk shall, in all counties having a population of more than 15,000, be . . . "ex-officio clerk *of the probate court of such county.*"

The intention, then, can be no other than to perpetuate the probate courts until their consolidation with courts of chancery has been effectuated by the General Assembly. In its unamended form, § 34 of Art. 7 of the Constitution provided that "The judge of the county court shall be the judge of the probate court . . ." It has never been supposed that because the judge of the county court was made judge of the probate court, the courts were a unity. An interesting comment on the jurisdiction of probate courts is found in *Reinhart, Administrator* v. *Gartrell,* 33 Ark. 727.[1]

Unless the amendment contemplated continued existence of probate courts, why did it direct that as to counties having a population of more than 15,000 . . .

[1] In the Reinhart-Gartrell Case the court said: "Courts of probate, during their existence in this state, have ever had and still have exclusive original jurisdiction in the matter of the administration of the estates of decedents. This was statutory until the abolition of these courts, by act of April 17, 1873. By an act approved April 16, 1873, this '*elusive original jurisdiction,* in all matters pertaining to probate and of administration,' was transferred to the circuit court. The experiment was not satisfactory, and by the Constitution of 1874, the probate court was re-established. It was provided (Art. 7, § 34), that they should have '*such* exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, etc.,' . . . as is *now vested* in the circuit court, or may be hereafter prescribed by law. Obviously it was intended to relegate to the probate courts their old jurisdiction, without restriction or qualification."

"the county clerk shall be ex-officio clerk *of the probate court of such county* until otherwise provided by the General Assembly"? There is the further declaration in § 1 that . . . "the regular terms of the courts of probate shall be held at such times as is now or may be hereafter prescribed by law . . ." Here, again, there is recognition of the existence of the probate court; for there is a command that its terms coincide with terms of chancery.

Continued existence of probate courts is recognized in § 3 where it is said: "Appeals may be taken from judgments and orders of *courts of probate* to the supreme court."

The conclusion is inescapable that probate courts were not abolished; nor were they consolidated with chancery. If a purpose of the amendment was to consolidate the two courts, why did it provide for such consolidation at the instance of the General Assembly?

The next question relates to effect of act 3. Section 1, standing alone, might be regarded as consummation by the General Assembly of authority conferred by the amendment, although it will be noted that *jurisdiction* of the probate court is consolidated with that of chancery. Still, even in § 1, the term "in all matters of probate" is used.

Whatever doubt may be cast upon the purpose of act 3 by the manner in which § 1 is worded, § 2 leaves no room for conjecture. It abolishes *terms* "of the various probate courts," and enacts that "*hereafter the terms of the probate courts* shall be the same as now provided by law for the various chancery courts of the state." Again, in the same section, there is direction with respect to a special judge, etc., the provision being that . . . "the bar of said court may elect a special chancellor to hear and determine matters in chancery and probate."

The act does not consolidate the two courts in the sense that courts of probate have lost their identity. They remain, as an eminent friend of the court has expressed it in his brief, "probate courts in chancery."

Authority conferred upon the General Assembly by Amendment No. 24 to "otherwise provide" with respect to clerks has not been exercised.

The judgment is reversed, with directions that the demurrer be sustained.

THE WHITE RIVER PRODUCTION CREDIT ASSOCIATION *v.* GRIFFIN.

4-5430 128 S. W. 2d 701

Opinion delivered April 24, 1939.

Kaneaster Hodges and *Gerard N. Byrne,* for appellant.

Sam M. Bains, for appellee.

McHaney, J. Appellant brought this action against appellee Griffin, as maker, and the other appellees, as indorsers, to recover the balance due on a promissory note. On April 24, 1937, appellee Griffin executed and delivered to appellant his promissory note for $1,000, due and payable December 1, 1937, with interest from date to maturity at 5 per cent. and thereafter at 8 per cent. per annum, which said note was indorsed by the other appellees, Koettel and Heffington, and further secured by a chattel mortgage on certain personal property and seventy-five acres of rice to be planted. Said note, in addition to a provision waiving presentment for payment, notice of nonpayment, etc., on the part of the maker and indorsers thereof, contained this statement: "This note is secured by a chattel mortgage on property therein more specifically described," etc. The mortgage contained a provision that it was given "for the purpose of securing the payment of said debt and the note evidencing the same, and all renewals and extensions thereof, and all additional loans and advances which may hereafter be made by the mortgagee, its successors [or] assigns, to the mortgagor, whether made before or after the maturity of the note described herein, and during the life of this mortgage, whether or not evidenced by note or notes, and any and all other present or future liabilities of the mortgagor to the mortgagee. . . ." Another provision in said mortgage is contained in the defeasance clause, providing that if the mortgagor shall pay said debt, "together with any and all other sums or advances paid, furnished or advanced hereunder" by it, then said conveyance or mortgage should be void, otherwise to be in full force and effect. Another provision is that if it should assign this mortgage and said note to the Federal Intermediate Credit Bank of St. Louis, Missouri, and "shall make additional advances to the mortgagor, or shall pay or incur sums or obligations hereunder for the protection or preservation of said security, such additional advances, sums and obligations shall be secured by the lien of this mortgage, although—not assigned to the Federal Intermediate Credit Bank of St. Louis; provided, however, that if such advances, sums and obligations are

not assigned to the Federal Intermediate Credit Bank of St. Louis, then any note or notes or other obligations herein secured held by such Federal Intermediate Credit Bank of St. Louis shall have priority over any other notes or liabilities secured hereby in so far as concerns participation in the proceeds of any foreclosure sale hereunder, and the priority of said assignee shall extend and operate to and throughout all transactions, proceedings or controversies with respect to the security herein conveyed, and said assignee shall be entitled to payment in full before any of the other claims herein secured shall be paid.

In addition to the $1,000 loaned appellee Griffin, appellant made other advances to him to enable him to harvest, haul, store and market his rice crop of 90 acres instead of 75, for which he executed to it three other notes dated November 1, November 6, and November 23, 1937, aggregating $745, and which appellees Koettel and Heffington refused to indorse because they did not wish to be liable for more than $1,000. Koettel was Griffin's landlord and he executed and delivered to appellant his waiver of landlord's lien for rent, which was attached to the mortgage and recites: "Such waiver to extend to and cover the amount now due under and secured by said mortgage or which may be hereafter secured thereby under the terms thereof, and I/we hereby waive the right to a marshalling and consent to the collection of said mortgage out of any and all said crops."

The rice crop was thereafter harvested and sold. On January 22, 1938, appellee Griffin made a payment to appellant which it applied first to the retirement of the additional loans represented by the three notes executed in November, and the remainder, $108.35, to the original $1,000 note. Thereafter, three other payments were made on said note, the last being on June 24, 1938, which left a balance, exclusive of interest, of $564.99. On August 15, 1938, the date of the filing of this suit, there was a balance due thereon, including interest, of $643.31.

Appellee Griffin made no defense to the action. The other appellees defended on the ground that the note

which they indorsed had been paid. The case was tried before the court, a jury being waived, and it found that appellant was required by law to apply the first proceeds of the mortgaged rice crop and other security to the $1,000 note on which Koettel and Heffington were indorsers before making any application of said proceeds on the three notes, representing advances. Judgment was rendered against Griffin for $643.31 with interest from August 15, 1938, at 8 per cent. per annum, and in favor of Koettel and Heffington.

We think the court erred in discharging Koettel and Heffington. It is undisputed in this record that Griffin instructed appellant's agent, Mr. Harris, to "take up the additional advances out of the first rice sold." Griffin did not remember this conversation, but did not deny that it occurred. It is also undisputed that neither Koettel nor Heffington undertook to direct application of payments, although Heffington says that, in a conversation with Harris, he suggested that he thought the proceeds should "go to the first instead of the last" or that the money "ought to be applied at the bottom and not at the top." The general rule for application of payments is stated in the second headnote to *National Surety Co.* v. *Southern Lumber & Supply Co.,* 181 Ark. 105, 24 S. W. 2d 964, as follows: "The right to apply payments exists only between the original parties, and no third person, such as guarantor, surety, indorser or the like, has any authority to insist on an appropriation of the money in his favor where neither the debtor nor the creditor has made such appropriation."

And the court further stated in this case the rule often announced that the debtor at the time of making a payment has the right to direct the application. If he fails to direct such application, the creditor has the right to make it, "and the third person or surety company has no right to be heard, and no right to direct how the payments shall be applied." Quotations from 21 R. C. L. 107-8 and 30 Cyc. 1250-51 are given to support the rule that the right to apply payments is strictly one existing between the original parties, and not to persons

secondarily liable. In an exhaustive note to *Wait* v. *Homestead Bldg. Assn.*, 21 A. L. R. (W. Va.) 704, it is said: "It is well settled that a surety or guarantor cannot in the absence of an agreement or of special equity in his favor, direct or control the application by the principal and the creditor, or either of them, of payments made by the principal from his own funds; in other words, the mere fact that one of the debts in question is covered by the obligation of a guarantor or surety does not defeat the right of the principal debtor in the first instance, or, in case of his failure, the right of the creditor, to apply the payment to another debt due from the principal."

In this case there was no "agreement" that the proceeds of the rice crop be first applied to the note indorsed by Koettel and Heffington and it (the note) specifically notified them it was secured by a mortgage which also secured other advances that might be made to Griffin, as it stipulated that "failure to pay the principal or interest as herein provided this note and all indebtedness secured by said mortgage may," etc. There are no special equities in their favor—no special pledge to a particular debt, as the mortgage, to their constructive, if not actual, knowledge secured the particular note and all other advances. The rule is a little more succinctly stated in the same annotation at page 720, where it is said: ". . . the creditor may, in the absence of a special pledge to a particular debt, apply the proceeds of collateral to debts of the principal on which the surety or guarantor is not bound, in preference to debts on which he is bound, assuming that both classes of debts are covered by the collateral." As stated above, there was no "special pledge to a particular debt" in said mortgage. The $1,000 note stood on a parity with the other advances.

Appellees cite and rely on *Jordon* v. *Bank of Morrilton,* 168 Ark. 117, 269 S. W. 53; *Herweigh* v. *Hall,* 172 Ark. 1148, 292 S. W. 97; and *Gowan* v. *Robinson,* 191 Ark. 356, 86 S. W. 2d 19. We think these cases are not in point. In the Jordon Case, after stating the general rule, as above announced, "that the right of appropria-

tion of payments belongs exclusively to the debtor and creditor, and that no third person can control or be heard for the purpose of compelling a different appropriation from that agreed on by them," the court said: "There is a well-recognized exception to this rule, and that is, if the creditor had notice that money had been furnished his debtor upon an understanding that it was to be applied towards the payment of a particular debt, it could not be appropriated to the payment of another debt. Here, according to the finding of the chancellor, the bank lent the money to Turner with the express understanding that a specified part of it should be applied towards the payment of a debt of Turner to Jordon secured by a mortgage upon the same land which he had mortgaged to the bank. If Jordon had notice of these facts, he would not be permitted, even with the consent of Turner, to misapply it. *Harding* v. *Tifft*, 75 N. Y. 461. In short, if Jordon had notice that the bank had lent the money upon the understanding that a part of it should be applied towards the payment of his mortgage debt, he could not apply it to the payment of his unsecured debt as against the bank, even with the consent of Turner." In other words, where a third person advances funds to a debtor to be applied on a particular debt, the creditor, with knowledge of the purpose of such advancement, cannot make a different application. The other cases cited make similar exceptions to the general rule. These are some of the "special equities" referred to in the first above quotation from 21 A. L. R.

It is perfectly manifest that it was the purpose of all parties, appellant and appellees, that Koettel and Heffington should indorse said $1,000 so as to give appellant additional security for said note over and above the property covered by the mortgage. Such being the purpose of the indorsement, it would be frustrated and rendered valueless to require the application of the proceeds of the mortgaged property first to the discharge of the indorsed note, for if all or a substantial part of such proceeds should be required to discharge the indorsed note, leaving some of the unindorsed notes unpaid, the creditor would have no security for their payment. The Supreme

Court of Florida expressed the same view in *Consolidated Naval Stores Co.* v. *Wilson,* 82 Fla. 396, 90 So. 461, 21 A. L. R. 681, as follows:

"If it was the purpose of the creditor to take additional security in the form of an indorsement of some of the notes, and the indorser met the creditor upon that proposition, it would be inequitable and manifestly unjust to require the application of the proceeds of the mortgaged property to be applied first to the indorsed notes, for the whole purpose of the additional security would be destroyed by such application."

Appellees Koettel and Heffington, having indorsed said note for the purpose of giving appellant security in addition to the mortgaged property, cannot be permitted to destroy the very purpose of their indorsement and escape the consequences of their own voluntary act.

The judgment will, therefore, be reversed, and judgment will be entered here against said appellees for $643.31 with interest at 8 per cent. from August 15, 1938, together with costs. It is so ordered.

LLOYD *v.* JAMES.

4-5469 128 S. W. 2d 1019

Opinion delivered May 8, 1939.

M. F. Elms, for appellant.

Botts & Botts, for appellee.

MEHAFFY, J. On August 6, 1936, the appellants sold and delivered to appellee an International truck for $789, retaining title to the truck. There was a payment made on the truck, but thereafter the appellee declined to pay and the appellant brought suit in replevin for the truck.

There was a trial by jury, and appellants were awarded possession of the truck, but appellee was given a judgment for $300 on his cross-complaint.

The answer and cross-complaint admitted the purchase of the truck and admitted that appellants retained title, but alleged that the appellants, at the time appellee purchased the truck, represented and guaranteed that the truck would operate decidedly more economically than a Ford V-8 truck, and would operate at a savings in oil and gas to such an extent as to pay the purchase price of the truck within a short time.

This is the second appeal in this case. When the suit was brought originally, appellants filed demurrer to cross-complaint. The court sustained the demurrer, and appellee prosecuted an appeal to this court. This court reversed the judgment of the lower court, remanding the cause with directions to overrule the demurrer. *James* v. *Lloyd,* 196 Ark. 568, 118 S. W. 2d 284.

The purchase of the truck and the execution of the note were admitted, and appellee's contention was that the truck did not come up to the guaranty.

The appellee, W. F. James, testified that he bought the truck from a Mr. Harris, representative of appel-

lants; that Harris came to see him and talked about the truck and he came again in a few days; made two trips before he sold witness the truck; told him what the International truck would do and how much better it was than a Ford V-8 and how much mileage it would make and said that he would guarantee it to make better mileage than any Ford V-8 that was ever built; Harris said he came down to sell witness this truck, and witness told him if he kept on he would sell him the truck; witness then told Harris that if he would guarantee the International truck to make more mileage than a Ford V-8 he would buy the truck; that was the guaranty he put on it; Harris said that they stayed with what they said and what they sell, and witness stated that that was the reason he bought the International truck. Before the truck came appellee paid $25 and in about ten days paid $400 more; built a bed for the truck that cost $75, and $8 additional, which amounted to $508. The truck did not come up to Mr. Harris' guaranty with reference to the gasoline; witness saw Mr. Harris in a few days and told him about the truck and Harris directed him to bring it in and they would check it up; they worked on it six different times and it never did come up to the guaranty; he offered the truck back if they would give him his money, but when he offered the truck back, Mr. Moseley laughed at him and demanded that he pay the note; Mr. Harris made the guaranty and he kept trying to get them to fix it; Mr. Moseley directed witness to Little Rock and wrote a letter to the International people there to work on the truck; witness intended to buy a Ford V-8, but with this guaranty, he bought the International; if it had not been for the guaranty he would have bought a Ford V-8; it took 39 gallons of gas to go to Memphis and back; it took 29 gallons for the Ford with the same weight; had the truck in his possession about six months and drove it about 7,600 miles; witness kept thinking they were going to fix it and bring it up to the guaranty; he kept the truck as long as he did because he thought they would fix it; they kept telling him they would; they did not do it, but kept insisting that they would make it come up to their guaranty.

Other witnesses corroborated appellee as to the statements about the International truck, but Mr. Harris, who sold the truck to appellee, denied making the statements.

When the case was here on appeal before this court stated: "The only question for our consideration is whether the cross-complaint states facts sufficient to constitute a defense. The appellee contends that the statements made were mere dealer's talk, and that may be true, but the appellant alleged that they not only made these statements, but that they warranted them to be true. He also states in his cross-complaint that he called the attention of the seller to this defective condition of said truck, and that the seller undertook on four different occasions to remedy the defect, but was utterly unable to do so. He, in effect, alleges that there was a defective condition of said truck, and the appellees were unable to remedy it.

"Whether there was a warranty or whether the truck was defective are questions of fact, and should be submitted to the jury, if there is substantial evidence to prove them."

We agree with the appellants that the only complaint made or attempted to be made by appellee was that the International truck used more gasoline than a Ford V-8.

Appellee contends and testifies that the seller guaranteed that it would require less gasoline to operate the International than it would to operate a Ford V-8, and that but for this guaranty he would not have purchased the truck. While other witnesses testified that Harris said it was better than any Ford, yet the appellee is the only witness that testifies positively that a guaranty was made and that this caused him to purchase the truck. As we said on the former appeal: "Whether there was a warranty or whether the truck was defective are questions of fact, and should be submitted to the jury, if there is substantial evidence to prove them."

In the case of *Missouri & N. A. Rd. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478, this court said: "We will not reverse the judgment because of the insufficiency of the evidence, for, as we view this evidence, it is not physi-

cally impossible that appellee was injured as the result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner."

While the evidence of appellee is contradicted by other witnesses, yet it was a question of fact for the jury and we have repeatedly held, in testing the sufficiency of the evidence to support the verdict, that we must view the evidence in the light most favorable to the appellee. We do not pass on the facts, on the credibility of the witness, or the weight of their testimony; but if there is any substantial evidence to sustain the verdict of a jury, its finding on the facts is conclusive here.

Appellee cites and quotes from numerous cases. It may be said there is some conflict in authority. However, the only question to be determined in this case is whether there was a guaranty. The jury was instructed by the court, at the request of appellants, as follows: Instruction No. 5. "You are instructed that before expressions rise to the dignity of a warranty or guaranty, they must amount to a specific, definite and certain representation of a fact that is material, and, if you find from all the testimony in this case that the expressions of the salesman who sold defendant the truck in controversy did not definitely and certainly point to some material quality of the truck on which the defendant might rely and did rely, your verdict should be for the plaintiffs."

The court also, at the request of appellants, gave instruction No. 7, as follows: "You are instructed that the burden is upon the defendant in this case. He admits the purchase of the truck and the execution of the note sued on and sets up the breach of a warranty or guaranty alleged to have been included in the contract of sale. This means that the defendant must establish in your minds to a reasonable certainty his claims of the warranty and its breach, and this must be done by a preponderance of the evidence. If the evidence on the part of defendant on his claims of a breached warranty does not outweigh the evidence on behalf of the plaintiffs in your minds or if the evidence on the alleged breach of warranty seems to

be equal in your minds, then your verdict should be for the plaintiffs."

There were numerous instructions given, and we think the court correctly instructed the jury.

"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. 859, 860.

"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 court and jury for 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 makeweights 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; *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689.

No formal words are necessary to create a warranty. but it is only necessary to use words that are sufficient to show the intention of the parties. 55 C. J. 674, 675.

The warranty may be made orally, or in writing. 55 C. J. 675.

If the appellee's testimony is believed, and the jury had a right to believe it, the seller guaranteed that the truck could be operated less expensively than a Ford V-8; that it would use considerably less gasoline. Appellee

testified that the seller made this warranty, and that he would not have purchased the truck if this warranty had not been made; that he told the seller that he would buy it if he would guarantee that it would use less gasoline than a Ford V-8 truck.

The facts or statements relied on in this case to prove the warranty rest wholly in parol, and it was, therefore, a question for the jury to determine whether there was an express warranty. 24 R. C. L. 165.

We find no error, and the judgment is affirmed.

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

CHRONISTER *v.* SKIDMORE.

4-5476 129 S. W. 2d 608

Opinion delivered May 8, 1939.

Caudle & White, for appellant.

Opie Rogers, for appellee.

McHaney, J. Appellant brought this action against appellee to recover a 160-acre tract of land in Van Buren county, alleging that he was the owner and entitled to the possession thereof; that it was purported to have been sold to the state on June 1, 1923, and certified to the state on June 15, 1925, for the taxes of 1922; that on June 6, 1931, the cashier of the Farmers Bank & Trust Company of Russellville wrote a letter to the collector of Van Buren county directing him to draw a draft on said bank to pay the delinquent taxes on the lands here in controversy, and received a reply stating that he could find no such lands as those described; that on July 15, 1931, appellant received an entry statement from the state land office to the effect that the land in controversy was never certified to that office and that the state had no claims to the land according to their records; that the clerk of Van Buren county, through error, did not certify said lands to the state until May 3, 1932; that on July 13, 1933, appellee received from the state land office a donation entry certificate and in 1936 a donation deed was issued to him. It was alleged that the tax sale, donation certificate and deed were all void; that the tax sale was void for twenty-six separate reasons, and that the donation certificate and deed were void for twelve different reasons. He prayed that the donation deed be canceled.

Appellee filed a motion to dismiss the action because appellant failed to comply with the statutes which require

the filing of an affidavit of tender of taxes and improvements before the issuing of any writ and a dismissal of the action for failure to file the affidavit, §§ 4663 and 4664, Pope's Digest; also on account of limitations and laches. He also demurred on the same or similar grounds in addition to the ground that the complaint did not state facts sufficient to constitute a cause of action.

The court sustained the motion and demurrer. Appellant elected to stand on his pleadings and his cause was dismissed. The case is here on appeal.

Section 4663 of Pope's Digest provides that: "No person shall maintain an action for the recovery of any lands, or for the possession thereof against any person who may hold such lands by virtue of a purchase thereof at a sale by the collector or Commissioner of State Lands, for the non-payment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the non-payment of taxes, or who may hold such lands under a donation deed from the state, unless the person so claiming such lands shall, before the issuing of any writ, file in the office of the clerk of the court in which suit is brought an affidavit setting forth that such claimant hath tendered to the person holding such lands in the manner aforesaid, his agent or legal representative, the amount of taxes and costs first paid for said lands, with interest thereon from the date of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of all improvements made on such lands by the purchaser, his heirs, assigns or tenants, after the expiration of the period allowed for the redemption of lands sold for taxes, and that the same hath been refused."

Section 4664 provides for a dismissal of such an action for failure to file such affidavit of tender.

It is the contention of appellant that the making of the tender and the affidavit of tender were not conditions precedent to the bringing of the action and that this court, in construing said sections, had made a distinction between suits brought to set aside tax sales because

of mere irregularities of the officers conducting the sale, and suits where jurisdictional defects make the sale absolutely void. In other words, a distinction between voidable and void sales.

Appellant sets out one allegation of the complaint and relies upon it as rendering the sale absolutely void and as being a jurisdictional defect. It is as follows: "(1) That the quorum court of Van Buren county, purporting to levy the several respective items of taxation against the lands above described, was not legally in session at the time of the purported levying of said taxes, and each item thereof; that a majority of the legally constituted justices of the peace of said county did not attend and were not present and participating in said quorum court and proceedings, and that the roll upon the levy of the respective tax items extended upon the tax books, and for which said land was sold, was not called and that a yea and nay was not taken as is required by law."

We do not construe this allegation as constituting such a defect as claimed. The substance of it is that the quorum court was not legally in session because a majority of the justices of the peace were not present and that the roll was not called and a yea and nay vote was not taken. It is not alleged that the land was not subject to taxation, nor that the taxes have been paid, nor that the quorum court failed to meet at the time and place provided by law. Only that it was not legally in session, which is a mere conclusion of law; that a majority of the justices did not attend and were not present, another conclusion of the pleader; and that the roll was not called and a yea and nay vote taken, a mere irregularity, since there is no claim that the land was not subject to taxation or that the taxes were paid. If the pleader meant that a quorum was not present because the roll call was not recorded or that such call failed to reveal a quorum, this would still be a mere irregularity. We do not mean to say that this was a valid sale, for, according to the allegations of the complaint, which, on demurrer, we must take as true, it was not. What we do mean to say and

to hold is, that the allegation relied on is not such as would avoid the necessity of the affidavit of tender.

It has been held by this court, under certain conditions, that the statute above quoted does not apply. For instance, it was held in *Kelso* v. *Robertson*, 51 Ark. 397, 11 S. W. 582, that the payment of a tax extinguishes the authority to make a sale for its collection; in *Sutton* v. *Lee,* 181 Ark. 914, 28 S. W. 2d 697, it was held that a bad description avoids the sale as the land could not be identified and was, therefore, not sold; and in *Winn* v. *Little Rock,* 165 Ark. 11, 262 S. W. 988, it was held that sale of land used by a city for a public cemetery was void because it was not subject to taxation. See, also, *McCann* v. *Smith*, 65 Ark. 305, 45 S. W. 1057, and *Jones* v. *Fowler,* 171 Ark. 594, 285 S. W. 363. No such allegations as those noted above are in this case. The land was subject to taxation, was not exempt, the description was good and the tax was not paid.

Under the allegations here presented, the affidavit of tender of taxes and betterments as required by statute was necessary, and, not having been made, the court correctly dismissed the complaint.

Affirmed.

McHaney, J. (on rehearing). In his motion and brief on rehearing, appellant states that the court apparently overlooked an allegation in the complaint to the effect that the donation certificate and the donation deed issued by the Commissioner of State Lands to appellee were void for the reason that the defendant was a tenant upon the lands at the time of the attempted donation, and prior thereto, and that under the authority of *Casey* v. *Johnson,* 193 Ark. 177, 98 S. W. 2d 67, he could not acquire his landlord's title at a sale by the State. While it is true the complaint contained such an allegation, it is also true that it was not discussed in the original opinion for the reason that counsel for appellant failed to assign and argue it as a ground for reversal in their original brief or on the original hearing. It is presented and argued for the first time on rehearing. But it could not be sustained had it been argued, as it is not such a defect in the

title as would render the sale void for want of power to make it. The fact that it was sold to a tenant of the owner does not go to the power to sell, so as to avoid the necessity of a tender as provided by the statute.

His second argument on rehearing is likewise presented for the first time, and that is that this is not a suit in ejectment to recover the possession of lands, but is a suit in chancery to set aside a tax sale and a donation deed, and the prayer of the complaint is quoted to show that possession was not asked. It is then argued that the affidavit of tender is not required because of this fact and great reliance is placed on the recent case of *Reynolds* v. *Plants,* 196 Ark. 116, 116 S. W. 2d 350. Aside from the fact that the complaint alleges in the very beginning, "That Burlin Chronister is the owner of the following described real estate: (describing it) and is entitled to the possession thereof," it is also true that no such argument or assignment was presented as a ground of reversal on the original hearing. It is the rule in this court that assignments of error not presented or argued on the original hearing will not be considered on rehearing. *Midland Valley Rd. Co.* v. *Lemoyne,* 104 Ark. 327, 148 S. W. 654; *Driver* v. *Gary,* 143 Ark. 112, 220 S. W. 667.

It is true that § 4663 of Pope's Digest, providing for an affidavit of tender, is conditioned that this must be done in "an action for the recovery of any lands, or for the possession thereof," but it is also true that the purpose of this action was for the recovery of the lands and the possession thereof. The complaint alleges that the appellant "is the owner—and is entitled to the possession thereof," and this shows that it was a possessory action regardless of the omission of the prayer to ask it. In *Lea* v. *Lewis,* 189 Ark. 307, 72 S. W. 2d 525, also relied on, Mrs. Lea, the owner in possession, brought the action to cancel the State's tax deed to Lewis, and this court correctly held that it was not a suit to recover the land or the possession thereof and could not be as Mrs. Lea was already in the actual possession thereof. In *Security Products Co.* v. *Booker,* 195 Ark. 843, 115 S. W. 2d 870, the question of an affidavit of tender was not

raised, either in the lower court or in this court. In *Reynolds* v. *Plants, supra,* two of the appellants were minors when the lands were sold for taxes and their suit for redemption was filed "within the time permitted by the statute to redeem from the alleged tax sale." The opinion in that case might well have been based on that fact instead of on the fact that it was not a suit to recover the land or the possession thereof, and that, therefore, no affidavit of tender was required. See, also, *Hodges* v. *Harkleroad,* 74 Ark. 343, 85 S. W. 779.

In this case appellant is not in possession of the land and the gist of the action is not only to cancel the forfeiture and sale to the State, as also the donation deed from the State to appellee, but to recover the land or the possession thereof. The affidavit of tender should, therefore, have been filed and the court correctly dismissed the complaint for failure to do so. The petition for rehearing is, therefore, denied.

VELVIN *v.* KENT.

4-5508 128 S. W. 2d 686

Opinion delivered May 8, 1939.

G. P. Casey and *Geo. R. Steel,* for appellants.

Steve Carrigan, E. F. McFaddin, Albert Graves, O. A. Graves, Royce Weisenberger and *L. E. Glover,* for appellees.

BAKER, J. On May 5, 1938, the County Court of Hempstead county called an election to be held June 11, 1938, to have the electors of that county vote upon and determine the matter of the removal of the courthouse from Washington to Hope.

The election was held according to call made with the result, as certified by the election commissioners, Hope received 2,040 constituting an alleged majority of 455 votes.

There was a contest in the county court followed by an appeal to the circuit court. The contestees won in both courts. This appeal from the judgment of the circuit court challenges the correctness of the trial court's decision.

It becomes necessary, in explanation of some of the matters considered, to say the appellees have sought a dismissal of this appeal for the reason the appellants have failed to comply with Rule IX in regard to abstracting the entire record made upon the trial of the case. We have overruled that motion solely upon the ground that some matters of apparent merit appear from the abstract made, when taken in connection with the findings of fact by the court and declarations of law thereon.

Appellants have abstracted the evidence of thirteen witnesses, omitting all testimony of 247 other witnesses, so it must be held that no disputed question of fact may here be considered. Every inference and presumption to support findings in favor of appellees will be indulged.

But appellants urge that the court's declarations of law are erroneous and that the judgment must be reversed for these alleged errors.

Such a conclusion does not necessarily follow. The court may have erred in some aspects of the case and yet the final results be correct.

Appellants open their argument with an admission that according to the certificate of the collector there were 3,169 poll tax payers in the county for 1937. This was the last certificate issued prior to dates of calling and holding the election. It is also admitted that, according to the election returns as certified, there were 2,040 votes for removal which was a majority of 455. Appellants insist they have overturned this majority. Their method of attack they state as follows: "This appeal primarily involves the construction of § 2 of act 123 of the Acts of the General Assembly of Arkansas for the year 1935 and carried in Pope's Digest as § 4693, for it will be conceded by the appellees that if this court should hold that votes cast by persons who did not assess and pay their poll tax in person or upon the written authority of their agent were illegal and should be thrown out then the election failed and the cause should be reversed."

If appellants have mistaken the right or correct test in the determination of the proper majorities, it is practically conclusive that appellees must prevail. Other alleged errors urged by appellants tend to reduce the majority if sustained, but without the support of the above stated attack the appellants must fail. For that reason we now examine the only conclusive proposition presented.

The Constitution of 1874 provides that county seats may be changed by a majority of the qualified voters of the county . . . Art. XIII, § 3.

The applicable statutes are found under Chapter 39, Pope's Digest, §§ 2388 to 2400, inclusive. It will be noted that in the several sections in regard to petitions and elections those who may participate therein are designated as "qualified voters." We find in § 2398 who are "qualified voters." They are "persons who have paid their poll tax, as shown by the list of persons who have paid their poll tax as filed with the county clerk by the collector on the first Monday preceding the holding of any election or the removal or change of any county seat under this act." There was a provision in this amending act of March 7, 1901, exempting certain counties mentioned. Those counties are still under the original act as it was prior to amendment. It is significant, we think, that "qualified voters" under the original act of March 2, 1875, were those listed by the assessor as "those liable to pay poll tax" and so returned by him.

In those counties still under the original act as it was prior to the amendment, we find outstanding authority fixing definitely the status of the "qualified voter." *Vance* v. *Austell*, 45 Ark. 400.

The opinion in this cited case was delivered in 1885, prior to the passage of the amending act of March 7, 1901, now § 2398, Pope's Digest. It is a landmark in Arkansas jurisprudence. In it the act under consideration is boldly criticised as a misconception of the legal meanings of constitutional provisions, yet its constitutionality is upheld, and we think correctly so.

Since this case has never been overruled or modified it is yet the law of this state. We quote pertinent declarations from this opinion. . . . "it erects an arbitrary standard for determining the result of the election," . . . Again we find this language: "The result is that, under our Constitution and laws, before the removal can be had, there must be a majority in favor of the proposition to remove the county seat to a particular point, and the vote cast in favor of the proposition must exceed one-half the polls returned by the assessor. The last requirement is not an unreasonable regulation."

In the matter of this appeal the "last requirement" above discussed is the only one at issue. We are told

less than 200 voted against removal. So appellees must count their "qualified voters" against the total number of such "qualified voters" to determine if they have exceeded one-half thereof.

In *Vance* v. *Austell, supra,* it is stated that the assessment list had been delivered to the clerk's office on the first Monday in June, as required by § 5672, Mansfield's Digest. The court said in respect thereto: "And being so returned, it was a finality for all purposes connected with a county seat election. *Ib.* 1156. It matters not that there were other persons in the county liable to assessment for per capita tax and whose names were afterward added by the assessor; nor that some of the persons included in the list were not in fact legal voters."

And it is also held that the criterion fixed by law would be destroyed if courts were allowed to inquire into the completeness of the list, or to enter upon an investigation into the qualifications of those who did not offer to vote. It was also held that the trial court erred in holding that the assessor's books were not conclusive for the purposes of the election, but open to contradition and correction by extraneous proof. The court then struck from the assessor's list names added by him after the first Monday in June.

For more than 50 years the doctrine announced in *Vance* v. *Austell, supra,* has not been changed or modified. The statutes as construed have been deemed sufficient for the purposes designated. Experience teaches us that inadequacy will compel changes in an effort to make correction.

The application of this cited case to the problem here will be clear if we substitute poll taxpayers for the assessor's list, the poll taxpayers to be determined by the collector's list filed with the county clerk, Pope's Dig., § 2398. We quote from that section: "To ascertain the number of qualified voters of any county for the purposes of this act, etc." We have purposely ceased to quote at this point to direct attention to the expression, "for the purposes of this act," lest it be argued that this provision furnishes only a measure for the determination of a law-

ful majority. It does that by express words, so it must be held that, "for the purposes of this act" means something more.

It has been argued that § 2 of act 123 of 1935 furnished a proper test to determine who are electors. That is not a disputed question. In this case we have a certified list of electors made by the collector and filed with the county clerk in 1937. They were qualified electors, made so by statutes applicable. Chapter 39, Pope's Digest. Act 123 of 1935 was in force at the time and we think under statutes aforesaid and doctrine announced in *Vance* v. *Austell,* which we fully approve, there is a conclusive presumption effective to foreclose inquiry as to qualifications of these particular voters so listed. Act 123 of 1935 was amended by act 46, 1939, but the amendment or change does not affect any issue on appeal. This could not apply to those who may have moved away, so as to create a disqualification, nor can it apply to those who have moved into the county since the list was made.

The changing or removal of a courthouse may be said to be a special proceeding, regarded as such by both the legislative and judicial departments. The legislature has made the collector's poll tax list a criterion in county seat removals. This court gave full approval. *Williamson* v. *Russey,* 73 Ark. 270, 84 S. W. 229; *Neal* v. *Shinn,* 49 Ark. 227, 4 S. W. 771; *Dunn* v. *Lott,* 67 Ark. 591, 58 S. W. 375; *Saunders* v. *Erwin,* 49 Ark. 376, 5 S. W. 703.

So it appears the trial court erred in permitting this certified list to be challenged generally.

Upon entering upon this method of procedure this anomalous situation presented itself quite naturally. Appellants insisted several hundred were disqualified under the proof offered; that is, they were not in fact qualified voters. The court so held as to large numbers. All this was done over objections of appellees who then argued that if the court might properly enter upon such inquiries the logical consequences must result in the removal from the filed list the disqualified voters as adjudged by the court, including many alleged to have been improperly assessed and paid upon by some of the appel-

lants, in not complying with act 123 of 1935. The court overruled this contention.

Under the court's rulings, even if all those found to be disqualified were deemed to have voted for a removal and that number there deducted from the certified majority, appellants failed upon the count.

Although it might be found the court made some erroneous announcements, these were immaterial and the ruling we have announced will increase appellees' majority over that determined by the court. Besides, we have decided § 2 of act 123 against appellants' contention that it is the sole criterion. Both the certified list, and said act must be given effect. This holding is admittedly conclusive.

The only other contention appellants make is that the court, having constructive possession of all ballots, should have gone into them for examination. This was justified because of the charges of fraud and improper conduct of electors and officers of the election. These charges were serious and grave, but they did not prove themselves. Forceful and emphatic denunciation at this time does not supply proof wholly lacking upon the trial.

Without stating and discussing other matters presented, we must content ourselves with an assurance to all parties interested that we have given due consideration to all propositions argued upon this appeal, not even overlooking the oratorical plea for reverence for the honored dead and their homes as shrines for those who are whole-hearted admirers of that brilliant past. Those who lived in those days beat out the pathway for our feet. We humbly follow them. We, therefore, hold that upon the whole case the judgment was correct.

Affirmed.

MEHAFFY, J., not participating, GRIFFIN SMITH, C.J., SMITH, J., concur in judgment.

SMITH, J. (concurring). It has not been made to appear that the court below was in error in finding that a majority of the qualified electors of Hempstead county voted to remove the county seat to Hope, and for that

reason I concur in the holding that the judgment should be affirmed.

I do not concur in the reasoning by which the majority have reached that conclusion. The majority say that "section 2 of act 123 of 1935 (carried into Pope's Digest as § 4693 thereof) furnishes a proper test to determine who are electors." But that test was not applied. Had it been, many of the 3,169 names appearing on the collector's list would have been found not to be qualified electors. The court below so found, and this is admitted to be true.

I think the majority misconceive the purpose and effect of § 2398, Pope's Digest, and also the effect of the opinion of this court in the case of *Vance* v. *Austell*. It is true, of course, as the majority say, that § 2398, Pope's Digest, has changed the law as it existed when the opinion in *Vance* v. *Austell* was rendered, the change being to require, in certain counties (Hempstead, among others), a majority vote of the qualified electors as certified by the collector, instead of a majority of all persons assessed, as was formerly the law, and it is true also, as the majority say, that in those counties to which § 2398, Pope's Digest, applies, the list of voters certified by the collector is conclusive of the number of which a majority must be obtained to remove the county seat. In other words, the collector's certified list is conclusive as to the number of votes required to remove the county seat, and a vote of not less than one more than half that number is required to remove the county seat.

In determining that number it is immaterial that persons who have been certified by the collector as qualified electors are not such in fact. They must be included, nevertheless, and at least one more than half that number must vote for removal to remove the county seat. Section 2398, Pope's Digest, merely provides the basis for determining the number of qualified electors. Section 3 of art. 13 of the Constitution provides that "No county seat shall be established or changed without the consent of a majority of the qualified voters of the county to be affected by such change," and § 2398, Pope's Digest,

provides how the number of qualified voters may be ascertained. The majority quote *Vance* v. *Austell* as authority for holding that this is "not an unreasonable regulation," which is, of course, the law. But when you have thus ascertained what number of votes will be required to remove the county seat, there remains to be determined whether the necessary number of votes were cast for that purpose, and this means, of course, legal votes. No others have the right to vote in determining that question. The provisions of § 2 of act 123 of the Acts of 1935, as well as those of any other applicable statute, may be invoked, not for the purpose of changing the arbitrary number of which a majority must be received, but for the purpose of determining whether persons who voted were in fact qualified electors.

As I understand the majority opinion, it is held that the vote of no person may be challenged if his name appears on the list certified by the collector. It may not be for the purpose of determining the total number of qualified electors in the county, but it does not follow, and § 2398, Pope's Digest, does not provide, that one, not a qualified elector, may vote for removal if his name was certified by the collector as having paid a poll tax. It has never been held that the mere possession of a poll tax receipt qualifies one to vote, if he is otherwise ineligible to vote. The contrary has been held in all of the innumerable election contests which have been reviewed by this court. If § 2398, Pope's Digest, is so construed, it is clearly unconstitutional, as the section of the Constitution above quoted permits only "qualified voters" to participate in the election and to have their votes counted for removal. So that in any election contest over the removal of the county seat, the question to be determined is whether those voting for removal were in fact qualified electors, and whether the number of qualified electors so voting totaled more than half the number certified by the collector as having paid their poll tax.

Act 38 of the Acts of 1901 became and is § 2398, Pope's Digest, and was construed by this court in the case of *Williamson* v. *Russey*, 73 Ark. 270, 84 S. W. 229. The question there involved was whether the requisite

number of electors had signed petitions for the holding of an election upon the question of the removal of a county seat. Under the law, as it then existed, and now is, it was necessary for the petitions for ordering an election to contain a third of the qualified electors. In construing this act of 1901, now appearing as § 2398, Pope's Digest, it was said in the case of *Williamson* v. *Russey, supra:* "2. The act of 1901, p. 76, fixes the collector's list of the poll taxes paid as the rule to govern in determining what is the number of electors in the county, in order to ascertain the majority, etc. The legislature could fix any definite and certain number or any definite and certain way of ascertaining the number, as was herein done. This is but an approximation, for there may be many legal voters not found on that list, young men arriving of age within the prescribed time, qualified electors moving from other counties and being in the county the requisite length of time to vote, persons who had paid poll taxes and were accidentally omitted, and possibly others. Yet the collector's list must be used to govern the ascertainment of the requisite number of qualified voters to be signed to the petition. To illustrate: The collector returns 3,000 electors on his list; then the petition, to become effective, must contain at least 1,000. It might happen that through death and removals there were not 3,000 electors in the county, yet the petition must, under this act, contain 1,000 qualified electors, or it fails. On the other hand, from the causes suggested, there may be over 3,000 electors, and yet the petition is effective if it contains 1,000 qualified voters, although all of them may not be upon the list."

The rule there announced is that persons may sign the petition for an election although their names do not appear on the collector's certified list, if they are qualified electors. The corollary of that proposition is that they may not sign the petition, or vote, unless they are qualified electors, even though their names appear on the collector's list. At the election some number in excess of half the number of persons certified by the collector as having paid their poll tax must vote for removal to authorize that action, but if a majority of the qualified

electors did so vote, removal carries, even though, as was said in the Williamson case, *supra,* "all of them may not be upon the list" certified by the collector.

The right to vote is not conferred by the fact alone that names appear upon the collector's certified list, nor may it be denied because the name of a qualified elector does not appear upon the list. To hold otherwise would render ineffective the mandate of the Constitution that the county seat may be removed only upon the vote of a majority of the "qualified voters" in the county affected.

For the reasons stated I concur only in the judgment of the court, and am authorized to say that the Chief Justice shares the views here expressed.

THE NATIONAL LIFE & ACCIDENT INSURANCE COMPANY v. MATTHEWS.

4-5475 128 S. W. 2d 695

Opinion delivered May 8, 1939.

Barber & Henry and *Brewer & Cracraft,* for appellant.

Hal P. Smith and *Peter A. Deisch,* for appellee.

HUMPHREYS, J. Appellee, the beneficiary in an insurance policy issued by appellant to her husband, Mitchell Matthews, on his life, of date November 2, 1936, brought suit against appellant in the circuit court of Phillips county, to recover the face of the policy, penalty and attorney's fee. She alleged that her husband died on November 13, 1936, of a cerebral hemorrhage; that she made proof of his death to appellant, but that it denied liability under the policy and refused to pay her. Appellant filed an answer denying liability under the terms of the policy, because insured was not in good health when the policy was issued and delivered. It alleged that the policy contained a condition as follows: "No obligation is assumed by the company prior to the date hereof. If the insured is not alive or is not in sound health on the date hereof; or if before the date hereof, the insured had been rejected for insurance by this or by any other company, order or association, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection or previous disease is specifically recited in the 'Space for Endorsements' in a waiver signed by the secretary, then, in any such case, the company may, within the contestable period, declare this policy void and the liability of the company shall be limited to the return of premiums paid on the policy."

It alleged that it tendered the amount of the premiums paid to appellee, which she refused to accept, and that it now tenders said amount into court, and prayed that the complaint be dismissed.

The cause was tried on November 14, 1938, and at the conclusion of the evidence appellant requested an instructed verdict in its favor, which the court refused to give, over its objection, whereupon appellant asked the court to give other instructions, among them Instruction No. 4, which is as follows: "The policy sued on herein contains a condition, that, if at the time of the delivery of the policy the insured is not in sound health, then the company may declare the policy void within two years from the date of delivery, and the liability of the company will be limited to a return of the premiums paid

which was $1.44, which has been tendered into court, and so, if, from the evidence, you find that the insured was not in sound health on November 2, 1936, when the policy was delivered, you will find for the defendant regardless of whether the insured knew the condition of his health or not."

The court refused to give requested instruction No. 4 over appellant's objection, but at the request of appellee instructed the jury to return a verdict in her favor for $400, with 6 per cent. interest from November 13, 1936, a 12 per cent. penalty, and an attorney's fee of $100, and costs.

A verdict was returned against appellant for the amounts prayed, and a consequent judgment was rendered thereon for said amounts, from which is this appeal.

The condition of the policy was a warranty that insured was in sound health on the date of the delivery of the policy, else appellant's liability thereunder was limited to the return of the premiums.

Appellant argues that the undisputed proof shows that the insured was not in sound health on the date of the delivery of the policy. In this contention it is mistaken. Much proof was introduced tending to show that the insured was in sound health on the date of the delivery of the policy. This issue of fact was in sharp conflict. This issue should have been submitted to the jury by the court, and the court erred in refusing to do so.

On account of the error indicated the judgment is reversed and the cause is remanded for a new trial.

MASSEY *v.* FLINN.

4-5481 128 S. W. 2d 1008

Opinion delivered May 15, 1939.

W. V. Thompson and *W. M. Thompson,* for appellant.

Dene H. Coleman, for appellee.

HOLT, J. This proceeding was brought by appellee, Mrs. Nellie Mae Flinn, against Paul Massey, appellant, in the Independence chancery court for a writ of habeas corpus to recover the custody of the infant daughter of appellant who was about two and one-half years of age at the time. Appellant is the father of the child and appellee is its aunt.

Paul Massey married Pauline Pressley in 1927 and to this union two children were born, Richard Paul Massey, now about five years of age, and Patsy Gale Massey, the child here in question. Mrs. Paul Massey died on July 14, 1937, and on February 12, 1938, Paul Massey married Daisy Shell, his present wife.

About two weeks after Mrs. Massey's death her sister, Mrs. Dunlap, at Paul Massey's request, took both children to her home in Little Rock. The boy remained there for about ten days when he was taken to the home of Mrs. Thorn, another sister of Mrs. Massey in Batesville, Arkansas, and about September 20, 1937, the little girl, Patsy Gale Massey, was taken to the home of Mrs.

Thorn also. On September 29, 1937, appellee took the little girl to her home in St. Louis, Missouri, at the request of appellant.

Appellant, immediately upon his marriage to Daisy Shell, took the little boy into his home and assumed his care and custody. In August, 1938, appellee began adoption proceedings in St. Louis, Missouri, for the little girl and upon objections from appellant she later dismissed the proceedings. Thereafter she came to Arkansas, with the little girl, and she and appellant entered into a written agreement giving to appellee the care and custody of the child, Patsy Gale Massey. This agreement is as follows: "Whereas, the said Paul Massey is the father of Patsy Gale Massey, aged two years, and that shortly after the death of the said child's mother, the said Mrs. Nellie Mae Flinn, who is a sister of the said child's mother, took the custody and care of said child, and has had the care, custody, and control of said child since September 29, 1937.

"Now, for and in consideration of the mutual benefits and agreements hereinafter contained, it is agreed by and between said parties as follows:

"That said child is to remain in the care and custody of the said Mrs. Nellie Mae Flinn, who agrees to care for, support and educate and raise said child.

"The said Paul Massey is to have the right and privilege of visiting said child at any and all reasonable times, in the home of the said Mrs. Flinn; and it is further agreed that the said child shall spend at least six weeks each year with the said Paul Massey, in his home, and such other times as may be mutually agreeable, and when said child shall reach an age of discretion she may also visit her father at such time as she shall also desire, when reasonable and convenient to the parties hereto.

"During school terms said child shall be kept in school and her visits aforesaid shall in no way interfere with her education or school life.

"The said Paul Massey shall also have the privilege of counsel and advising his said daughter as to her education and avocation in life.

"That each party shall refrain from any conduct which shall tend to prejudice said child against the other.

"That the said Paul Massey and his wife shall, at all times, be treated with proper respect by Mrs. Flinn and her family.

"That the said Mrs. Flinn hereby agrees to dismiss the petition for adoption of said child now pending in the courts in St. Louis.

"That the said Paul Massey may make such contributions as he may be inclined to make to said child, but the said Mrs. Nellie Mae Flinn hereby agrees to bear all expenses incident to the raising and education of said child.

"Witness our hands this August 29, 1938.

"(Signed) Paul Massey,
"Nellie Mae Flinn."

In December, 1938, appellee brought the child from St. Louis and left her with her father, appellant, for a visit. On January 12, 1939, when appellee asked for the return of the child to her, appellant refused, whereupon appellee secured a writ of habeas corpus *returnable on* January 23, 1939. On the hearing on this writ, the chancellor decreed that appellee have the care and custody of the child for all except sixty days of each year, with the privilege to the father to visit her at all reasonable times, that the expense of bringing the child from St. Louis to the father in Arkansas be borne by appellee, and required her to execute bond in the sum of $2,000 to comply with the court's decree. From this judgment of the court comes this appeal.

On the part of appellee, the record reflects that Mrs. Pauline Massey, the mother of the child, asked appellee, Mrs. Flinn, her sister, on her deathbed to "take care of my baby." Appellee, Mrs. Flinn, testified that appellant asked her to take the baby and wanted her to have its care and custody, that she took the baby to St. Louis to her home and about a month later appellant came and stayed two weeks and tried to get employment. Her home is a modern six-room house. She is part-time employed, but

her husband and daughter have full-time employment. They are well able to care for and educate the child, their combined earnings amounting to about $80.00 a week. From September 29, 1937, when she took the child to her home in St. Louis, to January 12, 1939, appellant has never indicated any desire to take the baby girl from appellee and made no demand for her return. She desired to adopt the child, but upon appellant's objection she did not do so. Following this, the agreement set out above was entered into.

Appellant's present wife lived with her first husband about seven years, but had no children.

When appellee went to appellant's home in January, 1939, to get the child to return her to St. Louis, she found the stepmother, Mrs. Massey, very dirty and the children in a similar condition. She said to Mrs. Massey, "I wish you would not feel like you do toward me," and Mrs. Massey replied, "Why do you come here when you know you are not wanted?" When Paul came in a little later he ordered her out of the house. Appellee feels toward the child as though she were her own. On this occasion the child kept saying, "Let's go home," and cried for appellee to take her home.

The record further reflects that about two months after the death of the baby's mother, Mrs. Flinn had a conversation with appellant relative to his present wife and we quote from her testimony: "Q. You may just inform the court, if you will, why you think Paul Massey is not a fit person to have the care and custody of his own child? A. He told me himself that his wife wasn't any good, when I came for the baby in September, the night before that he didn't come home, and the next morning when he came in he said that he was ashamed of himself, and ashamed of what he did the night before. I didn't know just what he meant, and then he said he had brought his girl friend down from Sage, and spent the night with her, and he said he was ashamed of himself for acting that way, and then he begged me to get him a job in St. Louis, because he wanted to get away from here, and that he couldn't keep away from bad women

here, and that they would not let him alone. Three weeks after that he visited me in St. Louis, and he was talking to me and took a picture out of his pocket, and said, 'That is my girl friend,' and I asked him if it was the same one he spent the night with and he said it was and said she was crazy about him, but that was the way that kind of women were. He said she had been going out with married men, and that he knew she had because one of the men she had been out with told him so, but he said, 'She won't do it any more because she is so crazy about me,' and I said, 'Do you think a woman that would spend the night with a married man would be the right kind of a woman to raise your children?' and then when I learned that he was thinking of marrying this woman I went to Sage to see about it." In appellant's testimony he denied a part of the above conversation, but he himself testified: "Q. I mean what Mrs. Flinn testified to about what you told her about your wife. A. I remember telling her about one night that me and my wife had been to a dance, and we danced until two o'clock, and then went to a sandwich shop and set up there the rest of the night."

The record further shows that the child was seriously ill at one time in St. Louis and that appellee wrote appellant a letter everyday, or every other day, but that he never replied to any of these letters and that he has made no contribution toward the child's support since she has been in appellee's possession.

Appellee's sisters, Mrs. Dunlap, Mrs. Thorn, and Miss Pressley, testified that their sister, the first Mrs. Massey, did not want the little girl reared by a stepmother and that it would be to the best interest of the child to be with Mrs. Flinn, their sister. In the main their testimony corroborates that of appellee.

On the part of appellant, the record discloses that he is a mail carrier earning about $170.00 a month. He testified that appellee, after his wife's funeral, kept after him while he was all torn up to allow her to take the baby to St. Louis with her, but that he told her he wanted the children to grow up together. Mrs. Dunlap said she would keep the children for awhile. He told her he would pay

her $5.00 a week to keep them and he first gave her $6.00 when he took the children to her there and on leaving gave her $5.00 in addition. He didn't have a good home to put the baby in, and at appellee's request took the baby to St. Louis and tried to get work. Never intended to abandon either child. Appellee always promised to return the baby when he provided a home for her. He signed the agreement set out above to avoid fighting adoption proceedings in St. Louis. Appellee talked rough to my wife and was trying to stir up trouble between us and he ordered her out of his house. He insisted that she treat his wife with respect. He did not have all of the conversation with appellee that she claimed. Appellee did not treat his wife with respect. He loves his children and their mother had always said that whatever happened he must keep them all together. None of his wife's sisters wanted the little boy.

There is other evidence from many witnesses that appellant and his wife are suitable people to have the care and custody of this little girl and that appellant's reputation is good.

Appellant earnestly contends here that the evidence in this record is not sufficient to support the chancellor's findings and that divided custody is not conducive to the best development of the child in question. We shall treat these two contentions together.

We recognize the general rule that ordinarily the parent of the child is its natural guardian and is entitled to its care and custody, however, this is not always true. There are exceptions. Of prime concern and the controlling factor is the best interest of the child.

The rule is laid down in *Johnston* v. *Lowery*, 181 Ark. p. 284, 25 S. W. 2d 436, by this court in the following language: "The law recognizes the preferential rights of parents to their children over relatives and strangers, and where not detrimental to the welfare of the children, they are paramount, and will be respected, unless special circumstances demand that such rights be ignored. *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513; *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726.

"The courts will not always, however, award the custody of an infant to the father, but, in the exercise of a sound discretion, will look into the peculiar circumstances of the case, and act as the welfare of the child appears to require considering primarily three things: (1) Respect for parental affection, (2) Interest of humanity generally, (3) The infant's own best interest."

And again in *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. 2d 879, the late Judge Hart again stated the rule: "Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights. This is a habeas corpus proceeding, and the court had the authority to grant the custody of the child to the aunt, provided it finds that the father had forfeited his rights thereto. Three parties are interested in the custody of minor children, the State, the parents, and the child itself. While the right of the father to the custody of his child is paramount, this is denied in many cases, and, regard being had for the welfare of the child, its custody has been placed elsewhere. *Verser* v. *Ford,* 37 Ark. 27; *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Coulter* v. *Sypert,* 78 Ark. 193, 95 S. W. 457; and *Clark* v. *White,* 102 Ark. 93, 143 S. W. 587, Ann. Cas. 1914A, 739. Other cases from this court and from many other courts of last resort to the same effect will be found cited in a case-note to Ann. Cas. 1914A, 748.

"The permanent well-being of the child more than its present enjoyment is to be considered as of prime importance. No hard and fast rule can be laid down on the subject, and each case must be governed to a large extent by its own particular facts."

We recognize the difficulties confronting the trial court in striving to reach a just decision in cases of this character. However, we also recognize that he is in a better position to weigh the evidence and to arrive at a proper conclusion than this court which sees and hears none of the witnesses. As this court said in *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474, "We have here the judgment of a circuit judge awarding the custody of

the child to its natural parents, and due effect must be given to that finding.

"In the case of *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389, Chief Justice Cockrill said: 'The circuit judge had the parties, the witnesses and the child before him, and was charged with the exercise of a sound discretion in disposing of the question.' This was said after a review of the law of the subject of the award of custody of an infant."

We agree with appellant that the written agreement between the parties to this litigation, set out, *supra,* is not binding upon appellant, however, it is of strong probative value as evidence of the feelings, desires and wishes of both appellant and appellee relative to the custody, welfare and best interest of this little child. As was said in the *Holmes* v. *Coleman Case, supra*: "A father cannot, by a mere gift of his child, release himself from the obligations to support it or deprive himself of the right to its custody. Such agreements are against public policy, and are not strictly enforceable."

We do not think that the fitness or competency of the father is the only criterion by which to judge his right to the custody and control of his child. This court in *Willis* v. *Bell,* 86 Ark. 473, 111 S. W. 808, said: "We think the evidence establishes the fact that he (the father) is a man of good repute, that he is in good condition financially, and has a comfortable home shared by his mother, and that the child would be well cared for there, and properly reared. But for the present, at least, what she needs most is a mother's care and attention."

In *Verser* v. *Ford,* 37 Ark. 27, this court said: "In this case the motherless infant was taken by the maternal grandmother with the father's assent, and tenderly guarded through all the perils of infancy. There has been all of a mother's care, and scarcely less than a mother's affection. The child is yet scarcely three years of age, delicate in health; she is in a safe asylum, surrounded by those who may be trusted to guard her anxiously against pernicious influences, and to do the best to instill into her mind such principles as will pro-

mote her future usefulness and happiness. They, too, plead the full strength of natural affection.

"The infant needs female care and guidance of that patient, ever-watchful nature which is better insured by the natural affection of a grandmother than by the inexperienced efforts of a father or the sense of duty of the second wife."

After carefully considering this entire record, we cannot say that the findings of the chancellor are against the preponderance of the testimony, and finding no errors, the judgment is accordingly affirmed.

McDONIEL *v.* EDWARDS.

4-5560 128 S. W. 2d 1007

Opinion delivered May 15, 1939.

S. M. Casey and *Shields M. Goodwin,* for appellants.

S. C. Knight, for appellees.

HUMPHREYS, J. Big Bottom Fencing District was created in Independence county by special act No. 41 of the Acts of 1891, the assessors of the district, three in

number, being named in the act to serve until the first Saturday in January, 1892.

Section 3 of the act provides that the landowners in the district shall, on the first Saturday in January of each alternate year, beginning with the year 1892, elect three of their members (landowners) as a board of assessors.

On Saturday, February 19, 1938, appellants, J. F. Cossey, W. E. McDoniel and R. L. Sliger were unanimously elected assessors of the district and qualified as same. After qualifying and organizing they demanded that appellees, who were elected assessors in 1936, surrender and turn over to them all books, records, moneys, accounts and property of the district which demand was not complied with.

On the first Saturday in January, 1939, appellants, W. E. McDoniel, L. S. Cash and W. A. Barber were unanimously elected assessors of the district and qualified as such. After qualifying and organizing they also demanded that said appellees surrender to them all books, records, moneys, accounts and property of the district, which demand was not complied with.

This suit was brought by appellants against appellees in the circuit court of Independence county to oust appellees and recover the possession of the offices and property of the district under the allegations of appellants that they were legally elected as assessors of said district either in the election of 1938 or 1939 and are, therefore, entitled to the offices and property of the district.

Appellees filed an answer denying that appellants were elected assessors on the day provided in the act creating the district in either election and for that reason were not legally elected assessors and not, therefore, entitled to the offices or property of the district.

The case was tried on an agreed statement of facts which was incorporated in the judgment resulting in a dismissal of the complaint over appellants' objection and exception, from which is this appeal.

The main and controlling question arising on this appeal is whether appellants are entitled to the offices and property of the district in view of the undisputed fact that both elections were held on different days from the day provided in special act No. 41 of the Acts of 1891 creating the district. Said act provides that the landowners within the district shall elect three of their number (landowners) as a board of assessors on the first Saturday in January, 1892, and each alternate year thereafter.

As stated above according to the undisputed facts the election held in 1938 was on the 19th day of February and not the first Saturday in January and the election held on the first Saturday in January, 1939, was not held in an even-numbered year or an alternate year as provided by said act. Both elections, therefore, were void. This court said in the case of *Simpson* v. *Teftler*, 176 Ark. 1093, 5 S. W. 2d 350, that: "The first question to be determined is whether the election held on August 11, 1925, was void, the act requiring the election to be held on the first day of April, 1925. When the Legislature fixes the time, names the day on which an election shall be held, said election must be held on that day. The holding of an election on any other day than that named by the Legislature is not authorized and the election is void."

The instant case is ruled by the case cited.

The judgment is, therefore, affirmed.

FLEMING, ADMINISTRATRIX *v.* MISSOURI & ARKANSAS RAILWAY COMPANY.

4-5482 128 S. W. 2d 986

Opinion delivered May 15, 1939.

Brewer & Cracraft, for appellant.

Jo M. Walker and *W. W. Sharp,* for appellee.

GRIFFIN SMITH, C. J. We adopt appellant's statement of the case, as follows:

"This appeal is from a directed verdict for the defendant in a suit brought by the administratrix of the estate of Carl Allen Fleming.

"The deceased was killed on the night of October 9, 1935, at approximately 11:30, due to a collision between the automobile he was driving and a train of freight cars belonging to the Missouri and Arkansas Railroad Company, appellee, which had blocked the crossing where highway No. 70 intersects the railway a short distance west of the town of Wheatly in Monroe county, Arkansas. There is a curve in the highway a short distance west of this crossing and a slight decline from the curve down to the track. There had been a number of serious accidents at the same point prior to this fatal injury and a number thereafter, resulting finally in the construction by the railroad company of an automatic barrier. The accident happened on a dark, rainy night, and the deceased had never been over this highway before and was

at the time on his way from Texas to points east of the Mississippi river.

"According to the testimony offered by appellant, there were no flares or signal lights or any other warnings of the train blocking the highway at the time of the accident.

"The court excluded all evidence of the number of accidents that had happened at this point under similar circumstances, which the appellant had offered for the purpose of proving that there was a dangerous condition of which the railroad company had notice.

"At the close of the plaintiff's case, the defendant moved and was granted a directed verdict, and the case is on appeal here on the questions: (1) Whether the evidence offered by the plaintiff was legally sufficient to support a verdict, tested by the rule that the testimony must be given its strongest probative force in favor of the plaintiff's cause of action. (2) Should the excluded evidence, which would have established that a large number of accidents had occurred at this crossing, have been admitted for the purpose of showing existence of and notice to the railroad company of the hazardous condition of the crossing? (3) Was this injury to the deceased caused by the running of a train which cast the burden of proof upon the railroad company, upon proof of the happening of the accident? (4) Could the deceased be said to be guilty of contributory negligence as a matter of law?"

Gordon Duncan, testifying for appellant, said that he was returning from Memphis to his home in Brinkley. He did not observe any flares at the crossing; was on the east side of the track, but could see under the train of cars; attention was attracted to the blocked highway. A light was shining through between the box cars. The weather was "misting rain and dark."

The question was asked: "I now want to ask you if, in your knowledge and observation, this crossing is dangerous and deceptive to persons approaching it, particularly from the west, going east?"

An objection was sustained.

The witness further testified—"It must have been ten or twelve or fifteen cars from where Mr. Fleming hit the side of the train up to the engine. I do not know just how far it was back to the caboose. It was some distance. . . . . It looked as though the [automobile] had hit the train and [had been knocked] sideways. The light of the [automobile] was shining and continued to burn after it was hit. The train was coupled up. . . . As to the curve of the road coming from Brinkley down to the crossing, I would not say exactly. I am by there every week, but I would say it is about 100 yards from the top of the hill; you come up a hill and the curve is around this way [indicating to the left]. The top of the hill is about 100 yards. There is a little decline running to the track."

R. C. Wise had been to Brinkley. After starting home it began to mist, and was cloudy. Witness was with his wife, traveling in their automobile at thirty or thirty-five miles per hour. Half way between Brinkley and Wheatley Fleming passed them, "driving at a high rate of speed—forty to forty-five miles an hour." When witness reached the crossing he could see the tail light of an [automobile]. He remarked to Mrs. Wise that it was the car that had passed them, and that it had run into a train. —"As I approached the train a brakeman and flagman came from some point, which to my mind was from between some cars. I know he was coming from the other side of the train, and he flagged me down, thinking there would be another wreck; but I saw the situation before I arrived, and drove on the shoulder of the highway. . . . The two trainmen had lighted lanterns, . . . but had not gotten to the car when we arrived. This is the only crossing accident that I have observed at this place, but I know of others that have happened. I know of four or five that have happened."

Fleming had not previously been over Highway 70 between Brinkley and Wheatley. This fact is relied upon by appellant to distinguish the instant suit from *Gillenwater* v. *Baldwin, Trustee, et al.*, 192 Ark. 447, 93 S. W. 2d 658.

In the Gillenwater Case the car driver approached a blocked crossing at a point on the highway with which he was familiar. In the opinion it is said: "The record is silent as to the purpose for which the train stopped or how long it had been there when appellant Gillenwater ran into the flat car. For aught that appears, it may have just come to a standstill, and time sufficient may not have elapsed for the brakeman to hang out a lantern or other signal or to place a watchman to warn the public who might be approaching. The record does not reflect that the train had stopped and obstructed the street in violation of any ordinance or had been there for an unreasonable length of time without putting out a signal."

It is the settled rule that whether failure of a railroad company to station a flagman at a crossing constitutes an omission of such care as an ordinarily prudent person would use under the same or similar circumstances, is a question of fact where there are obstructions which materially hinder the view of approaching trains, provided the crossing is used frequently by the public, and numerous trains are run. Inasmuch as permanent surroundings may create a hazardous condition, the rule of care goes further and requires precautions where special dangers arise at a particular time. It is said that the obligation exists, at an abnormally dangerous crossing, to provide watchmen, gongs, lights, or similar warning devices not only for the purpose of giving notice of approaching trains, but such care is to be equally observed where the circumstances make their use by the railroad reasonably necessary to give warning of cars already on a crossing, whether standing or passing, as where a crossing is more than ordinarily dangerous because of obstructions to the view interfering with the visibility of the responsible train operatives, or those approaching the track.

Appellant seeks to invoke the rule of care on the theory that other wrecks or collisions had occurred where Fleming was injured; that the frequency of accidents was sufficient, as a matter of law, to put appellee on notice of the special hazard alleged, and that ordinary prudence

required the placing of signals at a point plainly observable to users of the highway.

These contentions would be availing if the special circumstances heretofore mentioned were present. But they were not. The railroad crosses the highway at almost a right angle, and the approach is straight for at least a hundred yards. No more effective precaution could have been adopted by the unfortunate driver than reasonable attention to the highway in front of him, under the illumination of his own headlights.

In *The Kansas City Southern Railway Company* v. *Briggs,* 193 Ark. 311, 99 S. W. 2d 579, (quoting part of a syllabus), it was said: "Since the train was at the station not exceeding three or four minutes, the company was not required to keep a watchman at the crossing or to display a light signal or give other warning of the standing train."

Chicago, Rock Island & Pacific Railway Company v. *Sullivan,* 193 Ark. 491, 101 S. W. 2d 175, is decisive of the case at bar. There the appellee was traveling from Texas to El Dorado, Arkansas, in a car operated by Mitchell. Appellee repeatedly cautioned Mitchell, who at no time drove faster than fifteen or twenty miles an hour. They approached the crossing at about nine or half past nine o'clock at night. The first information appellee had that they were going on the railroad was when the automobile hit the train. They struck the first car back of the locomotive. The engineer "never blew the whistle nor rang the bell." After the collision the train stopped with the caboose just above the crossing. It had been raining that day, but was not raining at the time of the accident. The car driver said his brakes were bad and he was unable to stop. Mr. Justice Butler, who wrote the opinion, said:

"When the testimony of the appellee is accepted as true, and the greatest weight given to it, we are of the opinion that it fails to establish actionable negligence on the part of the appellants. While appellee stated that the train whistle was not blown or the bell sounded, she admitted that the automobile struck the box car behind

the locomotive. Therefore, the locomotive was blocking the highway as the automobile approached, and was of itself notice of its presence. The only negligence testified to was the failure of the train crew to sound the whistle or ring the bell. . . . Assuming there were no signals given, this was not the proximate cause of the collision, which can be attributed only to the inattention of the driver of the automobile, and its defective condition."

So, in the instant case, appellant's intestate, although not familiar with the crossing, was using a public highway of ample dimensions, and at a point where a view straight ahead for three hundred feet necessarily enabled him, if he had been exercising ordinary prudence, to see the blocked crossing. As expressed by Chief Justice Hill in *St. Louis & San Francisco Railroad Company* v. *Ferrell,* 84 Ark. 270, 105 S. W. 263, and quoted with approval by Judge Butler in the Sullivan Case, "The object of signals is to notify people of the coming of the train. Where they have that knowledge otherwise, signals cease to be factors." The same rule of reason applies in derogation of a cause of action by one who, by the exercise of ordinary care, would have seen a blocked crossing in ample time for self-preservation. The freight cars were on the crossing, the highway was straight for a distance of a hundred yards, Fleming's headlights were ample, there were no abutting buildings or other obstructions, the train was not suddenly projected across the highway; and, although the weather was misty and perhaps there had been a slight rain, it is not shown that visibility was extraordinarily poor. Even if such had been the case, that fact in itself enjoined upon Fleming additional care for his own safety. He was traveling, as one of appellant's witnesses said, "at a high rate of speed." Photographs introduced in evidence show that the "hill," and "curve," are a sufficient distance from the railroad to contribute to the element of safety in so far as the crossing is concerned, for one driving with reasonable prudence on a dark and misty night (and particularly one who is unfamiliar with the route) would be ex-

pected to slow down at the point of curve; and beyond the curve, beginning at point of tangent, there is an unobstructed view to the track for three hundred feet. The "little incline" which dips from the curve to the crossing is negligible, not exceeding seventy-six hundredths of one per cent.

In any view that may be taken, Fleming's inattention was the proximate cause of the accident. His negligence was greater than that of appellee, even though it should be conceded that similar accidents had occurred at the point in question.

Second. It was not error to exclude evidence of other accidents. Mere proof that some one else had been injured at this crossing would not establish appellee's culpability, and there is no presumption that when a collision occurs one of the involved parties is negligent to the exclusion of the other. For all that the record may show, the conduct of each of those who suffered misfortune may have been the sole cause of the happening. It is not urged that the track was physically faulty, or that an obligation to repair and maintain had been disregarded.

Affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

CHRISTOPHER *v.* WASSON.

4-5479 128 S. W. 2d 1012

Opinion delivered May 15, 1939.

Stevens & Cheatham, for appellant.

J. L. Davis and *H. B. Colay,* for appellees.

McHaney, J. Appellants, husband and wife, seek to set aside a foreclosure decree, the sale, confirmation and commissioner's deed to the NE NW-23-16-20, Columbia county, all occurring in 1934, and also a deed conveying the same property by the purchaser at the foreclosure sale, appellee Marion Wasson, to appellee McNeil Hardware & Furniture Co., dated September 28, 1936. Their complaint for this purpose was filed June 1, 1938.

The record reflects that, on June 11, 1932, appellant W. M. Christopher and his then wife, Perreine, borrowed $450 from the Bank of McNeil for which they executed their promissory note, secured by a deed of trust on 120 acres of land other than that above described. Said note being past due and unpaid, and said bank having become insolvent and being in the hands of appellee, Marion Wasson, State Bank Commissioner, for liquidation, he brought suit to foreclose said deed of trust on May 25, 1934. Perreine Christopher died and, on May 12, 1933, W. M. Christopher married his present wife, Mattie. Not knowing that Perreine had died, the bank commissioner had summons issued for her and her husband which was

served on him and a return made showing such service and the death of Perreine.

On July 12, 1933, appellants executed and delivered to the McNeil Hardware & Furniture Co., their deed of trust to the 40 acres of land above described, the land now in controversy, to secure their note for $200 due November 1, 1933, with interest at 10 per cent. from maturity. This note and deed of trust were acquired by the Bank of McNeil and on September 12, 1934, the bank commissioner filed an amendment to his complaint, setting up this additional cause of action, the note, the deed of trust, the assignment of both, the fact that the note was past due and unpaid, and prayed judgment for the amount thereof with interest and a foreclosure. Summons was issued on this amendment against Mattie Christopher and had upon her. No additional service was had upon her husband. No defense was made, no answer or other pleading filed and judgment was rendered by default, sale had, confirmed and deed issued to the bank commissioner, all in 1934. Appellees answered denying the illegality of the sale. Trial resulted in a decree dismissing the complaint of appellants for want of equity. The case is here on appeal.

For a reversal of this decree, appellants first say that there was a misjoinder of actions and parties, in that the suit on the $200 note could not be properly joined with the suit on the $450 note. We cannot agree. The real parties in interest were the same. While it is true the $200 note and deed of trust had originally been given to the McNeil Hardware & Furniture Co., it is also true that the latter sold and assigned same to the bank or to the bank commissioner, who was then the owner of both notes and deeds of trust. If separate suits had been filed, they could have been consolidated for trial as both were between the same parties. But, if they were improperly joined appellants have waived the right to object. Sections 1286 and 1287, Pope's Digest. See *Lake v. Combs,* 84 Ark. 21, 104 S. W. 544. Service was had upon both appellants,—on him in the original action and on her in the amended action.

But if we concede that the actions were improperly joined and that their failure to object did not waive the right, still the decree cannot now be set aside three and one-half years later, as they have not stated or offered to prove a meritorious defense to the action. *Sweet* v. *Nix,* 196 Ark. 284, 122 S. W. 2d 538; *Federal Land Bank* v. *Cottrell,* 197 Ark. 783, 126 S. W. 2d 279; *Minick* v. *Ramey,* 168 Ark. 180, 269 S. W. 565.

Another argument is that J. R. Kendall being the trustee in the deed of trust securing the $200 note and a party to the suit, could not serve the summons on Mattie Christopher, which he did as deputy sheriff. But as we said in *Sweet* v. *Nix, supra,* "Appellants cannot question the service in the absence of a defense to the original action." This also disposes of other contentions made as to the service on each of them.

Appellants also contend that the notice of sale and the judgment on which such notice is based are insufficient. We fail to find where any such issue was raised in the pleadings or in the trial court, but if they were, they would be concluded by the decree of confirmation. Proof of publication of the notice of sale is also questioned because it was signed "W. M. Jones, Business Manager," instead of W. M. Jones, Manager. We think this form was in substantial compliance with § 8784, Pope's Digest. But if it be a fault, it was cured by confirmation. *Carpenter* v. *Zarbuck,* 74 Ark. 474, 86 S. W. 299.

The decree is correct and is, therefore, affirmed.

PROTAS *v.* MODERN INVESTMENT CORPORATION.

4-5478 128 S. W. 2d 360

Opinion delivered May 15, 1939.

R. S. Wilson, for appellant.

Hardin & Barton, Rittenhouse, Webster & Rittenhouse and *Paul E. Gutensohn*, for appellees.

GRIFFIN SMITH, C. J. Appellants alleged an oral contract of fire insurance. This appeal is from actions of the chancellor in finding that the allegations were not established, and in dismissing for want of equity.

The London Assurance, United States Branch, through its agency at Oklahoma City, issued a $2,000 policy indemnifying appellants against loss on furniture, fixtures, and motion picture projecting machines at Spiro, Oklahoma. The policy was dated November 26, 1937, with a December 17 endorsement. As originally written, the insured were listed as J. L. Protas and Frank Comber. Under the endorsement, Comber was substituted as the insured in lieu of Comber and Protas.

Protas was in the mercantile business in Fort Smith and had been so engaged, as he testified, for about ten years. During that period C. W. Jameson, manager of

Modern Investment Corporation of Fort Smith, had been writing insurance on Protas' Fort Smith business.

Protas was asked if Jameson had been representing him as an insurance agent, and replied that he had. Protas contended that from November 26, when the Spiro property was insured, there were conversations respecting the policy, resulting in corrections. About January 9, 1938, the coverage clauses were examined and certain irregularities were noted. The policy was retained by Jameson, who subsequently sent it to the agency at Oklahoma City.

Protas testified that at the time the policy was being examined, and when conversations were had relating to the inaccuracies, he and Comber owned a picture show at Webbers Falls, Oklahoma.—"At that time we told Mr. Jameson to insure Webbers Falls because the equipment was in, and as we had told him before it would be ready. When Mr. Jameson was leaving he said, 'You want this [Webbers Falls policy] just like [the Spiro] policy'? [and I said], 'Yes, except $1,000 more, because we have new and more expensive machinery at Webbers Falls'—and that was good night."

"Q. When you told him you wanted the insurance on the Webbers Falls equipment, what did he say? A. He said, 'Boys, you are covered' ".

Fire destroyed the Webbers Falls equipment January 19. Protas says he notified Jameson the day of the fire.—"Mr. Jameson came up to my place of business: 'Mr. Jameson,' I said, 'how are the policies'? 'O, everything's all right,' [he replied]. I questioned him again about the Webbers Falls policy, and he said, 'You are covered.' I [then said], 'Well, the darned place is burned down,' and he said, 'Well, make out your list of equipment.' It took up that day and part of the night to look up the bills. The next day Mr. Comber and I delivered to Mr. Jameson at the Ward Hotel building an itemized statement of the equipment that was burned . . . This is a copy. Mr. Jameson called me in an hour or so and said, 'Protas, you have some things like "stage" that doesn't belong to the equipment. I believe

that if you will take this off it won't be complicated with the insurance company.' I assumed he was right. Jameson came out to my place of business two or three times; in fact, we paid him a balance on the Spiro policy, as well as I believe, on Mr. Comber's automobile . . . He said, 'You are covered; you have nothing to worry about'. We didn't worry about it until about six weeks, and then we began looking for some one to give us advice. . . . We demanded adjustment of the loss, and Mr. Jameson would say, 'Well, still nothing from main headquarters' —that he hadn't heard from them, or something like that."

On cross-examination Protas stated that Frank Comber was his brother-in-law; that at the time of trial his son, A. J. Protas, was owner of the Spiro property; that on December 17, 1937, witness and Comber each owned a half interest in the Spiro business, but on December 17 he had R. M. Langston, the Oklahoma agent, put an indorsement on the policy showing Comber to be the owner; that to the best of his recollection the Webbers Falls property was acquired about the first of November; that his interest was that of a lessor.

Substance of other testimony offered by plaintiffs was that Comber and Protas informed Jameson they would like to have insurance on the Webbers Falls property, and that Jameson replied, "All right, you are covered." Jameson was asked to "Please take care of this."

The complaint alleged the oral contract of insurance was entered into November 26, which was the same day the policy on the Spiro property was dated.

C. W. Jameson testified he was manager of Modern Investment Corporation, residing in Fort Smith; that neither he nor his company had at any time represented The London Assurance; that he was not authorized to do business in the State of Oklahoma, nor was Modern Investment Corporation; that appellant Protas has business interests in Fort Smith, and he (Jameson) had written insurance for Protas for a number of years; that he first heard of the motion picture business at Spiro in December, 1936, "when Mr. Protas told me about owning

the property. He stated that he did not have insurance, and would like to get it. I told him I couldn't write insurance on property in Oklahoma, but that I had a friend in Oklahoma City I could contact, and that I could get the policy issued through this friend of mine—Mr. Harris, State agent for The London Assurance."

The witness testified that he wrote Harris; that Harris was unable to get the Spiro rate, because it had not been established by the bureau; that he (Jameson) had several conversations with Protas, but that Harris could not get the Oklahoma bureau to rate Spiro. The matter was dropped, but in October, 1937, Protas and Comber called on witness at his office. While there, something was said about the Spiro property. Witness told Protas and Comber he would again try to get a rate. At the same time Protas and Comber said they were on a deal for a picture show at Webbers Falls, and that they would want insurance there.

Witness says he told his callers to let him know when they were ready. In the meantime, he wrote Harris, reopening the case, stating that $2,000 in insurance was wanted on the Spiro property.—"We were unable to get a rate on Spiro for some little time. In November Mr. Harris wrote me and told me that the only way it looked like they could get the bureau to rate this property was to write a policy on it. So this policy on the Spiro property was written, effective November 26, 1937. When I took this policy to Mr. Comber it was written at a $2.50 rate, which made the premium $50. Mr. Comber said he wouldn't pay any such premium as that.

"I tried to explain that in the event the premium was lower when the final rate was established, there would be a return premium due him. He told me to ascertain what that would be, and then he would talk business with me. That was along about the first of December. At the same time they told me about an error in the coverage, and we sat there and discussed it. They also told me they had leased the Webbers Falls property and were going to want some insurance. I told them I would get them the rate on it. . . . As I remember, they hadn't gotten

possession of the property at that time—or just had gotten possession: they hadn't done any work on it. [Without returning the Spiro policy] I wrote and told Mr. Harris of the refusal to pay the rate, and that I would like to get the flat rate cancellation period extended because I didn't want to be 'stuck' on the premium. He wrote back and told me the bureau was working on the rate and he would allow flat cancellation on the policy in the event it wasn't accepted. A little later in December—the 16th, I believe it was—I was out at the store. . . . I had the Spiro policy in my possession. . . . I offered it to them, but they were still haggling over the premium.

"Mr. Protas had a small loss on a dwelling house. This was January 19. After I got there he asked me about this insurance on the Webbers Falls property and I told him I hadn't received a rate on it yet. He wanted to know if he was covered, and I told him, 'No, you aren't covered; I haven't been able to get a rate on it yet.' He said, 'I am awfully sorry; we thought we were going to get that insurance issued, and we had a fire last night, and it burned.' I told him if I could assist him in any way I would be glad to do that, but that I had not bound the company; I couldn't bind the company. I hadn't had any authorization either as to the amount or the time for the insurance to start. I had no notice of any equipment ever being placed in the building, so I didn't feel like he had anything to insure, or he would have notified me if he had."

According to Jameson, final adjustment of the Spiro rate was had in February, and the policy was delivered. Jameson insisted that when he talked with appellants December 16 about insuring the Webbers Falls property, seats he thought were samples of those to be installed in the Webbers Falls theatre were in Protas' store. Witness denied stating that the property would be "covered"; but, to the contrary, insisted that he said, "When the time comes I will take care of it."

It was shown that the Spiro policy bore the indorsement: "Modern Investment Corporation. Insurance, Real

Estate. C. W. Jameson, manager, Fort Smith, Arkansas." In explanation of the indorsement, Jameson testified—"Well, you see, the policy wasn't paid for. If a man has a policy in his files, he should at least know who he was. . . . They owed me for this policy; it had never been paid for."

Testifying further, Jameson said: "After the fire Mr. Protas and Mr. Comber asked me what to do, and I said, 'The first thing you ought to do is to find out what your loss is—you had better get your bills together and find out where you are, and if I can be of any assistance, I shall be glad to do so. . . . They were hoping they would be able to collect from the insurance company. . . . The reason I went out to his house was that I had a $17.50 check from another insurance company for him. I delivered it to him, and he told me about the fire. . . . The first payment on the Spiro policy was in April, 1938—$10. Another ten-dollar payment was made in May, and the balance of $13.20 was settled in June. The rate had been adjusted to $33.20.

Appellants contend (a) that subject-matter of the claimed Webbers Falls insurance was not in existence, or at least the property had not been placed at the time Jameson is said to have agreed upon the coverage; (b) that Jameson was representing Protas and Comber as their agent in procuring at their request insurance in a foreign state, if in fact there was a contract; (c) that service of summons on the Commissioner of Insurance for Arkansas did not give jurisdiction to the Arkansas court in a cause of action originating in Oklahoma, under a policy alleged to have been written in Oklahoma on property located in that state; (d) that the statutes of Oklahoma prohibit foreign insurance agents writing insurance in that state, and (e) the purported oral contract was not, in fact, made.

First. The London Assurance, without waiving any of its rights, moved to have the summons quashed. We think the motion should have been sustained. The contract sued on, even if we accept appellants' views of the transactions, was made in Oklahoma, and was to have been

performed there. The defendant could not be brought into an Arkansas court in the manner attempted.

Old Wayne Mutual Life Association of Indianapolis v. *McDonough,* 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345, was an action in an Indiana court against the plaintiff in error upon a judgment against it in a Pennsylvania court. The defendants in error brought suit against the insurance company (an Indiana corporation) in Pennsylvania, upon a certificate of life insurance, whereby the insurance company agreed to pay Winnifred Herrity and Sarah McDonough, of Scranton, Pennsylvania, or their legal representatives, the sum of $5,000, etc., the policy or certificate having been on the life of Patrick McNally. Death of the insured having occurred, suit was prosecuted under jurisdiction alleged to have been acquired through summons served on the Insurance Commissioner for Pennsylvania. The insurance company, after its demurrer had been overruled, answered, alleging its status as an Indiana corporation; denying that it had ever been admitted to do business in Pennsylvania; that no one of its agents or officers was in that Commonwealth at the date of the alleged suit, or had been there since; that no summons was served upon it, and that it did not appear in that action; that no one appeared for it in Pennsylvania who had authority to do so.

There was judgment by default, and an effort to collect in Indiana. Plaintiff in error insisted that the Pennsylvania court had no jurisdiction, and consequently the judgment was void for want of the due process of law required by the Fourteenth Amendment. In disposing of the case, the court said:

"As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant association and without it having appeared in person, or by attorney or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment, we

hold that the judgment in Pennsylvania was not entitled to the faith and credit which by the Constitution is required to be given to the public acts, records and judicial proceedings of the several States, and was void as wanting in due process of law."

Simon v. *Southern Railway Company,* 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492, is in point. The Louisiana statute required foreign corporations doing business within the State to name an agent for service, and further provided that upon failure so to do, process served upon the Secretary of State would have the same effect as though the corporation had been served personally. It was alleged that the appellant had fraudulently obtained a judgment against the Southern Railway; that the Company had no notice the suit had been brought. There was judgment by default. Upon ascertaining that judgment had been rendered, the Company filed in the United States Circuit Court for the District of Louisiana a bill against Simon, a citizen of Louisiana, asking that he be perpetually enjoined from enforcing the judgment. The opinion by the Supreme Court of the United States says:

"Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be had upon an officer designated by law. . . . But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointment, could

not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association* v. *McDonough, supra,* that statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States."

In *National Liberty Insurance Company* v. *Trattner,* 173 Ark. 480, 292 S. W. 677, the appellee had brought suit in Craighead Circuit Court to recover $12,000 under a fire insurance policy. The goods and fixtures, at the time the policy was issued and the loss incurred, were contained in a building in St. Louis, State of Missouri. The plaintiff was a citizen of St. Louis. Summons was served on the Insurance Commissioner for Arkansas. The defendant, a foreign corporation, had been authorized to do business in this State. It appeared for the sole purpose of moving to quash summons. Judgment was for the plaintiff.

The opinion was written by Mr. Justice Kirby. He quoted § XI, art. 12, of our Constitution,[1] and then said:

"A fair construction of our law under the provisions of which foreign corporations are authorized to do business in the State upon the appointment of an agent upon whom process can be served, made primarily to secure local jurisdiction in respect of contracts made and business done within the State, would seem to require only that such corporations shall be subject to suit for any liability arising from or growing out of contracts made or business done in the State or necessarily incident thereto, and not that they shall be required by service

[1] "Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this state except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this state, nor shall they have power to condemn or appropriate private property."

of summons upon said agent to be subject to suits of non-residents of the State upon foreign causes of action, transactions, and causes of actions arising outside the State and in no wise incident, related to, or connected with contracts made or business done in the State. The Legislature . . . is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the State, and having no reference to or effect upon persons or property in the State."

The difference between the suit at bar and the Trattner Case is that Protas and Comber are residents of Arkansas, while Trattner was not. The principle, however, is not affected by that circumstance. The subject-matter of the instant suit (if in fact it existed within legal contemplation at the time the conversations upon which coverage is predicated are alleged to have occurred) was in Oklahoma. In writing the Spiro policy, the London Assurance acted through its agent at Oklahoma City. Jameson was not authorized to write insurance in Oklahoma, nor did he represent The London Assurance in a manner creating the relationship of principal and agent. It is probable that, as a friend of appellants, and as one who had handled their insurance business for ten years, Jameson undertook, after being informed of the fire, to be of service to his clients. He had written Harris that a policy at Webbers Falls was wanted. He did not know what the company's attitude would be with respect to the claim, and suggested to appellants that they make proof. This was not inconsistent with his previous relationships, although he seems to have impliedly expressed a degree of optimism not warranted by the facts, and to that extent he possibly misled his clients. If this conduct be conceded, still there was no ratification. Not being an agent of The London Assurance, no unauthorized act of his could amount to ratification.

Nor can Modern Investment Corporation be held liable. A preponderance of the evidence establishes the fact that Protas and Comber knew negotiations for the Spiro policy were being carried on with the Oklahoma

City agency, and according to their own testimony the Webbers Falls policy was to be similar, except as to amount.

Having reached the conclusion that as to the appellee The London Assurance there was no proper service; and further, that there was no oral contract of insurance; and having determined that there was never an intention that the alleged policy should be written by Modern Investment Corporation, it follows that the judgment must be affirmed. It is so ordered.

HOLT, J., disqualified and not participating.

JAMES *v.* UNITED FARM AGENCY.

4-5480 128 S. W. 2d 365

Opinion delivered May 15, 1939.

C. C. Wait, for appellant.

Jesse Reynolds and *Chas. Maze*, for appellees.

BAKER, J. Harve Taylor was part owner of a forty-acre tract of land. He had inherited an interest from his father and acquired some other interests therein. He executed a bond for title agreeing to convey this forty-acre tract of land to his brother, G. W. Taylor, who entered into possession of the land. Under the contract G. W. Taylor was to pay $1,000 and 8 per cent. interest, payable annually. This thousand dollar indebtedness was also evidenced by a note dated January 9, 1932, payable August 20, 1932.

There was a provision in the bond for title, to which reference was made in the note, that 60 per cent. of the net proceeds from the peach crop grown on the lands should be applied annually to the indebtedness.

G. W. Taylor kept the place until November 21, 1933, when he made an assignment of his contract to C. C. James who assumed the obligations of the note and the bond for title. During the time that G. W. Taylor held the land he paid nothing on the debt. No peach crop was grown in 1932 and 1933.

G. W. Taylor listed the land with United Farm Agency and this agency advertised the lands with others for sale and sent the advertisements through the mail, one of the lists reaching the said C. C. James who then lived at Houston, Texas.

James wrote the Farm Agency and inquired if the farm was just as represented and received a reply to the effect that it was just as advertised. In addition, he was advised by the agency that after making the down payment he would not have to make any other payments except from the peach crops grown upon the land. James at once telegraphed $100 to bind the deal and upon arrival at Clarksville, and after having made an examination of the property, he paid the balance of the down payment, $200, to G. W. Taylor, or to the Farm Agency.

James took charge of the land and some personal property advertised and sold with it. He did some of the early spraying and cultivation required, pruning the trees, and in 1934 there was a prospect for a good crop of peaches from the orchard.

When James first reached Johnson county he went to see this property and stayed all night in a barn upon the land and then went out the next morning and made whatever inspection and investigation of the property he desired, looking it over to his satisfaction, or, at least he has not complained that proper opportunity to do so was not available. On that day he went with G. W. Taylor to the land agent's office, or to a law office, to close the deal, but did not do so on that day for the reason that the advertisement he had answered called for the payment of 80 per cent. of the proceeds of the peach crop instead of 60 per cent. as was provided for in the bond for title executed by Harve Taylor to G. W. Taylor. According to James, G. W. Taylor, or the land agent, one or the other if not both, desired to confer with Harve Taylor before changing the provision as stated in the advertisement to conform to the contract for the payment or delivery of 60 per cent. of the proceeds of the peach crop.

On the next day the same parties, that is to say, James, G. W. Taylor and the land agent met in an office where a written assignment of the bond for title executed by Harve Taylor to G. W. Taylor was prepared and duly executed. According to the terms of this assignment James agreed to assume, and did assume, the liabilities of G. W. Taylor to Harve Taylor evidenced by the note and bond for title.

The note provided for payment of the $1,000 with interest at 8 per cent. per annum. At the bottom of it there was: "Subject to extension as per terms of the bond for title given."

Although the bond for title provided the debt might be paid: "Sixty per cent. of the net proceeds of all fruit crops to be applied on the purchase price until fully paid, grantee to pay for the pruning, spraying, fertilizing and cultivation, and interest on the said note at the rate of 8 per cent. per annum from date until paid; interest payable annually," he now insists that he did not know at that time that interest payments upon the land were delinquent and he now insists that in several respects the property he bought, and that was delivered to him, did not come up to the statements of the advertisement and letter he received. In this regard he says there were 200 or 300 peach trees less than the number the advertisement stated; there was no spring or spring water upon the land; there was no barn as advertised; that the mule, which was part of the property he bought with the land, was then already dead. In fact, he now says there was a deficit in value amounting to $600.

James did not pay any interest upon this property though he says he spent about $100 in spraying the fruit trees, pruning them, cultivating and making ready for the 1934 crop.

Harve Taylor insisted some time in 1934 that the interest should be paid upon the note and finally gave James notice that he must pay. James was probably relying upon something that had been said to him by G. W. Taylor or the land agent when he wrote a letter to Harve Taylor in which he said, quoting: "I do not owe you or he one dam cent until I am here one year. Thanks for the notice. Awaiting your next move." This letter was dated the 9th of April. James in his letter was making some complaint as to the fact that he had nothing to work with and he also said in it: "I have been notified by your brother, G. W. Taylor, that you or he would make me leave between suns. I am sorry, but I want to gather the fruit before leaving."

Harve Taylor testified that he talked with James and that James had told him that he not only was not going to pay anything upon the obligations, but that he was going to gather the fruit and appropriate that to his own use without credit upon the note.

This suit was filed by Harve Taylor in which he alleged a breach and abandonment of the contract by James, his refusal to be bound by it and his threat to appropriate the fruit without making the proper application of it toward payment of the debt, and a receiver was prayed for and duly appointed to take charge of the fruit and farm. This suit was instituted just before the fruit had begun to ripen and the receiver took charge and had in his hands $419.13, proceeds of the crop after paying taxes, expenses and receiver's fee.

James sought a rescission and recovery of all sums spent by him on the farm, although he had disposed of a part of the personal property delivered to him. His proof seemed to establish the fact the mule had died before he had made the trade, and that he was not so advised either by the letter received before he wired the $100 down payment or by any of the parties thereafter, prior to date of closing the deal, and also claims that he was not so advised at the time the assignment was executed and delivered to him when he paid down the additional $200. He prayed for a rescission of the contract and the consequent return of the money paid down by him, and some damages. He prayed in the alternative that the debt be credited on interest, for damages for the deceit in the sum of $600. He made G. W. Taylor and the Farm Agency parties to his cross-complaint, although he was seeking to rescind and recover as against Harve Taylor also, who had contracted by this bond for title with G. W. Taylor.

There is some hint or suggestion, though not taken advantage of by the pleadings, that Harve Taylor was not the owner of the land and could not alone make a conveyance. In his complaint Taylor did not allege himself to be the owner of the entire tract of land, but said he had the right to convey and that he was the administrator of his father's estate, from whom he and his co-heirs

had received title. He proved without objection, and which may be treated as an amendment to his complaint, that he was ready and able to make conveyance of title in fee simple to this land. The plaintiff proceeded upon the theory that as maker of the bond for title he was in the position of one who had conveyed the property and had received or taken back a note and mortgage as security for the debt.

The court found all the facts, as we understand it, in favor of the plaintiff; that he was entitled to recover upon the note and bond for title, the indebtedness evidenced thereby; that $100 in the hands of the receiver, to restore the money sent by telegraph, should be delivered to James; the remainder of the money should be paid over to Harve Taylor; that James' cross-complaint should be in other respects denied; that the bond for title and assignment should be canceled and the title and possession of the property be delivered and restored to the plaintiff. James and the plaintiff both have appealed.

The court found James had defaulted in his payments. There might well have been a finding that there was not only the technical breach by default, but a disavowal of the obligation of the contract by him, and the consequent right of foreclosure by sale of the land. Plaintiff had a lien, not title, to the money in the hands of the receiver because it had been properly impounded. His lien could not be displaced to pay back money G. W. Taylor had allegedly obtained by his or his agent's fraud.

The defendant James made an inspection of this property before he made the down payment of $200; he had prior to that time in response to the advertisement and the letter received by him in regard to the property, sent $100 by telegraphing it either to the agent or to G. W. Taylor and immediately thereafter left his home in Houston, Texas, and went to Clarksville to complete the deal. His statement, as we have observed this record, to the effect that a mule he was purchasing in this contract was already dead at the time he arrived at the farm and that he did not know that fact, and was not advised of it until after he had signed the contract and paid over the additional $200, seems without substantial dis-

pute and under the record as it now appears he is entitled to relief to whatever extent proof may show the value of the mule to have been, but his remedy, in that respect, is not against Harve Taylor. We judge from some of the pleadings that there was perhaps a stated value either in the advertisement or in some of the conversations. If not, proof should be offered, if defendant James be so advised.

James attempts to protect himself against the effect of his inspection and examination of the property on the day before he executed the contract by saying that a lawyer advised him that he would have to pay the additional $200 of the down payment before he could recover the $100 already advanced, and which he still insists was procured from him through fraudulent inducements to enter into the contract. Whether this statement be true can make no difference for it would not change the law applicable to the situation.

After James made his inspection and examination of the farm to whatever extent he desired, he then went on and completed his contract making the entire down payment and thereby waived the alleged fraud he now insists upon. *Delaney* v. *Jackson*, 95 Ark. 131, 128 S. W. 859; *Darnell* v. *Bibb*, 143 Ark. 580, 221 S. W. 1061; *Carwell* v. *Dennis*, 101 Ark. 603, 143 S. W. 135; *Hildebrand* v. *Graves*, 169 Ark. 210, 275 S. W. 524; *Troyer* v. *Cameron*, 160 Ark. 421, 254 S. W. 688; *Nix* v. *Kirkland*, 173 Ark. 291, 292 S. W. 664.

He knew when he made the $200 payment, or at least he could have known from his examination, that there was a shortage in the number of fruit trees; he knew whether there was a spring upon the land and sufficient spring water or well water to supply his needs, or if there was a barn. If there had been deceit up to that time there certainly was none at the time he completed the transaction. He waived whatever deception or alleged misrepresentation there had been as to all these several matters.

James now insists that he was not to pay anything except from the proceeds of the peach crop. Those statements are in direct contradiction of the written contract

he adopted by the one signed, and, of course, may not be seriously considered. Not only did he say in his letters that he would not leave until he had gathered the peaches, but, according to Harve Taylor, he was going to gather the peaches and appropriate the proceeds without conforming to the contract he had made. He was denying indebtedness as to interest, although it was expressly set forth in the bond for title assigned to him and which he agreed to assume. Had this interest been mentioned only in the note held by Harve Taylor, James might have had an excuse, if not a real reason for his attitude. He was bound to take notice of what appeared in his line of conveyances.

So it appears the chancellor was correct in declaring that James had breached a contract. It follows Harve Taylor was entitled to a decree of foreclosure. Since he was entitled to a decree of foreclosure, the contradictory remedy of a rescission was not applicable to the rights of either one of the parties. It may be said if a rescission were proper, which it was not in this case, appellant James was correct in insisting that his entire amount of money should be returned to him and he should have been charged a reasonable amount for use and occupancy of the land during the time he was in possession. Under the law James was not the victim of any fraud practiced by plaintiff. Besides he had ratified the contract by accepting delivery of the property, and by selling and disposing of the personal property.

The proper remedy was to credit the amount of money in the receiver's hands on the debt, advertise and sell the land. James was a mortgagor in possession until the receiver took charge. As such, he was not entitled to credit for spraying, pruning, fertilizing or cultivating the land or making any improvements thereon. If he paid taxes on the land it was also a part of his legal obligations so to do. If Harve Taylor paid taxes on the lands after he sold to his brother, G. W. Taylor, he would have the right to recover such taxes as he may have paid.

It will appear from the foregoing, of course, that James was not entitled to have paid or delivered to him the $100 so ordered to be paid by the court from money

in the receiver's hands. If the land should sell for more than the debt and costs, James will receive the overplus. If there is a deficiency after the sale of the land, James will owe the balance.

The decree of the chancery court is, therefore, reversed and the cause remanded with directions to the chancery court to determine any matters not already settled by the record, particularly as between James and G. W. Taylor and his agents, and to proceed in accordance with this opinion to foreclose and sell the property, unless the indebtedness be paid by James, when the amount shall have been determined by decree.

HOT SPRINGS STREET RAILWAY COMPANY *v.* HILL.

4-5467 128 S. W. 2d 369

Opinion delivered May 15, 1939.

Sydney S. Taylor and *Martin, Wootton & Martin,* for appellant.

Leo P. McLaughlin, Earl J. Lane and *James R. Campbell,* for appellee.

MEHAFFY, J. The appellee, Juanita Hill, filed suit in the Garland circuit court against the appellant, Hot Springs Street Railway Company, to recover damages for personal injuries alleged to have been received as a result of the negligence of the appellant while it was engaged as a common carrier, operating motor buses over the streets of the city of Hot Springs, Arkansas. She alleged that she was a passenger on a bus operated by appellant, and while she was alighting from the bus, an employee of appellant negligently and carelessly attempted to close the door of the bus before she had gotten clear of same, and that the door struck her, knocked her to the pavement, causing permanent injuries. She prayed damages in the sum of $3,000.

The appellant filed answer denying each and every material allegation of the complaint.

The appellee testified in substance that she lived at 622½ Ouachita Avenue and was 18 years old; on the morning of September 9, 1938, she left her home to go to the Mexican Chiquita on the Little Rock Highway, where she was employed; she entered one of the buses of the appellant, which she thought was going north, and after the driver had gone a few feet he started turning and said "All aboard for south Hot Springs." She told the driver that she wanted to go to Park Avenue and he gave her a transfer; the bus turned near the filling station towards the Majestic Hotel; as she was leaving the bus she got to the ground and did not get entirely clear of the door and it hit her on the left shoulder; she went into the filling station and telephoned for her mother to come after her, and a man at the filling station took her home; when she got off the bus she fell and hopped into the station to use the phone; when she realized where she was she was sitting in the street; she looked down and her ankle was swollen; pains her all the time; cannot

turn the ankle and cannot put her weight on it; she weighs about 150 pounds, is five feet, ten inches tall; on the same morning she had X-ray pictures taken of her ankle and was treated by a physician from that time until the time of the trial; Dr. Wright placed her ankle in a cast on Monday, the injury having been received on Friday; the cast was on her ankle about a month and two weeks, then the upper half was removed; she was earning $10 to $12 a week; the injury happened about 10:45 a. m.; she went to the stop sign in front of the Rockafellow Hotel and the bus came by; the driver opened the door and she got on; the bus drove about 25 or 30 feet when it began turning; she was hurt about 15 feet from the filling station; got on the bus in front of the Rockafellow Hotel at the sign that was around the post; the bus went to about 15 feet of the filling station and made a turn, and she received her transfer; when she was told that she had the wrong bus, she received the transfer; there were four men on the bus including the driver; Frank Stauder stood up and appellee identified him as the driver; she did not know any other man on the bus; she was the only one that left the bus and when she stepped to the ground the driver pulled the door closed and did not give her time to get in the clear; when he closed the door it knocked her down; the bus was at that time moving on; fell on her right ankle and right hip and her heel went under her; the door struck her left shoulder and there were several bruises; the cast was put on her leg about a week after the accident; she has remained at home since the accident and her leg has been in a cast since it was first put there; pains her continuously; hurts mostly at night; she has not attempted to stand on her foot; massages it every day and tries to relieve the swelling; does not recall whether she made any outcry at the time; she was stunned.

The physicians testified about her injury and the extent of it, and that a bone in the heel was broken.

It is contended by the appellant that the evidence is not sufficient to sustain the verdict, and that the trial court should have directed a verdict for the appellant.

The witnesses for appellant testified that the injury did not occur as testified to by plaintiff.

In determining the sufficiency of the evidence to support a verdict, we must view the evidence with every reasonable inference arising therefrom in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict, it cannot be disturbed by this court.

If the evidence on the part of the appellee, although contradicted by evidence of the appellant, is of a substantial character, evidence that the jury could reasonably have believed, the case will not be reversed because of the insufficiency of the evidence, although this court may think that the verdict is against the preponderance of the evidence. *Missouri Pac. Rd. Co.* v. *Dotson,* 195 Ark. 286, 111 S. W. 2d 566; *Missouri Pac. Rd. Co.* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428; *American Equitable Assurance Co. of N. Y.* v. *Showers,* 195 Ark. 521, 113 S. W. 2d 91; *Kansas City So. Ry. Co.* v. *Larsen,* 195 Ark. 808, 114 S. W. 2d 1081.

In a recent case this court said: " 'The great preponderance of the evidence appears to be that appellee was not injured in the manner testified by him, indeed, that he was not injured at the frog at all, and one of the grounds upon which we are asked to reverse this case is that the evidence shows that it was physically impossible for appellee to have been hurt in the manner testified to by him.' [*Missouri & N. A. R. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478]. In commenting upon the evidence above noted, the court 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 the result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner.' " *Missouri Pac. Trans. Co.* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 579.

It is contended by the appellant in this case that the physical facts contradict the statement of the appellee, and that it was not physically possible for the appellee to have been injured in the manner testified to by her. There are no physical facts or natural laws that are in conflict

with her testimony. The evidence shows that the door hinged from the front and it is argued that when the car moved, after she had alighted, it moved from her and could not have hit her; but her testimony is that before she had time to get out of the way, the driver closed the door and in closing it, struck her and knocked her down. If she was immediately in front of the door and it was closed by the motorman, it could strike her whether it was hinged from the front or rear.

The facts in the case last cited are very similar to the facts in this case.

The appellant calls attention to, and relies on, the case of *St. Louis, S. W. Ry. Co.* v. *Ellenwood*, 123 Ark. 428, 185 S. W. 768. It quotes from said case as follows: "Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics, so, where there are undisputed facts shown in the evidence, and, by applying to them the well known laws of nature, or mathematics and the like, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law, that the testimony is not legally sufficient to warrant the verdict."

Immediately following the paragraph quoted by appellant from said case, is the following: "In the case at bar the conditions surrounding the plaintiff, as testified to by the defendant's witnesses, furnish a very strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. It can not be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature. His testimony related to matters, situations and conditions which might or might not have existed, and his right to recover depended wholly upon the truth or falsity of his testimony. His testimony was, therefore, evidence of a substantial character and if believed by the jury, was sufficient to warrant a recovery in this case."

The testimony of the appellee in this case is evidence of a substantial character, and if believed by the jury, was sufficient to warrant a recovery. It is argued, how-

ever, that there is no evidence of appellee's injury except her own testimony. If this were true, still her evidence, if believed, would be sufficient to warrant a recovery.

Appellant admits that appellee was injured on the morning she testifies she was injured, but it says that no one saw her, and that she made no outcry. These matters, of course, were proper to be considered by the jury in determining whether she was injured in the manner to which she testifies. Other persons may have seen the accident. Appellant says there were usually many persons on the front porch of the Majestic Hotel. If there were persons on that porch at the time of the accident, some of them may have seen her, but she would not know who, if any, saw the accident. Immediately after the injury she went to the filling station and the persons at the filling station did not see her when she came; but that she did go to the filling station is undisputed. The man operating the filling station heard her talking over the phone and went in and learned that she was trying to get some one to take her home; he took her home and said that she was apparently suffering pain, and that her ankle was swollen; he drove her home and helped her into her apartment.

Whether appellee was injured in the manner in which she claims to have been injured, was a question of fact for the jury, and if they believed her testimony, it was sufficient to support the verdict.

Appellant insists that the court should have directed a verdict for it, but it did not request the court to instruct the jury to find for it.

It is next contended by appellant that the verdict of the jury is excessive. While there was conflict in the evidence as to how appellee was injured, there is no conflict in the evidence as to the extent of the injury. The verdict was for $1,500. The appellee was 18 years old, and the undisputed evidence shows that she was employed, and earned from $10 to $12 a week. Dr. Thompson testified that he visited appellee in her apartment; that she was lying on her bed crying, suffering intense pain; he gave her something to relieve the pain, and found her ankle swollen considerably; he strapped it ad-

hesively, telephoned the nurse and had an ambulance carry her to Dr. Gray and had a picture made; it showed a piece of bone chipped off the heel bone, and said that any movement of the ankle would be very painful with this injury, and cause a sickening pain on account of the pulling of the bones. Dr. Nims testified that he made an X-ray picture of appellee's ankle, and there was a fracture and a tenderness, and evidence of sprain in the ankle, that a sprained ankle may produce anything from a slight pain and a little swelling for a few days to a tearing of the ligaments, where a person may be conscious of it for life; that after a severe strain the ligament is never as sure and snug-fitting as originally. A month later he made another X-ray picture and at that time she could use her foot so far as the bone was concerned; any pain that she experienced is the result of the sprain, the tearing of soft parts; it would be impossible for a break to occur without some displacement or tearing of the ligaments.

Dr. Wright testified that when he saw her on September 10th she was suffering from swelling of her right leg, discoloration, and considerable pain; she had bruises on her head, left shoulder and right hip; a fracture of a small bone of the heel. He told her not to put any weight on her foot; she had a good deal of pain and her ankle was swollen badly and discolored. The time of the recovery is problematical; the sprain will have to run its course; the process would not be complete until the patient is able to get out and walk and put the ankle to a considerable amount of weight-bearing; there is a possibility that the structure may be weak even though the line of the break has disappeared; he advised the appellee to stay off her feet because of the sprain to the tendon and ligaments.

The appellee testified about her pain and suffering, and the evidence showed that a cast was put on her leg and kept there for six weeks; she was still suffering and unable to walk, and as the physician testified, the extent of her injury is problematical. According to the physician's testimony, it may trouble her as long as she lives.

We think the evidence justified a verdict for $1,500. Under the evidence, it was a question for the jury, and the jury's verdict as to the amount of damages cannot be disturbed by this court, as excessive, if there is any substantial evidence to sustain the amount.

"The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendance and support during the period of his disablement, and for such permanent injury and continuing disability as he had sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are insusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which must be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained." *Coca-Cola Bottling Co. of Ark.* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771; 17 C. J. 869, *et seq.*

We find no error and the judgment is affirmed.

HOLMAN *v.* KIRBY.

4-5459 128 S. W. 2d 357

Opinion delivered May 15, 1939.

C. E. Johnson, for appellant.

Geo. R. Steel, for appellee.

SMITH, J. Holman was adjudged a bankrupt, and he applied to Kirby to buy for him a part of the land he had previously owned. Kirby agreed to do so, and Holman negotiated a sale with the trustee in bankruptcy whereby a deed was made to Kirby for the consideration of $168, which Kirby paid. This fact is undisputed. But Kirby testified that the understanding was that he would allow Holman only 30 to 60 days to repay the money advanced. Holman denied there was any such limitation of time, and the undisputed testimony is to the effect that nearly a year after the purchase of the land Holman offered to pay a portion of the purchase money, but was told by Kirby to wait until he could pay it all.

The land bought by Kirby had forfeited to the state for the nonpayment of taxes, and the discovery of this fact, which was unknown to Kirby when he bought the land, appears to be the circumstance which determined Kirby not to accept the tender which Holman later made.

Kirby had the impression that Holman was endeavoring to buy the land from the state and thus acquire the title, and witnesses testified that Kirby said he had bought the land from the state and had "beaten Holman to it," and that he would just keep the land.

The litigation began when Kirby filed suit to enjoin Holman from interfering with his possession, and, by appropriate pleadings, the issue was joined whether Kirby had acquired title for the use and benefit of Holman, whose cross-complaint, containing that allegation, was dismissed as being without equity. From the decree quieting Kirby's title is this appeal.

The essential facts in this case are identical with those in the case of *Strasner* v. *Carroll,* 125 Ark. 34, 187 S. W. 1057, Ann. Cas. 1918E, 306, and that case controls here. The opinion in that case declares the law applicable to the facts in this case, and we quote from it as follows: "So we think a clear preponderance of the evidence shows a parol agreement on the part of Carroll to purchase the land at the foreclosure sale, hold it in trust for Strasner and to convey it back to Strasner on repayment of the purchase money, and that he afterwards refused to do so. Even under this state of facts, it is contended by counsel for Carroll that the agreement being a verbal one, was within the statute of frauds, and not enforceable as a trust in equity. It is true, the general rule is, that a mere verbal agreement by which one of the parties thereto promises to buy in at a judicial sale, lands of the other and hold the same for his benefit, does not create a resulting or implied trust, the agreement itself being within the statute of frauds. There are, however, several well recognized exceptions to the rule, and one of them is that where the purchaser of lands in which the other is interested becomes such under such a state of facts as would make it a fraud to permit him to hold on to his bargain. *Trapnall* v. *Brown,* 19 Ark. 39; *McNeil* v. *Gates.* 41 Ark. 264; *LaCotts* v. *LaCotts,* 109 Ark. 335, 159 S. W. 1111. In the first two mentioned cases the principle is announced that it would be a fraud in a purchaser, who obtained property at a price greatly below its value by means of a verbal agreement, to keep the property in violation of the agreement."

This case is distinguishable from the recent case of *Patton* v. *Randolph,* 197 Ark. 653, 124 S. W. 2d 823, although the distinction is rather narrow. There a brother who owned a tract of land conveyed to his sister upon her promise to reconvey to him. The conveyance was procured without fraud or deception except that the sister, after having promised to reconvey, refused to do so. We there quoted from the case of *Holt* v. *Moore,* 37 Ark. 145, as follows: " '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.' "

Here, the deed from the trustee to Kirby is absolute in form, but the testimony is to the effect that it was taken to secure the advance of money made by Kirby in the purchase of the land which was bought for the benefit of Holman, and the deed was his security for the repayment of the money. It was, therefore, in the nature of an equitable mortgage, taken in this form to secure the payment of a debt. There was not merely a parol contract to reconvey, as was true in the Patton Case, *supra.* Holman did not convey to Kirby, and there was no oral agreement to reconvey, which agreement would be within the statute of frauds. There was, in

effect, a loan, which the trustee's deed to Kirby secured, and the deed having been taken to secure a debt, it was, in legal effect, an equitable mortgage, and being a mortgage when executed, it continued so to be. Section 1193, Pomeroy's Equity Jurisprudence, Vol. 3 (4th Ed.), p. 2825.

The law as declared in the case of *DeLoney* v. *Dillard,* 183 Ark. 1053, 40 S. W. 2d 772, is applicable here. There a deed from DeLoney to Davis was absolute in form, but there was a contemporaneous written agreement between DeLoney and Davis that in the event the $700 consideration recited in the deed was returned by a designated day, Davis would reconvey. The consideration was not repaid on the designated day, or at all, yet the deed was construed to be a mortgage. It was true the agreement to reconvey in that case was in writing, while here it rests in parol, but that circumstance did not control the decision. The right of DeLoney to have the deed declared a mortgage did not depend upon the writing, which merely proved the purpose of the deed. Chief Justice HART there said: "Evidence, written or oral, is admissible to show the real character of the transaction."

The deed from the trustee to Kirby having been taken as security for the money advanced to buy the land, Kirby acquired no independent title by reason of the tax deeds procured by Kirby from the state. In the case of *Cole* v. *Swift,* 190 Ark. 499, 79 S. W. 2d 426, we said: "In a long line of decisions we have consistently held that the purchase by a mortgagee of the mortgagor's right of redemption at a tax sale did not extinguish the mortgagor's right of redemption, but on the contrary that such a purchase should be treated and considered as a redemption from the tax sale for the benefit of all interested parties. (Citing cases.)"

An actual tender was made in open court at the trial from which this appeal comes of a sum of money said to be sufficient to reimburse Kirby for the money advanced by him, with the interest thereon, and the taxes paid in purchasing the land from the state. Holman admitted that Kirby was to be paid "for his trouble."

Upon payment of all these amounts, a redemption should be permitted, and the decree will be reversed and the cause remanded, with directions to ascertain the total of all these items and to accord the right to redeem upon their payment.

WEBB *v.* CALDWELL.

4-5498 128 S. W. 2d 691

Opinion delivered May 22, 1939.

Glover & Glover, for appellant.

J. S. Abercrombie and *F. L. Smith*, for appellee.

HOLT, J. Appellants bring this appeal from an adverse ruling of the Grant chancery court in a suit filed

by appellees to partition the lands of Robert N. Caldwell, Jr.

Robert N. Caldwell, Sr., was the owner of 160 acres of land in Grant county, Arkansas, in 1880. On November 19, 1890, he gave by warranty deed to his son, Robert, Jr., eighty-five acres of this land, his wife, Celina S. Caldwell, joining him in this deed, conveying her dower and homestead rights. There were only two children born to Mr. and Mrs. Caldwell, Robert, Jr., and daughter, Rosella. Robert Caldwell, Sr., died on March 11, 1891, shortly after execution of the deed to his son. The consideration mentioned in this deed to his son is "that we, Robert N. Caldwell, Sr., and Celina S. Caldwell, his wife, for and in consideration of love and respect I have for Robert N. Caldwell, Jr., my son, do hereby give, grant, bargain and convey unto the said Robert N. Caldwell, Jr., etc." Sometime before the execution of the above deed to his son, Robert N. Caldwell, Sr., had given to his daughter, Rosella, the equivalent in value of the eighty-five acres conveyed, in personal property, amounting to approximately $300. Rosella died on April 1, 1892, without living issue.

Robert Caldwell, Jr., after the death of his father and sister, continued to reside with his mother until her death on December 15, 1906. Robert, Jr., had the eighty-five-acre tract of land, referred to above, assessed in his name, and he paid the taxes thereon after acquiring it by deed up until his death on January 1, 1935. The remaining seventy-five acres of the 160-acre tract were assessed, and the taxes paid, in the name of his mother until her death on December 15, 1906, fifteen years later.

It was the intention of Robert N. Caldwell, Sr., prior to his death to give each of his two children an equal amount of property, and this he attempted to do. Up to this point the facts are practically undisputed.

The appellees are the paternal heirs of Robert N. Caldwell, Sr., and descendants of his five brothers and sisters, all deceased. The appellants are the maternal heirs of Celina S. Caldwell, the mother of Robert N.

Caldwell, Jr., and descendants of her four brothers and sisters, all deceased.

It was the contention of appellees, in the trial below, that Robert N. Caldwell, Jr., when he died on January 1, 1935, owned the 160 acres of land in question by virtue of the deed to eighty-five acres from his father and the remaining seventy-five acres by inheritance upon the death of his father followed by his mother's death in 1906, all of which came to him through his father, and that this 160 acres thus acquired is an ancestral estate from his father and is now the property of appellees, his paternal heirs. They concede that prior to his death, Robert Caldwell, Jr., acquired twenty-two acres of land by purchase, which is a new acquisition. There is no dispute as to this twenty-two acres, it clearly being a new acquisiton.

Appellants, on the other hand, contend here that the 160 acres of land, referred to above, is a new acquisition in the hands of Robert N. Caldwell, Jr., at the time of his death and not an ancestral estate.

The only question, therefore, presented for our determination is whether or not Robert N. Caldwell, Jr., at the time of his death held this 160 acres of land as an ancestral estate or as a new acquisition.

The chancellor found that these lands were ancestral, and that they should go to the appellees as the paternal heirs of Robert N. Caldwell, Jr. Appellants, in order to sustain their contention that the land in question is a new acquisition and not ancestral, contend that the son, Robert N. Caldwell, Jr., entered into an oral contract and agreement with his father and mother to take care of them the remainder of their lives for this 160 acres of land, and that both the father and mother had a joint interest in it. That the mother's interest consisted of the homestead and dower right, which had not been set aside to her, and that by relinquishing this right in the deed it constituted a valuable consideration on her part, and, therefore, when she and her husband passed this property by deed to Robert, Jr., under Robert's agreement to support them, it thereby became a new acquisi-

tion in the hands of Robert, Jr., and likewise the remaining seventy-five acres, by reason of this agreement, makes the entire 160 acres a new acquisition. We cannot agree with appellants in this contention.

Mrs. Fannie Webb testified: "Q. Do you know anything about what agreement was made between Robert N. Caldwell, Sr., and his wife, with Robert N. Caldwell, Jr., about caring for them during their natural lives? A. Yes, I guess— Q. Tell what you know about it—what your information was that you gathered while you lived there, and what you know about it. A. It was always my understanding that he was to take care of them . . . Q. What was he to get in consideration of that? A. The rest of the land, I think. Q. Then it is your information that after the deed was made to eighty-five acres of land that the remainder of the homestead was given to him to take care of his father and mother during their natural lives? A. Yes . . . Q. You were not present when the trade was made, were you? A. No. Q. Who told you about what was in the trade? A. Robert Caldwell, Jr. Q. I want to ask you again, if you will, my mind isn't clear on this. What was in that trade agreement? What did Robert Caldwell, Jr., tell you was in that contract or trade? A. Well, I did not hear the trade but Robert told me. Q. What did Robert tell you? A. That he was to take care of them and they were to give him the land. They gave Rosella something, and they gave him that, because they gave Rosella something. She did not want the land. She had poor health, and did not expect to live, I reckon. She did not want the land deeded to her, she had rather have the other stuff."

Alvin Webb testified: "Q. State whether or not the eighty-five acres was given to him to equal the contribution given to his daughter? A. Yes. Q. Your understanding was after that, that he gave the homestead to Robert under the agreement that he was to take care of him and his mother during their lives? A. Yes." He also said that he deeded it to him merely, because he was his son, and that he had already given some stuff to

Rosella. Also stated that Robert lived in the house with his parents from the time of his birth until they died; that if Rosella had not died, Robert and Rosella together would have been the owners of the land which he (Robert, Sr.) had at the time of his death. He supposed that both gifts to Robert and Rosella were for love and affection.

Sam Webb testified that they all lived in the same house all the time except the sister, Rosella, lived part of the time in a little house on the same place, and stated that it was the general talk that he gave Rosella personal property, and then deeded to Robert eighty-five acres to equal it, then said that he knew that Caldwell, Sr., wanted Robert to have the remainder of his land for taking care of him. He also said he supposed that the gifts to the daughter and son were for love and affection; that all he knows about it is what was told him by someone else; that his opinion all the way along was, and is now, that if Rosella had lived she and Robert, Jr., would have shared alike in the estate of Robert Caldwell, Sr.

Bill Lindsey testified that Caldwell, Sr., gave Rosella some personal property and deeded some land to Robert, he supposed because he wanted him to have it. Didn't know unless it was to equal the contribution that he had given to the daughter, Rosella. Didn't know except what had been told him with reference to distribution of the remainder of the land. Heard no statements from interested parties.

Bob Lindsey testified that he did not know what disposition was made of the other land, not taken in the deed; said neither Uncle Nute, Robert, or any member of the immediate family told him about that; knew only what people said about it. He said that he waited on Uncle Nute. It was a hard winter and he died in March, 1890 or '91; said none of them told him about any agreement except giving Robert the first land, said "Father gave me eighty acres of land, and Uncle Nute told me he had given Robert some land," because "he wanted to even Robert's with Rosella's."

John Stowers testified that Robert Caldwell, Jr., was twenty-five years old when his father died; that he corresponded with him all the time; he talked to me about financial and family affairs and friends. I know Robert N. Caldwell, Sr., gave to Rosella, his daughter, certain personal property, and he gave to Robert eighty-five acres of land which he considered an equal value, prior to his death. And further: "Q. Do you know whether or not there was any agreement made between R. N. Caldwell, Sr., and Robert Caldwell, Jr., that Robert Caldwell, Jr., was to get the amount that he reserved for his homestead in consideration that Robert Caldwell, Jr., was to take care of him and his wife during the remainder of his days? A. I never heard of such agreement. . . . He inherited it . . . Q. Did Robert ever tell you after his mother's death how he came to be the owner of this property? A. No, he never told me. He just told me he owned the whole place. That it came through his father. Of course, he didn't have any other relations living. Of course, he got it all, because Rosella was dead . . ." Rosella and her husband, Jim Roland, lived there. Uncle Nute was in bad health for three or four years with dropsy. Robert taught school in the summer and winter. That was up until Robert was twenty-five or twenty-six years old.

It is our view on this record that the only consideration for the eighty-five acres which Robert Caldwell, Sr., and his wife conveyed to their son by warranty deed, was that stated in the deed, "love and respect" for their son, and that this conveyance was a gift to equalize a prior gift of personal property of the value of some three hundred dollars to Rosella, the daughter. If there had been any intention in the minds of the parties that a part of the consideration was an agreement on the part of the son to care for his father and mother during their lives, it would have been an easy and simple matter to have so stated as a part of the consideration in the deed.

The difference between an ancestral estate and a new acquisition is clearly set out and determined by this court in *Martin* v. *Martin,* 98 Ark. 93, 135 S. W. 348,

wherein it is said: "In the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, the construction of our statute of descent and distribution, creating ancestral estates and those by new acquisition, has been definitely determined. In that case it is said: 'Land is to be considered as having come from or by or on the part of the father or mother when it comes by gift, devise, or descent, either mediately or immediately, from them or from any person in their respective lines'; that is an ancestral estate. In the same case, it is said, relative to a new acquisition, that 'it is an estate derived from any source other than descent, devise, or gift from father or mother or any relative in the paternal or maternal line. If the son should purchase land from the father or mother for a valuable consideration, it would be a new acquisition, and descend as such.' The purpose of the statute creating ancestral estates was to keep such estates in the line of the blood whence they came, and blood must be the only consideration by which they are acquired, whether by devise or gift. If the estate is obtained by any means other than descent, gift or gratuitous devise, then it is a new acquisition; in order for the estate to be ancestral, it must come from the ancestor and without price; it must come with no consideration other than that of blood. In Walker's American Law (4 ed.) p. 409, it is said: 'By ancestral property is meant that realty which came to the intestate from his ancestor in consideration of blood and without a pecuniary equivalent, and which must have come either by descent or devise from a now dead ancestor or by deed of actual gift from a living one. And by nonancestral property is meant all . . . that realty which came to the intestate in any other way, whether by purchase from the ancestor or from a stranger for an equivalent paid or by actual gift from a stranger—so that consideration of blood is out of the question, for this makes the sole distinction.' In speaking of this phase of the question relating to ancestral estates and those by new acquisition, the Supreme Court of Ohio in the case of *Brown* v. *Whaley,* 58 Ohio St. 654, 49 N. E. 479, 65 Am. St. Rep. 793, says: 'How, then, shall it be

solved when the considerations are thus mixed? The title came either by deed of gift or by purchase. It could not come by both; and, legally speaking, it could not come partly by deed of gift and partly by purchase . . . To make ancestral property . . . title by deed of gift . . . there must be no other consideration than that of blood.' ''

In the case of *Chaffin* v. *Crow,* 182 Ark. 621, 32 S. W. 2d 155, (a case similar to the case at bar), where Irene Crow, having survived her father and being his sole living heir, became seized and possessed of the lands of her father by inheritance, and she dying without descendants, this court said: ''The descent of the lands is controlled by § 3480, C. & M. Digest (§ 4347 Pope's Dig.), which is as follows: 'In cases where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as come by the mother, shall ascend to the mother and her heirs . . .' This statute was first considered in the case of *Kelly's Heirs* v. *McGuire, supra,* and the conclusions there reached have been followed by this court in a number of decisions down to and including the case of *Eason* v. *Highly,* 181 Ark. 933, 28 S. W. 2d 1048. In the case of *Kelly's Heirs* v. *McGuire,* supra, the court had under consideration each of the provisions of the statute of descent and distribution, and, after a careful analysis, said: ''After carefully considering each of the provisions of the statute, and all together as a whole, we have come to the following conclusions: . . . ' '3rd. That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the line of succession, and that is to depend on the fact, whether the inheritance is ancestral or new; and, if ancestral, then whether it came from the paternal or maternal line. 4th. If the inheritance was ancestral and come from the father's side, then it will go to the line on the part of the father, whence it came, not in postponement, but in exclusion, of the mothers' line; and so, on the other hand, if it come from the mother's side, then to the line on the part of the mother, whence it came, to the exclusion of the father's line'.

As the conveyances were made to Claude Crow, the title devolved to Irene Crow, his daughter, by inheritance, and as it came from the father, it will go to the line on the part of the father to the exclusion of the maternal kin . . .".

In *McElwee* v. *McElwee,* 142 Ark. 560 219 S. W. 30, this court said: "In order to constitute a gift from a parent to a child an ancestral estate within the meaning of our statute, the conveyance must be entirely in consideration of blood and without any consideration deemed valuable in law; . . ."

As to the seventy-five acres, as to which no record disposition appears on the part of the mother and father of Robert Caldwell, Jr., during their lifetimes, we think it clear from this record that these lands came to Robert, Jr., by inheritance only from his father and that he paid no consideration whatever therefor. We think there is no substantial evidence reflected in this record showing any oral agreement on the part of Robert, Jr., to care for his father and mother during their lives, as a consideration for this seventy-five acre tract, and, we, therefore, hold that it is ancestral and not a new acquisition.

There is no evidence in this record to indicate that the land in question was the joint property of the father and mother of Robert Caldwell, Jr. The most that is shown is that the mother's interest was her dower and homestead rights. See *Chaffin* v. *Crow, supra.*

On the whole case we conclude that the findings of the Chancellor are not against a preponderance of the evidence and finding no errors the judgment is accordingly affirmed.

SEWELL *v.* BENSON.

4-5483 128 S. W. 2d 683

Opinion delivered May 22, 1939.

Nash, Ahern, McDermott, McNally & Kiley; E. O. Westfall and *G. R. Haynie*, for appellants.

Streett & Harrell, L. B. Smead and *Gaughan, McClellan & Gaughan*, for appellees.

SMITH, J. This suit was brought by Arthur W. Sewell and by the City National Bank & Trust Company of Chicago, as guardian of John W. Sewell, a minor, and a brother of Arthur. The complaint contained the following allegations.

William L. O'Connell had been appointed and had served as guardian of both Arthur and John from August 17, 1933, until his death on July 24, 1936. The plaintiff trust company was appointed guardian in succession of the estates of both minors, and has since served and is now serving as the guardian of John. Arthur is now of full age and sues in his own right.

The complaint alleged that Arthur and John owned an eighty-acre tract of land in Ouachita county, on which, for more than ten years, large quantities of crude oil had been produced, which were sold to and delivered into the pipe lines of the Texas Company, a corporation, and

for which the Texas Company was, on March 7, 1937, largely indebted to said minors.

On December 21, 1935, F. P. Benson filed petition in the probate court of Ouachita county asking to be appointed curator for said minors, representing to the court that said minors had property coming to them of the value of $500, and that there was great danger of said property being lost or destroyed. The appointment was made as prayed, and Benson executed bond in the sum of $1,000, conditioned as required by law.

On March 7, 1937, Benson, as curator, collected from the Texas Company the sum of $15,822.26, "being the principal amount then due from said Company to said minors' estates for oil run prior to said date." On March 17, 1937, Benson filed in the probate court a petition asking that he be allowed three per cent of this money as commission, amounting to $474.66, and that he be authorized to pay L. B. Smead "the sum of $500.00 for alleged services rendered and to be rendered as attorney for said curator." The order prayed was made.

The complaint further alleged that Benson made application for appointment "as a result and in furtherance of a conspiracy entered into between the defendants, F. P. Benson, L. B. Smead, and the Texas Company, to cheat and defraud said minors in their estate by collecting large sums of money from said estate as commissions and attorney's fees, and to avoid the payment of interest by said Texas Company on royalties due for oil runs from the lands of said minors, which royalties were withheld by said company without lawful authority, reason, or excuse," and that no notice of this application or of the orders of the court thereon were given the minors or O'Connell, their then acting guardian. It was alleged that neither Smead, as attorney, nor Benson, as curator, performed any services for the minors for which a charge could be made.

It was alleged that Smead was at the time the legally retained attorney of the Texas Company in all matters and litigation in Ouachita and other counties in southern Arkansas with full power and authority to appear in

court and represent said company in all legal matters involving the interests of said company, and was such attorney when the said sum of $15,822.26 was paid the curator. "That said defendant, Texas Company, by and through its said attorney, aided, abetted, and assisted in procuring the appointment of said F. P. Benson as such curator with the design and purpose of avoiding payment of the interest then due and to become due on the funds in its hands belonging to said minors;" that the curator made no interest charge against the Texas Company, nor did he collect or attempt to collect any interest from said company on long past due accounts owing by said company to said minors, but, on the contrary, accepted and receipted for said sum without collecting or attempting to collect any interest due thereon; that Benson, Smead and the Texas Company were all three fully advised that the minors "then and there had a legal Domiciliary Guardian of the estate of said minors in the City of Chicago, Illinois, who was then and there clothed with complete power and authority to collect, preserve, protect all funds and other property due and to become due and belonging to said minors." It was further alleged that at the time of the payment to the curator by the Texas Company the guardian was negotiating with the Texas Company for the payment of royalties due the minors and the interest thereon, and had made demand of payment upon the Texas Company.

It was further alleged that a decree was rendered by the chancery court on December 12, 1933, in a suit between Benson, as curator, and the Gulf Refining Company, in which O'Connell, as guardian, had intervened. This suit involved royalties on oil produced from the minors' lands. It was there adjudged "that all moneys, credits, and effects adjudged to be the property of said minors, Arthur W. Sewell and John W. Sewell, should by the pipe line companies and all other companies or corporations holding the same be paid directly to William L. O'Connell, the domiciliary guardian of the person and estate of said minors;" that Benson had, on a prior date, to-wit, December 19, 1924, procured his appoint-

ment as curator, and was still serving as such curator on December 21, 1935, the date of his said second appointment, and continued to act as curator under his first appointment in 1924 until April 21, 1937, when his final settlement under said appointment was confirmed and approved and his sureties discharged.

That one of the questions involved in the litigation in the chancery court referred to was the question of the compensation of the curator and the fee to be paid his attorney, and a consent decree was entered authorizing O'Connell, then the guadian of the person and estate of said minors, to pay the curator the sum of $500 for his services, and to pay J. Bruce Street, his attorney, the sum of $2,500.00 for services, and the decree recited that the compensation thus allowed should be in full payment for the services theretofore or which would thereafter be rendered. Those sums were paid by the guardian.

It was also provided in said decree that Benson should resign as curator when the litigation then pending should be finally determined, and "such resignation was one of the conditions precedent to the agreement then entered into for the payment of this compensation." The decree so recites.

It was further alleged that Benson, Smead and the Texas Company knew, when the application was made on December 21, 1935, for Benson's second appointment, that this consent decree was being violated, and that Benson had no right to be again appointed curator, and that he and his attorney practiced a fraud upon the probate court in procuring said appointment and in procuring the order allowing compensation to the curator and to the attorney, the probate court being ignorant of the facts and the action of the court being induced by the false representation that the appointment of a curator was necessary for the safety and protection of the estate of said minors.

It was alleged that the order of the probate court was void for the reasons stated, and it was prayed that it be canceled and that Benson be ordered to account to plaintiffs for all money collected by said curator and due

the minors subsequent to his appointment on December 21, 1935.

A demurrer was sustained to this complaint, and from that order is this appeal.

We have quoted rather extensively from the complaint, as the question here presented is the sufficiency of its allegations to state a cause of action within the jurisdiction of the chancery court. Defendants demurred to the complaint upon the ground that the chancery court had no jurisdiction of the subject-matter of the action, nor of the persons of the defendants, and that the complaint did not state facts sufficient to constitute a cause of action against them.

Without reviewing the facts, which, for the reason stated, have been fully recited, we announce our conclusion that a cause of action was stated against all three defendants. Whether that cause of action was within the jurisdiction of the chancery court is the real question in the case. The contention of defendants is that, if a cause of action is stated, plaintiff's remedy is by appropriate proceedings in the probate court which court has exclusive jurisdiction of all probate matters.

The complaint was filed and summons thereon was issued April 12, 1938. On April 21, 1937, an order was entered by the probate court approving the final settlement of the curator and discharging him and his bondsmen under the appointment made December 19, 1924. It does not appear that the curator made any report to the probate court under his second appointment, but the order discharging him was made subsequent to the date of this second appointment.

That a cause of action was alleged is not seriously questioned. Whether the chancery court had jurisdiction of this cause of action is the real and serious question in the case.

The insistence for the affirmance of the decree from which is this appeal is that it is attempted to lift the case out of the jurisdiction of the probate court and to pray a judgment which only the probate court has jurisdiction to render.

That the probate court had the jurisdiction to appoint a curator for the nonresident minors, having an acting guardian in the state of their residence, is not questioned, and that the probate court has the jurisdiction to require settlement by the curator is equally certain. But this case presents the anomalous situation of a person assuming to act as curator upon a second appointment as such before his discharge under a prior appointment. The complaint alleges that the curator had collected the money on March 7, 1937, and that he was discharged as curator on May 21, 1937. It was charged that this collection was made as a result of a conspiracy between the curator and two others who are not parties to the probate court proceeding, nor subject to the order and judgment of that court, these being the attorney and the Texas Company.

It was alleged that the curator had been in possession of the money for nearly two months before the approval by the court of his final settlement under his appointment of 1924.

We think the chancery court has jurisdiction of the cause of action alleged, for the reason, if for no other, that relief is prayed which the probate court does not have the jurisdiction to grant. Judgment is prayed, not only against the curator, but also against the attorney and the Texas Company as well, and the probate court could, in no event, render judgment against the two latter.

It was said in the case of *Shane* v. *Dickson,* 111 Ark. 353, 357, 163 S. W. 1140, that "The probate court has no jurisdiction of contests between an executor or administrator and third parties over property rights or the collection of debts due the estate. Its jurisdiction is confined to the administration of assets which come under its control, and, incidentally, to compel discovery of assets. (Citing cases)."

Here, there appears to be no necessity for the continuance of the curatorship, indeed, the curator has been discharged under one of his appointments. The 4th headnote to the case of *Beckett* v. *Whittington,* 92 Ark.

230, 122 S. W. 633, reads as follows: "An order of the probate court appointing an administrator in succession after the former administrator's final settlement has been approved is without jurisdiction and void."

The curator has made a final settlement, which had been approved when the suit was brought, and it was alleged that he and others had conspired to defraud the estate, and the relief prayed against these parties is of a nature which the probate court does not have the jurisdiction to grant, but which is within the jurisdiction of the chancery court. *Reinhardt* v. *Gartrell,* 33 Ark. 727; *Myrick* v. *Jacks,* 33 Ark. 425; *West* v. *Waddill,* 33 Ark. 576; *Jones* v. *Graham,* 36 Ark. 383; *Hankins* v. *Layne,* 48 Ark. 544, 3 S. W. 821; *Nelson* v. *Cowling,* 89 Ark. 334, 116 S. W. 890; *Beckett* v. *Whittington,* 92 Ark. 230, 122 S. W. 633; *Fogg* v. *Arnold,* 163 Ark. 461, 260 S. W. 729.

One of these former minors is now of full age; the estate of the other is in charge of his guardian in the state of his residence. It appears that nothing remains but to fix the liability of the defendants to the plaintiffs, and the probate court cannot grant full and complete relief. We conclude, therefore, that a cause of action within the jurisdiction of the chancery court was alleged, and the decree will be reversed and the cause remanded with directions to overrule the demurrer.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BEARD, ADMR.

4-5499 128 S. W. 2d 697

Opinion delivered May 22, 1939.

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

GRIFFIN SMITH, C. J. Guy A. Thompson, trustee for Missouri Pacific Railroad Company, has appealed from a judgement of $3,733.33 in favor of Chester F. Beard, individually and as administrator. Of the sum awarded, $3,333.33 was for suffering endured by Chester H. Beard, twelve year old son of the administrator, who died from injuries sustained when he was struck by a train. Four hundred dollars was allowed to compensate expenditures made by the father as cost of funeral and medical attention.

The jury found in favor of the defendant on an allegation that Chester F. Beard had sustained damages of $2,500 in consequence of the loss of his son's services and contributions during minority. It also found in favor of Bob Emerson, engineer, who had been sued jointly with the trustee. The plaintiff, personally, but not as administrator, has cross appealed, contending that the jury, in finding for the engineer on all counts, and in favor of Thompson as trustee on the question of contribution, acted arbitrarily, and that its finding is contrary to the evidence.

August 30, 1937, about 9:15 in the morning, Chester H. Beard and Willie Bob Horne were riding double on a pony. Willie was in the saddle, with Chester behind him. It is alleged that as they proceeded in this manner

at a slow gait, going east on the public street which crosses the railroad at right angle, a passenger train operated at a high rate of speed struck and fatally injured the boys. Chester lived three hours and fifteen minutes. On behalf of the plaintiff-administrator it was insisted that Chester was conscious for some time and experienced severe pain. The defendants' contention was that the impact rendered the boy instantly unconscious, and that he remained so until death.

The railway through Dumas runs almost due north and south. The gravel street over which the boys were riding extends east and west. The passenger train northbound from McGehee to Little Rock had a schedule of 60 miles per hour; but, according to the testimony of G. A. Ford, fireman, the speed actually being maintained on the day in question was 45 miles, and this was reduced to 25 miles when the city limits of Dumas were reached. The complaint alleged that a speed of approximately 60 miles was being maintained through the town. Some witnesses estimated the speed as high as 70 miles.

At a point 366½ feet south of the highway crossing, a railway sidetrack taps the main line on the west, and for 200 feet or more south of the crossing the sidetrack parallels the main line, the distance between the two tracks being 21 feet.[1] West of the sidetrack and paralleling it 69 feet are a coal bin and seed house. Distance between the center line of the sidetrack and the coal bin and seed house is seven feet. From street center to the north end of the coal bin the distance is about 20 feet.

Engineer Emerson, after verifying the fireman's testimony that in entering the city limits, speed had been reduced to 25 miles, stated that as the train traveled north the fireman was on the west side of the engine. The first information witness had that an accident had occurred was when the fireman stood up in the cab and said "stop"! The track was practically level. Emergency brakes were applied. Lapsed time between notice of danger and effective application of the brakes—that is,

[1] The measurement is from the center of the main line, and not from the west rail.

the period of mental and physical reaction, plus the time required for mechanical operation and transmission of power to brake contacts, was approximately three seconds. During that period a train traveling 25 miles an hour (36.83 feet per second) would move 110.49 feet. At 25 miles, a train such as the one being operated at the time in question, could not be stopped under 450 feet. From the engineer's position in the cab, the left rail of the track can be seen at a distance of 165 feet.

Fireman Ford, while insisting that he was keeping a constant lookout, did not see the boys until the engine was within 50 or 55 feet of the crossing. This statement was modified when he said that the engine was "just about the south end of the seed house".[2] When the train came to a stop the rear car was over the crossing. Witness saw the pony and boys "when they got over about the center of the house track. The instant I saw [the pony] it loped right in there. When I first saw it, we were within 50 feet of the crossing, and the boys were about 14 feet away. . . . The boys were riding the horse ten miles an hour, or fifteen feet a second."

R. A. Minor "saw the horse rear up and the train hit it."

Matthew Horne testified: "Just as [the boys] rode on the track the boy in front tried to pull his little pony off the track, and the pony reared up and the engine hit him. He hadn't more than got on his hind feet before the engine hit him."

Testimony was conflicting on the question whether warnings were sounded by bell or whistle. Effect of the jury's verdict was to find that they were not.

Approximate and relative distances are shown by testimony of the fireman. Although estimating that when he first saw the boys they had "loped into sight" from

[2] Distance from road center to the south end of the seed house is approximately 89 feet. Actual measurement from road center to the north end of the coal bin is not given, and statement in the opinion that the distance is 20 feet is an estimate based upon relative distances as reflected by the blue print supplied.

around the coal bin, and were 14 feet from the track, riding 10 miles per hour, and at that time the engine was 50 or 55 feet from the crossing, the explanation is necessarily qualified by the additional statement that when he saw the boys the engine was about even with the south side of the seed house. This would place the point of initial observation at 89 feet, instead of 50 or 55, and at 25 miles per hour (36.83 feet per second) almost two and a half seconds would be required to cover the distance. Within that time the boys, traveling 10 miles per hour (14.66 feet per second) would have advanced 36.65 feet—and they were only 14 feet from the track. One of five things is suggested: the fireman was mistaken in saying he saw the boys when the engine was at the south end of the seed house; or, he was in error in saying they were within 14 feet of the track; or, they were not riding at a speed of 10 miles per hour; or, the train's speed was in excess of 25 miles; or, the pony stopped on the track.

Photographs and blue prints show, as physical facts, that if the fireman had been keeping a constant lookout, he would, at a distance of 89 feet, have seen the boys when they were 25 to 28 feet from the track. On the other hand, if the fireman's minimum estimate of 50 or 55 feet is correct (the distance the engine was from the crossing when the pony first loped into view), the boys were, at that time, from 30 to 35 feet from the crossing. If the distance had been only 14 feet, it matters not from which point the fireman discovered them, for in either event there was not sufficient time for the engineer to have made an effective stop. Conversely, if from a distance of 50 or 55 feet from the crossing the fireman was keeping a watch and the boys were not visible until the engine reached that point, they must have been 25 to 35 feet from the main track, and could not have reached the place of tragedy ahead of the train.

Some one was mistaken. With the evidence in this condition, the questions of negligence and comparative negligence should have been submitted to the jury under proper instructions.

But the judgments must be reversed because of erroneous instructions. By Instruction No. 1[3] the jury was told to find for the plaintiff unless the defendants had, by a preponderance of the evidence, overcome the statutory presumption of negligence. There were general and specific objections. Specifically, it was urged that the instruction was incorrect and prejudicial "For the reason that it places an unlawful burden upon the defendants to show more than enough evidence to overcome the *prima facie* rule" . . . "in violation of the Arkansas rules of law on evidence, and in violation of the Constitution of the United States, Fourteenth Amendment."

The trial court thought the instruction justified under § 11138, Pope's Digest.[4]

In *St. Louis-San Francisco Railway Company* v. *Cole,* 181 Ark. 780, 27 S. W. 2nd 992, we discussed a question similar to that presented by the instruction here complained of. It was there said:

"It is the established doctrine of this State . . . that where an injury is caused by the operation of a railway train, a *prima facie* case of negligence is made against the company operating such train. When the evidence shows that an injury was caused by the operation of a train, the presumption is that the company operating the train is guilty of negligence, and the burden is upon such company to prove that it was not guilty of negligence. . . . The Supreme Court of the United States recently said, in construing a statute similar to the Arkansas statute: 'The only legal effect of this inference

[3] Instruction No. 1 is: "It being admitted in this case that the plaintiff's son, Chester H. Beard, was killed by the operation of one of the trains of the defendant company as alleged in the complaint, you are told therefore that the law presumes negligence on the part of the defendant company, and it will be your duty, and you are instructed, to find for the plaintiff, unless the defendant has overcome that presumption by a preponderance of the evidence in the case."

[4] Pope's Digest, § 11138: "All railroads which are now or may hereafter be built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state."

is to cast upon the railway company the duty of producing some evidence to the contrary. When this is done, the inference is at an end, and the question of negligence is one for the jury upon all the evidence.'[5]

"In construing the Mississippi statute, the Supreme Court of the United States said: 'It did not . . . fail of due process of law because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. . . . That of Georgia, as considered in this case, creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate. The presumption . . . is unreasonable and arbitrary, and violates the due process clause in the Fourteenth Amendment.'[6]

"Under the construction placed upon statutes like ours, the presumption of negligence is at an end when the railroad company introduces evidence to contradict it, and the presumption cannot be considered with the other evidence, because to do this would, as stated by the Supreme Court of the United States, be unreasonable and arbitrary, and would violate the due process clause of the Fourteenth Amendment. Therefore, in determining whether the evidence in this case is legally sufficient to support the verdict, we cannot consider the presumption created by the statute, but must determine the question from the evidence introduced."

The instruction in the case at bar told the jury, without qualification or reservation, to find for the plaintiff unless the defendants had overcome the legal presumption of negligence by a preponderance of the evidence.

This court has held that an instruction which omits an essential element of defense, but directs the jury to find for the plaintiff if other factors concur, is inherently

[5] *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884.

[6] Same citation as Note 5.

wrong and the prejudice cannot be overcome by other correct instructions. In *Vaughan* v. *Herring*[7] there is this declaration of the law: "Each of the instructions is long and we deem it unnecessary to set them out, but to simply state that each of them left to the jury the determination of the appellant's conduct as the sole issue of the jury's verdict and made no reference whatever to the defense interposed that appellee himself was guilty of contributory negligence which was the proximate cause of his injury, and then said that in that event you will find for appellee. It is true that other instructions were given by the court relative to the issue of contributory negligence on the part of appellee, but they did not have the effect of curing the error. . . . 'An instruction is inherently erroneous, and therefore prejudicial, which leaves out of consideration the plaintiff's contributory negligence or his assumption of risk, and leaves to the jury the determination of the defendant's conduct as the sole issue of the jury's verdict, by concluding with the phrase, "you will find for the plaintiff," since, under the evidence, the conduct of the plaintiff as well as that of the defendant is essential to a proper verdict'."[8]

In the instant case there was included in the instruction an element wholly foreign to the issue then before the jury, the effect of which was to tell the finders of facts that the legal presumption of negligence attended the trial throughout; that irrespective of defense testimony it continued as a burden against the defendants which they could overcome only by a preponderance of the evidence; and failing to produce this quantum of evidence, the defendants were legally adjudged to be negligent, regardless of any testimony less than a preponderance which they may have offered.

The instruction is also erroneous in that it did not submit to the jury the defense of contributory negligence. It is urged that because of his immature years, Chester

[7] 195 Ark. 639, 113 S. W. 2d 512.

[8] *Temple Cotton Oil Co.* v. *Skinner*, 176 Ark. 17, 2 S. W. 2d 676; *Garrison Company* v. *Lawson*, 171 Ark. 1122, 287 S. W. 396; *Natural Gas & Fuel Company* v. *Lyles*, 174 Ark. 146, 294 S. W. 395.

could not be guilty of contributory negligence, in that he did not have the experience and training necessary to an appreciation of the dangers involved. While this reasoning may apply in certain cases, it is not a rule of law, and the jury, under proper instructions, should determine whether, in the particular circumstance, there was, or was not, an understanding or appreciation of the dangers.

For the errors indicated, the judgments are reversed and the causes are remanded for a new trial. It is so ordered.

JONES *v.* STATE.

4124 129 S. W. 2d 249

Opinion delivered May 22, 1939.

W. A. Jackson, for appellant.

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

MEHAFFY, J. The appellant, on November 3, 1938, while en route from Cairo, Illinois, to Tipton, Oklahoma, transporting 50 cases of taxpaid liquor, was arrested in Randolph county, Arkansas, and his cargo of whiskey taken away from him by the Revenue Commissioner, and appellant was lodged in jail. The prosecuting attorney filed information before a justice of the peace in Randolph county, charging the appellant with unlawfully transporting into the State of Arkansas from without the state, 50 cases of whiskey without having obtained a permit from the Commissioner of Revenues of the state of Arkansas, as provided for in § 14177 of Pope's Digest.

Upon a trial in the justice of the peace court, appellant was convicted, fined $500, and recommitted to jail. An appeal was prosecuted to the circuit court of Randolph county, and at the January term of the circuit court was tried before the court by agreement of parties upon an agreed statement of facts. He was convicted in circuit court, and his punishment fixed at a fine of $500.

The appellant asked that the liquor, in possession of one of the revenue officers, be released to him, and the state asked for an order of the court to destroy the liquor seized. Both motions were overruled by the court and the court made the following statement: "In this proceeding, as the record stands before the Court, the Court doubts about having any authority to order a disposition of the liquor in view of the status of the record."

The court, therefore, did not pass on the question of confiscating the liquor. The facts in the case are undisputed. The appellant was transporting, whiskey upon which the tax had been paid, from Cairo, Illinois, to Tipton, Oklahoma, through the State of Arkansas without having obtained a permit from the Commissioner of Revenues of the State of Arkansas, as provided for by § 14177 of Pope's Digest.

This section makes it unlawful for any person to ship or transport, or caused to be shipped or transported, into the state of Arkansas, any distilled spirits from

points without the state, without first having obtained a permit from the Commissioner of Revenues. The penalty for a violation of this act is a fine of not less than $500, nor more than $1,000.

It is agreed that appellant transported the whiskey as alleged by the prosecuting attorney, and also admitted that he did not have any permit from the Commissioner of Revenues, as required by the above section.

The whiskey had been purchased from a wholesale liquor dealer in Cairo, Illinois, by a Mr. Rollins in Tipton, Oklahoma, and paid for by Mr. Rollins. The appellant went to Cairo for the whiskey and was transporting it as stated.

After the court had found appellant guilty and fixed his punishment at a fine of $500, appellant filed motion for a new trial. In the motion for new trial, among other things, it was stated that the judgment is in violation of the law and constitution and that it was in violation of the law and provisions of the Constitution of the United States.

Appellant says that it is admitted *that he* was stopped by the officers while en route through the state on an inter-state trip with his whiskey from Cairo, Illinois, to Tipton, Oklahoma, and that the court therefore erred in finding him guilty, and in refusing to discharge to him his cargo of whiskey, because Congress has exclusive power to regulate commerce between the states.

It is true, as contended for by appellant, that the Constitution of the United States provides that Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes.

Appellant cites not only the Constitution of the United States, but numerous authorities to sustain his statement that Congress has exclusive power to regulate commerce between the states. About this, however, there is no dispute.

He then calls attention to the case of *Dunn* v. *United States,* 98 Fed. 2d 119, 117 A. L. R. 1302. In that case the court said:

"The effect of § 2 of the Twenty-first Amendment U. S. C. A. Amend. 21, § 2, was to qualify the Commerce Clause, U. S. C. A. Const. art. 1, § 8, cl. 3 so as to permit a state to prohibit or condition the importation or transportation of intoxicating liquor thereinto.

"Referring to § 2 of the Twenty-First Amendment, U. S. C. A. Const. Amend. 21, § 2, the Supreme Court in the *State Board of Equalization of California* v. *Young's Market Co.,* 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38, said: " 'The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.'

"In *Sancho* v. *Corona Brewing Corp.,* 89 Fed. 2d 479, the court said: " 'The Twenty-First Amendment simply withdraws the exclusive control of Congress, under the commerce clause (art. 1, § 8, cl. 3), over commerce in intoxicating liquors, when their importation is in violation of the laws of a state, territory, or possession of the United States.' "

Appellant contends that the court in the case last cited held that the transportation of whiskey from Arkansas to Oklahoma was not in violation of the Liquor Enforcement Act of 1936, 27 USCA, § 221, *et seq.,* that act was passed by Congress and the prosecution in the Dunn Case was under the Federal statute. It was held in that case: "The intention of Congress manifest by the language of § 223 (a), *supra,* when read in the light of the committee report is clear. It is to make it a federal offense to import or transport liquor into a dry state only when that state, by its laws, prohibits all importation or transportation of intoxicating liquor thereinto, or provides for and requires a permit or license to accompany intoxicating liquor that may be lawfully imported or transported thereinto."

The reason given by the Court of Appeals for reversing the conviction of the lower court in that case was that § 2 of the Twenty-First Amendment, which prohibited the transportation or importation in violation of the laws thereof, was not self-executing, and, therefore, the defendant in that case was not guilty of violating the federal law. The lower court, however, in that case held

that a state may prohibit or condition the importation or transportation of intoxicating liquor into a dry state.

The Supreme Court of Tennessee held that a state can forbid and punish the transportation of liquor across the state line into another state only in case the proposed use was contrary to law. The Tennessee court reversed the case holding that courts cannot judicially know the statutes of another state. The case was remanded and the court stated that if it should develop on a subsequent trial that the sale of intoxicating liquor in Mississippi was illegal, the defendant was not protected by the Commerce clause of the Federal Constitution while passing through Tennessee with such liquors, but was subject to the Tennessee laws against the transportation of liquor within the boundaries of Tennessee. *Haumschilt* v. *State,* 142 Tenn. 520, 221 S. W. 196.

There seems to have been no proof in that case that Mississippi was a dry state, and the Tennessee court did not take judicial notice of the laws of other states.

The law of this state, however, requires the courts to take judicial knowledge of the laws of other states. Section 5119 of Pope's Digest reads as follows: "The courts of this state shall take judicial knowledge of the laws of other states."

This court takes judicial notice of the fact that Oklahoma is a dry state, and it is not necessary to state in an indictment or information matters of which the court takes judicial notice. Section 3847, Pope's Digest.

It would serve no useful purpose to review all the authorities on the question of the right of the state to prohibit or condition the transportation of intoxicating liquors throughout the state.

We think the case of *Dunn* v. *United States, supra,* and the Tennessee case above cited, settle this question. Arkansas had not undertaken to prohibit the transportation, but conditions it. That is, liquor may not be transported without a permit, as provided by law. Under the facts in this case there can be no question but that the appellant violated the law as stated in § 14177 of Pope's Digest, and that his conviction was proper.

However, any person charged with crime, whether guilty or innocent, should be tried and, if guilty, punished according to law. The justice of the peace in the instant case confisated the liquor belonging to appellant. This he had no right to do. There is no law authorizing a confiscation of liquor for a violation of the above section. There is a section of law that provides for the confiscation of liquor when it is in possession of one without the tax having been paid, but the agreed statement of facts in this case shows that the tax on the liquor being transported had been paid. The state, therefore, had no right to confiscate the property.

The circuit court, however, declined to pass on this question; that is, on the question whether the circuit court had any right to make an order as to the disposition of the liquor. The appellant, however, if the liquor is not delivered to him, may recover it by appropriate action.

The judgment of the circuit court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* TROY.

4-5495 128 S. W. 2d 1002

Opinion delivered May 22, 1939.

Thomas B. Pryor, H. L. Ponder and *H. L. Ponder, Jr.*, for appellant.

J. Paul Ward and *W. D. Murphy, Jr.*, for appellee.

HUMPHREYS, J. Appellee brought suit against appellants in the circuit court of Independence county to recover damages in the sum of $650 done to his truck growing out of a collision between appellant's passenger train and his truck at Sherill crossing between the towns of Sulphur Rock and Magness in said county, through the alleged negligence of their employees in approaching the crossing without blowing the whistle, or ringing the bell as required by the signal statute, (§ 11135, Pope's Digest), by failing to maintain the crossing in passable condition, and by permitting bushes to grow up on its right-of-way so as to obstruct the view of travelers on the highway to some extent in approaching the crossing.

Appellants filed an answer denying each allegation of alleged negligence and, by way of further defense, alleging the collision was due to the negligence of the driver of the truck, Melvin Casey, in carelessly and negligently driving the truck upon the track in front of the approaching train.

The cause was submitted to a jury upon the issues joined by the complaint and answer, the testimony of the witnesses introduced by the parties and the instructions of the court resulting in a verdict and consequent judgment for $500 in favor of appellee, from which is this appeal.

At the conclusion of the evidence appellants requested the court to instruct the jury to return a verdict for them on the ground that there was no substantial

evidence showing that appellants failed to ring the bell or blow the whistle as the train approached the crossing, nor by failing to maintain the crossing in a passable condition, nor in permitting bushes to grow up on the right-of-way so as to obstruct to some extent the view of travelers using the highway in approaching the crossing and for the further reason that the undisputed evidence showed that appellee was guilty of contributory negligence himself which resulted in the damage to the truck.

Eight witnesses who were in a position to hear the whistle had it been blown, or the bell had it been rung, as it approached the crossing testified that the whistle was not blowing and the bell was not ringing as the train approached the crossing. It is true that about as many witnesses testified that the bell was ringing and the whistle blowing as the train approached the crossing, but this conflict in the testimony presented an issue of fact for the jury to determine. The jury determined the issue adversely to the appellants and as there is much evidence of a substantial nature to support the verdict it is binding upon appellants.

There is, also, much testimony of a positive nature in the record to the effect that the crossing was extremely rough caused by exposed ties, rails sticking up from three to five inches and loose gravel that had been dug out by the wheels of trucks and automobiles. Several photographs of the crossing were introduced showing otherwise, but they were taken after the crossing had been repaired by spreading gravel and chat over the crossing. There is ample evidence in the record tending to show that the crossing was in an unusually rough condition at the time the truck was run over by the train and practically demolished.

Likewise there is much substantial testimony in the record to the effect that bushes had been permitted to grow up on the right of way which obstructed to some extent the view of travelers who might be looking in either direction for approaching trains.

All these issues were submitted to the jury under correct instructions. In fact appellants do not now argue that any of the instructions given by the court were

erroneous. They do argue that instructions numbers three, five, six and seven which they requested and which the court refused to give should have been given by the court. These instructions were either covered by other instructions given or were abstract or presented issues not involved in the case, and each and every one of them was properly refused.

Appellant argues that the facts and circumstances surrounding the collision show that the driver of the truck was guilty of contributory negligence in driving the truck upon the crossing. The facts stated in the most favorable light to appellee relative to driving the truck upon the crossing are, in substance, as follows: The railroad bed was higher than the highway and the approach to it was upgrade. From the crossing the railroad was straight in the direction from which the train came to high ground through which there was a cut. The distance from the crossing to the cut was about 250 or 275 feet. The approaching train could not be seen until it came out of the cut. As the truck driver was approaching the crossing he stopped his truck eight or ten feet from the track and looked and listened in both directions to ascertain whether a train was coming. His wife who was riding beside him did likewise. A boy in the rear of the truck was also looking and listening. None of them saw or heard the approaching train. The truck driver then started his truck very slowly onto the track. At this time his wife saw the train some seventy-five feet from them coming very rapidly and called the truck driver's attention to it and before he got the back end of the truck off the track the train struck it and practically demolished it. The driver testified on cross-examination that after looking and listening and failing to see or hear the approaching train he did not look again as he was attempting to pass over the crossing and directed his attention to the operation of the truck. Appellant argues that since he did not continue to look both ways he was guilty of contributory negligence as a matter of law. The duty resting upon him under the law was to exercise such care as a man of ordinary prudence would exercise under similar circumstances. The rule was announced in *Coca-*

Cola Bottling Co. v. *Shipp,* 174 Ark. 130, 297 S. W. 856, that negligence is doing something a person of ordinary prudence would not do, or failure to do something that persons of ordinary prudence would do, under the circumstances. This rule was re-announced in the case of *Arkansas Drilling Co.* v. *Gross,* 179 Ark. 631, 17 S. W. 2d 889, and the case of *Johnson* v. *Coleman,* 179 Ark. 1087, 20 S. W. 2d 186. Under this rule of what is ordinary care and prudence we are unable to say that as a matter of law the driver was guilty of contributory negligence in failing to look down the track again during the short interval he was attempting to pass over same. A careful or prudent man may have well concluded after stopping, listening and looking both ways, within eight or ten feet of the track, and hearing and seeing no approaching train he could pass over the crossing in safety, so it can not be said as a matter of law that the driver was guilty of contributory negligence. Appellants argue that the driver could not have looked and listened without seeing or hearing the train. Three witnesses swear positively that they not only listened and looked in both directions, but that the driver stopped the truck in order to do so. It must be remembered that the hill through which there was a cut prevented them from seeing the train more than 250 or 275 feet and that the train came at a speed of perhaps fifty or more miles per hour out of the cut as it approached the crossing. If the bell was not ringing nor the whistle blowing it can not be said as a matter of law that if the driver of the truck had listened he could have heard the approaching train. We think it clearly a question under all the circumstances surrounding the collision for a jury to determine whether the driver of the truck acted imprudently or carelessly in starting his truck and attempting to pass over the crossing. We do not think the undisputed evidence shows that the driver of the truck must necessarily have seen and heard the approaching train had he listened and looked. There is nothing to show that he could have driven faster than he did over the character and kind of crossing maintained by appellants for him to pass over and thereby prevent the injury to the truck.

No error appearing, the judgment is affirmed.

PHILLIPS *v.* TURNEY.

4-5491 129 S. W. 2d 963

Opinion delivered May 22, 1939.

[redacted]

Christy & Henley and *W. F. Reeves,* for appellant.

Opie Rogers, Wm. T. Mills and *William T. Mills, Jr.,* for appellee.

BAKER, J. The appellants, Velona Phillips, as widow, and as next friend to Clifford, Venita, Eual,

Hubert and Quindora Phillips, minors, and Carrie Phillips, of lawful age, the children and heirs at law of Carl Phillips, deceased, sued Coy Turney for damages, alleging that they were wholly dependent upon the said Carl Phillips for support and that he contributed to them the proceeds of his labor; that Carrie Phillips, although an adult at the time her father was killed, was going to school at his expense and was dependent upon him and had his promise for assistance to obtain an education; that by reason of his death she had to quit school. The usual allegations of the deprivation of companionship, protection, support, aid, assistance and parental care were alleged.

They also alleged that on the 15th day of May, 1938, Coy Turney willfully, deliberately, wrongfully and without cause shot and killed the said Carl Phillips.

Defendant filed an answer and denied specifically the allegations of the complaint and pleaded that on the 15th day of May, 1938, the defendant was at his home, in or near the town of Snowball, Arkansas; that at about 8:00 o'clock p. m. he went to his barn, fed his mules and at that time he saw Carl Phillips "slipping" into his field and proceeding toward his house, that he had not spoken to Carl Phillips for about eight years; that he had had trouble with him at that time; that the said Carl Phillips was attempting or had been trying to pay attention to his wife; that when he saw that Carl Phillips was coming toward his home and that he was laboring under a belief that if Carl Phillips appeared at his home it would be for the purpose of killing or hurting him, or to assault his wife; that he armed himself with a shotgun and left his house and remained inside the yard or its enclosure and that Carl Phillips came close or near to him, within possibly twenty-five yards, and that he called to the said Carl Phillips who "made a pass like he had a gun with him," and that the defendant fired with his gun.

On account of the fact that a detailed statement of this case, in all its particulars, would necessarily prove embarrassing to certain persons, particularly children, without any consequent good to follow therefrom, we shall content ourselves with the barest possible statement of

the conditions stated favorably to support the judgment in favor of the appellee. *Alexander* v. *Johnson,* 182 Ark. 270, 31 S. W. 2d 304.

Phillips and Turney had been enemies for a period of years, stated as seven or eight years. Their troubles at that time culminated in Turney shooting Phillips twice. Apparently the troubles between the two were settled and Phillips moved out of the community. Possibly within a year before this last matter arose in which Phillips was killed, Phillips had moved back within three hundred yards of the place where Turney was living. The two frequently met or passed each other without speaking or having any kind of communication. Turney says that he was advised that Phillips was carrying a pistol, had made some threats, perhaps somewhat veiled in their nature. His evidence evinces the fact that during these years he had lived under the belief that the trouble might again be renewed by Phillips and that he had kept shotgun shells with one of which he killed Phillips. On the night of the killing he had gone to his barn and fed his mules a short time before it was really dark, though night was coming on, and while he was engaged in these chores about his place, he observed Phillips inside his field, "slipping" toward his barn. He finished his work at the barn and returned to his house, and he states that he thinks he had washed his hands and eaten supper when he went out in the yard, taking his gun with him. He wanted to know if Phillips was coming to make an attack upon him or his home; that he saw Phillips coming rapidly along the fence and close to the fence toward his house; that the pathway that Phillips followed was one that went only from the barn to the house and depending upon the direction traveled the destination of one using this path was determined. He is not sure, but he thought that Phillips had climbed the fence to the yard; that when he called to Phillips, Phillips made a motion as if to draw a pistol when defendant shot him. When Phillips body was later examined no pistol was found upon his person or near his body, but it is argued that one of his sons, practically grown, was the first person

to him. There was found, however, within six or seven feet of the deceased's body, brass knucks.

One of the arguments made upon this appeal, from the judgment rendered in favor of Turney upon this suit for damages, is that the evidence and reasonable inferences from it do not justify the conclusion reached by the jury. We think otherwise. There were two men engaged in a fued so bitter that one had shot the other seven or eight years ago. During all the interval since that time there was some form of truce, but no assurance of peace. We do not think that the evidence warrants a conclusion that Turney was unnecessarily frightened or afraid of further violence, but the conduct of Phillips was such that Turney was justified in his fears that there might be at some time a recurrence of the old troubles. Neither one of these men apparently talked very much to their friends or neighbors and this is perhaps one indication that each understood that any new or second embroilment as between them would end only in the death of one or the other. There is not one iota of proof or suggestion that Turney did anything to carry on this fued or that his conduct was such as to aggravate or bring about any new outbreak as between the two. He seems to have ignored Phillips, lived quietly in his home, though perhaps ready at all times to protect himself should an attack be made upon him. We think we are justified in considering what his feelings must have been when he observed Phillips climbing into his field and secretly and furtively attempt to reach his barn where Turney was at the time feeding his mules, just before dark, on the fatal day. Turney did not wait in the barn for Phillips, but, having finished his feeding, went immediately to his house and remained inside for a time. It is easy to argue that it might have been better had he stayed inside the house with his family, but we seriously doubt if that were the better part of discretion, if he expected an attack, fatal in its nature, to be made upon him by Phillips. Since he had retreated to his home, the last stronghold of protection left to him by nature and the law of the land, he must have felt justified when he went back into his yard in taking his gun in order that

he might be ready, if some attack were made under cover of darkness which had then ensued. Pope's Digest § 2998. His testimony is that when he returned to his yard he saw Phillips in the hall way of his barn peering out as if looking for someone. No doubt he was expecting to see Turney return to the barn or doing chores about the house, as he perhaps did not know that he had been discovered as he went "slipping into the barn."

Appellants do not face the true issue upon this proposition and say that perhaps when Phillips left the barn "he had evidently started to go to town." Phillips was upon the pathway that led from the barn to the house, going toward the house of Turney, after he had been secreted in the barn for a time as on the lookout for Turney. Whether he was armed with pistol or gun upon that occasion makes no difference now. If Turney honestly thought he was armed, and we really think he was justified in so doing, under the facts and circumstances, he was justified in acting upon that presumption. When Phillips approached the place where Turney was then standing, walking in a rapid manner, Turney fired the fatal shot. At least, the facts that were disclosed by this record were sufficient and of substantial nature to warrant the jury in finding that Turney believed Phillips was seeking him out. It is inconceivable under the circumstances that Turney could have surmised the visit was a friendly one. We entertain no such view. *Sullivan* v. *State,* 171 Ark. 768, 286 S. W. 939. This was, also, held to be a jury question. Many authorities are available, but the above one is typical.

It is argued that because of the fact that Turney had kept the shotgun and loaded shells for several years, this was evidence of his long continued ill feeling and malicious conduct. But the jury may have found it was also evidence of his patient and long suffering without active resentment, or, even of a law abiding disposition and nature. If these facts were properly submitted to the jury its verdict is conclusive. We, therefore, consider the method of submission. In doing so we discuss only the instructions to which objections were made.

Appellants argue that the court erred in giving three instructions at the request of the defendant. These instructions were No. 3, No. 4, and No. 6.

Instruction No. 3 is as follows: "I instruct you that in case of a wilful tort the wrongdoer is responsible for the direct and proximate consequences of his act without regard to his intention to produce the particular injury. And in this case if you find that Carl Phillips was in the act of committing a tort or wrong and that the act of so committing said tort or wrong was the proximate cause of his injury and death, if any, you should find for the defendant, Coy Turney."

Instruction No. 4 is as follows: "You are instructed that before you can find for the plaintiff and against the defendant, Coy Turney, you must find from the evidence and by a greater weight thereof, that Coy Turney was negligent and had no right to kill Carl Phillips, and that Carl Phillips did not contribute to said killing either by any action of his or by any omission of his, and unless you so find you should find for the defendant, Coy Turney."

Instruction No. 6 is as follows: "I instruct you that if you find from the testimony in this case and by the greater weight thereof, that the deceased Carl Phillips, at the time of the shooting, which mortally wounded him, was engaged in the commission of an unlawful act and that the shooting and killing was caused by said unlawful act on the part of the deceased, Carl Phillips, and was necessary, then you should find for the defendant, Coy Turney."

The only objection made to instruction No. 3 is a general objection. It was perhaps ineptly drawn and might have been better expressed in different language, but the form or method of expression was not objected to and unless the instruction was in itself inherently wrong, appellant's objection cannot be sustained. *Alexander* v. *Johnson, supra; Mississippi River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255.

In this case we cannot see how it may reasonably be argued that Phillips had any right upon appellee's

property. There was no excuse for him to be present upon the premises of Turney according to the facts disclosed, except to commit some wrong upon the person of Turney or those of his household. There is no evidence of any kind that justifies any conclusion except that Phillips was there for the purpose of making an assault upon Turney or some member of his family. If such was his intention, and his intention may be interpreted only from his conduct, since he is now dead, and no explanation may be made except from his conduct, then his conduct, under all the facts and circumstances above stated, justified every act that might be employed in the necessary self-defense and defense of the home, and such is the effect of instruction No. 3, when rightly considered and interpreted as related to the facts in the record.

In instruction No. 4 the court told the jury that before it could find for the plaintiff against the defendant, Coy Turney, it must find from the evidence and by the greater weight thereof, that Coy Turney was negligent and had no right to kill Carl Phillips and that Carl Phillips did not contribute to the said killing by any action of his or by any omission of his. The objection made to this instruction is a general objection and not specific as to any method employed in its statement. While we think the instruction might well have been omitted in that there was no specific act of negligence that might properly have been argued as against Turney, yet we do not see how there could be any prejudice in basing the instruction upon such a condition. It is true that one acting in self-defense may not act negligently, but such conduct as may be treated as negligence in homicide cases is not the willful disregard for the rights of others, but perhaps more in the nature of violating the rights of others by reason of a failure to consider that the second party may have any rights at all under the circumstances. There may have been such a theory in the oral presentation of the case that Turney shot too soon and before his danger was so eminent and perilous as to make the shooting absolutely necessary for his own self-defense. If such was the theory upon which this instruction was founded, then necessarily we think before plain-

tiffs could recover, the facts presented must have justified the jury so to determine the facts in their favor. This certainly was not a proposition of law, but it was a question of fact for the jury. We do not think this statement impairs in the least the well known and long established doctrine that one who kills another must assume the burden of establishing the fact that the killing was in the necessary defense of his person or of those entitled to his protection. Pope's Digest, § 2968. It was Turney who had to meet this additional burden of showing himself not to have been negligent. The court did not by this instruction impose the burden upon plaintiffs to disprove that defendant had acted in self-defense. The court had properly instructed the jury under the provisions of § 2968 aforesaid. Although this instruction might have been challenged properly by specific objections to its method of expression, such objections were not made. It was not inherently wrong or prejudicial as applied to all the facts developed.

In regard to instruction No. 6, the same statement may be made as has been made in regard to the others, that the objection is general. We think the purport of the instruction is correct; that is to say that it is not inherently erroneous. Carefully analyzed, it is subject to criticism. In this instruction, the court told the jury that if they found from the preponderance of the evidence that at the time of the shooting Phillips was engaged in the commission of an unlawful act and the shooting and killing was caused by said unlawful act and that it was necessary, they should find for the defendant. Of course, it is true that the commission of unlawful acts does not always justify killing and such killing may be murder, but this instruction related to the specific acts in evidence before the jury. The instruction is also susceptible of the criticism on account of the manner in which it is stated, that it makes the unlawful act of which Phillips may have been guilty the proximate cause of his death. We think it is only another way of permitting the jury to determine if the particular unlawful acts or conduct of Phillips as presented in evidence may have justified Turney in shooting him. Since we believe this is the only

interpretation under the facts and circumstances that might have reasonably been given to this instruction by the jury, we do not believe it was prejudicial or erroneous.

These were all the matters urged for a reversal of the verdict of the jury in this case. They are not sufficient.

Affirmed.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* RILEY.

4-5489 128 S. W. 2d 1005

Opinion delivered May 22, 1939.

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

Partain & Agee, for appellee.

SMITH, J. Between 8 and 8:30 on the night of March 24, 1938, E. J. Riley left home in his car, with his wife and two children, to visit his wife's mother. As he crossed the tracks of the appellant Railroad Company in the City of Fort Smith his car collided with a locomotive which was switching two cars attached to the rear of the locomotive. Appellee sustained personal injuries, as did also his wife and one of the children, the other child, a baby, escaping injury. Judgment was recovered to compensate these injuries, and also the damage to appellee's car.

The cause was correctly submitted to the jury under instructions usually given in such cases.

The testimony of the plaintiffs was to the effect that Riley looked and listened for a train as he drove upon the track, but he neither saw nor heard a train. It was "pitch dark," as Riley said, and he offered his own and other testimony to the effect that the headlight of the engine was not shining, and that the whistle was not blown, nor was the bell rung, as the train approached the crossing.

However improbable it may be that a train would be switched in the dark, there was affirmative testimony to that effect, and, as was said by Justice Hart in the case of *St. Louis & San Francisco Ry. Co.* v. *Stewart,* 137 Ark. 6, 207 S. W. 440, "It is possible, however, for a train to be run without the headlight on the engine being lighted and whether the headlight was burning at the time of the accident does not contradict any law of nature or the physical facts in the case, but depends upon whether or not the plaintiff and his witnesses were telling the truth." A case was, therefore, made for the jury.

The court read § 11135, Pope's Digest, as an instruction in the case. This section requires trains to give signals as crossings are approached, and that "A

bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing, or whistling, until it shall have crossed said road or street, . . ."

Objection was made to this instruction upon the ground that "The movement of this train was less than eighty rods from the crossing where the accident occurred at the time the movement started, and that said movement was a switching movement." In other words, after being put in motion the train did not travel eighty rods before reaching the crossing.

The duty to ring the bell or blow the whistle is not relieved because the train was put in motion at a point less than eighty rods from the crossing. Of course, the crossing signals could not be given for a distance of eighty rods, but they could and should be given while the train is approaching the crossing, whatever the distance.

After objection to the instruction it was modified to read that the signal should be given "in approaching a crossing and within 80 rods thereof, or within any distance under 80 rods traveled in approaching a crossing."

The instruction as modified was correct and was authorized by the statute. The case of *Missouri Pacific R. R. Co.* v. *Powell,* 196 Ark. 834, 120 S. W. 2d 349, is adverse to appellant's contention in regard to the instruction as modified, and disposes of it.

Judgments were recovered in this case as follows: For E. J. Riley, $2,000.00, which included damage to his car; for the injury to his wife, $3,000.00; for the injury to his little daughter, Jo Ann, the sum of $2,000.00, making a total judgment of $7,000.00.

It is not very seriously contended that the judgment in favor of Mrs. Riley for $3,000.00 is excessive, but it is very earnestly insisted that the other judgments are.

As to the judgment in Mr. Riley's favor for $2,000.00, it may be said that his car was wrecked, and that he paid for himself and for his wife and daughter $100.00 for

medicines and medical attention. He received an injury to his eye which caused him much pain. He testified that "I had gotten a lick in my stomach, and was down in my back for several days after the wreck, and didn't work for a week or two and my back is still that wav up until now, but it is all right as long as I don't strain myself, I can make it all right if I take it easy." He stated his occupation to be that of machine operator, which occupation he was able to pursue, and was now pursuing, except that, when it was necessary to lift some heavy object, or to crank a machine, as it frequently was, he was required to have assistance, which would not have been necessary but for his injury. The doctor who attended Mr. Riley testified that his injuries had been very painful, as appellee was both swollen and tender, and one Garrett, who works with appellee, testified that even then, some months after the injury, witness was required to do the heavy work which their employment required.

Under these circumstances we are unable to say that the verdict in Mr. Riley's favor is excessive.

The child received several cuts and bruises, which, while painful, are not permanent, except a scar over her eye, which the doctor said might finally disappear, and a scar on the lower part of her hip and side about five or six inches long, which the doctor said would not disappear. This scar is a disfigurement which may be more embarrassing when Jo Ann becomes a woman than it is now while she is a child. Permanent disfigurement has always been regarded as a recoverable element, in measuring damages, and we are unable to say that the verdict on this account is excessive. *Ferguson, etc., Co.* v. *Good,* 112 Ark. 260, 165 S. W. 628.

Upon the whole case we are unable to say that any of the judgments are excessive, and, as there was no error in the trial at which they were recovered, they must be affirmed, and it is so ordered.

Opinion delivered May 22, 1939.

[redacted]

Chris Carpenter, for appellant.

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

McHANEY, J. Appellant was charged by information with the crime of grand larceny for the stealing of "one yellow jersey heifer, past two years old, and roan calf, with white spots in flank, same being the property of F. B. Hoover." He was tried and found guilty on January 16, 1939, his punishment being fixed at one year in the penitentiary, and judgment was accordingly

entered. On the same day he filed his motion for a new trial which was overruled, and he prayed and was granted an appeal to this court, sixty days being given to file a bill of exceptions. The transcript was filed in this court on March 15, 1939, and appellant's brief was filed twelve days later, on March 27th.

On April 25, during the January term of the Arkansas circuit court, southern district, but at an adjourned day thereof the court made an order which recited the facts above stated and continued as follows: "Now on this 25th day of April, 1939, being an adjourned day of the regular January Term, 1939, the court on its own motion, upon investigation finds, that the proof on the part of the State of Arkansas, fails to sustain the charges of the information filed herein; and fails to sustain the verdict and judgment rendered herein on the 15th day of January, 1939. Now, therefore, the verdict and judgment of conviction of the said defendant, Hollis Fletcher, rendered herein on the 16th day of January, 1939, is hereby vacated and set aside; new trial granted and ordered, and this cause set for trial on the second day of the next regular term of this court."

The record has been amended by stipulation to include said order. The question naturally arises as to the validity of said order although not raised by the briefs of the parties. It is a novel situation, but not entirely new to this jurisdiction. The question is: Did the court have jurisdiction to make the order at the same term, but after the appeal had been perfected in this court? We feel compelled to answer the question in the negative, because of prior decisions of this court which were grounded on good authority and sound reasoning. In *Freeman* v. *State,* 158 Ark. 262, 249 S. W. 582, 250 S. W. 522, a case in point, Freeman was convicted of grand larceny and sentenced to a year in the penitentiary on October 20, 1922, in the Sebastian circuit court. He appealed promptly to this court and the judgment was affirmed on January 27, 1923. Thereafter, on February 13, 1923, he moved the trial court to modify the judgment so as to sentence him to the reform school alleging that he was a minor 16

years of age at the time of trial. The court overruled the motion and he again appealed to this court. The case was again affirmed. On petition for re-hearing, he suggested a diminution of the original record and asked for certiorari to the clerk of the trial court directing him to certify to this court a transcript of the record showing the date of adjournment of the term of court at which he was convicted and sentenced, the object no doubt being to show that the term of the trial court had not adjourned when his original appeal was taken. His motion for certiorari was denied. The court said: "The request for the writ is denied because the perfection of the record as to the date of the adjournment of term of court could not benefit appellant. It is true we affirmed the judgment of the circuit court upon the ground that the sentence could not be modified after the adjournment of court. That was not the only ground which called for an affirmance. An appeal was prosecuted to the Supreme Court from the original judgment of conviction and sentence, which was affirmed. The appeal lifted the cause out of the circuit court; and, as the judgment was affirmed, it was beyond the power of that court to afterwards modify or change it in any respect. After the appeal was taken and the transcript lodged in this court, the only jurisdiction remaining in the circuit court was to correct the judgment by *nunc pro tunc* order to make it speak the truth, or upon reversal and remand of the cause to follow the directions of this court. The motion for the writ and for rehearing is overruled."

Another case in point is *Emerson* v. *Boyles*, 170 Ark. 621, 280 S. W. 1005, 44 A. L. R. 1193. Boyles plead guilty to manufacturing mash and he was sentenced to a year in the penitentiary on July 22, 1925, a regular day of the July term of the Perry circuit court. He shortly thereafter began serving his sentence. On December 17, 1925, an adjourned day of the same term, the trial court made this order: "On this day comes on for hearing this cause, and the court finds that the judgment entered in the cause herein should not have been entered, and it is accordingly ordered and adjudged that the judgment rendered in the above entitled cause, at the present term

of this court, be and the same is hereby set aside and held for naught, and the commitment heretofore issued is recalled. The keeper of the Arkansas State Penitentiary is hereby ordered to release the said defendant, J. M. Boyles. The court deeming it best for the defendant, and not harmful to society, the case is hereby continued on condition, first, that the defendant pay the cost of this court within thirty (30) days from date, and second, that his behavior shall hereafter be good, pending which time he shall be released on his own recognizance. It is further ordered that a copy of this order be served on the keeper of the State Penitentiary." The penitentiary officials refused to obey this order and to release Boyles, and on December 22, 1925, he brought habeas corpus against them to be released. The Pulaski circuit court granted the writ and the Board appealed. This court held that where a defendant is convicted, enters the penitentiary in execution of the judgment, and serves a part of his sentence, the trial court has no jurisdiction at the same term of court to set aside the sentence and direct the case to be continued, as it would be in effect putting him twice in jeopardy for the same offense. In doing so the court used this language: "This holding is a recognition of the rule, well established, that, where the defendant has entered upon the execution of a valid sentence, the court loses jurisdiction over the case.

"Reasoning by analogy, it may be said that the case is not unlike one where an appeal is taken to the Supreme Court at the same term during which the judgment is rendered in the lower court.

"In *Robinson* v. *Arkansas Loan & Trust Co.*, 72 Ark. 475, 81 S. W. 609, it was held that, when an appeal is granted and an authenticated copy of the record is filed in this court, the suit is thereby removed to the Supreme Court. When the transcript is filed, the jurisdiction of the Supreme Court is complete, and the lower court loses jurisdiction, except to correct its judgment to make it speak the truth, in aid of the jurisdiction of the appellate court. The same rule has been held applicable to criminal

cases. *Freeman* v. *State,* 158 Ark. 262, 249 S. W. 582, 250 S. W. 522.

"Thus it will be seen that, while the general power of the court over its judgments, both in civil and criminal cases, during the term in which they are first rendered is undoubted, still there are well known exceptions to the general rule. If the trial court loses jurisdiction over the case when the statutory requirements for an appeal are complied with, and a transcript of the record is filed with the clerk of this court, it would seem that for a similar reason the trial court would lose jurisdiction of the case when it had issued its commitment of the defendant to the State Penitentiary, and the defendant had been transported there, and was serving his sentence."

So, in this State, there are two well known exceptions to the rule that the court has general power over its judgments during the term in which they are first rendered. One is that when an appeal has been perfected in this court and the other is that the defendant has served a portion of his sentence. In either case the trial court is without jurisdiction to modify its judgment, "except to correct its judgment to make it speak the truth in aid of the jurisdiction of the appellate court." There can be no such thing as two courts having jurisdiction of the same case, involving the same subject-matter, at the same time.

We, therefore, hold that the order of April 25, 1939, was ineffective because the case was then pending on appeal in this court.

Coming now to the merits of the appeal, two questions are raised. The first is that there is a variance between the information and the proof. The second is the sufficiency of the evidence to sustain the verdict.

Appellant was charged with stealing two animals—a "yellow jersey heifer, past two years-old" and a "roan calf, with white spots in flank." It appears to us that there can be no question as to variance between the information and proof as regards the calf, because appellant was found with it in his possession and delivered it to Mr. Hoover, the owner, when he came and identified

it as his calf. The cow which was the mother of this calf was found dead, about three quarters of a mile from appellant's house. The skin on the head of the dead cow had been removed and the ears were cut off. She had been dead about three days. Mr. Hoover identified her by her horns. Another witness, Hal Collier, identified the cow and calf as the property of Hoover. Still another witness, Walter Perry, testified that he traded two dogs to appellant for the cow and calf in question, a jersey cow and calf; that appellant came and got the dogs and the witness went after the cattle, but was told by appellant to come back next day and he would have the cow up there; that he went back in a day or so and appellant told him the cow got run into by a car and was killed; that he saw the cow and calf before the cow was killed and saw the calf after it was taken from appellant, but did not see the dead cow; and that the calf was the same as the one he had traded with appellant for. He described the cow as "a little jersey cow—weighing about 450 pounds. Just the average color of a jersey cow, and the calf appeared to be about two months old." Appellant showed him the cow and calf and offered to trade them for his two dogs. It was a bull calf.

We cannot agree with appellant that there was a fatal variance as to the cow. It is argued that, because the charge was the stealing of a yellow jersey heifer, past two years old, and that the witnesses referred to a jersey cow, this constitutes a variance; that a heifer is not a cow. Webster defines the word "heifer" as "a young cow; a cow that has not had a calf." The animal in this case was a young cow with her first calf, and while the use of the word "heifer" in the information was not exactly accurate, yet the additional words, "past two years old" shows that she was a mature animal which properly would be called a cow. When all the language in the information describing the animal is considered together, we are of the opinion that the testimony referring to her as a "jersey cow weighing about 450 pounds" and "a little jersey cow weighing about 450 pounds just the average color of a jersey cow" does not constitute a substan-

tial variance. In *State* v. *Haller,* 119 Ark. 503, 177 S. W. 1138, the indictment charged Haller with stealing "one cow (bull)" etc. In holding there was no variance between the indictment and the proof which showed that a bull was the subject of the larceny, this court said: "The liberality of our code of criminal practice is illustrated in the decision of this court in *State* v. *Gooch,* 60 Ark. 218, 29 S. W. 640, and we think according to the liberal rule laid down in that case the indictment was sufficiently clear to indicate an animal of that kind of the male species, and that the proof in this case conformed to the allegations of the indictment."

We think the evidence sufficient to support a conviction. He offered a plausible explanation of his possession of the calf, but the jury refused to accept it. Possession of property recently stolen is sufficient to support a conviction for the larceny thereof, if unexplained to the satisfaction of the jury. *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93. Moreover, the testimony of Walter Perry that appellant traded him a jersey cow and calf for two dogs, and that the calf is the one in controversy, shows that appellant was exercising acts of ownership over both animals, which the proof shows did not belong to him.

We find no error, so the judgment is affirmed.

SMITH and HOLT, JJ., dissent.

SMITH, J. (dissenting). By stipulation, the judgment of the trial court setting aside the conviction and the sentence of the court pronounced thereon has been made a part of the record in this case. This order and judgment was made and entered at the same term of court at which the judgment sentencing appellant to a term in the penitentiary was made and entered, but it was not made until after appellant had prayed and perfected his appeal to this court.

Grave doubt has been expressed in our consultation by the members of this court as to the legal sufficiency of the testimony to support the conviction, and Justice Holt dissents upon that ground, but he also concurs in what is

hereinafter said. In this respect the case is not unusual. Such a condition frequently arises. But in another and far more important respect, the case is very unusual. We have now before us a record containing the solemn finding and recital that the trial judge has concluded that the testimony did not sustain the conviction. It was the peculiar province of the trial judge to determine that fact. It was said in the case of *Missouri Pacific Rd. Co.* v. *Brewer,* 193 Ark. 754, 102 S. W. 2d 538, as has been said in many other cases, that the trial judge has a power which we do not possess in passing upon the weight and sufficiency of the testimony.

It is true, of course, that the action of the trial judge in sentencing appellant to the penitentiary imports a finding that the testimony was sufficient to sustain the conviction. But during the continuance of that term he changed his opinion. This may have resulted from further reflection, or upon a consideration of new or additional testimony. But in any event, we have before us the judgment of the court, rendered at the same term of court, finding that the testimony does not sustain the conviction.

Appellant does not, upon this additional record, ask that his appeal be dismissed, but in bringing this additional record before us, he does ask the relief to which he may be entitled. If to grant him the relief, to which he is plainly entitled, it is necessary to dismiss the appeal, we should make that order. Certainly, we should not affirm his conviction and order him sent to the penitentiary, when the trial judge has found that the testimony is not sufficient to sustain the conviction.

The majority say the lower court was without power to make any order in the case after the appeal was perfected. When sentence was pronounced appellant could take no action to obtain relief except to appeal to this court, and that he did. But before the adjournment of the term at which the sentence was pronounced the trial court concluded that he had erred in sentencing appellant to the penitentiary, for the reason that the testimony was not sufficient to sustain the conviction. Shall we deny the trial judge the right to correct the error which

he admits was made? The majority say we must because appellant has appealed to this court. If this be true, why not dismiss the appeal and let justice prevail?

The majority say they are constrained to the conclusion which they have reached by the following cases: *Robinson* v. *Arkansas Loan & Trust Co.*, 72 Ark. 475, 81 S. W. 609; *Freeman* v. *State*, 158 Ark. 262, 249 S. W. 582, 250 S. W. 522; *Emerson* v. *Boyles*, 170 Ark. 621, 280 S. W. 1005, 44 A. L. R. 1193.

In the first of these—the Robinson case—there was involved only the question when an appeal had been perfected, and when a second appeal might be prosecuted. The trial court in that case had made no order, either at the same or at a subsequent term, vacating the judgment appealed from.

In the opinion on re-hearing in the case of *Freeman* v. *State, supra*, it was said that "The appeal lifted the cause out of the circuit court." That was true in that case because, as stated in the original opinion, "the trial court was without jurisdiction to modify the judgment, upon motion, after the term of court at which the judgment was rendered had expired." In other words, the control of the court over the judgment had ceased, because the term of court at which it was rendered had expired, and it was then beyond the power of the court to modify or change the judgment. But not so here.

The case of *Emerson* v. *Boyles, supra,* involved only one question, which is reflected in the single headnote to that case, which reads as follows: "Where the accused in a felony case pleaded guilty and was sentenced to a term in the penitentiary, and had served a part of his term, the trial court had no authority at the same term of court to set aside the sentence and direct the case to be continued, as the effect would be to put the accused in jeopardy twice for the same offense."

In so holding the majority opinion states that the authorities on the question presented and decided are divided, and that among other courts which had held contrary to the conclusion there announced was the Supreme Court of the United States. I am not now pressing my

dissenting view in that case, nor am I trying to reinforce the dissenting opinion. It will speak for itself. What I do protest against is the extension of the majority opinion.

The majority opinion in the Emerson case is authority for holding that the court had the power to set this judgment aside during the term at which it was rendered, even though an appeal had been prosecuted. The following statement from 12 Cyc. 783 is there approved: " 'At any time during the term the court has power to reconsider the judgment, and to revise and correct it by mitigating and even by increasing its severity, where the original sentence has not been executed or put into operation; but, where the prisoner has paid his fine or his imprisonment has begun, the court has no power to recall him to revoke his former sentence and impose one which inflicts a greater punishment.' ".

The opinion itself states the law to be that "It is a rule of universal application that, so long as a judgment or sentence of a court remains unexecuted or is not put in operation, it is, in contemplation of law, in the breast of the presiding judge of the court, and is subject to revision and alteration during the same term at which it is rendered."

Here, let it be remembered the judgment or sentence of the court remains unexecuted and has not been put into operation. The reason given in the Emerson case, *supra,* for holding that a sentence may not be vacated, after it has been put into operation, and has been executed in whole or in part is, as the headnote above quoted says, "would be to put the accused in jeopardy twice for the same offense." I do not understand that any court has ever held that it twice puts a man in jeopardy to try him a second time upon the same charge, after a new trial has been granted setting aside a prior conviction. If that is the law we will have to readjust and rewrite our entire criminal procedure.

In the chapter on Judgments, 15 R. C. L., § 132, p. 681, it is said: "Within the limits of time allowed by law a judgment may, pending an appeal therefrom, be

amended in the court which pronounced it, if the circumstances are such as to warrant the amendment, if no appeal had been taken."

Certainly, the circumstances that the trial court had concluded that the testimony was not sufficient to sustain the conviction would appear, not only to justify, but to require, the trial court to grant a new trial, and the general power of the court to set aside a judgment of conviction at the term at which it was rendered, when its execution has not been entered upon, ought not to be questioned.

However, it was said in the case of *Union Sawmill Co.* v. *Langley,* 188 Ark. 316, 66 S. W. 2d 300, that "We have repeatedly held that, during the term of court at which a judgment is rendered, the court has the inherent power to set aside the judgment, and it may do so without stating any cause."

Here, the court has stated the cause which induced that action.

It was held in the case of *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922, to quote a headnote in that case, that "Trial courts have large discretion in the matter of granting new trials, especially upon the weight of the evidence, and the Supreme Court will not interfere with such discretion unless it be made to appear that it was improvidently exercised."

Certainly, it was not an improvident exercise of the power to grant a new trial when the court concludes that the testimony was not sufficient to sustain the conviction.

In the case of *Foohs* v. *Bilby,* 95 Ark. 302, 129 S. W. 1104, it was held, to quote a headnote in that case, that "The fact that a party against whom a judgment has been rendered in the circuit court took an appeal therefrom and that the judgment was affirmed on appeal will not preclude such party from applying, under Kirby's Digest, § 4431, subdiv. 7, to the circuit court at a subsequent term to vacate the judgment for unavoidable casualty which prevented the party from appearing at the trial."

In that case, as the headnote copied reflects, there had been, not only an appeal from a judgment, but the judgment had been affirmed, yet it was held that pursuant to the statutory power the trial court might grant a new trial for an unavoidable casualty. Here, the court was not acting pursuant to a statutory power, but under its inherent power to correct its judgment at any time during the term at which it was rendered, before any part of the sentence or judgment had been executed. It is unimportant whether the court, in a particular case, derives the power to vacate the judgment from the statute, or has that power inherently. Courts may exercise their jurisdiction in either case.

What better example of the harm which may follow from attempting to interfere with, or control, the discretion of trial courts could be found than is presented in the instant case? Here, the trial court, which is not restricted, as we are, to a mere determination of the legal sufficiency of the testimony, has found that the testimony does not sustain the conviction, and that finding was made, as has been several times herein said, at the term at which the trial and conviction were had. The majority ignore that finding, because it was not made until after appellant had appealed to this court for relief. To so hold, in my opinion, is to let technicality go to seed. Justice has obviously miscarried, and this result has been accomplished without necessity or reason therefor. If any rule of practice required that result, it should be changed, but, as I have attempted to show, we have no such rule of practice. If relief cannot otherwise be granted, we should, of our own motion, dismiss this appeal.

Consider the effect of the majority opinion. We have affirmed the sentence. That certainly is jeopardy. Appellant must serve a sentence for a crime which the trial court found he was not shown to have committed, Only the pardoning power of the Governor may now save him. On the other hand, if he should be pardoned, he may not again be tried, although he is, in fact, guilty, because, as a result of our action, and not that of the trial court, he has been placed in jeopardy. How much better would it

be to preserve the orderly and usual course of respecting the judgment of the trial court, no part of the sentence having been executed?

I, therefore, very respectfully dissent, and am authorized to say that Justice HOLT concurs in the views here expressed.

CIVIL SERVICE COMMISSION OF NORTH LITTLE ROCK *v.* MCDOUGAL.

4-5488 129 S. W. 2d 589

Opinion delivered May 29, 1939.

Laurence J. Berger and *Floyd Terral,* for appellant.

Sam E. Montgomery, for appellee.

GRIFFIN SMITH, C. J. In an appeal by J. O. McDougal from an order of the Civil Service Commission of North Little Rock, the circuit court treated as a demurrer McDougal's motion to dismiss charges preferred against him by the Commission. The charges resulted in McDougal's dismissal from the position of chief of detectives and superintendent of the bureau of identification of the police department of the City of North Little Rock. The motion, when so treated as a demurrer, was sustained, with the order that ". . . the charges against J. O. McDougal are hereby dismissed. The court further orders that said J. O. McDougal be, and he hereby is, reinstated in the police department of the City of North Little Rock to the same rank, duties and compensation as when he was illegally suspended on the night of December 20, 1938."

The question to be determined is, Was McDougal illegally suspended?

Act 28 of the Forty-Ninth General Assembly, approved February 13, 1933, is an act creating a board of civil service commissioners of cities of the first class having a police department and all cities having organized fire departments, "To have control, management and jurisdiction of the officers and employees of said fire and police departments in their respective cities."

For the purpose of this opinion, the Board of Civil Service Commissioners will be referred to as the Commission.

The law's requirement is that the City Council shall, by ordinance, name three citizens as commissioners, one of whom shall be selected by the Commission as secretary, and who shall ". . . report the evidence at all trials and shall act as clerk when the board shall constitute a trial court."

Section 3 directs the Commission to ". . . prescribe, amend, and enforce rules and regulations governing the fire and police departments of their respective cities, and said rules and regulations shall have the same force and effect of law. They shall keep a record of its examinations and shall investigate the enforcement and effect of this act and the rules as provided herein."

The act sets out twelve specific rules which shall be adopted, and allows for promulgation of others not inconsistent with the act.

Mandatory Rule No. 7 provides for a period of probation not to exceed six months ". . . before any appointment or promotion is complete, during which period the probationer may be discharged, in case of an appointment, or reduced, in case of promotion, by the chief of police or of the fire department."

Mandatory Rule No. 10 provides for suspension ". . . for not longer than thirty days, and for leave of absence."

By Mandatory Rule No. 11 the Commission shall provide "For discharge or reduction in rank or compensation after promotion or appointment is complete, only after the person to be discharged, or reduced, has been presented with the reasons for such discharge or reduction, in writing. The person so discharged or reduced shall have the right within ten days from the date of notice or discharge or reduction to reply in writing, and should said person deny the truth of such reasons upon which such discharge or reduction is predicated and shall demand a trial, said Commission shall grant a trial

as provided herein. The reason and the reply shall constitute a part of the trial and shall be filed with the record."

Section 4 provides that "All employees in any fire or police department affected by this act shall be governed by rules and regulations set out by the chief of their respective police or fire departments after such rules and regulations have been adopted by the governing bodies of their respective municipalities."

Section 5 is: "No officer, private, or employee of any police or fire department affected by this act shall be discharged or reduced in rank or compensation without being notified in writing as provided herein. Such person shall have the right of reply and trial as provided herein and may be discharged or reduced only after conviction at said trial before the Commission."

Rules and regulations were adopted in May, 1934, by which it was provided:

"The chief of police shall be the executive head of the department, responsible to the Board of Commissioners for the maintenance of peace and order within the city, enforcement of the criminal laws of the state, and the ordinances of the city council. [He] shall be empowered by the Board of Commissioners to establish rules for the police department and to discipline those under his authority for violation of such rules and regulations. . . . The chief of police shall be the directing head of the department and shall exemplify in his own personal conduct the qualities of courtesy, consideration, justice, and thorough competency that is required of his subordinates. . . . Every officer of this department will be required to exemplify, in his personal conduct while on or off duty, the qualities of a gentleman and an officer. His personal habits, his language, and associations, are matters that not only concern his individual standing in the community, but reflect credit or discredit on the department."

Rule 4-a is: "Drinking of intoxicating liquor or being under the influence of liquor while on duty shall

cause the discharge of an officer, and excessive use of intoxicating liquors on or off duty will not be tolerated."

December 10, 1938, J. N. Laman filed charges with the Commission, alleging that McDougal was found drunk while on duty. The Commission at once notified the chief of police (Gabe Pratt) that such charges had been filed, and directed that McDougal be immediately suspended. This order was complied with by Pratt, but nine days later Pratt informed the Commission he had restored McDougal to the latter's former status. McDougal was promptly told by the Commission that charges against him had not been disposed of, and he was directed not to return to work.

December 21 McDougal filed with the Commission a formal denial of the charges and demanded a hearing. Two days later the Commission wrote McDougal his request for a hearing had been granted, and that such hearing would be held in the city hall January 4, 1939. At the appointed time the hearing was conducted. Ten witnesses testified in support of Laman's charge. The defense offered no evidence. The Commission (January 6) notified McDougal he had been found guilty, and that he was dismissed from the service.

On appeal to circuit court, McDougal contended that the right to discipline, under the Commission's rules, rested entirely with the chief of police; that disciplinary measures had been exercised by the chief through the order of suspension; that after reinstatement the Commission was without authority to proceed; that in hearing charges involving violations of rules the Commission acted in a quasi-judicial capacity; that its jurisdiction was appellate, and not original, and that at the time the hearing was conducted there was nothing before the Commission for determination, the matter having been disposed of by Chief Pratt.

In its judgment the court found that ". . . under Act 28 it is the duty of the chief of police, as executive officer of the police department, to handle [matters of discipline]; that he would have authority to suspend

and discharge, and that the person so discharged would have a right of appeal to the Civil Service Commission; that the chief of police would also have authority to certify the matter to the Civil Service Commission for its action, but in the absence of that, then the present case would have to be governed by the rules and regulations as exhibited. The question as to the failure of the chief of police to perform or not to perform his duties would be a matter for him to answer to the Board of Commissioners. For that reason, therefore, and solely on that issue, without going into the matter of the guilt, the court will find that the Board of Commissioners have exceeded their authority, and that the order dismissing the petitioner should properly be set aside, and that the petitioner should be reinstated and would be entitled to such pay as under the law he would be entitled."

January 9, 1939, the city, by ordinance, directed "That the Bureau of Identification and the office or position of Chief of Detectives in and for the City of North Little Rock, be, and the same are, hereby abolished."

It is our view that testimony before the Commission in support of Laman's charges amply sustained the Commission's findings. Laman testified he arrived at police headquarters about 2:40 a. m. McDougal was lying on the tile floor before a stove. His coat and hat were off, his vest unbuttoned, and he was otherwise disheveled.

Witness was a member of the city council. He called other members of the council. Later, McDougal was aroused from what the witnesses thought was a drunken stupor. He walked unsteadily, and asked, "Who hit me?—somebody hit me and dragged me off into this room." Laman and others smelled whiskey. There was no indication McDougal had been hit, nor was he in any manner injured.

Dr. V. E. Lyons, assistant city physician, found McDougal lying on the floor. He felt McDougal's pulse and asked if he were sick. McDougal mumbled something witness did not understand, and turned over. The odor

of alcohol was detected on McDougal's breath, and he had the appearance of one under the influence of alcohol.

None of the testimony pointing to McDougal's guilt is in dispute, other than by the defendant's denials as expressed in letters read into the record.

We do not agree with the trial court's declaration of the law.

The Commission, and not the chief of police, is the responsible agency. By § 3 of Act 28, the Commission is expressly charged with the duty of prescribing, amending, and *enforcing* its rules. The Commission is required to *investigate* the enforcement and effect of Act 28. An exception to the Commission's power is found in Mandatory Rule No. 7, which authorizes the chief of police, during the six months period of probationary employment, to "discharge, in case of an appointment, or reduce, in case of promotion."

Mandatory Rule No. 11 authorizes the Commission to provide for discharge or reduction in rank ". . . . only after the person so discharged, or reduced, has been presented with the reasons for such discharge or reduction," the notice to be in writing. It then becomes the duty of the Commission, when demand is made, to grant a trial.

It is true § 4 provides that all employees in the department shall be governed by rules and regulations set out by the chief, ". . . after such rules and regulations have been adopted by the governing bodies," etc., but this does not mean that when the Commission has approved expressed standards of conduct, as to which the chief of police has a duty of enforcement, the Commission is deprived of all authority, and must supinely acquiesce in any policy of discipline the chief may determine is proper. Certainly that official's power of supervision cannot rise above the source from which it was derived.

Act 28 provides for suspensions "for not longer than thirty days." Under the Commission's rules, and the law, we think the chief would have the right, irre-

spective of the Commission, to resort to suspension of an insubordinate or otherwise offending officer for the period mentioned. and unless the chief's action in so doing was arbitrary, the Commission would be bound thereby, in so far as the subject of discipline was concerned.

Certain details of administration may properly be delegated, if such details are purely ministerial; but the Commission, charged by law with the power to promulgate rules, cannot, in turn, delegate that power to another. The test is whether the power to make the rule is delegated, or whether authority as to its execution is delegated. The latter may be done; the former may not.

Under the sub-title "Delegation of Authority to Boards or Commissions," it is said at page 925 of volume 10 of American Jurisprudence: "In exercising its general authority and discretion the legislature has the constitutional right to create a board of civil service commissioners and to delegate to it the power to make rules, not inconsistent with existing laws, to conduct investigations and in the course thereof to compel the attendance of witnesses and the production of evidence, and generally to exercise whatever administrative measures may be necessary to effect the purposes of the civil service acts; and this is not considered as being a delegation of the power to enact laws or of judicial functions, but merely a delegation of administrative powers and duties."

Act 28 provides that rules promulgated by the Commission shall have the force of law. This is not an improper delegation of power, but the authority to make the rules must be read in connection with the expressed purpose of the statute, and "force of law" cannot be given to any rule or regulation the Commission might conclude would be appropriate, unless, in fact, such rule came within the purview of the legislation.

If we should affirm the lower court's judgment, we would say that the Commission (to which has been delegated authority to make necessary reasonable rules to

carry into effect the intent of civil service) once having made its rules, and having designated the chief of police executive head of the department, with power ". . . to establish rules and regulations for the police department and to discipline those under his authority for violation of such rules and regulations," has thereby surrendered complete control of the department to such chief—an abdication not contemplated by the statute. Effect of this argument, if conceded, would be to say that once the chief's rules have been approved by the Commission, the creative body automatically loses its supervisory powers, and must abide the judgment or even the caprice of its own agent except in matters of appeal.

If this construction should be approved, then regardless of the nature of an offense charged against a member of the police force, the Commission could only refer the complaint to the chief for such administrative disposition as that officer might think proper. Assuming a serious infraction, and that charges against the accused should be dismissed with a mild admonition or a mere reprimand, there would be none to appeal. The accused could hardly be expected to disagree with such a verdict, and citizens and the Commission would be bound by the chief.

In the instant case Chief Pratt wrote the Commission, informing that body he had reinstated McDougal. He later stated that although he signed the letter, it was written by another; that it was brought to his home for his signature, and "pressure" was exerted to procure his co-operation.

Clearly, the purpose in persuading Pratt to assume jurisdiction and go through formality of having exercised disciplinary measures was to provide a basis for technical objections to anything the Commission might do. If Pratt's testimony is to be believed—and there is no evidence to the contrary—the idea was not his own.

On the question of sufficiency of evidence against McDougal (which has heretofore been referred to), Rule 4-a is conclusive. Two violations are mentioned: drink-

ing intoxicating liquor or being under the influence of liquor while on duty, and excessive use of intoxicating liquors on or off duty.

In the first instance—drinking intoxicating liquors or being under the influence of liquor while on duty—the officer offending is subject to discharge.

In the second case—excessive use of intoxicating liquor on or off duty—an intolerable condition is created.

It will thus be seen that the mere drinking of intoxicating liquor while on duty subjects the officer to dismissal.

The assistant city health officer, and members of the city council, testified they smelled liquor on McDougal's breath. His conduct and general attitude were such as to raise a presumption the liquor was intoxicating, and he is concluded by such evidence.

The judgment is reversed, with directions to the lower court to enter an order sustaining action of the Commission.

ROBERTS *v.* TICE.

4-5492 129 S. W. 2d 258

Opinion delivered May 29, 1939.

Saye & Saye and *Lincoln & Harris,* for appellants.

Will Steel, H. M. Barney, Frank S. Quinn, A. L. Burford, A. G. Sanderson, Jr., Willis B. Smith and *Ben E. Carter,* for appellees.

McHaney, J. Appellants, M. E. Roberts and his brothers, who are referred to in the briefs as Roberts Bros., were the owners of an oil and gas mining lease on certain tracts of land in Miller county, holding same under the usual Arkansas form of lease in which one-eighth royalty was reserved in the fee owner or lessor, and on March 10, 1938, assigned same to Texarkana Drilling Company, reserving to themselves a one-eighth overriding royalty interest in the seven-eighths leasehold estate then owned by them. This assignment was

filed for record in Miller county on March 28, 1938, and it contained the following provision: "It is distinctly understood and agreed that as an additional consideration for this assignment, there is hereby specially excepted and reserved unto assignors, as an overriding royalty interest, one-eighth (1/8) of all of the oil, gas and other minerals produced, saved and marketed from the above described lands, and assignee, its successors and assigns, agrees to pay over and deliver to assignors (in addition to the one-eighth (1/8th) royalty interest stipulated to be paid to lessors in the aforesaid lease) one-eighth (1/8th) of all of the oil, gas and other minerals produced, saved and marketed from the above described tract of land, free and clear of all costs and expense except its proportionate share of *ad valorem* and severence taxes.

"As an additional consideration for this assignment, assignee agrees to commence the drilling of a well on said land on or before March 17, 1938, and agrees to prosecute the drilling of said well with due diligence until completed to a depth sufficient to test the present known producing horizon in the Miller county, Arkansas, extension of the Rodessa field. All costs and expenses incurred in connection with the drilling of said well, or any wells which may be drilled on said land, and all costs and expense incurred in producing, saving and marketing oil, gas and other minerals from said well, or any additional wells on said above described tract of land, shall be borne exclusively by said assignee, its successors and assigns, and no part thereof shall be chargeable to assignors or to assignors' said overriding royalty interest."

The assignees also agree to the following condition: "Assignee agrees to faithfully carry out and perform all of the obligations of the original lease insofar as same apply to the tracts and interest hereinabove described, including the implied obligation of lessee to protect the property from drainage from offset wells and to adequately develop said property and operate same in a prudent and workmanlike manner."

Appellant, C. E. Brower, was the owner of a like oil and gas lease on another tract of land in Miller county, and, on April 19, 1938, he assigned same to the Texarkana Drilling Company, reserving to himself a one-eighth overriding royalty in the seven-eighth leasehold estate then owned by him. This assignment was filed for record promptly and contained the following provision: "Said reservation and interest out of and from said production shall be delivered to the credit of the assignor, C. E. Brower, free and clear of all costs and expenses whatsoever of developing, operating, maintaining, re-working, repairing and pumping said lease, the assignee, The Texarkana Drilling Company, Inc., an Arkansas corporation, assuming and agreeing to pay all such costs and expenses." It also contained this provision: "And any person, individual, firm, pipeline company or companies, running or purchasing oil from these lands and premises, are authorized and directed to pay the proceeds of said reservation direct to C. E. Brower, free of costs." Other appellants claim under conveyances from Brower of portions of his overriding royalty.

Thereafter, and during the year 1938, said Texarkana Drilling Company drilled three oil wells on the leased lands so assigned to them, and became heavily indebted to appellees who are either laborers or material furnishers, who performed labor or furnished material in developing the properties for oil and gas. They, appellees, brought suit to enforce their respective liens against said drilling company and against appellants. The drilling company was insolvent and a receiver for it was appointed. It made no defense. Appellants defended on the ground that their overriding royalty interest was not subject to the liens of appellees. The trial court held against them and this appeal is from a decree declaring and enforcing liens in favor of appellees, not only against the 7/8 of 7/8 of said leasehold estates owned by the drilling company, but also against the 1/8 of 7/8 of said leaseholds owned by appellants and which was never sold or conveyed by them to it.

In the view we take of the case, the only question necessary for our determination is whether the overriding royalty of appellants may be subjected to the liens of appellees. It was stipulated that none of the appellees had any express contract with any of appellants for the material and supplies furnished or labor performed and that they were furnished or performed after the assignments to the drilling company were executed and recorded.

It is well settled in this state that an oil and gas lease conveys an interest in the land. *Watts* v. *England*, 168 Ark. 213, 269 S. W. 585; *Sherveport-El Dorado Pipe Line Co.* v. *Bennett*, 172 Ark. 804, 290 S. W. 927; *Huffman* v. *Henderson Co.*, 184 Ark. 278, 42 S. W. 2d 221. Also that royalties under an oil and gas lease are interests in land. *Arrington* v. *United Royalty Co.*, 188 Ark. 270, 65 S. W. 2d 36, 90 A. L. R. 765.

Two acts of the General Assembly of 1923, Act 513, approved March 21, digested as §§ 8916 and 8917 of Pope's Digest, and Act 615, approved March 23, 1923, digested as §§ 8905 to 8915 of Pope's Digest, cover the subject of liens for laborers and material furnishers for oil and gas operations. Section 8916 of the Digest provides for lien for laborers only and they are given " a lien upon the output and production of such oil or gas well for the amount due for such work" and upon the machinery, tools, etc., and "all leases to oil or gas rights on the land upon which such drilling or operation shall be performed. Such lien shall be superior and paramount to other liens or claims of any kind whatsover—; and said lien shall be enforced in the same manner now provided by law for enforcement of laborer's liens." Section 8917 provides: "This lien shall not be construed to be a lien upon the real estate of the employer or lessee, but shall be a lien upon the personal property used and connected with said drilling and operations and the output or production of said oil or gas wells and the oil or gas lease on said land." We do not concur in appellants' criticism of this act as being loosely or carelessly drawn. Its only purpose was to protect laborers by permitting them to

have declared and enforced a lien for their wages earned by virtue of a contract or agreement with the owner of the lease or his agent on the personal property, including the oil or gas produced, and the leasehold interest of the lessee or his assignee.

The other act covered by §§ 8905 to 8915 inclusive is a very much more comprehensive act. By it a lien is given not only to persons who perform labor, but to those who "furnish fuel material, machinery or supplies" etc. Such lien is given to those "who shall under contract, express or implied . . . with the owner or lessee of any gas, oil or mineral leasehold interest in land . . . or with the trustee, agent or receiver of any such owner, perform labor, or furnish fuel material, machinery or supplies . . . shall have a lien on the whole of such land or leasehold interest therein . . . or lease for oil or gas purposes, the buildings and appurtenances, and upon the materials or supplies so furnished," etc., "Provided, that if labor, supplies, machinery or material is furnished to a leaseholder the lien hereby created shall not attach to the underlying fee title to the land." Liens under this act shall be established, preserved and enforced in like manner as are mechanics liens, except as otherwise provided, and priority is given the lien of the common laborer by § 8915.

As said by the late Chief Justice Hart, speaking for the court, in *Crown Central Petroleum Company* v. *Frick-Reid Supply Co.,* 173 Ark. 983, 293 S. W. 1012, "It is true that the foundation of the right to secure a lien for labor performed or material furnished must be a contract with the owner of the land upon which the lien is sought to be enforced, and, if there does not exist such a contract, express or implied, the person claiming it must fail. Thornton's Law of Oil and Gas, 4th Ed. Vol. 1, § 371. This holding is in accord with our construction of our materialman's lien statute. In *Burel* v. *East Arkansas Lumber Co.,* 129 Ark. 58, 195 S. W. 378, 10 A. L. R. 1017, it was held that the lien given by the statute must have its foundation in contract and must correspond

with the contract." This was said in construing § 1 of Act 615 of 1923, above quoted as § 8905 Pope's Digest.

It is conceded that the one-eighth royalty reserved to the owner of the land cannot be affected by the liens of appellees. The contract of appellees was made with the drilling company and not with appellants, owners of the one-eighth overriding royalty, and we think only the interest of the drilling company can be charged with or subjected to such liens. By § 4 of Act 615, § 8908 of Pope's Digest, it is specifically provided "that any lien, encumbrance or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for shall not be affected thereby; and the holders of such liens upon land or leasehold interest shall not be necessary parties in suits to foreclose the lien hereby created." And the lien given by the act is only prior to "subsequent liens, encumbrances and mortgages." So, if appellants had conveyed to the drilling company the whole leasehold estate and taken a mortgage back to secure them in a one-eighth interest therein, as a part of the purchase price, assuming it could be done, their mortgages would have been superior to the liens of appellees. Instead, which is perhaps more practical and effectual, they carved out of the seven-eighths working interest, constituting the whole leasehold estate, a one-eighth overriding royalty and reserved that from the conveyance. This override never did pass to the Texarkana Drilling Company, and by a condition inserted in the assignment, heretofore quoted, provided that this one-eighth should not be liable for any expense of development, operation, etc. But even if we should say, and we do not, that this condition was ineffectual for the purpose intended, still we would have to say that this one-eighth interest reserved to appellants was at least an encumbrance on the leasehold estate, which is protected from the liens of appellees by § 8908 of Pope's Digest, just above referred to. It is at least an encumbrance and was prior to the liens of appellees. The word "owner" as used in the statute refers to the owner with whom lien claimants contract, and the lien attaches to

the property of the owner. When the statute says "the whole of the leasehold interest therein" it means the whole interest of the owner who made the contract.

Appellees rely on *Whitmore* v. *Harper,* 168 Ark. 1079, 272 S. W. 662; *Pilcher* v. *Parker,* 173 Ark. 837, 293 S. W. 738, and other cases. The Whitmore Case arose before the passage of the lien acts above cited. In the Pilcher Case it was held that the lien attached to the drilling machinery which was leased from the real owner by the operator and this court treated the operator as the owner. The decision was based on a California case which said: "That the actual ownership of the property was an immaterial circumstance—the obvious theory, and, as we deem it, the correct one, being the one lawfully holding from the actual owner the possession and the right to operate the machine is to be deemed, for the purposes of the statute, the owner of the property." That case involved a lien on personal property while here the lien is attempted to be asserted against an interest in real estate, the record title to which was burdened by a prior encumbrance of appellants. Or, stating it another way, the record title to which showed a conveyacne to the Texarkana Drilling Company of only 7/8 of 7/8 of the leasehold estate, which was all the leasehold the drilling company ever owned and all that could be subjected to these liens by virtue of a contract with it.

Appellees rely on the provision of said act 513, being the last sentence in § 8916, that, "Such liens shall be superior and paramount to any and all other liens or claims of any kind whatsoever, and no contract, sale, transfer or other disposition of said property shall operate to defeat said lien," but this provision has been changed, and modified, if not actually repealed by the later statute, § 4 of act 615, being § 8908 of Pope's Digest, above quoted. As above stated, said section expressly protects prior "liens, encumbrances and mortgages" from the liens created thereby. Said section does provide that: "The lien herein provided for shall attach to the machinery, materials, supplies and the specific improvements made in preference to any prior lien or

encumbrance or mortgage upon the land or leasehold interest upon which the said machinery, materials, supplies or specific improvements are located." In other words, a prior lien, encumbrance or mortgage on the land or leasehold only shall not come ahead of laborers and material men's rights to liens on the machinery, materials, supplies and specific improvements not specifically covered by the prior lien, encumbrance or mortgage, and justly so. If laborers and material men perform labor and furnish material to improve a leasehold already covered by a mortgage or other encumbrance, their right to a lien on the improvements is paramount, but not so to the leasehold.

To construe the statute as appellees contend would render it of doubtful constitutionality, which is always to be avoided. The two statutes above mentioned are to be construed together, in *pari materia*. They were passed at the same session of the legislature and were approved with but two day's difference in time. Wherever, they conflict, the later act must control, and the former yield.

We, therefore, hold that there can be no lien in favor of appellees as against the overriding royalty interest of appellants, Roberts Bros., and Brower, and, of course, those holding under conveyances from them or either of them of a portion of such interests. It follows that the decree of the trial court must be reversed and the cause remanded with directions to dismiss the complaints and interventions as to appellants.

HUMPHREYS, MEHAFFY and HOLT, JJ., dissent.

BURKE *v.* DOWNING COMPANY.

4-5509 129 S. W. 2d 946

Opinion delivered May 29, 1939.

Ras Priest, for appellant.

Maddox & Greer, for appellee.

MEHAFFY, J. On March 29, 1936, appellants purchased certain machinery from the appellee, Downing Company, for which they executed their notes for the sum of $1,031.75. On October 30, 1936, appellants traded to appellee the binder for a new binder, and executed a title-retaining note. This last mentioned note was held by the International Harvester Company and the International Harvester Company repossessed the binder.

On December 26, 1936, the parties met at Marked Tree and made a settlement. The appellants executed and delivered to the appellee, Downing Company, a chattel mortgage on certain personal property.

In September, 1937, appellants filed a petition in the Poinsett chancery court against Downing Company and International Harvester Company praying an accounting from the Downing Company and a cancellation of the mortgage, and praying a restraining order against both defendants to prevent the sale of the binder. A hearing was had and the restraining order was denied. No appeal was taken and no relief is sought on account of the original complaint. The appellee, Downing Company, filed an answer and cross-complaint praying a recovery of an alleged balance of $283.88, and foreclosure of the mortgage dated December 26, 1936.

The appellants filed a reply and an amendment setting up certain claims and alleging that the notes did not

represent the amount claimed, and that certain payments made had not been credited, and alleging that the Downing Company was indebted to them.

The court rendered a decree in favor of the Downing Company against the appellants for $283.88 and a foreclosure of the mortgage. This appeal is prosecuted to reverse said decree.

In the decree it is stated: "That thereafter on the 26th day of December, 1936, defendant Downing Company, a corporation, had a settlement with plaintiffs, who are defendants in cross-complaint, whereby said indebtedness was reduced to $687.77, and the $550 note, hereinabove referred to, was reduced to the sum of $206.02, and the time of payment extended until February 1, 1937; that the interest on the $481.75 note was then paid, and the due date of the principal sum extended to March 1, 1937; that said sums bear interest from the 26th day of December, 1936, until final payment at the rate of eight per cent per annum.

"That since the execution of said mortgage, and on March 26, 1937, $300.00 was paid thereon, and on May 26, 1937, $155.00 was paid thereon, leaving a balance of the principal of $232.77 and interest to the amount of $51.11, making a total sum now due the Downing Company on said indebtedness of $283.88; that said sum bears interest from this date until paid at the rate of eight per cent per annum."

There was considerable evidence introduced by appellants, but all of it related to matters and disputes that arose prior to the settlement in December, 1936. The undisputed evidence shows that there was a settlement made, and that appellants executed a mortgage to secure the indebtedness due at that time. There is no claim that there was any fraud in the settlement, and all disputes that existed prior to this settlement are barred by the settlement.

The rule as to settlements is thus stated in 11 Amer. Jurisprudence, 249: "The law favors the amicable settlement of controversies, and it is the duty of courts

rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. The nature or extent of the rights of each should not be too nicely scrutinized. Courts should, and do, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable, but highly meritorious. Because they promote peace, voluntary settlements of differences between parties having legal capacity to contract in respect of their rights, where all have the same knowledge or means of obtaining knowledge concerning the circumstances involving their rights and where there are no fraud, misrepresentations, concealments, or other misleading incidents, must stand and be enforced if intended by the parties to be final, notwithstanding the settlement made might not be that which the court would have decreed if the controversy had been brought before it for decision. Such agreements are binding without regard to which party gets the best of the bargain or whether all the gain is in fact on one side and all the sacrifice on the other."

The appellee, Downing Company, testified that when they went to Marked Tree appellants owed it $986.93; that they had a settlement, but they quarreled and finally reduced it to $687.77. This evidence is not contradicted by appellants. The undisputed evidence shows that Downing took the appellants to Marked Tree in his car and after the settlement was made took them back in his car.

The appellants do not contend that there was any fraud in procuring or making the settlement, but their contention is altogether about disputes that arose before the settlement.

This court recently said: "There is no charge of any mistake or fraud, duress or coercion, but the parties themselves settled, drew drafts, and gave checks in settlement, evidently taking into consideration everything that they regarded as necessary to a complete settlement

of the contract. And when parties have settled under such circumstances, the settlement is binding on the parties. The parties had a right, even if the contract was not ambiguous, to make any settlement satisfactory to themselves. They had a right to make such settlement, although it might not be according to the terms of the original contract. They had as much right to do this as they did to make the original contract." *Temple Cotton Oil Co.* v. *Southern Cotton Oil Co.*, 176 Ark. 601, 3 S. W. 2d 673.

The settlement made at Marked Tree was a contract binding on both parties, and having reached the conclusion that the undisputed evidence shows that there was a settlement by agreement of parties, it becomes unnecessary to decide the other questions discussed by counsel.

The decree is affirmed.

COMPRESSED INDUSTRIAL GASES, INC., *v.* TODD.

4-5506 129 S. W. 2d 262

Opinion delivered May 29, 1939.

Buzbee, Harrison, Buzbee & Wright, for appellant.

George F. Hartje and *R. W. Robins,* for appellee.

HUMPHREYS, J. On December 16, 1937, about 7:30 o'clock p. m. on a dark, rainy night a collision occurred on highway 65 in Faulkner county, near Mayflower, between appellants' truck which was being driven by Hugh E. Coleman, its agent, and a Chevrolet sedan being driven by Paul K. Todd, the owner thereof.

Mrs. Joyce K. Todd, the wife of Paul K. Todd, was riding in the Chevrolet sedan with her husband and they were returning to their home in Texas from a visit to relatives in Missouri. They had a boy-child, three years old, but had left him with his grandparents in Missouri. Paul K. Todd was twenty-eight years old and had employment in Texas at $200 per month. His expectancy was thirty-one years and he was a kind, loving and devoted husband and father. He was strong and healthy physically. Mrs. Joyce K. Todd was about twenty-seven years of age and in good health. The truck was a combination tractor and trailer, 26½ feet long and contained a steel body 84 inches wide. The truck weighed 11,000 pounds and was loaded with gas drums weighing 18,000 pounds, the total weight of truck and load being close to 30,000 pounds. The Chevrolet weighed 3,250 pounds. The collision resulted in the immediate death of Paul K. Todd and the permanent injury and maiming of Mrs. Joyce K. Todd. Mrs. Joyce K. Todd remained unconscious for several days and remained in the hospital until about January 1. Her mind did not clear up entirely until sometime in February. After regaining her memory relative to the incidents preceding the collision she brought a suit in the circuit court of said county under the provisions of §§ 1277 and 1278 of Pope's Digest for the benefit of herself, as widow, and Paul Craig Todd as the sole heir at law of Paul K. Todd, deceased, against appellants; and also brought a separate suit in said court against appellants for damages on account of the injuries she received in the collision.

She grounded her action in both cases upon the alleged negligence of appellants in operating said truck at an excessive rate of speed, considering the condition of

said pavement, which was wet and slippery; in failing to maintain a proper lookout for the automobile in which Paul K. Todd, deceased, was traveling; in failing to keep said truck under proper control; in failing to drive said truck on the proper side of the pavement; in failing to have body or clearance lights burning on said truck and by negligently driving said truck against the automobile in which Paul K. Todd and appellee were traveling.

An answer was filed in the first case denying each and every material allegation of negligence contained in the complaint and alleging that Paul K. Todd came to his death through his own negligence.

An answer was filed in the latter case denying each and every material allegation of negligence alleged in the complaint and alleging that the injuries received by appellee were received because of the negligence of persons other than appellants.

The cases were consolidated without objection by proper orders for the purposes of a trial.

The consolidated cases were submitted to a jury upon the pleadings, evidence introduced by the respective parties and instructions of the court resulting in a verdict against both appellants in favor of Mrs. Joyce K. Todd on account of the injuries received by her in the sum of $15,000, and in favor of appellee for the use and benefit of Paul Craig Todd, a minor, for $15,000, and for her benefit, as widow, for $10,000, and judgments were rendered in accordance with the verdicts, from which is this appeal.

Appellants contend for a reversal of the verdicts and consequent judgments on account of the alleged insufficiency of the evidence to support them.

The collision occurred near the bottom of a slight hill down which the Todd's car was traveling. The truck came down a slight hill also and started up the first hill. As each came over the crest of the hill on which he was traveling the drivers observed the other approaching and dimmed his lights. Just after doing this the Todds observed a truck in front of them with a trailer loaded with cedar or Christmas trees and slowed down so as not

to run into the trailer in front of them. The truck and trailer loaded with Christmas trees and the Todds were traveling south on the west or right-hand side of the road in the direction in which they were traveling. The truck in front of them was traveling about fifteen miles an hour. Mrs. Todd testified that when they reached the foot of the hill they were about a car and a half behind the truck in front of them when the truck they had seen coming north over the crest of the hill in front of them passed the truck and trailer loaded with Christmas trees and veered toward their car; that the headlights of the oncoming truck were turned in the direction of their car and shone into it, at which time she lost consciousness and knew nothing of what happened afterwards. She testified that her husband did not turn his car toward the east side of the road, but continued straight ahead about the length of a car and a half behind the truck immediately in front of them loaded with cedar or Christmas trees.

The only other eye-witness was Hugh E. Coleman, the driver of the truck owned by the Compressed Industrial Gases, Inc., who testified that just after passing the truck or trailer loaded with cedar trees the Todd car came onto his, or the east side of the road and struck his front bumper, bounced back and struck him again and when the truck he was driving stopped, it was angling across the road toward the west and his trailer had turned over on the right or east side of the road and spilled out most of the load.

Both of the parties in the truck loaded with cedar trees testified that the collision occurred behind their truck or trailer and that either Todd's car or the truck was thrown into the trailer and their trailer was knocked off and torn all to pieces; that they were driving only ten or fifteen miles an hour and that their load was not heavy; that it was dark and raining, and as the slab was only twenty feet wide, they were driving very close to the edge of the pavement on the right side; that when they first saw the Compressed Industrial Gases, Inc., truck driven by Hugh E. Coleman as it came over the hill toward them the driver was going at a very rapid rate

of speed; that he seemed to pass very close to them; that they did not see any lights or clearance lights on the side of the truck approaching them; that at the time the collision was over the Todd car was seventy-five or eighty feet back of them and had turned around and was facing north.

Ed Martin testified that he reached the place of the collision a few minutes after it occurred and that appellants' truck was turned across the highway facing the west, sitting upon its wheels and that the trailer of the truck was turned over on its side and that the Todd car was about thirty feet behind the truck and was facing north in the center of the slab.

A. J. Starr testified that he was justice of the peace, living near Mayflower, and heard the collision and took a lantern and went over there and got there about ten minutes after it happened; that it looked like the trouble had happened behind the Christmas tree truck; that he found Mr. and Mrs. Todd both lying at or near the wreck and that he could not tell just exactly where the collision occurred, but that appellants' truck was headed toward the west and that the Todd car was about the middle of the highway and that Hugh E. Coleman, the driver of appellants' truck, told him that his truck hung upon the Chevrolet car and that he had driven some distance trying to shake loose and in doing so his trailer turned over.

Pictures of the Todd car and the truck made after they were taken to the garage for repairs appear in the record.

Appellants' truck showed a slight injury to the left front bumper and the radiator. Neither the front part of the truck nor the Todd car appear to be injured to any great extent, but, according to the photographs, the entire left-hand side of the Todd car had been sheared off beginning just back of the front bumper and continuing toward the rear so as to take off the left rear wheel. The jury might well have found from the two pictures or photographs that the Todd car had been swiped by appellants' truck which had sheared off practically the left side of the car.

The main factual issue in this case is whether the driver of appellants' truck negligently veered or turned his truck to the west immediately after passing the truck loaded with cedar trees into the Todd Chevrolet while it was being driven south on the right-hand side of the road or whether Paul K. Todd, in an effort to pass the truck loaded with cedar trees, negligently drove his Chevrolet to the east across the center of the slab into appellants' truck.

Appellants argue that the undisputed evidence shows that Todd drove his Chevrolet to the east side of the road across the center line thereof into appellants' truck and that there is no substantial evidence in the record showing the contrary. The driver of appellants' truck testified that the collision was a head-on collision caused by Todd driving his car in front of the truck and striking it twice. Mrs. Todd testified positively that her husband who was driving the Chevrolet never turned off his side of the road, onto the other side of the road but that he kept on his own side of the road following the truck loaded with cedar trees and that the driver of appellants' truck turned west in the direction of their car; that the headlights of the truck, instead of shining straight down the road in the direction it should have gone, turned directly onto their car, at which time she became unconscious. The drivers of the car loaded with cedar trees testified that the collision occurred just back of their car and just after the truck had passed them going north; that in passing them the truck came very close to them and was traveling at a high rate of speed. The photographs taken after the cars had been removed showed there was no head-on collision, but that the Chevrolet car had been sideswiped in such a way that its side next to the truck was sheared off. According to the statement of the driver of the truck to the justice of the peace, his truck hung onto the Chevrolet and in an effort to pull loose he drove quite a little way and in doing so caused his own trailer to turn over and spill its load on the east side of the slab. We cannot agree with appellants' analysis of the evidence to the effect that there is no substantial evidence to show that the collision was due to the

negligence of the driver of appellants' truck, but was due to the negligence of Todd in driving the Chevrolet. The evidence tends to show that this heavily loaded truck without clearance lights on the side was being driven at a high rate of speed on a dark, rainy night and just after passing or in the act of passing the truck loaded with cedar trees veered to the west and struck or hooked onto the Chevrolet car and in an effort to get loose from it proceeded for some little distance, turning the Chevrolet around in the opposite direction from which it had been traveling and after getting loose from it stopped angling across the road in a westerly direction.

Appellants did not argue that the judgments obtained in the case were excessive and we see no necessity of setting out the evidence or any part thereof tending to show the extent of the injuries received by Mrs. Joyce K. Todd or the suffering she endured. Suffice it to say that Paul K. Todd was killed perhaps immediately and the injuries and suffering received and endured by Mrs. Joyce K. Todd justified the verdict of the jury in her favor. We have carefully read the instructions given by the court and those refused at the request of appellants and think those given correctly declared the law applicable to the issues joined in the pleadings and the issues of fact involved and that the instructions refused by the court at the request of appellants were properly refused.

It is insisted that instruction No. 4, given by the court, makes it the absolute duty of the driver of a motor car to avoid striking another car. The instruction reads as follows: "The court instructs the jury that it is the duty of the driver of any truck or automobile to drive same on the right-hand side of the road, and to allow a proper distance on the left-hand side of his vehicle for the safe passage of any vehicle which he is meeting, and you are further instructed that it is the duty of every person driving a truck, automobile, or other such vehicles, on the highways of this state to drive same at a proper and safe speed, considering the character of the road and the traffic thereon, and the weight and load of the vehicle which he is driving, and to drive same at such

a speed as will enable him to control the vehicle and avoid striking other vehicles driven on said road."

We think the correct construction of the instruction as given told the jury in effect that a driver of a motor vehicle should drive on the right-hand side of the road and drive his car at a proper and safe speed that would enable him to control it and avoid striking other vehicles. The law clearly imposes such duty upon the driver of a motor car. This court said in the case of *Northwestern Casualty & Surety Co.* v. *Rose,* 185 Ark. 263, 46 S. W. 2d 796, that: "It is the rule arising from common custom and recognized by law that it is the duty of the driver of a motor vehicle to keep to the right of the road and whether this is done or not is a matter to be considered by the jury in determining the question of negligence."

It would extend this opinion to great length to set out all the instructions objected to and the objections made to them, but we will say after examining them particularly that none of the objections made to those given are tenable and sound. Running through the instructions that were given we find that negligence was clearly defined and the jury told that appellee was required to show by a preponderance of the evidence that appellants were guilty of negligence that solely caused the collision before a recovery could be had and that before any recovery for the death of Todd could be had the appellee must show by a preponderance of the evidence that Todd was not guilty of any negligence that caused or contributed to the collision.

We think the record reflects that the case was fairly tried under correct declarations of law, and for that reason the judgments are affirmed.

BROWN, ADMINISTRATOR, *v.* COLE, ADMINISTRATOR.

4-5500 129 S. W. 2d 245

Opinion delivered May 29, 1939.

E. Newton Ellis and *Schoonover & Schoonover,* for appellant.

A. J. Cole, Smith & Judkins, W. A. Jackson and *O. C. Blackford,* for appellee.

HUMPHREYS, J. Sometime prior to the fall of 1930 John R. Kizer married a Mrs. Arnold, who was a widow at the time, and who was the mother of a boy child by her former husband. A short time after the marriage the mother of the boy died leaving as her only heir Bonner Arnold, who was then nine years of age.

His grandparents were living, and by and with their consent the boy was adopted by his stepfather on proper

petition in probate court of Randolph county, which order of adoption entered on October 1, 1930, recited that Bonner Arnold was nine years old, that both his parents were dead, that he was the owner of certain real estate consisting of blocks 9 and 10, Masonic Heights of the city of Pocahontas and the owner of 355 acres of land in said county, particularly describing same; that it was to the best interest of the child for said adoption to be granted and for the name of the child to be changed from Bonner Arnold to Bonner Kizer.

After the adoption the boy continued to reside with his stepfather or adoptive father. His grandparents died a short time after the adoption leaving as their sole surviving heir Bonner Kizer. Bonner continued to live in the home and under the care of the adoptive father until the 22d day of October, 1936, at which time he died of strychnine poisoning after suffering intense pain for several days.

John R. Kizer was suspected of having administered the poison to his adopted son and was charged with and arrested for murder. After the arrest of Kizer, A. J. Cole was duly appointed administrator of the estate of Bonner Kizer, deceased, and on October 28, 1936, brought this suit as such administrator in the circuit court of said county against John R. Kizer for damages for the pain and suffering endured by Bonner Kizer resulting from strychnine administered by John R. Kizer to Bonner Kizer. Service of the suit was obtained upon John R. Kizer and within a few weeks thereafter John R. Kizer committed suicide by taking strychnine.

The case was revived in the name of Ben A. Brown as administrator of the estate of John R. Kizer, deceased.

On August 29, 1938, appellant filed a motion to abate the cause of action, alleging that such cause of action did not survive the death of the alleged wrongdoer, John R. Kizer, which motion was overruled by the court over appellant's objection and exception.

A general demurrer was filed to the complaint and amendments thereto which was overruled by the court over appellant's objection and exception.

Appellant filed an answer denying the material allegations of the complaint and amendments thereto and the cause proceeded to trial upon the pleadings, testimony of witnesses introduced by the parties and instructions of the court, resulting in a verdict and judgment for $17,500 against the estate of John R. Kizer, from which is this appeal.

Appellant contends for a reversal of the judgment for the following reasons:

First. That it is a cause of action for wrongful death, which abated on the death of the alleged wrongdoer.

Second. That the cause of action involves an unemancipated minor child suing his father in tort and that such action is not maintainable.

Third. That there is no substantial evidence upon which the jury might properly base a verdict, and a verdict, therefore, should have been directed for appellant.

(1) Appellant argues that the cause of action is based upon §§ 1277 and 1278 of Pope's Digest for the wrongful death of Bonner Kizer, which action abates with the death of the wrongdoer. Appellee concedes that if this action was one for the wrongful death of Bonner Kizer based upon said sections of Pope's Digest the action would abate, but asserts that under the allegations of the complaint it was an action based upon § 1273 of Pope's Digest which is as follows: "For wrongs done to the person or property of another, an action may be maintained against the wrong-doers, and such action may be brought by the person injured, or, after his death, by his executor or administrator against such wrong-doer, or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts."

It is true that the complaint alleges that Bonner Kizer died as a result of the poisoning, but this was in the nature of an allegation by way of inducement and the gist or real allegation for which damages were claimed is as follows: The complaint alleges that the deceased "suffered untold excruciating pain and agony for several days prior to his death; that the said deceased could have,

had he survived, sued for and recovered for said pain and suffering which is now recoverable by his personal representative herein, which pain and suffering appellant is entitled to the sum of $30,000 actual damages."

Therefore, this is not a suit for "wrongful death" which would abate, but is one for injury resulting in pain and suffering, which does survive.

The court was correct in overruling the motion to abate the cause of action.

(2) It is true that this court, in the case of *Rambo* v. *Rambo,* 195 Ark. 832, 114 S. W. 2d 468, announced the following rule: "We, therefore, hold that an unemancipated minor may not maintain an action for an involuntary tort against his parent in this state. The converse of the proposition would likewise be true, that the parent might not maintain such an action against his infant child."

The reason for announcing this rule was that such suits would disturb the relationships of the family as a social unit as the members thereof are bound by the same blood and natural ties of affection.

In the Rambo Case, *supra,* the suit was brought by the mother on behalf of Billy Rambo against his own father for personal injuries sustained by him through the alleged negligence of his father. There was a blood relationship between Billy and his father. In the instant case John R. Kizer was an adoptive father and Bonner Kizer was his adopted son. There was no blood relationship between them. No natural ties of affection existed between them. We are not willing to extend the doctrine announced in the Rambo Case, *supra,* so as to prevent an adopted child from bringing suit against his adoptive father for a voluntary tort committed upon him by the adoptive father.

It is true we have a statute investing adopting parents with every legal right in respect to obedience on the part of an adopted child and investing the adopted child with the legal rights, privileges, obligations and relations with respect to education, maintenance and the right to inheritance which is as follows:

"The adopting parents shall be invested with every legal right in respect to obedience on the part of the child as if the child had been born to them in legal wedlock.

"The child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate or the distribution of personal estate on the death of the adopting parents, as if born to them in legal wedlock.

"Nothing in this act shall be construed as debarring a legally adopted child from inheriting property from its natural parents or other kin. See the second and third sub-divisions of § 262 of Pope's Digest."

It will be observed that in these statutes no attempt is made to invest either the child or the adopting parents with natural affections existing between blood relations, so the reason for the rule that prevents natural children from suing natural parents for voluntary torts committed upon them does not exist between adopted children and adoptive parents. We, therefore, hold that an adopted child may sue an adoptive father for torts committed upon it which cause him suffering and pain.

(3) We think there is substantial testimony in the record tending to show that John R. Kizer administered strychnine poison to Bonner Kizer which caused him to suffer very great and excruciating pain for several days before Bonner Kizer died from the effects thereof. The testimony shows that John R. Kizer purchased at least two bottles and maybe more of strychnine poison from Rector Johnson, a druggist at the time he claimed to be treating Bonner Kizer for malaria and that he bought some large capsules also and attempted to buy magnesia powder. He took Bonner Kizer to Dr. H. H. Price, who was a chiropractor, for treatment and was advised by the chiropractor that he should employ a physician to administer to the boy. Dr. Price testified that the boy was suffering excruciating pain and needed medical attention. John R. Kizer did not call in any other physician, but continued to treat the boy himself for malaria. Immediately after the boy's death two bottles with the labels

burned off were found in the stove which had coals of fire in it and which had burned off the labels. The bottles were taken to the druggist, Rector Johnson, and he identified them as bottles which contained the strychnine he had sold John R. Kizer. Dr. Price testified that when the boy was in his office he was suffering intense pain, that his expression showed it, that his heart beat showed it and of all the patients he had ever had only a few had suffered such pain as was manifested by the boy. The boy expressed a doubt as to whether he should continue to take the treatment which his father was administering to him and asked the advice of Dr. Price as to whether he should continue taking it and was advised that perhaps it would be best to leave it off.

After the boy's death an autopsy and chemical analysis of his body showed that he had died from strychnine poisoning.

When an officer notified John R. Kizer that the bottles had been discovered in the stove he became very excited and protested his innocence of having administered poison to his stepson, but within a month after he had been arrested he committed suicide by taking strychnine himself. We think the evidence was ample and sufficient to warrant the jury in concluding that the strychnine poison which was found in the body of Bonner Kizer had been administered to him from time to time so as to bring about his slow death and that during the time it was being administered to him Bonner Kizer had suffered excruciating pain for at least several days.

No prejudice resulted to appellant on account of the instructions given by the court. The court instructed the jury that pain and suffering was the only element of damages in the case for which a recovery might be had. They could not have been misled by the instructions to believe that they would be warranted in returning a verdict for the death of Bonner Kizer instead of for the intense and excruciating pain he suffered.

No error appearing, the judgment is affirmed.

McHaney and Baker, JJ., dissent on the ground that an adopted minor child may not maintain a tort action against the adoptive parent.

RAILWAY EXPRESS AGENCY, INC., *v.* H. ROUW COMPANY.

4-5497 128 S. W. 2d 989

Opinion delivered May 29, 1939.

Paul E. Gutensohn and *Warner & Warner,* for appellant.

Howell & Howell, for appellee.

SMITH, J. There is no essential or controlling distinction between the instant case and the recent case of *Railway Express Agency, Inc.,* v. *H. Rouw Co.,* 197 Ark. 1142, 127 S. W. 2d 251. The law of the subject was examined and reviewed at some length in that opinion, and to discuss the questions of law here involved would be to repeat what was there said, indeed, a substantial part of the brief for appellee in the present case is a reprint of the brief in support of the petition for rehearing in the former case.

Both appeals were from judgments awarding damages arising out of carload shipments of strawberries. In the former case it was said that the suit was based upon a contract evidenced by the bill of lading or express receipt. The instant suit was of the same nature, but it is recited in the bill of exceptions that counsel for plaintiff below—appellee here—said: "At this time and before there is any evidence taken in the case, the plaintiff states, in open court, to the court and jury, that it elects to try this case on the defendant's common-law duty or liability and does not in any manner attempt to allege or try this case on any specific act of negligence, but on the contrary, we are strictly relying on the defendant's common-law liability."

There is, therefore, this apparent difference between the two cases, but in the former opinion it was said: ". . . even if we test appellee's right to recover in these cases, on appellant's common-law liability, which only requires appellee to show that it delivered the berries 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." The opinion then proceeds to show, under the law applicable to that issue, why there was no common-law liability, as distinguished from contractual liability. So that, as has already been said, this case is governed by the law as thus declared, as there is no substantial difference in the testimony appearing in the record in the instant case from that which appeared in the former.

The complaint in the instant case contained ten counts, each involving a carload shipment of strawberries. Verdicts were returned for $231.75 and $140.40, respectively on counts 4 and 10, being the amounts sued for in each of those counts, and this appeal relates only to those two counts of the complaint. The car of berries involved in count 4, which, for convenience, we will designate as

car 4, was shipped from Russell, Arkansas, to Buffalo, New York. In count 10 the car of berries, which we will designate as car 10, was shipped from Russell, Arkansas, to Cleveland, Ohio. The cars were billed to St. Louis, with the right reserved, which was exercised in each case, to divert or to continue the shipment to some other destination. The shipper negotiated and arranged by wire for the disposal of the berries after the cars were in transit, so that, in many, if not in most, instances, the final destination of a car was unknown, even to the shipper, when it started rolling.

North Little Rock, was a concentration point for refrigerated cars used in such shipments, and the undisputed testimony of the inspectors shows that the cars here in question were properly inspected at that point. The inspections were carefully made by experienced employees, who made a complete inspection, and both cars were found to be in good condition for shipping berries. The records of those inspections concerning which the inspectors testified show that those cars were in good order, and that the drip pans and the drain pipes were in perfect condition. Indeed, it is not contended, and no attempt was made to show, that proper cars were not furnished.

The inspection records also show without dispute that before the cars were shipped to Russell, the point at which they were loaded, 6,000 pounds of ice were placed in the front bunker of each car, and the same quantity of ice was placed in the rear bunker of each car. This was the full capacity of the bunkers. Car 4 was thus iced at 10:10 p. m., May 5th, and the icing of car 10 was completed at 10 p. m. on the same day. Both cars left North Little Rock for Russell at 11:50 p.m., May 5th. A route agent of the defendant express company kept a written log book, detailing the handling of each car and the loading of the berries therein from the time the car arrived at Russell until it was forwarded. The record thus kept showed that both cars were re-iced to full capacity at Russell before being forwarded. The cars were again inspected at Russell and found to be in good condition in every respect. The detailed inspection report covered all

parts of the car and its equipment. The inspector representing the consignor was also present, and it was his duty to inspect the car. The blank report furnished for his use required him to examine the car and its equipment and to report any defect found. Neither of his reports on these two cars showed any defect of any kind in the cars or in their equipment.

The loading of car 4 was commenced at 2:25 p. m., May 6th, and was completed at 9:15 p. m. on the same day. The loading of car 10 was commenced at 4:50 p. m., but was not completed until 8:15 p. m. the following day. This was a delay for which, of course, the carrier was not responsible.

It was shown that cars may be precooled, and that the purpose of this operation was to reduce the temperature of the berries by eliminating field heat, and is a service performed by the shipper, and not by the carrier, and the operation requires about four hours. Car 4 was the only one precooled, and this was done for only an hour and twenty minutes. Equipment for this purpose consists of a blower fan, operated by electric or other power, placed inside the car at the top of the ice bunker, blowing the cool air through the car and its contents.

When loaded, both cars were billed to St. Louis, but that city was not the final destination of either car. While the cars were rolling the shipper was looking for purchasers, and the cars were diverted when a purchaser was found. As to car 4 there was no delay in the diversion at St. Louis. There was a delay in the diversion of car 10 at St. Louis before it was forwarded to Cleveland. Car 4 was promptly diverted to Buffalo, but there was a delay of 16 hours in effecting a diversion of it from Cleveland to Buffalo, New York, its final destination. There appears to have been a delay of about 62 hours in unloading the car at Buffalo after its arrival there. When the diversion was made the original express receipt was surrendered and an exchange receipt given, but the duty of the carrier remained unchanged.

It was affirmatively shown that there was no delay in forwarding either car on the first available train. No

negligence in transportation was alleged, and the affirmative and undisputed proof is to the contrary.

On account of delay in loading car 10 at Russell it was necessary to re-ice it a second time, and that was done. The progress of both cars to their final destination was traced, and it was shown that both were re-iced at Poplar Bluff, a point 125 miles north of Russell. Upon arrival at St. Louis the cars were again inspected and re-iced, and before leaving St. Louis they were again iced, indeed, car 10 was so long delayed at St. Louis that it required and was given an additional re-icing. As the cars proceeded to their respective destinations they were both re-iced at the regular icing stations. The periods of time between re-icing extended from 3½ to 14 hours. Inspections were made at each of the re-icing stations, and nothing was found at any of them to suggest deficient refrigeration. The bunkers showed only normal meltage of the ice, and both bunkers were filled in every instance to full capacity.

Prompt notice was given of the arrival of both cars at final destination, and a prompt inspection was made by a competent inspector representing the Railroad Perishable Inspection Agency, which is referred to as RPIA. Some deterioration was found in both cars, which was not very extensive in either. It was alleged that the damage to the berries amounted, in one car, to $231.75, and $140.40 in the other, these amounts being the difference between the price the berries would have sold for had they been in good condition and the price for which they did sell on account of their damaged condition.

The testimony is sufficient to show damage in the sums alleged and found by the jury, and the question in the case is whether the carrier's negligence caused this damage. The shipper makes a *prima facie* case when he shows that sound berries were delivered for shipment, and that the berries were in a damaged condition upon arrival at their destination. But the carrier is not an insurer against such damage, and it discharges its liability therefor when, and if, it shows that ordinary care was employed by it in the shipment. The opinion in the for-

mer case, hereinabove referred to, discusses the law upon that subject, and the discussion will not be repeated here.

The RPIA inspectors who inspected the cars upon arrival at destination testified that the damage found, which they called botrytis and other technical names, was caused by the inherent nature of the berries, and was of a field origin. The carrier was not responsible for damage thus caused.

It is said the RPIA inspectors are mere agents of the carrier. Even so, their testimony is undisputed, and there is nothing to contradict their reports. But it does not appear to be true that they were the agents of the carrier. On the contrary, the blanks furnished for the reports of these RPIA inspectors contained the direction, "If carrier disputes your inspection, get disinterested party or parties to inspect shipments and make written report." There was no dispute of their inspection at destination and disinterested persons were not called to check the inspection.

It is true one T. O. Cole, of Ft. Smith, testified that if the berries had been properly iced they "would have stood up" for five or six days, and no deterioration would have occurred within that time, and both shipments were completed within that time. Mr. Cole has no interest in this litigation, except that he is himself a berry shipper, but he did not see the berries either at the point of shipment or at destination, and knew nothing of the condition of the berries at either place. No one contends that any refrigeration, however perfect, could improve the condition of the berries. It is insisted only that proper refrigeration would retard deterioration.

The temperature of car 4 was taken upon its arrival at Buffalo, and was found to be 45 degrees at the top of the car and 42 degrees at the bottom. Car 10 was found upon its arrival at Cleveland, to have a temperature of 45 degrees at the top and 40 degrees at the bottom, and numerous witnesses testified that this, for all practical purposes, was as low a temperature as could be obtained, unless the ice were salted, this being a service not furnished unless requested, and for which an additional charge was made, if furnished.

The testimony shows that after car 4 was accepted for delivery there was a delay of 37½ hours in unloading it, and that after car 10 arrived about 36 hours elapsed before unloading started and an additional delay of about 48 hours occurred before unloading was completed. But, as the undisputed testimony shows, the carrier had already discharged its duty upon the delivery of the car, and it is not responsible for damages which occurred thereafter.

It was said in the case of *Railway Express Agency, Inc.,* v. *S. L. Robinson & Co.,* 184 Ark. 660, 43 S. W. 2d 543, that when the shipper proves delivery of the commodity in good condition, and failure to re-deliver in good condition, a *prima facie* case is made, and the burden shifts to the carrier to show that its negligence did not cause the damage which accrued to the commodity in its shipment. But it was held in that case that the carrier may show that it was not responsible for the damage, and in holding that the carrier had discharged this burden in that case it was there said: "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."

In this case, as in the Robinson case, *supra*, none of the crates were broken or damaged, and it appears, from the facts herein recited, that appellant carrier has, in like manner, overcome the *prima facie* case, and the judgments must, therefore, be reversed, and as the causes sued upon appear to have been fully developed, they will be dismissed. It is so ordered.

CLEMMONS *v.* CLEMMONS, ADMINISTRATOR.

4-5507 128 S. W. 2d 994

Opinion delivered May 29, 1939.

Reinberger & Reinberger and *E. D. Dupree, Jr.,* for appellant.

M. Danaher and *Palmer Damaher,* for appellee.

McHaney, J. This case was tried on an agreed statement of facts which is as follows: "On August 25, 1935, A. J. Clemmons was appointed administrator of the Estate of Polk Clemmons, deceased. Various claims were filed and approved and paid by the administrator. On August 19, 1936, Earl H. Clemmons, one of the heirs of Polk Clemmons, deceased, filed his claim in the office of the clerk of the county and probate court for the sum of seventeen hundred twenty-six and 36/100 dollars ($1,-726.36) representing an account which he had purchased from the old Tamo Mercantile Company. This claim was approved on the same day by the administrator. The heirs did not file any objection to the payment of the claim in the probate court.

"On February 2, 1937, this claim was approved by the probate court and classed as a third class claim and on February 3, 1937, a check was issued by the administrator to Mr. Earl H. Clemmons for the sum of seventeen hundred twenty-six and 36/100 dollars ($1,726.36).

"On March 17, 1937, an affidavit for appeal was filed by James H. Clemmons, another of the heirs of Polk Clemmons, deceased, and appeal was granted to the circuit court on the same day. No supersedeas bond was given upon this appeal.

"On September 13, 1937, the claim of Earl H. Clemmons was reduced by the circuit court from the sum of seventeen hundred twenty-six and 36/100 dollars ($1,-726.36) to sixty-nine and 37/100 dollars ($69.37), and a certified copy of said order was filed in probate court on September 20, 1937.

"On October 12, 1937, the second and final settlement of A. J. Clemmons as administrator of the estate of Polk Clemmons, deceased, was filed by the administrator. Included in this settlement was an allowance of $1,726.36 for the claim of Earl H. Clemmons, which had been paid by the administrator.

"On October 14, 1937, exceptions were filed to this final settlement by James H. Clemmons, Mrs. G. F.

Botts, Mrs. B. B. Cummings, and Mrs. Mike Fry, all heirs of Polk Clemmons, deceased.

"On January 24, 1938, on oral argument by counsel, final settlement was approved as filed by the Lincoln probate court. Appeal was granted James H. Clemmons on February 10, 1938. This cause was submitted to the Lincoln circuit court at its regular term on February 14, 1938 in Star City to be heard in Pine Bluff later.

"All other claims against the estate of Polk Clemmons except that of Earl H. Clemmons had been paid by the administrator before February 2, 1937.

"It is agreed that the above writing is a statement of facts which may be taken as true by the court in the trial of this case without other evidence concerning such facts. Either party may object to the competency, materiality, or relevancy of any of the facts so stated at the trial, and may except to the ruling of the court upon such objection."

In addition certain testimony was offered by the witness, A. J. Johnson, for appellant. This was excluded by the court because Mr. Johnson was the attorney for appellee, the administrator, who objected to his testimony. We agree with the trial court that this testimony was inadmissible. Section 5156, Pope's Digest, sub-division 4.

The question presented by this appeal is whether an administrator is bound, under all circumstances, to plead the general statute of limitations against a claim apparently barred, but which is otherwise an honest debt of the decedent. We do not think so, although there is apparently some conflict in our decisions, which we think more apparent than real.

We also think the fact that the circuit court, on the first appeal from the order of allowance of the probate court, reduced the amount of the claim very substantially long after it had been paid by appellee can have no bearing on this appeal. As said in 24 C. J. 499, "A payment or distribution in good faith in accordance with an order or decree of court will generally protect a represen-

tative and release him from further liability, although the order or decree is subsequently reversed . . ." There is nothing here to show bad faith and it is not disputed that the debt was a just claim.

Now, as to whether the administrator can waive the operation of the statute of limitations, this court in *Conway's Exc'rs.* v. *Reyburn's Excrs.,* 22 Ark. 290, said: "But it is an obligation resting upon no man to discharge an honest subsisting debt by the plea of limitation. What would be infamous to be done by a man when alive, cannot be commendable or legally binding to be done for him by his representative, when he is dead. By the will of James S. Conway, his executors were directed to pay his just debts, and in this his will was co-incident with the requirement of the law. Nothing is more inconsistent with what we know of Conway, as disclosed in his long and various dealing with Reyburn, than to suppose that he would himself have plead the statute to a just demand of Reyburn. And what his executrix knew he would not have done, she was not bound to do to protect his estate." In *Scott* v. *Penn,* 68 Ark. 492, 60 S. W. 235, this court said that, "An administrator is not bound to plead the statute of limitations under ordinary circumstances." In *Rhodes* v. *Driver,* 108 Ark. 80, 157 S. W. 147, Ann. Cas. 1915B, 258, it was said: "Our court, although it has said that an administrator should plead the statute of limitations in bar of a claim presented against the estate for allowance, it has nevertheless held that an administrator's settlement, claiming credit for payment of such a claim which could have been defeated by a plea of the statute of limitation, after its confirmation, will not be set aside by a court of chancery for fraud on that account. *Williams* v. *Risor,* 84 Ark. 61, 104 S. W. 547; *Dyer* v. *Jacoway,* 50 Ark. 217, 6 S. W. 902; *Conway* v. *Reyburn,* 22 Ark. 290. The administrator, of course, pays such a claim at his peril, for, if he be not allowed credit therefor by the probate court upon his settlement, he necessarily stands charged with the amount so paid, and he and his sureties remain liable therefor to those interested in the distribution of the estate."

Quoting again from Judge Fairchild's opinion in *Conway's Exr.* v. *Reyburn's Exrs., Supra,* it is said: ". . . we should regret to be obliged to accede to the unqualified proposition, that the representative of a deceased person is obliged to plead the statute to discharge his duty to an estate. An estate does not belong to the heirs of an intestate person, nor to the divisees of a testator, till its debts are paid. It is only the residue, after the payment of debts, that is subject to descent or distribution, or to pass under a will. And what a man owes is none the less a debt, because the staute of limitations has taken away the means of enforcing it. *Rogers* v. *Wilson,* 13 Ark. 507, and *Rector* v. *Conway,* 20 Ark. 79, were cases, in one of which, the administrator was seeking to recover his own demand, and in the other he was plainly colluding with the creditor to subject the estate to a stale and suspicious demand. But both cases admit that there are decisions which hold that an administrator is not bound to plead the general statute of limitations. And this is the law; 2 Williams, Exrs. 1635 (5th Am. Ed.) *Norton* v. *Frecker,* 1 Ark. 524; Lewin on trusts, 520, And *Hodgdon* v. *White,* 11 N. H. 208, which is cited as authority in *Rogers* v. *Wilson, supra,* is an express authority that an administrator fails to plead the statute at his own peril, as he will not be allowed credit in his settlement for a debt subject to the statute, unless it was a subsisting just demand. This we conceive to be the true extent of the obligation of an executor to plead the general statute of limitations. But statutes prescribing the period of presentation of demands against estates must be pleaded, as it is the duty of an executor to close the business of an estate as soon as possible, and to avail himself of all the helps for so doing."

Appellant cites and relies on *Abbott* v. *Johnson,* 130 Ark. 1, 195 S. W. 676, where it was said that the administrator did not have the power to waive operation of the statute of non-claim or the general statute of limitations, and cited *Cox* v. *Phelps,* 65 Ark. 1, 45 S. W. 990, to support the statement. When the facts in the Abbott case are carefully considered, it will be seen that the

language used in so holding was not necessary to a decision of the case and was *obiter dicta,* as the point was whether the payment of interest by Abbott, the administrator, on a non-probated claim and his request to Johnson not to foreclose until after the period covered by the interest payment had elapsed, which was acceded to by Johnson, tolled the statute of non-claim and the statute of limitations. And the case cited, *Cox* v. *Phelps, supra,* did not support the *dicta,* as the point there decided was that an administrator, by making a payment on a debt of his intestate, did not toll the statute.

Here, while the claim was that of a brother of the decedent and the administrator, it is not questioned that it is a just debt of the decedent. It was presented to appellee, was allowed and filed, showing his approval thereof for the full amount on August 19, 1936. No objection was ever filed to it by any heir. On February 17, 1937, nearly six months later, no objections being filed, the court examined, allowed and ordered the claim paid. It was paid on February 3, 1937. All other claims had been paid long prior thereto. If the heirs had any valid objections to its allowance and payment, they should have presented them. They knew the claim was pending, and their failure to make timely objection prior to action by the court and payment by the administrator is chargeable to their own neglect.

We find no error, and the judgment is affirmed.

McCarroll, Commissioner of Revenues, *v.* Mitchell.

4-5568 129 S. W. 2d 611

Opinion delivered May 29, 1939.

Frank Pace, Jr., and *J. F. Koone*, for appellant.

Herm Northcutt and *Walter L. Pope*, for appellee.

BAKER, J. This suit was filed in the Pulaski chancery court by the Director of State Highways and the State Highway Commission against Z. M. McCarroll, as the Commissioner of Revenues for the State of Arkansas. The substantial and pertinent parts of the complaint are to the effect that plaintiffs are engaged in the exercise of the powers and discharge of duties bestowed upon them by law in the maintenance, repair and construction of public highways and bridges of the state. For use in the performance of their duties they had purchased a railway tank car of motor fuel. The plaintiffs plead that it is the duty of the Commissioner of Revenues to collect the so-called gasoline tax of 6½ cents per gallon and that he has asked of the plaintiffs, the Director of Highways, and the Highway Commission, that they pay the 6½ cents per gallon tax and that upon their refusal, has assessed, or that he will assess a penalty of 20 per cent. and that the Commissioner of Revenues will follow up the remedies provided by law to collect the tax and impose the penalties fixed thereunder.

Plaintiffs plead that they are lawfully in possession of the said tank car of gasoline; that it is not to be sold or otherwise used than in the repair, maintenance and construction of highways and bridges in the state highway system; that it is not subject to the alleged tax of 6½ cents a gallon. They pray that the defendant be enjoined from the collection of the gasoline tax or taking any steps threatening or seeking to collect the same.

The Commissioner of Revenues filed a demurrer to this complaint which the court overruled, and, defendant refusing to plead further, decree was entered enjoining the appellant as Commissioner of Revenues from proceeding to collect any tax upon the railway tank car of gasoline.

The appeal challenges the correctness of the trial court's decree.

The appellees, aside from the statute imposing the tax, rely upon one Arkansas authority, the case of *Board of Improvement* v. *School District*, 56 Ark. 354, 19 S. W. 969, 16 L. R. A. 418, 35 Am. St. Rep. 108. In that case it is insisted that because the court held that school buildings were not liable for special improvement taxes, for the reason there is a presumption that public property is exempt from the special tax, should be controlling upon the issues presented, and reliance of the brief writer is also upon the announcement made by Cooley on Taxation, which is quoted as from vol. 2, (4th Edition), § 621. Without attempting to quote from the above excellent work, we content ourselves with the comment that although Mr. Cooley suggests that some things are always presumptively exempted from the burden of general tax laws, because it is reasonable to suppose it was not within the intent of the legislature to include state or municipal property as taxable property, such presumption is not controlling. He speaks, therefore, of the property as belonging to the state and municipality, held and used by them for public purposes, as presumptively exempt. One of the reasons suggested for this implied exemption is that the enforcement of such taxes would require a new levy to meet the demand of the

enforced tax in order to raise money to pay over to itself the tax levied and that no one would be benefited except officers employed whose compensation would increase the useless levy. The cogency of this subtle argument may be said to be fully met by the facts and conditions which have prevailed in the matter of the assessment, levy and collection of the so-called gasoline taxes under the several former acts of the legislature, culminating in the present act 11, of the Extraordinary Session of 1934. We cannot think it necessary to detail this legislative history.

We speak of this tax in this opinion as we do in ordinary or every-day language, but we think it must be understood generally, both by the lawmakers and the legal profession, that the tax had its origin, not as a sales tax upon the commodity, but as a tax upon the privilege and use of the highways, which privilege and use was measured by the amount of gasoline used in the exercise of that privilege and use so taxed. Such has been the holding of this court in some of its previous decisions. *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753.

In the cited case, the tax by act 606, §§ 1 and 3 of Acts of 1921 was a tax of 1 cent a gallon for fuel sold or used.

Section 25 of act 11 of the Acts of the Extraordinary Session of 1934 amends § 2, of act 63, of the General Assembly, approved February 25, 1931, and as to this act expressly states: "The purpose of this act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this state; double taxation is not intended."

A certain provision of the same section is: "The tax herein levied is to be collected at the source in this state of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this state, then when first brought into this state for use therein."

Section 27 of the said act is cited by the appellees as an indication or implication that it was not intended by

the legislature to impose a tax upon gasoline bought and used by the Highway Department. This section reads as follows: "Nothing in this act or in any similar law on the subject shall be construed as intending to levy any tax on motor vehicle fuel that the state has no power to tax."

Answering the suggestion as to the last-quoted section, we must say that we do not understand that this section provides the exemption claimed. Rather it looks to transportation in interstate commerce of gasoline or motor fuels shipped through the state which is not brought into the state to be sold here, nor for use in this state. Directly, there is no indication under this provision that gasoline used in this state may be exempted from the tax.

Section 25, just mentioned above, not only imposes the tax upon gasoline sold in the state, but the tax is there fixed upon gasoline used in the state. We cited *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, and other cases as showing the basis and authority for the assessment and collection of special taxes imposed by the several legislative enactments, as license fees upon cars or so-called taxes upon gasoline gallonage.

This case does not call for any special analysis of those several authorities. They are sound in principle and the deductions are conclusive upon us.

We proceed, however, to discuss the application of some of these announcements of the law. In the case of *Blackwood* v. *Sibeck,* 180 Ark. 815, 23 S. W. 2d 259, exactly the same contentions were made therein as against the right of the state to impose license fees upon Pulaski county for the use of the improved streets and highways by its vehicles and trucks. There was therein cited the same case of *Board of Improvement* v. *School District, supra,* and also copied from Cooley on Taxation, in an earlier edition, a very similar, if not the exact declaration offered in this case to support appellee's position. It was contended there that as the county was one of the sub-divisions of the state, it was a public unit in the state and that it was exempt from the payment of these exactions in the nature of license fees. It was said in that

case that although there might be a presumption that the legislature did not intend to levy or impose the tax upon one of the sub-divisions of the state, there is no limitation upon the power of the legislature to do so. The court then proceeded to make a general analysis of the several acts imposing the license fees and the exemptions therefrom and then held upon such analysis that the counties of the state are required to pay the license fee upon motor vehicles owned by them, and reversed the judgment of the trial court.

A similar analysis was made in the case of *Ft. Smith* v. *Watson,* 187 Ark. 830, 62 S. W. 2d 965, and in that case, the exact or identical question was presented for a decision as we have before us in the instant case. Ft. Smith, however, was seeking to recover taxes upon gasoline used by it in motor vehicles owned and operated by it upon the public roads and highways of the state for governmental purposes. The court said in that case: "This identical question was decided by this court in the case of *Blackwood* v. *Sibeck,* 180 Ark. 815, 23 S. W. 2d 259. This court ruled in that case that by exempting motor vehicles belonging to the United States Government from the payment of a license fee, no other vehicles were intended to be exempt. The exemption from the license fee and gasoline taxes appear in the same section (§ 35) of the act. The interpretation placed on this act heretofore and now finds support in the cases of *Crockett* v. *Salt Lake County,* 72 Utah 337, 270 Pac. 142, 60 A. L. R. 867; *City of Portland* v. *Kozer,* 108 Or. 375, 217 Pac. 833; *City of Louisville* v. *Cromwell,* 233 Ky. 828, 27 S. W. 377."

The court said there that the city must be regarded as a wholesaler of the gasoline in its purchase and use of it and that it was liable for the tax.

Again we had this suggestion made, almost identical with the proposition we now have for consideration in the case of *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. 2d 1007, 103 A. L. R. 1208. The question arose there out of the two per cent. sales tax of the sale price of an automobile. In that opinion we said: "If the legislature had intended to exempt automobile dealers, as

claimed by appellee, it could have said so in language about which there could have been no doubt. It did not do this. Appellee, claiming an exemption, the burden is upon it to show that it is entitled to exemption."

There was, also, quoted from 61 C. J. 391, the announcement that in cases of doubt as to legislative intention, or as to inclusion of particular property, within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption, bringing himself clearly within the terms of such conditions as the statute may impose.

There was, also, quoted from vol. 2, (4th Ed.), of Cooley on Taxation, 1403, § 672, an announcement to the same effect as above stated, except that this celebrated law-writer made more emphatic the principle announced, for he says: "Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed, and cannot be made out by inference or implication, but must be beyond reasonable doubt."

We think the case under consideration had been decided in principle by an announcement of this court in the case of *Arkansas State Highway Commission* v. *Wiseman, Commissioner,* 192 Ark. 873, 95 S. W. 2d 557. In this last-mentioned case the highway department, for the same reason it urges in the case at bar, insisted that it is not subject to the sales tax. It is an arm of the government. It is taking money out of one pocket and putting it into another. We held there, without our opinion being questioned by any dissent, that the mere fact that the highway department was an arm of the government, acting for the state in a particular sphere, did not exempt it from the taxation imposed. While the appellees question the soundness of our conclusions as announced in the last-cited case, the criticism is not convincing in the face of the history of legislation imposing these special taxes, such as license fees upon automobiles or so-called gasoline taxes when used by cities and counties and departmental agencies of the state. Experience has taught that these exemptions, when tried in the past, were not whole-

some, and legislation as it had developed upon these subjects in recent years has tended to exclude any form of exemptions. Although we do approve and consider this as real progress in legislative development, such legislation does not need our approval. It is sufficient, if the legislature by its own fiat so announces, and we think it has done so in unequivocal language. If by interpretation we might hold the Highway Department exempt from these taxes, in like manner and for the same reasons we should hold the Department of Education and all its agencies exempt. All agencies and employees of the executive department, while in the service of the state, would in like manner be exempt, and so would the members of the judicial department and all its employees.

It is unnecessary to extend unduly this discussion, but we desire to close it by announcing that the argument made that a tax upon the Highway Department is the taking of money from one pocket and putting it in another is not conclusive. However absurd the statement may appear, we do not feel at liberty to announce a principle whereby less revenue will be collected or distribution provided for under the provisions of act 11 of the Extraordinary Session of 1934 and in that manner impair the effectiveness of that legislation. While it is true that if the Highway Department pay over this tax it will have that much less money to pay out on highways, the argument is just as forceful that if it should not pay over this tax, there will be exactly that much less money in the aggregate paid to the treasury for the redemption of bonds and payment of interest and other debt service obligations.

It is suggested, but not seriously argued, that the Highway Department cannot be required to pay this tax because there is no special appropriation therefor. If the Highway Department is able to buy gasoline it will find, unless it seeks to evade the law, that the tax imposed upon the gasoline is a mere incidental part of the purchase price. We do not mean by "incidental" that it is small or insignificant, but that it is an inseparable part of the purchase price.

The other questions suggested and presented in this case, as to the right of the Commissioner of Revenues to sue the Highway Department, we deem of no particular significance as this action was instituted by the Highway Department and its director. The officers in control of the various departments of this state desire merely to know and understand their duties and obligations in order that complete and entire performance may be insured.

It follows that the trial court was in error. The decree is, therefore, reversed, and the cause remanded with directions to sustain appellant's demurrer.

GRIFFIN SMITH, C. J., and HOLT, J., dissent.

ANDERSON *v.* ODOM, GUARDIAN.

4-5490 128 S. W. 2d 993

Opinion delivered May 29, 1939.

E. A. Williams, for appellant.

Edw. Gordon, for appellee.

GRIFFIN SMITH, C. J. Appellee was a tenant in common with others, each owning a one-sixth interest in forty acres of land inherited from their father. The property forfeited in 1920 for non-payment of state and county taxes. In 1933 title was confirmed in the state under authority of Act 296 of 1929.

Collier Anderson and another, in 1937, purchased the state's interest. After recording their deed they

brought ejectment. Appellee, Carl Odom, as guardian for Coetha Odom, intervened. The cause was transferred to chancery. The agreed statement shows that James Odom, common ancestor, and appellee and cotenants, have been in possession of the property for more than forty years, and that Coetha Odom has been insane from birth.

The guardian offered to redeem the entire tract; to pay interest, costs, etc. Appellants admitted the ward's right of redemption as to a one-sixth interest, but insisted that the right did not extend to the five-sixths owned by the other heirs. There was a decree permitting the guardian to redeem the entire tract, from which comes this appeal.

Act 296 of 1929 provides that "The decree of the court confirming the sale to the state shall operate as a complete bar against any and all persons who may hereafter claim said land in consequence of any informality or illegality in the proceedings; and the title to land shall be considered as confirmed and complete in the state forever; saving, however, to infants, persons of unsound mind, imprisoned beyond the seas, or out of the jurisdiction of the United States, the right to appear and contest the state's title to said lands within one year after the disability may be removed."

Appellee's claim is not based upon any informality or illegality in the sale to the state, or in the confirmation of title. Four years elapsed between confirmation and purchase by appellants from the state, during which time appellee did nothing.

We think the case of *Harris* v. *Harris,* 195 Ark. 184, 112 S. W. 2d 40, is controlling here. While it is true that in the Harris Case there had been no confirmation, yet the confirmation statute expressly reserves to persons under disability the right to redeem within a year after such disability has been removed.

In the case just referred to it was said: "We conclude, therefore, that the proper construction of our redemption statute not only permits, but requires a co-

tenant who wishes to redeem any portion of a tract, where the taxes thereon have been assessed *in solido*, to redeem the entire tract."

Reasons for this rule are clearly set out in the opinion in the Harris Case. See, also, *Reynolds* v. *Plants*, 196 Ark. 116, 116 S. W. 2d 350.

The decree is affirmed.

ANTHONY *v.* THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY.

4-5484 128 S. W. 2d 1014

Opinion delivered May 29, 1939.

Shaver, Shaver & Williams, for appellant.

H. M. Barney and *Frank S. Quinn,* for appellee.

SMITH, J. This appeal is from a decree of the chancery court of Little River county holding void the sale of a tract of land in School District No. 4 of that county made in the year 1934 for the taxes due and delinquent thereon for the year 1933.

The sale was held void for the following reasons: "(a) That no proper certificate or return certifying the voting of a school tax in the district in which said lands are situated was filed with the county clerk or county court of Little River county, Arkansas; (b) and the county court clerk of Little River county, Arkansas, did not certify that the notice of delinquent tax sale for the year 1934 was published in a county publication qualified by law to publish such notices; (c) and the notice of delinquent tax sale of the year 1934 was not recorded by the county clerk of Little River county along with the delinquent list, and (d) that the notice of delinquent tax sale was not published for two weeks as required by law, and finds that the said tax forfeiture, sale and certification should be canceled, set aside and held for naught."

We consider these findings in the order stated in the decree. From the "records and proceedings of county board of education of Little River county" the following recital was read into the record now before us:

"At the meeting of the county board of education of Little River county, Arkansas, at Ashdown, on the 25th of May, 1934, there being present R. T. Sessions, County Judge, and C. D. Franks, County Examiner, all members of the board, the following business was transacted, to-wit: Canvassing the return of the school election May 20, 1933. Results were as follows:

Dist. No.	Directors	Term	Tax Gen.	Tax Bldg.	Total
4	W. W. Gardner	5 Years	14	4	18

(and other directors, terms and taxes not pertinent here).

"I certify that the above is a true report of the May school election of the year 1933.

"(Signed) C. D. Franks,
"County Examiner.

"Filed for record June 9, 1933.

"(Signed) W. W. Bishop,
"County & Probate Clerk,
"By Max M. Bishop, D. C.,
"Little River County, Arkansas."

There was also read into the record now before us excerpts from the records of the levying court of Little River county, which, after reciting the organization of the court at "the time fixed by law for the holding of the quorum court for the levying of taxes for the ensuing year," and the names of the several justices of the peace of the county who were present, contained the following recital:

"School Tax Levies: Upon motion by D. W. Bailey and seconded by J. W. Epps, the following levies were made on all real, personal and mixed property within the respective school districts of Little River county, Arkansas, subject to taxation for the year 1933, as hereinafter set out, and as voted by the several school districts in the regular school election held on the third Saturday in May, 1933, and certified by the several school districts within the time and within the manner required by law, and which levies are as follows, to-wit:

Place	School Dist. No.	Total Mills Voted	Gen Tax	Bldg. Fund
Richmond	4	18	14 Mills	4 Mills

"And upon roll call the said motion was carried by a unanimous vote."

It was alleged—and the court below found—that the records, above copied, failed to show proper return of the vote as to the school tax in District No. 4 in the year 1933.

It is argued—and it appears to be true—that when the quorum court met act 26, approved February 9, 1933, and act 247, approved March 29, 1933, were in effect, and that those acts had abolished the county board of education and the office of county superintendent, and that the duties and powers thereof exercised by the county board of education were transferred to the county courts of the respective counties, and the duties of the county superintendent of schools were transferred to a county examiner. It is, therefore, argued that the county board of education did not have the authority to make a canvass and return of the vote as to the school election and make a certificate showing the result thereof, and that this power and duty passed to the county court upon the passage of acts 26 and 247 of 1933.

We will not extend this opinion by a review of this legislation. The certificate does recite that it was prepared at a meeting of the county board of education, but it was signed by the county examiner, and recites that the county judge was present when the returns were tabulated. But the purpose of this canvass and certification was to expedite the work of the quorum court in levying the taxes. The power and duty of the quorum court to levy the school tax would not have been lost had no one made a certificate relating to the returns of the school election which were filed with the county court. It is not questioned that the school directors filed their election returns, nor is it questioned that the taxes levied by the quorum court conformed to the returns of the election held by the school directors. The order and judgment of the quorum court recites that the tax levied was that

"certified by the several school districts within the time and within the manner required by law." The quorum court had the power and was under the duty to levy the school tax if there were election returns filed with the county clerk showing that the tax had been voted and the amount thereof. That there were such returns is a fact not disputed. The quorum court may have examined these returns, and the record of its proceedings indicated that this had been done.

The county clerk was asked: "Q. I wish you would see if you have a certificate of any kind showing the canvassing, the levying and the voting of a tax in school district No. 4 in 1933?" He answered, "Yes, sir, we have the election returns." The county clerk in office at the time of the trial testified that he was not in office when the quorum court levied the taxes, and he did not know what records were before the court when the levy was made, but it was not shown that the election returns were not on file with the clerk of the county court, and a valid levy could have been made upon an inspection of these returns although they had not been tabulated and certified by any one. Certainly, the right to levy the school tax was not to be defeated when the election returns themselves had been properly filed and were present for the examination of the quorum court.

We conclude, therefore, that the sale was not void for the reason just discussed.

The second reason assigned in the decree for holding the tax sale void was that the county clerk did not certify that the notice of the delinquent tax sale for the year 1934 was published in a county publication qualified by law to publish such notices. The certificate reads as follows:

"State of Arkansas,
"County of Little River.

"I, W. W. Bishop, County Clerk of the County and State aforesaid, do certify that a notice of delinquent tax sale was published in the Little River News, a newspaper published at Ashdown, Little River county, Arkansas, for two consecutive issues, November 7th, 1934, and November 14th, 1934.

"In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said county this 15th day of November, 1934.

"W. W. Bishop,
"(Seal) County Clerk."

The law requires that the notice of sale shall be published ". . . in any county publication qualified by law," and it is not contended that the Little River News is not a newspaper "qualified by law." The contention is that the certificate must certify it so to be, and that in the absence of a certificate to that effect the sale is void.

The answer to this contention appears to be that in the same section of the act (§ 5 of act 16, Acts of Special Session of 1933, p. 61) in which the language quoted appears, there also appears a statement as to what the certificate shall recite, which reads as follows: "The list of delinquent lands recorded as provided in § 5 hereof shall be 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 certificate here involved, copied above, contains the recital which the law requires.

In the case of *Edwards* v. *Lodge,* 195 Ark. 470, 113 S. W. 2d 94, there is copied a certificate made pursuant to the above statute substantially the same as the one here involved, and it was held bad only because it recited that the notice had been published one time (November 8th) in one newspaper and the second time (November 16th) in another, and we held that the two publications should have been in the same paper—in one or the other of the papers. That was a certificate to the notice of the sale of lands in 1934 for the nonpayment of delinquent taxes for 1933.

There was a certificate appearing in the opinion in the case of *Benham* v. *Davis,* 196 Ark. 740, 119 S. W. 2d 743, which reads as follows: " 'I, E. H. DuVall, clerk of the county court, do hereby certify that the foregoing notice of sale of delinquent lands, was printed and pub-

lished in the Headlight at Sheridan, Grant county, Arkansas, on the 8th day of November, 1934, and the 15th day of November, 1934. Given under my hand and seal as county clerk on this 17th day of November, 1934.' "

There is no substantial difference between that certificate and the one here involved. One recited that the notice of delinquent lands was published in the Little River News November 7th and November 14th, while the other recites publication in the Headlight at Sheridan on November 8th and November 15th, but neither recited that either paper was "qualified by law," yet the certificate in the *Benham* v. *Davis* Case, *supra,* was held sufficient, and the same certificate must be held good in the instant case, unless we overrule the former cases, and this we decline to do.

The third ground upon which the tax sale was held to be bad was that "The notice of delinquent tax sale for the year 1934 was not recorded by the county clerk of Little River county, Arkansas, along with the delinquent list." The statute requires the delinquent list to be recorded. In the recent case of *Hirsch* v. *Dabbs* and *Schuman* v. *Mivclaz,* 197 Ark. 756, 126 S. W. 2d 116, we said: "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." Here, the delinquent list was recorded, and that record was made prior to the sale. It does not appear that the published notice was also recorded. But we see no reason for that action, and the statute does not appear to require it. To do so would be to record the same list of lands twice. The list of delinquent lands which the clerk is required to record is that certified by the collector.

This question also appears to have been raised in the case of *Benham* v. *Davis, supra,* and we there said that while the last paragraph of § 6 of the act 16 of the Special Session of 1933 (which is copied above) is somewhat involved, its meaning is that "the clerk shall attach to the list of delinquent lands recorded, as provided in § 5, a

certificate at the foot of the record, stating in what newspaper said notice of delinquent land sale was published and the dates of publication, and that such record so certified shall be received in evidence of the facts therein contained." In other words, the delinquent list as certified by the collector must be recorded prior to the date of sale, and must be published for the time and in the manner required by law, but, when published, it is not required that the published notice shall also be recorded. What is required is that, after publication has been made, there shall be appended, at the foot of the record of lands returned delinquent by the collector, a certificate stating in what newspaper said notice of delinquent land sale was published and the dates of the publication.

The record before us shows that the list of lands returned delinquent by the collector was duly and properly recorded, and when this delinquent list had been published the clerk made the certificate above copied, stating in what newspaper said notice of delinquent land sale had been published, with the dates of publication. This was a substantial compliance with the law.

The fourth reason given by the court below for holding the tax sale void was "That the notice of delinquent tax sale was not published for two weeks as required by law."

Section 5 of act 16 of the Special Session of 1933 provides that "There shall be published once weekly between the first Monday in November and the third Monday in November, in each year, in any county publication qualified by law, 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, or so much thereof as is necessary to pay the taxes, penalties and costs due thereon, by the county collector, at the courthouse in said county (or district), on the third Monday in November next, . . ."

It is argued that this act requires that the last publication be made two weeks before the day of sale, and the case of *McWilliams* v. *Clampitt,* 195 Ark. 908, 115 S. W. 2d 280, is cited to support that contention. It will be observed that the publications of the notice must be be-

tween the first Monday and the third Monday in November. We construed this portion of act 16 in the case of *Edwards* v. *Lodge, supra,* and held, to quote a headnote in that case, that "Section 6 of act 16 of the Ex. Ses. of 1933, providing that 'There shall be published once weekly between the first Monday in November and the third Monday in November, in each year, in any county publication qualified by law, notice, etc.,' requires the publication of the notice of sale of delinquent lands once a week for two publications, between the dates mentioned, and that it should be published each time in the same paper."

It would be a physical impossibility to have two publications of the notice a week apart, the last publication being two weeks before the third Monday if both publications are to be made between the first and third Mondays of the month. To so construe the act would be to hold that a legal notice of the sale could not be given. We, therefore, adhere to the construction of the act given it in the case of *Edwards* v. *Lodge, supra.* The publications here made complied with the act as there construed, the first publication having been made on November 7th and the second on November 14th, the publications being a week apart and both between the first and third Mondays. The first Monday in November, 1934, was the 5th day of the month and the third Monday was the 19th day of that month.

The case of *McWilliams* v. *Clampitt, supra,* cited and relied upon by appellee, does not apply or control here. It is true we held in that case that the last publication must be made two weeks before the date of sale, but that sale was not made pursuant to the provisions of act 16 of the Special Session of 1933, but was made pursuant to the provisions of § 10084, Crawford & Moses' Digest, as amended by act 250 of the acts of the Regular Session of 1933, the provisions of the amendatory act 250 being 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, . . .," the notice of delinquency. The change made by act 16, *supra,* is apparent, it having omitted the words "for two weeks" appear-

ing in the prior legislation, so that it is no longer required that the last publication be made two weeks before the sale, as was required under the law applicable to the *McWilliams* v. *Clampitt* case.

We conclude, therefore, that the notice was published in conformity with act 16 of the acts of the special session of 1933, and was sufficient.

Upon the whole case we are of opinion that the sale was not void for any of the reasons assigned by the court below, and the decree will, therefore, be reversed, and the cause will be remanded with directions to dismiss the complaint attacking the tax sale as being without equity.

CARPENTER *v.* CITY OF PARAGOULD.

4-5582 128 S. W. 2d 980

Opinion delivered May 29, 1939.

Kirsch & Cathey, for appellant.

Jeff Bratton, for appellee.

HOLT, J. Appellant, R. L. Carpenter, a taxpayer and a citizen of the city of Paragould, brought suit against that city, its mayor, and the members of its sewer committee.

The only record before us is the original complaint, the demurrer thereto and the final decree of the trial court overruling the demurrer and dismissing the complaint for want of equity.

Omitting formal parts, the complaint alleges: That plaintiff, appellant here, is a citizen and taxpayer within the district affected by the proposed sewerage system; that defendants are the mayor and city clerk of the city of Paragould and five other citizens, constituting the sewer committee of the city of Paragould, appointed under act 132 of the General Assembly of 1933, being §§ 9977-9990 of Pope's Digest, inclusive.

The plaintiff further alleges that said act prescribes method whereby the city of Paragould may construct and build a sewage disposal plant and issue bonds therefor, and that the city council of said city has enacted ordinance No. 502, entitled, "An Ordinance Establishing Just and

Equitable Rates or Charges for the Use of and the Service Rendered by the Proposed Sewage Disposal Plant and Improvements to the Sewerage System to be Constructed by the City of Paragould in the County of Greene, State of Arkansas, and Providing for Collection of Said Rates or Charges"; that said ordinance was introduced and placed on first reading at a special meeting of the council on December 14, 1938, at which all members of the council were present. This ordinance was read and adopted at two meetings of the city council thereafter and passed at a regular session of the council on December 29, 1938. Plaintiff alleges that said ordinance was not properly adopted.

Plaintiff further alleges that prior to the passage of said ordinance, the following notice was published in the city of Paragould in a newspaper having a *bona fide* circulation: "Notice is hereby given that there has been introduced in the city council of the city of Paragould, Arkansas, an ordinance fixing and providing rates for services of the proposed sewage disposal plant and improvements to the sewer system for the city of Paragould:

"Minimum disposal plant charges 50 cents per month minimum; additional charge for connection located on new extension 65 cents per month.

"Any person interested may appear before said city council on the 29th day of December, 1938, at 7:00 o'clock p. m. at its usual meeting place in the city hall and be heard concerning the proposed rates. At such hearing all objections and suggestions shall be heard and said rates, either as originally introduced or as modified and amended at said meeting, will be passed."

Subsequent to the publication of this notice, on December 29, 1938, said rate ordinance, being ordinance No. 502, was duly passed and contains the following provision as to rates:

"Section 1. There are hereby established just and equitable rates or charges for the use of and the service rendered by the project described generally in the preamble of this ordinance which shall be paid by each land-

owner whose premises are connected with and use such project by or through any part of the sewer system of the city of Paragould, Arkansas, whose premises in any way use or are served by such project (excepting vacant, unoccupied property not actually using such project), in accordance with the following schedule:

"Minimum disposal plant charges 50 cents per month.

"Minimum additional charges for connection located on new extension 65 cents per month.

"Section 2. That the minimum rate or charge for each connection, either directly or indirectly as described in Section 1 hereof to such project, shall be 50 cents per month for premises using previous connection to the system and $1.15 per month to all others."

Plaintiff further alleges that said notice and the ordinance as to rates are not sufficient and that said rate provision in said ordinance is void.

Plaintiff further alleges that after the passage of ordinance No. 502, ordinance No. 503, entitled, "An Ordinance Providing for the Construction and Operation of a Sewage Disposal Plant for the City of Paragould and Improvements to the Sewerage System Consisting of New Lateral Lines, Providing for the Issuance of Revenue Bonds Therefor, Fixing the Details in Respect of Said Bonds, and Providing for the Method of Payment Thereof, and Declaring an Emergency," was adopted. Said ordinance provides for the issuance of bonds of the city in the sum of $94,000 which, together with funds to be furnished by the United States Government, are to be used to pay costs of the construction described in the ordinance and that said ordinance was duly enacted by the city council on January 16, 1939.

It is further alleged that subsequent thereto, the sewer committee by proper resolution authorized the sale of $94,000 in sewer bonds to the United States at private sale and this resolution of the sewer committee was subsequently approved by the council.

On December 21, 1938, by resolution, the bid of H. L. Perkins in the sum of $120,205.51, to make the improve-

ments, was accepted and the sewer committee, together with the proper city officials, were directed to prepare and execute all necessary contracts relating thereto.

On January 20, 1939, a proper referendum petition was duly filed with the city clerk, seeking a referendum on ordinance No. 503 and the resolution approving the bid of H. L. Perkins for the construction of the improvements to the sewerage system and that they be referred to the citizens of Paragould for vote, and that an election be called.

The city council refused to submit by referendum to a vote of the people of the city, said ordinance No. 503 and said resolution approving the bid of H. L. Perkins, on the ground that it was without power so to do, under the Constitution and statutes of the state of Arkansas.

Plaintiff further alleges that said ordinance and resolution are of such nature that they may be submitted to a referendum vote as authorized by the Constitution and statutes of the state of Arkansas. He further alleges, notwithstanding referendum petitions have been filed with the city clerk, as aforesaid, that the mayor and council are about to sell and deliver said bonds in the amount of $94,000 to the Government at private sale and are preparing to go ahead with the construction of the sewerage system as proposed in said ordinance and that he has no adequate remedy at law for the protection of his rights herein. He then prays for an order of the court declaring ordinance No. 502 void and of no effect; that ordinance No. 503 and the resolution accepting the bid of H. L. Perkins be declared legislation of such nature as to be subject to a referendum vote, and that the court enjoin defendants from executing and delivering the bonds in question to the Government; that they be enjoined from incurring any obligation or expenses in connection with said project; that the sewer committee be enjoined from proceeding further and all proceedings under ordinance No. 503 and said resolution be stayed until the voters of Paragould shall adopt the same at an election, and for all other proper relief.

Defendants demurred to this complaint, alleging that it did not state facts sufficient to constitute a cause of

action. The court sustained this demurrer, dismissed plaintiff's complaint for want of equity, and from this judgment comes this appeal.

It is first contended by appellant that ordinance No. 502, being termed the rate ordinance, was not properly passed for the reason that it was introduced at a special meeting of the council, and that the meeting was not called for the purpose of introducing the ordinance in question. We cannot agree to this contention.

The record reflects that all members of the City Council were present and participated in the meeting when the ordinance was introduced and all members voted to place it on first reading. At a following meeting the ordinance was read a second time, and later at a regular meeting it was read the third time and passed.

In *City of Mena* v. *Tomlinson Brothers,* 118 Ark. 166, 175 S. W. 1187, this court said: "The proceedings of a special meeting duly called would be legal, if all the members had notice whether all attended or not, and when all the members of the council are voluntarily present in a council meeting and participate therein, it is a legal meeting for all purposes unless the law provides otherwise. *State Ex Rel Parker* v. *Smith,* 22 Minn. 218; *Lord* v. *City of Anoka,* 36 Minn. 176, 30 N. W. 550; *Magneau* v. *City of Freemont,* 30 Nebr. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Reports 436, 27 Cyc. 329.

"There is nothing in the statute prohibiting the passage of such an ordinance at such a meeting, and having been properly passed it is valid."

Also in *Harrison* v. *Campbell,* 160 Ark. 88, 254 S. W. 438, this court held that an ordinance passed at a special meeting of the council is valid if all the members were voluntarily present and participated in the proceedings. This rule is applicable where the business to be transacted is not of a nature entitling the public to notice thereof, as, for instance, where the right of remonstrance exists.

Appellant next contends that the notice required by Act 132 of 1933 was not sufficient to put the property

owners on notice as to the rates to be discussed at the council meeting. Again we cannot agree with appellant. We think this notice sufficient to give the property owners all the notice required under the provisions of said act 132, which provides: ". . . after the introduction of the ordinance fixing such rates or charges and before the same is finally enacted, notice of such hearing, setting forth the proposed schedule of such rates or charges, shall be given by one publication in a newspaper published in a city or town." Appellant admits that the notice set out above was in fact published ten days before the enactment of ordinance No. 502. This notice speaks for itself, and we think amply sufficient to advise the property owner how he would be affected by the proposed rates. This notice clearly specifies the rates or charges to be made, the time in which all interested parties may be heard, and we think sufficient.

Appellant finally contends that he and the other citizens of Paragould have a constitutional right to have ordinance No. 503, termed the bond ordinance, and the resolution of December 21, 1938, approving the bid of H. L. Perkins, referred to the people of that city for a vote. After a careful consideration of this record we are of the view that appellant is correct in this contention. Taking the material allegations of the complaint as true, as we must in testing it on demurrer, it is conceded that all necessary steps have been taken to compel the submission of ordinance No. 503 and the resolution of December 21, 1938, to a vote of the people of Paragould under the power of referendum conferred by Amendment No. 7 to the Constitution of Arkansas. Unless the legislation or "measures" herein sought to be referred are of that character which are not subject to referendum, then appellant's petition for injunctive relief must be granted.

Amendment No. 7 of the Constitution of Arkansas, known as the initiative and referendum amendment, provides, among other things, as follows: ". . . The initiative and referendum powers of the people are hereby reserved to the local voters of each municipality and

county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties . . .

"In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty nor more than ninety days before the election at which it is to be voted upon; for a referendum petition at not less than thirty days nor more than ninety days after the passage of such *measure* by a municipal council . . .

"The word 'measure' as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character."

Appellees here are proceeding under authority of Act 132 of 1933, now §§ 9977-9990 Pope's Digest. The act provides the manner in which sewer projects may be constructed pursuant to ordinances passed by the city council. The improvement proposed originated in the city council itself. No petition is a condition precedent to action on the part of the city council. The action of the city council in the instant case, in enacting the ordinance and resolution in question is distinctly legislative, and not the exercise of a mere ministerial function. The council is not acting in an admistrative capacity as would be the case where a municipal improvement district is created pursuant to a petition of a majority of the property owners affected in that district. In such improvement districts created by petition of a majority of the property owners, the city council has no discretion in the matter, if all conditions precedent have been met.

The above provisions of the Constitution of Arkansas are plain, broad and unambiguous. "The . . . referendum powers of the people are hereby further reserved to the local voters of each municipality. . . . as to all local, special and municipal legislation of every character in and for their respective municipalities. . . . In municipalities the time for filing referendum petitions at not less than thirty days nor more than ninety days after the passage of such measure by a municipal council; . . . The word 'measure' as used herein

includes any . . . resolution, ordinance, . . . or legislative proposal or enactment of any character." It will thus be noted that the right of referendum is granted to the people on legislation of every character, whether the legislation affects all or a part of the citizens of the municipality affected.

In *Southern Cities Distributing Company* v. *Carter,* 184 Ark. 4, 41 S. W. 2d 1085, wherein a referendum petition, under constitutional amendment No. 7, was filed as against a resolution of the City Council granting an increase in gas rates, and citizens who did not use gas would not be materially interested in the rates charged, this court said: "It is next insisted that the resolution granting the increase in gas rates is not subject to the referendum, but this contention is without merit. The appellant company succeeded to all the rights of the old Southwestern Gas & Electric Company for supplying and distributing gas in the City of Texarkana, the transfer to it being recognized by the ordinances of the city and by the statute, Act 248 of 1929, page 1196.

"The constitutional amendment *provides: 'Every* extension, enlargement, grant, or conveyance of a franchise . . . whether the same be by statute, ordinance, resolution or otherwise, shall be subject to referendum and shall not be subject to emergency legislation.'

"In *Terral* v. *Arkansas Light & Power Company,* 137 Ark. 523, 210 S. W. 139, a case involving the construction of Act 135 of 1913, relative to the fixing of rates by a public utility in the City of Arkadelphia, a petition having been filed for referendum upon the ordinance granting an increase thereof, the court held that the fixing of such rates was not an exercise of the police power within the meaning of the statute, but the granting or extension of a franchise that was subject to the referendum. This constitutional amendment expressly provides: 'Every extension, enlargement, grant or conveyance of a franchise . . . whether the same be by statute, ordinance, resolution, or otherwise, shall be subject to referendum and shall not be subject to emergency legislation'. Such language necessarily includes a reso-

lution of the City Council granting an increase of rates to the public utility for supplying and distributing gas to the people of the city under its contractual rights to do so, being but an extension or enlargement of its franchise. Moreover, such resolution is clearly included in the word 'measure' as defined in the constitutional amendment, which states: '. . . includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character'. Amendment also provides: 'The initiative and referendum powers of the people are hereby reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character'.

"The making or fixing of rates is an act legislative and not judicial in kind within the meaning of this constitutional amendment." See, also, *Smith* v. *Lawson*, 184 Ark. 825, 43 S. W. 2d 544.

We have carefully examined and considered the authorities cited by appellees, but we do not think the principles announced in those cases are controlling here.

On the whole case, we conclude, therefore, that the Chancellor erred in entering a judgment sustaining the demurrer of appellees and the cause is accordingly reversed and remanded with instructions to overrule the demurrer and to proceed in accordance with this opinion.

SMITH, MCHANEY and BAKER, JJ., dissent.

BAKER, J. (dissenting). I have heretofore merely noted my dissent when I have not agreed with the majority of the court. I have undertaken to express my viewpoint only when I have felt that a majority was so far in error that some protest was required as a marking place to indicate the point at which the court went wrong. The opinion of the majority in this case is erroneous. I think the error is a demonstrable one. It is not every act or ordinance of a city council that may be deemed subject to a referendum. For instance, a group of citizens in a city like Paragould, Jonesboro, Little Rock, or Hot Springs, might get together and organize for some subdivision of that city a municipal improvement district.

The council would be required to pass proper ordinances. In such instances the council would act as agent for the property owners in the particular district formed. Such ordinances that would be passed are not measures which would be subject to be referred to the voters of the entire city. It was so held in the case of *Pavement District No. 36* v. *Little,* 170 Ark. 1160, 282 S. W. 971. In such an instance as that mentioned the entire city has no interest. Nobody's rights will be affected except the property owners whose property will be assessed by the particular ordinance, and other property owners in different or other sections of the city have no right to vote thereon.

The rule is not different if the district be co-extensive with the city limits. In such a case, property-holders to the exclusion of mere electors will be affected.

The power and right of property owners to make improvements without a vote of a majority of qualified electors was decided in the case of *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223. Also in *McCutcheon* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. 2d 1037; *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5.

The decision of the majority in this case will make it necessary perhaps for the legislature to amend the law and provide that such sub-divisions of the city, or property owners of the entire city, as may desire local improvements may not depend upon the council, but shall have the right to have a local commission within the territory affected make and declare proper rules or ordinances as agents for the property owners whose property will be taxed for the local improvement. In other words, in the case at bar the council acted in a purely administrative capacity, as legislative agents for the property owners whose property will be affected, assessed or taxed for the improvement, but not for municipality or electors generally, and such other citizens of the city have no interest therein and should not be called upon to aid in deciding matters in which the city is not involved. The bonds issued are not obligations of the municipality. The taxpayer generally will not be affected thereby and will not owe or be liable to pay one cent of principal and interest upon any bond issued.

This proceeding is under act 132 of 1933 and § 7 thereof expressly provides there shall be no liability except upon the property assessed, it being connected and receiving the service.

It is said in the case of *Monahan* v. *Funk*, 137 Ore. 580, 3 Pac. 2d 778: "The crucial test for determining that which is legislative and that which is administrative is whether the ordinance was one making a law or one executing a law already in existence."

Applying this test we find certain citizens in Paragould are asking for the application of the law whereby some improvements can be made on the sewer system and an extension made thereon with a right to tax users. The bonds to be issued will be paid from an assessment on the connected property by these people who ask the city council to apply the law to their properties and form the district. We now find an anomalous situation in which the entire electorate of Paragould is given the right to come in and vote on whether citizens interested may improve their own property and those who have no interest whatever may deny them that right.

Having stated my position I have no desire to argue it or submit authorities in regard to it. To my mind the mere statement of it establishes its soundness and the unsoundness of the position of the majority.

SMITH and MCHANEY, JJ., concur in the dissent.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* HERNDON.

4-5496 129 S. W. 2d 954

Opinion delivered June 5, 1939.

J. W. Jamison, Paul E. Gutensohn and *Warner & Warner*, for appellant.

Chastain & Chastain and *Partain & Agee*, for appellee.

MEHAFFY, J. The appellee filed his complaint in the Crawford circuit court against the appellants, alleging that on November 27, 1937, while he was in the employ of a coal company and working near the company's plant

in Fort Smith, Arkansas, about nine o'clock p. m., in a boxcar on appellants' track, and while he was so working in the performance of his duties, he was, by and through the carelessness and negligence of appellants, their servants, agents and employees, seriously and permanently injured; that while he was engaged as above stated, one of appellants' locomotives approached on the track on which said car was standing; that said employees in charge of said locomotive knew that employees of the coal company were accustomed to work in cars on said track, and knew, or by the exercise of ordinary care should have known, that they were working in the car at the time, and notwithstanding such knowledge, the employees of appellants so carelessly and negligently moved and caused said locomotive and car to be moved as to strike the car in which appellee was working, suddenly, forcibly and violently, and without any signal or warning whatever of their intention to do so, thereby causing appellee to be thrown violently from the car in which he was working, and against some iron and other objects on the ground, and to be seriously and permanently injured. He then describes his injuries, and prays for judgment in the sum of $3,000.

Appellants answered denying all the material allegations of the complaint, and pleaded specifically that appellee's injuries, if any, were caused by his own negligence and failure to exercise ordinary and reasonable care for his own safety.

There was a trial, verdict and judgment for $500 and the case is here on appeal.

Teddy B. Herndon, the appellee, testified in substance that he lived in Fort Smith, Arkansas, and was injured while in the employ of a coal company; he went to work in the car where the coal comes out of the car in two-inch squares; it comes out on a conveyor and it was appellee's duty to shovel the coal back into each end of the car; about 25 or 30 tons was put in each car; he went to work at seven o'clock in the evening, and there was some coal already in the car, about two feet deep; about 9:30 or 9:45 he had the car filled up about four feet in the end; was shoveling coal each way and could not hear

anything in the car unless someone called loudly; he was in there shoveling coal and something hit the car and knocked him out on the ground; he hit on his shoulder and back and was bruised, and for a second he was addled; he looked to see how far he was from the car, and saw the engine going up the track; he then went to where Buell Collins was and said something to him; does not remember what he said; the machinery was making so much noise; he did not think he was hurt badly at the time, and went back to get a drink of water, and when he went back to the car the coal was running out on each side; when he started to get into the car, a catch came into his arm; he turned and went into the boiler room and stayed there until about three o'clock; does not think anybody was in the boiler room except Buell Collins; was not outside near the boxcar, nor were any of the other employees working there at that time in the vicinity of the boxcar; after three o'clock he went to a grocery store on third and G streets to get some liniment and iodine; then doctored his shoulder and went to bed at home; did not go back to work for the coal company after that day, and has not worked for them since; his shoulder was in such shape that he could not work; worked a half-day for the O. K. Transfer & Storage Company, but his shoulder bothered him so that he could not handle the job; is not working now; has worked part of the time at a pool hall; muscles and back and shoulder are injured; could not raise his arm nor pick up a load of any more than 30 or 40 pounds, and when he does that for a short time, it gets weak; hurt his back when he fell on that shoulder against that tin, which is about 2½ feet high in the door; his only treatment was what his mother did for him; did not have a doctor; was earning 30 cents an hour at the time of the accident, and averaged $2.40 a day; remained in bed after the accident about five days, and still suffers from the injury; when he lifts a load or uses his arm, it swells up and he cannot raise it; cannot sleep at night and cannot pick up anything and put it over his head; cannot put his arm over his head with any weight at all; the conveyor comes out south from the coal company and is in a trough shape; it is built in an angle

shape about 25 feet high and the coal comes down this angle down the conveyor, which carries it down to the boxcar; conveyor sets some six inches from the top of the door to the boxcar; the coal drops off the conveyor into the boxcar; it knocked him unconscious for a short time; after he had fallen to the ground he observed an oil tank car on the track spotted to the north end of his car; appellee is 23 years old.

On cross-examination appellee stated in substance that he fixed the date, November 27, because on the 28th a lady had some property stored in the attic of his mother's home, and that was the next morning after the accident; the accident happened between 9:30 and 9:45; does not remember when he first began working for the coal company in November; they came after him, put him in a coal car previously occupied by Reed Mullins; had a scoop shovel to work with, and there were about four-feet of brickettes at the door and higher on each end; it was filled to the top of these grain doors; had done that kind of work before, but had never been in a boxcar when a switch engine moved in; the conveyor is about 75 feet long, constructed of iron, and has two wheels about five feet from the lower end which is the end that picks up the brickettes; would not know for sure what struck the car except that another car was on the same track, and something knocked him out of the car; the engine was up at the far end of the plant about 400 or 500 feet from where appellee was when he regained consciousness; the car appellee was in moved three or three and a half feet when it was struck; knocked him out on the east side of the car on his shoulder and back; the conveyor that piled the brickettes into the car is pretty heavy; it is operated by an electric motor and on one side there is a chain that pulls a bell; the conveyor was not damaged in any manner and not placed in a different position; it was at the south end of the door, and lacked about four or five inches being at the door at the south end; when he got up the conveyor was up against the other side of the door; did not see anybody on the east side of the track after the accident; did not see any switchman; talked to Buell Cowan after the accident; told Cowan he got knocked out of the

car and that it hurt his shoulder; does not know why he did not tell Cowan that he had been cut and bruised; did not have first aid treatment at the plant; did not tell Elmer Smith, the superintendent, that he had been hurt; witness did not know whether the car or engine struck the car he was in, but one or the other struck it; the tank car was up against the car he was in, but does not know whether it was attached or not; did not see the switchman to make any complaint that night, and did not make any complaint to the Frisco after the accident or before he filed suit; did not make any claim against anyone until suit was filed; went in and told Buell Cowan that he had been knocked out of a boxcar; then went out to the boxcar and the coal was about four feet high in the doorway and slightly higher in each end of the car; shoveled the brickettes back to each end of the car until they got full and then let the conveyor run until it filled up the doors; did not use a shovel after the accident; quit at three o'clock in the morning; did not talk to anyone before he left at three o'clock; went to a store run by Leslie Scott on G Street to get some Iodine and liniment; got him out of bed and did not pay for the medicine, but it was charged; was skinned on his shoulder and the liniment was put on the muscles of his arm; did not go back to the coal plant to show anybody his bruises, and did not show it to anybody connected to the Frisco; worked in a pool hall of Arthur Newman after the accident; Newman also operates a beer joint and barber shop; appellee made $5 a week and worked for him five weeks.

Appellee's testimony about the purchase of the liniment and iodine from Scott at three o'clock in the morning is corroborated by Scott; and also Ella Kline testified that she saw appellee in the early morning when he came to Scott's store.

Sarah Herndon, mother of appellee, testified that he came home about three o'clock in the morning after the night of November 27th; came to her bed and told her he was hurt; she took the liniment and doctored his side and arm and shoulder; then he went to bed and afterwards went to see a doctor and the doctor would not treat him because he had no money; he stayed in bed a week

or maybe longer; she doctored him all the time as best she could until he was able to get up; has not been able to do any work since that time; he complained of his injury, and does yet, at times; he has not worked since the accident and cannot do any hard work on account of his shoulder and arm.

Appellee's testimony was also corroborated by the testimony of Florence Dunn. She testified in substance that she was hired by Mrs. Herndon and lived there at her home in 1937; that she knows Teddy Herndon and that he came in on November 27th, about three or four o'clock; his shoulder was bruised and skinned pretty bad; that they bathed him and took care of him the best they could; that he was confined to his bed off and on for a week or more.

The witnesses for appellants contradict the testimony of appellee and his witnesses. Among other things they testify that the plant was not operating on November 27th, and that appellee worked on the 29th of November. Quite a lot of their testimony is to the effect that appellee made no complaint to any of the officers or agents of appellants, or the coal company for whom he was working. This, however, was all testified to by the appellee himself.

It is earnestly insisted that the evidence is not sufficient to support the verdict. Appellants cite and rely on cases which hold that a jury's verdict cannot be predicated upon conjecture or speculation. There is no conjecture or speculation in this case, but it is a question of whether there is any substantial evidence to support the verdict.

In determining the sufficiency of the evidence to support a verdict, under the well established rules of this court we must view the evidence with every reasonable inference arising therefrom in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict, it cannot be disturbed by this court. If the evidence on the part of the appellee, although contradicted by evidence of the appellants, is of a substantial character, evidence that the jury could reasonably have believed, the case will not be reversed be-

cause of the insufficiency of the evidence, although this court might think the verdict is against the preponderance of the evidence. *Hot Springs Street Railway Co.* v. *Hill, ante* p. 319, 128 S. W. 2d 369; *Missouri P. Rd. Co.* v. *Dotson,* 195 Ark. 286, 111 S. W. 2d 566; *Missouri P. Rd. Co.* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428; *American Equitable Assurance Co. of N. Y.* v. *Showers,* 195 Ark. 521, 113 S. W. 2d 91; *Kansas C. S. Ry. Co.* v. *Larsen,* 195 Ark. 808, 114 S. W. 2d 1081.

This court said, in the case of *St. Louis, S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768, in an opinion written by the late Chief Justice HART: "In the case at bar the conditions surrounding the plaintiff, as testified to by the defendant's witnesses, furnish a very strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. It cannot be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature. His testimony related to matters, situations and conditions which might or might not have existed, and his right to recover depended wholly upon the truth or falsity of his testimony. His testimony was, therefore, evidence of a substantial character and if believed by the jury, was sufficient to warrant a recovery in this case."

In the case of *Missouri & N. A. Rd. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478, this court 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 the result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner."

The late Justice BUTLER, speaking for this court, said: " 'The great preponderance of the evidence appears to be that appellee was not injured in the manner testified by him, indeed, that he was not injured at the frog at all, and one of the grounds upon which we are asked to reverse this case is that the evidence shows that it was physically impossible for appellee to have been hurt in the manner testified to by him." *Mo. Pac. Trans. Co.* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 579.

In the same case it was also said: "At any rate, the jury and trial court had the benefit of the presence of the witnesses and saw their demeanor upon the witness stand and the jury has accepted the testimony of the appellee as true."

Appellants contend, however, that the evidence of appellee is contradicted by the physical facts, and it is argued that if the car had moved at all, or if it had moved the distance testified to by appellee, it would have broken and injured the conveyor. The appellants say that the door of the car was between five and six feet wide, and the conveyor about two feet wide. Even if the conveyor was at right angles with the car, the moving of the car three feet would not necessarily injure the conveyor, and there is no evidence that it was at right angles. If the conveyor had gone into the car, not at right angles but from the rear, it is plain the car might have moved a considerable distance without injury to the conveyor, and the evidence of appellee, which is undisputed, shows that the conveyor was on one side of the car door before the accident, and was on the other side of the door after the accident.

It is also contended that if the car was struck as appellee testifies, it could not have knocked him out of the door. Of course, this would depend on a number of things. He might have struck either the coal or the side of the car and been knocked back and out of the door; but it is said that knocking a car three or four feet would not knock a person down. One witness of appellants said that the car would have to be knocked five car lengths in order to knock a person down. However, all these were questions for the jury. It is argued by appellants that gross preponderance of the evidence, which indicates an unreasoning passion or prejudice on the part of the jury, or misapprehension of the law, or disregard of the legitimate sphere of their action, and such as to shock a sense of justice, will justify this court in setting aside the verdict. The authorities cited in support of this argument have no application to this case.

This court has many times held that the trial court has a right to set aside a verdict when he thinks that the

verdict is against the preponderance of the evidence; but this court does not have the right to set aside a verdict simply because it appears to be against the preponderance of the evidence. The twelve jurors and the trial judge have an opportunity to see the witnesses, observe their demeanor on the stand, and are better able to arrive at the truth than this court, which simply has the printed record, and knows nothing about the witnesses, their apparent candor, their demeanor on the witness stand, and their willingness or unwillingness to testify. The jurors are required by law to be of good character, approved integrity, sound judgment and reasonable information, and the circuit judge, of course, must be learned in the law. Because they have an opportunity to hear the witnesses testify and observe their demeanor, their verdict, if there is any substantial evidence to sustain it, cannot be disturbed by this court.

It is next contended by the appellants that the court erred in giving appellee's instruction No. 2, which reads as follows: "You are instructed that the defendant railroad company owed a duty to the plaintiff of using ordinary care in protecting him and preventing injury to him if he was in one of its cars on a switching track, and if you should find from a preponderance of the evidence that it failed to exercise ordinary care to give notice that a coupling would be made with any such car and the plaintiff was in same in the discharge of his duties of assisting in loading same for the Brickette Company, and you further find that the plaintiff was injured thereby, then such action, if it existed, would constitute negligence on the part of the defendants."

Appellants' argument is that the instruction has no reference to the evidence. We do not agree with appellants in this contention. We think the instruction was a correct declaration of the law, and the court did not err in giving it.

Reading the evidence and the instruction will show clearly that the instruction is not abstract or misleading, and that it has reference to the evidence introduced.

Objection is made to the court's giving instruction No. 3 requested by appellee. The objection to this in-

struction is that it assumed the existence of facts that were not proved. The instruction is very long, but it tells the jury in effect that if they find from a preponderance of the evidence that the appellee was in the employ of the coal company and engaged in loading and moving brickettes in a box car, and if they further find from a preponderance of the evidence that while he was working in the performance of his duties, and while in the exercise of ordinary care for his own safety, a locomotive of appellants approached on the track on which the car was standing, in charge of the employees of appellants, and if they further found from a preponderance of the evidence that the employees of the appellants in charge of the movement of said locomotive carelessly and negligently moved same and car attached thereto so as to strike the car in which appellee was working with such force as to cause appellee to be thrown from the car and injured, without any signal or warning, and if they further find from a preponderance of the evidence that such action of appellants, if it existed, was negligent, and further find that if there was such negligence and that it was the proximate cause of appellee's injury, then the verdict should be for the plaintiff against the defendant, unless they found that plaintiff was guilty of contributory negligence. There does not seem to be any error in the court's giving this instruction.

It is finally contended that the damages are excessive. The judgment in a personal injury case should be for such an amount as would compensate the injured party for his physical injuries, including pain and suffering.

"The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendance and support during the period of his disablement, and for such permanent injury and continuing disability

as he has sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are insusceptible of pecuniary admeasurements, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which may be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained." 17 C. J. 869 *et seq.* *Coca-Cola Bottling Co. of Ark.* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771.

Under the rule for measuring damages in a personal injury case, we cannot say that $500 is excessive.

We find no error, and the judgment is affirmed.

WELLS *v.* SMITH.

4-5511 129 S. W. 2d 251

Opinion delivered June 5, 1939.

E. H. Tharp, for appellant.

Smith & Judkins, for appellee.

HOLT, J. Appellee, Mrs. E. G. Smith, filed suit in the chancery court for the eastern district of Lawrence county to partition eighty acres of land described as the N½ of the NE¼ of section 16, tp. 16 north, range 1 west, in which she claimed to be the owner of an undivided three-fourths interest and that appellant, Ottice Wells, is the owner of an undivided one-fourth interest.

To the complaint of appellee, appellant filed answer in which the material allegations are: That for many years his grandmother, Mrs. Laura E. Campbell, was the owner of the lands in question; that prior to her death she deeded other lands to her two granddaughters, sisters of appellant.

He further alleged that in February, 1919, his grandmother secured the services of a justice of the peace and directed him to prepare a deed in favor of appellant and his brother, Charles Wells, her two grandsons, conveying to them the eighty acres of land in question, but that through error the justice of the peace described in the deed lands that did not belong to Laura E. Campbell, but described land belonging to a neighbor, and that Mrs. Campbell, during her lifetime, did not discover the error in the description of the land.

This deed was made a part of appellant's answer and is as follows:

"Warranty Deed

"Know all men by these presents:

That I, Laura E. Campbell for and in consideration of the sum of One Dollar and in consideration of love and affection that I have for my grandsons, Ottice Wells and Charles Wells, do at my death grant, bargain, sell and convey unto the said Ottice Wells and Charles Wells and unto the heirs of their body forever, the following lands lying in the county of Lawrence, and state of Arkansas, to-wit:

"The north half (½) of the northwest quarter (¼) of section sixteen (16), township sixteen (16) north, range 1 west.

"To have and to hold the same after my death unto the said Ottice Wells and Charles Wells and unto their bodily heirs forever, with all appurtenances thereunto belonging. And I hereby covenant with said Ottice Wells and Charles Wells that I will forever warrant and defend the title to said lands against all claims whatever. Should either of said grantees die without bodily heirs, the surviving grantee to become sole possessor of above described lands.

"Witness our hands and seals, on this —— day of February, 1919.

(Revenue $1.00) LAURA E. CAMPBELL (seal)"

He further alleged that at the time of said conveyance to appellant and his brother that there was only one house on a part of this land and that in order that each of her grandsons should have a part of the land on which there was a house, she erected another house on the land and divided the lands between them, each consenting thereto and agreeing to take the part assigned, and that after the death of Laura E. Campbell, appellant and Charles Wells, his brother, were placed in possession of said land.

He further alleged that by false and fraudulent representations to the two granddaughters, sisters of appellant, J. K. Gibson, after having purchased the interest of Charles Wells to said lands, induced his said sisters to execute quitclaim deeds for a consideration of $100.00 paid to each for their interest in said lands and had his daughter, Mrs. E. G. Smith, appellee, named as grantee in said deeds.

He further alleged that said lands are reasonably worth $3,000.00 and "That on account of the division of her lands among her two granddaughters as heretofore alleged, wherein their lands were correctly described and set off to them, that it would be inequitable and unjust to now permit them to hold what lands had been given them by their grandmother and also to share with their two brothers, the defendant, Ottice Wells, and Charles Wells, in the tract of land intended by their grandmother for the two grandsons to have."

He prayed that the quitclaim deeds be canceled for fraud, that the two granddaughters and his brother, Charles Wells, and wife be made parties defendant and that upon a final hearing he, appellant, have his title in and to the lands in question defined, settled and confirmed according to the intention of his grandmother and the principles of equity.

Appellee, Mrs. E. G. Smith, filed a general demurrer to this answer of appellant on the ground that it did not state facts sufficient to constitute a valid defense to her complaint.

In passing upon this demurrer the court made the following order: "Now on this 15th day of February, 1939, comes on to be heard the above styled cause upon the complaint of plaintiff, answer of defendant, proof of publication of warning order for non-resident defendant, response of attorney *ad litem,* original deed being exhibited to pleadings of plaintiff, and demurrer of plaintiff to defendant's answer; that the court has jurisdiction of the parties and subject-matter; that plaintiff and defendant are owners as tenants in common of the following lands lying in Lawrence county, Arkansas, to-wit: North half of the northeast quarter, section sixteen, township sixteen north, range one west, containing eighty acres more or less; that the plaintiff has an undivided three-fourths interest in said land and the defendant has an undivided one-fourth interest; that said land is not susceptible to division without material injury to it;

"Thereupon the court sustained the demurrer to the defendant's answer and ordered the land to be partitioned among the parties hereto; to which ruling the defendant excepted and prayed an appeal which was granted by the court;"

On this state of the record it is urged by appellee that we should affirm this case for failure of appellant to comply with rule IX of this court, in failing to properly abstract the record.

We would agree with appellee in this contention but for the fact that we think appellee has supplied the nec-

essary omissions, herself. *Perry County* v. *Gatlin,* 186 Ark. 116, 52 S. W. 2d 626.

The question presented for our consideration in this cause is whether or not Ottice Wells, appellant, is entitled to the interest which his grandmother, Mrs. Laura E. Campbell, attempted to convey to him by her deed set out, *supra.*

It is earnestly insisted by appellee that the alleged deed in question is not a deed, that it lacks one of the essential elements to make it a deed in that it conveys no present estate, no estate in *praesenti,* and, therefore, that Laura E. Campbell, the grantor in said deed, died intestate in regard to the lands sought to be conveyed, and sought to be partitioned. Appellee further contends that even though the instrument in question be a valid deed, still it is a voluntary gift of conveyance and is not subject to reformation.

We are of the view that appellee is correct in the latter contention. As to the instrument in question, without regard to anything that might be argued to give it effect, we must, and do hold, that it is not subject to reformation, since the attending circumstances show, that the consideration of one dollar and love and affection is in fact a voluntary gift from the grandmother, Mrs. Campbell, to her grandsons, appellant and his brother, and has no element of contract in it.

Since the early case of *Dyer, et al,* v. *Beam, et al,* 15 Ark. 519, this court has consistently adhered to the rule that voluntary conveyances or gifts, such as in the instant case, "one dollar and love and affection," are not subject to reformation. In the Dyer case the court held (quoting headnote): "Imperfect voluntary gifts will not be enforced in chancery, no matter how manifest the intention of the party to perfect the gift."

In *Smith* v. *Smith,* 80 Ark. 458, 97 S. W. 439, 10 Ann. Cas. 522, this court again held (quoting headnote): "Equity will not reform a voluntary conveyance, or one based on mere love and affection."

In ruling case law, vol. 23, p. 344, § 38, the rule is stated as follows: "It is sometimes stated as a general

rule that equity will not undertake to reform a conveyance or contract which is merely voluntary and based on no consideration. Or, as some authorities state the rule, equity will not reform a voluntary conveyance without the consent of all parties. But the actual rule, stated with its proper limitations, is that a court of equity will not reform the instrument at the suit of the grantee or those holding under him, as against the grantor or his successors. There being no consideration moving to the grantor, the volunteer has no claim on him. If there is a mistake or a defect, it is a mere failure in a bounty which, as the grantor was not bound to make, he is not bound to perfect. Equity will not therefore lend the volunteer its aid." In support of the rule *Smith* v. *Smith, supra,* is cited by the textwriter.

In *Howard* v. *Howard,* 152 Ark. 387, 238 S. W. 604, this court held (quoting headnote): "A deed which recites a nominal consideration of one dollar and love and affection, so far as its recitals are concerned, appears to be a voluntary conveyance, within the rule that said conveyance will not be reformed."

Again in *Nelson* v. *Hall,* 171 Ark. 683, 285 S. W. 386, the late Chief Justice McCullough speaking for the court, said: "We have often held that a voluntary conveyance, executed as a mere gratuity and lacking in the elements of a contract, cannot be reformed. *Smith* v. *Smith,* 80 Ark. 458, 97 S. W. 439, 10 Ann. Cas. 522; *Johnson* v. *Austin,* 86 Ark. 446, 111 S. W. 455; *Jackson* v. *Wolfe,* 127 Ark. 54, 191 S. W. 938; *Peters* v. *Priest,* 134 Ark. 161, 203 S. W. 1042."

We conclude, therefore, under the authorities cited and the general rule which has been consistently followed by this court, that the conveyance, attempted by the grandmother in the instrument in question, is a gift from her to her two grandsons, and, being without consideration other than the nominal one dollar and love and affection, is an attempted voluntary conveyance and is not subject to reformation, and that, therefore, the grantor, grandmother, died intestate as to the lands not described in said instrument.

We conclude, therefore, that the findings of the chancellor are correct and the judgment is affirmed.

BAKER *v.* ADAMS.

4-5503 129 S. W. 2d 597

Opinion delivered June 5, 1939.

R. W. Tucker, for appellant.

Chas. F. Cole and *Dene H. Coleman,* for appellee.

SMITH, J. Owners of real property within Independence County Bridge District No. 1, of Independence county, brought suit to restrain the commissioners of the district from collecting the 1937 taxes assessed against the real property within the district, and alleged that the revenues which would thus be derived were not required to meet the obligations of the district. The final decree rendered in that cause dissolved a temporary restraining order, and denied the relief prayed. That action was based upon the deposition of C. A. Barnett, chairman of the board of commissioners of the improvement district, to the effect that the district had on hand, cash, $17,-

533.43, and the warrant of Independence county "of about $1,750," and that there were outstanding unmatured bonds amounting to $149,000, which, with the interest accruing until the maturity of the bonds, would amount to $207,000. As to the revenues to discharge this obligation he testified "That there will be due July 1, 1937, $11,725, being $8,000 in bonds and $3,725 interest; January 1, 1938, there will be due $3,525 interest; July 1, 1938, there will be due $8,000 of bonds and $3,525 interest, a total of $11,520, or a grand total of $26,775. This last payment will have to be available about ten days before July 1st."

Upon this showing the court very properly denied the relief prayed, but this decree did not become final. There was a motion for rehearing, which was considered and disposed of by the court. Thereafter there was entered what is called an "Agreed Judgment," which modified the decree in respect to the adjudication of the costs of the suit. The decree was later still further amended in that respect, this last amended decree having been rendered April 2, 1937.

The proceeding was apparently treated as still pending when, on September 1, 1938, the commissioners filed a pleading, in which they alleged that the 1937 taxes, which had then been collected, were not then required to meet the obligations of the district. These were the taxes the collection of which the court had refused to enjoin. The decree rendered upon this pleading is to the effect that the 1937 taxes, which had been collected, were not required to meet the obligations of the district, and it was adjudged that those taxes be refunded to the persons who had paid them.

It appears that when the improvement district was formed Independence county had obligated itself to make an annual contribution to the district of $5,000. The county filed its intervention in the first proceeding, in which it alleged that its fiscal condition made the continued contribution impossible, although it had delivered its warrant to the district, which Mr. Barnett had stated was for "about $1,750."

The second decree directed the refund of this contribution to Independence county, and directed the commissioners to retain "$500 of its funds for future incidental expenses, and that the remainder of all funds of said district be paid and distributed by the commissioner heretofore appointed." The commissioner of the court was directed to pay all current bills, expenses and court costs then due and owing by the district, and to refund to the taxpayers all taxes paid for the year 1937, and that, when the distribution was made, one-half of the balance then remaining be paid to Independence county and the other one-half be retained by the court commissioner as a fee for all his expenses in carrying out the provisions of the decree as such commissioner in chancery, that sum being by the court determined to be a reasonable fee for such services and expenses.

Thereafter the commissioner appointed by the court made a report of his proceedings under the decree, which recites a refund to Independence county of $1,578.77, and the payment to himself of a similar amount.

Edgar Baker, owner of property within the improvement district, was and is the clerk of the chancery court wherein these proceedings were had. As a property owner he filed exceptions to the commissioner's report. These exceptions raised the objections that the tax revenues are required to discharge the obligations of the district, amounting to about $140,000, and that the fees paid the commissioner are excessive. The exceptor has appealed from the decree ordering the return of the 1937 taxes, and from the refusal of the court to sustain his exceptions to the commissioner's report.

The source from which the improvement district derived the funds with which to meet its obligations due at the time of the rendition of the decree here appealed from is stated *in extenso* in the recent opinion in the case of *Sebastian Bridge District* v. *State Refunding Board,* 197 Ark. 790, 124 S. W. 2d 960, and will not again be reviewed. We copy the following statement of fact from that opinion: "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."

There are two bridge improvement districts in Independence county and each appears to be numbered 1, but they are otherwise distinguished by their names, and the language just quoted applies to the district here involved.

The state has, as a matter of grace, furnished the Independence County Bridge District the money to pay its 1938 maturities, and there was, therefore, no reason why the taxpayers should not have been awarded the relief which the state's donation was intended to afford. It was not error, therefore, for the court to award the refund of the 1937 taxes collected in the year 1938. If, for any reason, the state's gratuity should not take care of and be sufficient to pay future maturities, then, of course, taxes could and must be collected to discharge the contractual obligations of the district.

It is insisted that the fee allowed the commissioner was grossly excessive, and it certainly appears to have been very liberal. However, this was a matter within the discretion of the court, which we are reluctant to reverse for two reasons. The first is that the record before us does not show just what labor was required to secure the addresses of the taxpayers, of whom there were many hundreds, and the expense incident to the refund. The second reason is that the appellant landowner has accepted the benefits of the decree. It is not questioned that exceptor's taxes were refunded, and the general rule is that one may not accept the benefits of a decree and question its validity. *Morgan* v. *Morgan,* 171 Ark. 173, 283 S. W. 979.

Appellant insists that this rule should not be applied to him, for the reason that he accepted the refund under a misapprehension of the facts, the fact misapprehended being that he did not know that the taxes refunded were required to pay the obligations of the district. But, as we have herein shown, there was no misapprehension of the facts in this respect. The taxes were not required to pay the maturities. These were paid by the grace of the state.

Upon the whole case the decree does not appear to be erroneous, and it is, therefore, affirmed.

4-5486 129 S. W. 2d 231

Opinion delivered June 5, 1939.

[redacted]

A. R. Cheatham and *Walter L. Brown,* for appellant.

Ezra Garner, for appellee.

HUMPHREYS, J. Appellants were the owners by inheritance from their father of an eighty-acre tract of land in Columbia county, described as follows:

SW¼ of SE¼ and SE¼ of SW¼, section 19, township 18 south, range 20 west, containing 80 acres, more or less.

J. C. Yelvington resided upon the land. The Yelvingtons gave two mortgages upon it, one to Beene Motor Company and later another to Charles Lewis.

Both mortgages were foreclosed and C. A. Overstreet paid the amount due on each and S. G. Yelvington directed the Commissioner to make the deeds to C. A. Overstreet. The consideration expressed in the commissioner's deed under the Beene Motor Company mortgage was $801.16 and that expressed in the commissioner's deed under the Charles Lewis foreclosure was $126.75.

C. A. Overstreet paid the amount of both judgments and W. E. Williamson, who was the commissioner, executed deeds to C. A. Overstreet on January 28, 1935, and two days later S. G. Yelvington and Eunice Yelvington, his wife, executed a quitclaim deed to C. A. Overstreet because Eunice had not joined in the original mortgage to Beene Motor Company.

On March 15, 1935, C. A. Overstreet and wife executed a deed to Bonnie Davis.

On April 10, 1938, appellants brought suit in the first division of the chancery court of Columbia county against appellees alleging that the commissioner's deed and the quitclaim deed were in fact a mortgage, though in form deeds, because executed under an agreement that appellants could, within twelve months, pay to C. A. Overstreet the amount he had paid in satisfaction of the foreclosure decrees with interest and costs and receive from him a quitclaim deed to the lands; that Bonnie Davis was a party to the agreement; that within the twelve-month period allowed to them for redemption they tendered the full amount due C. A. Overstreet, which he refused to take, stating that he had already quitclaimed the lands to Bonnie Davis, whereupon they tendered the full amount, interest and costs to Bonnie Davis before the expiration of the twelve-month period, which he refused to accept and reconvey the lands to appellants.

The prayer of the complaint was that upon payment of the amount of money, interest and costs tendered by them that the commissioner's deeds and quitclaim deed from C. A. Overstreet to Bonnie Davis be canceled and that appellants be declared the owners of the land.

Appellees filed an answer admitting that C. A. Overstreet purchased the lands at the commissioner's

sale and later obtained a quitclaim deed from S. G. Yelvington and Eunice Yelvington, his wife, conveying their interest in the land to him, but stated that the quitclaim deed was executed for the purpose of conveying the title of Eunice Yelvington, wife of S. G. Yelvington, because she had not signed the original deed of trust or mortgage given to the Beene Motor Company by the Yelvingtons.

Appellees denied that the commissioner's deed and quitclaim deed were in truth and in fact a mortgage and denied that the deeds were intended to be or considered as a mortgage. They also denied that there was an understanding or express agreement that appellants could pay the purchase price, interest and costs to C. A. Overstreet or his assignee and receive a reconveyance of the lands from appellees. They also denied that appellants or either of them ever tendered any money to redeem the lands or that appellants had any equity of redemption in same.

The prayer in the answer was for a dismissal of appellants' complaint for the want of equity and that the title to the lands be quieted and confirmed in appellee, Bonnie Davis. The cause was submitted to the court upon the pleadings and evidence introduced by the respective parties resulting in a dismissal of appellants' complaint for want of equity, from which is this appeal.

S. G. Yelvington testified, in substance, that before the land was sold under the mortgage foreclosures he went to see Mr. Bonnie Davis about it and asked him whether he could get a loan; that Mr. Davis was connected with the Federal Land Bank and was told by Mr. Davis to buy the land in and he thought he could get somebody to take it up; that on the day of the sale he again went to see Mr. Davis and told him they were going to sell the old home place; that Mr. Davis told him again to go ahead and buy it in and go to Mr. Overstreet and he would furnish the money; that he bought it in and later saw Mr. Overstreet in the circuit clerk's office and that Mr. Overstreet asked him whether he, witness, wanted to see him; that prior to that interview he had never talked to Mr. Overstreet about the matter; that Mr. Overstreet said if they have sold your place I will

furnish you the money to pay it off; all he wanted was his money back and the interest on it; that from the conversation he was under the impression that Mr. Overstreet would allow him twelve months to redeem the land and said to me that I could pay him back any time I got ready; that all he wanted was his money back with interest; that he then went to Mr. Henry Stevens' office where Mr. Overstreet told Mr. Stevens that he was going to take this up and help the boys take care of their old place; that Mr. Stevens fixed up the papers and that the Commissioner deeded the property directly to Mr. Overstreet and that two days later he and his wife executed a quitclaim deed to Mr. Overstreet to perfect the title, but that he did not intend the deed to be an outright conveyance to him; that on the 13th day of January, 1936, he and his brother went out to see Mr. Overstreet and offered to pay him the money back with interest and requested that he make appellants a deed to the property and Mr. Overstreet told him that he had already sold it to Bonnie Davis; that a man by the name of Miller was with him who had agreed to furnish the money to pay Mr. Overstreet; that no money was actually tendered; that he then sent his brother to Mr. Bonnie Davis.

J. C. Yelvington testified, in substance, that he had a conversation with Mr. Overstreet on March 20, 1935, and told him that if he wanted his money we would get it for him and that Mr. Overstreet told him that he was under obligations to S. G. Yelvington to let him take it over, but that if my brother did not take it up he was under no obligation to let him, witness, do so. Witness further stated that he went to Bonnie Davis and offered to pay the amount and asked for the land back and that Bonnie Davis told him that he did not buy it to sell; that after the mortgage sale he remained upon the land and did some work on the place and had a flue built sometime in June, 1935; that no money was tendered by appellants to either C. A. Overstreet or Bonnie Davis, but that they offered to make him a check which was good; that Bonnie Davis did not make any demand for the property during the year 1935, but that the day after they

offered to redeem the land he was served with a writ of assistance by the sheriff and removed from the property.

Sam Emerson testified, in substance, that he and J. C. Yelvington were to cultivate the land in 1935, but that Yelvington failed to furnish him; that when he applied to Bonnie Davis to make some small improvements on the property, Davis told him that he did not want to make any improvements until the time was up for the Yelvingtons to redeem it, but would let him have some lumber that was already at Davis' home to build him a cow pen and a shed; that his contract was with S. G. Yelvington and Overstreet to whom he agreed to pay one-third and one-fourth as rent.

Maxwell Miller testified, in substance, that he went with appellants to see Overstreet and offered to pay him the money, interest and costs to redeem the land and was told by Overstreet that he did not own the property, that the title had passed from him.

Henry Stevens testified, in substance, that he represented the original mortgagees in the foreclosure proceedings and that during the afternoon and before the sale S. G. Yelvington told him that he would make arrangements whereby he would get up the money to buy the property and that S. G. Yelvington would buy it in in the afternoon when it was sold; that S. G. Yelvington told him he had a year in which to redeem the property; that sometime later the witness approached C. A. Overstreet and informed him that the Yelvingtons were ready to pay them his money, but that Mr. Overstreet did not have much to say about it; that he did finally say that he could not make them a deed, that he had disposed of the land.

C. A. Overstreet testified, in substance, that after the sale as he was passing through the courthouse, someone told him that S. G. Yelvington wanted to see him; that S. G. Yelvington came to the clerk's office and asked him to put up the money, the amount he had bid the property in for, stating to witness that he would give him a mortgage on the land as security; that he told Yelvington that he was not interested and that he did not want to tie up his money for a year; that Yelvington then

told him that he could have the land at his bid and that they went to Mr. Stevens' office and was advised that the matter could be worked out without the necessity of reselling the property and that upon that statement of Mr. Stevens' he paid the entire amount due under the two mortgages to the clerk of the court; that on March 20, 1935, J. C. Yelvington came to see him about redeeming the property; that he had used his own money in satisfying the mortgage decrees, but that he had no recollection of what occurred; that when the Yelvingtons and Miller came to see him about redeeming the land in December he had already conveyed the land to Bonnie Davis; that he paid his own money for the land when he obtained his Commissioner's deeds and no part of it belonged to Bonnie Davis; that Bonnie Davis had spoken to him before the sale saying that if he, Overstreet, could buy the property in at the foreclosure sale he would see that he lost nothing on the deal; that he did not want somebody to buy it who would put objectionable people on it; that he had no conversation with the Yelvingtons before the sale and no agreement with them or either of them to allow them a year to redeem it when he obtained the Commissioner's deeds and quitclaim deed from J. C. Yelvington and his wife.

Bonnie Davis testified that he made no agreement with the Yelvingtons that he would procure the money for them to buy the land in at the mortgage sale and would see that they might have a year to redeem same; that when J. C. Yelvington came to him something like a year after the property was sold and asked about redeeming the land he told him that he did not care to sell the land and that he never had any further discussion with him; that he did tell S. G. Yelvington to go see Overstreet, but that Yelvington came back to him and said that Overstreet would not have anything to do with purchasing it and in extending them the right to redeem same.

All the instruments including the original mortgages, the report of sale by the Commissioner and the confirmation thereof by the court, the two Commissioner's deeds and the quitclaim deed from S. G. Yelvington

and Eunice, his wife, and the deed from Overstreet to Davis were introduced in evidence.

Neither the Commissioner's deeds nor the deed from S. G. Yelvington and Eunice, his wife, to Overstreet, nor the deed from Overstreet to Bonnie Davis, contained any clause which would indicate that the Yelvingtons had a right to redeem the land within twelve months on or after the execution of the deed S. G. Yelvington says that the deed was delivered with that understanding, but Overstreet testified that there was no such understanding. J. C. Yelvington moved away from the place after the writ of assistance was served on him and this suit to redeem was not instituted until more than two years after the offer to redeem and the refusal on the part of appellees to reconvey the property to appellants. While not perhaps estopped from bringing suit on account of this delay as the situation of the parties was not changed, yet it is a strong circumstance to indicate that they did not have a contract for the redemption of the land which they regarded as binding upon the appellees. The law is that where it is sought to show that a deed absolute in form was intended to be a mortgage, the burden rests upon the one who alleges that it was intended as a mortgage to show by clear, unequivocal and convincing evidence that the instrument was intended to be a mortgage and not a deed. *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663. We are quite certain that if Davis or Overstreet were attempting to foreclose the commissioner's deeds and the quitclaim deed as a mortgage and to obtain a judgment against the Yelvingtons for the amount Overstreet paid when the Commissioner's deeds and the quitclaim deed were executed they could not do so, and, if they could not do so the evidence is insufficient to show under the rule stated above that the instruments were intended as a mortgage. S. G. Yelvington testified that Overstreet agreed to let him pay the amount Overstreet was out and deed him the property within twelve months, but when pressed on cross-examination he said that that was the impression Overstreet made on him at the time of the execution of the instruments. Overstreet denied absolutely that any right of redemption was reserved by the

Yelvingtons and stated that he refused to pay anything on the judgments if the right to redeem was reserved by the Yelvingtons. He testified that S. G. Yelvington made two propositions to him of that kind and that he would have nothing to do with it until Yelvington turned to him and told him to go ahead and take the property for the bids he had made at the foreclosure sales. We do not think that the evidence is of that certain, unequivocal and convincing character that would authorize or justify a court of equity to treat the instruments as a mortgage instead of deeds.

No error appearing, the decree is affirmed.

STEWART *v.* HALL.

4-5512 129 S. W. 2d 238

Opinion delivered June 5, 1939.

McKnight & McKnight, for appellant.

Tom Marlin and *T. O. Abbott*, for appellee.

GRIFFIN SMITH, C. J. By suit in ejectment appellees sought possession of eighty acres of land they owned prior to its forfeiture in 1929 for non-payment of state and county taxes.

November 24, 1934, appellant secured a donation certificate from the State Land Commissioner, and subsequently paid taxes for 1934, 1935, 1936, and 1937, amounting to $28.56.

Information having been received by the Attorney General that the donee, in procuring his certificate, had made fraudulent representations, complaint was filed with the Commissioner in which it was alleged that a part of the land had been in cultivation within five years next preceding donation; that approximately twenty acres were fenced, and that improvements on the property exceeded in value $200. Prayer of the complaint was that the certificate be set aside, and that possession be restored to the state. The complaint was filed April 11, 1935.

April 26, 1935, the Commissioner found that the lands were not subject to donation and cancelled the certificate. On the same date his action was confirmed by the board of review.

May 17, 1935, appellees redeemed.

March 23, 1937, the donee filed proof of improvements, and the following day a deed was executed in his favor. This deed was cancelled by the Commissioner July 7, 1937, on the ground that it had been erroneously issued, the certificate having been withdrawn.

Appellees filed their suit March 21, 1936. There was answer June 24 of the same year, followed by continuances from time to time.

June 27, 1938, the cause was definitely set for November 22. The attorney who filed appellant's answer withdrew from the case. At that time appellant was advised that he should employ other counsel. This he did not do, and judgment went against him.

December 31, 1938, petition was filed to vacate the judgment. It was denied. February 18, 1939, motion for a new trial was filed and overruled, and an appeal was granted.

In his petition to vacate the judgment, appellant alleged that cancellation of the donation certificate was fraudulently obtained through false affidavits filed with the Commissioner; that appellant had at all times and in all respects complied with the donation laws; that after receiving the certificate he took possession of the property for the purpose of acquiring a home; that he had made improvements to the extent of $916.56; that he had paid taxes for four years; that appellees had not tendered payment to compensate expenditures made by appellant in good faith, and that such tender was a condition precedent to appellees' right to maintain the suit.

Condition of the record is such that we must assume the court granted the necessary time for filing motion for a new trial.

We do not think the court arbitrarily compelled the defendant to go to trial without an attorney. Litigants have a right to represent themselves, and appellant presented his own case. Every consideration seems to have been shown. Oral testimony tended to show that at the time the donation certificate was issued the lands were wild and unimproved and had been for more than five years, and were therefore subject to donation. While such testimony would ordinarily present a question for the jury, we do not think the court erred in rendering judgment for the plaintiffs.

In 1931, by Act 125, p. 347, directions were given the Attorney General, upon receipt of information that timber was being cut on lands of the state, to institute suit for recovery, and (§ 3) it was provided that "Whenever the Attorney General shall have information that any donee of state lands has violated any of the laws, or failed to comply with any of the laws relating to the donation of state lands, the Attorney General shall file a complaint with the State Land Commissioner praying for cancellation of the donation certificate. Such complaint shall

set forth the reason for the cancellation of the certificate, and a copy of it shall be served on the donee ten days before the matter is heard by the Land Commissioner. The state and donee may present affidavits as proof. If the decision of the Land Commissioner should be adverse to the donee, the donee shall have the right to appeal to the Circuit Court of Pulaski County from such decision."

The Attorney General's complaint of April 11, 1935, was filed in compliance with act 125, and a copy of such complaint was served on appellant April 16, 1935, as shown by the sheriff's return. Appellant, while being questioned by the trial court, admitted receiving a letter from the Commissioner, informing him of the hearing, but said that he expected the trial to be in Chancery Court at Fordyce. He also claimed that he did not receive the information until after May 26, and that between date of entry and receipt of information his donation certificate had been cancelled, improvements of the value of $250 were made.

In view of the fact that actual service was had on appellant ten days prior to the hearing before the Commissioner, it was his duty, under the law, to appear and contest the Attorney General's charges that the donation certificate was fraudulently procured. If an adverse determination of the issue had then been announced, he had the right of appeal to the Pulaski Circuit Court. Having done neither, he was precluded from relying upon the donation certificate as a basis for issuance of the donation deed, and could not successfully plead the latter in the ejectment suit.

The court found that the rental value of the lands equaled the value of improvements made during the period appellant occupied the premises in good faith. We cannot say that this finding is not sufficiently supported by the evidence. Assuming, as we must, that the Commissioner's finding that the donation certificate had been fraudulently procured, the original entry was not in good faith. There was, therefore, nothing for the jury's consideration, and the court correctly declared the law.

Judgment affirmed.

4-5510 129 S. W. 2d 236

Opinion delivered June 5, 1939.

R. W. Robins and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

George F. Hartje, for appellee.

McHANEY, J. Tri-State Savings & Loan Association hereinafter called Association, was, at all times herein mentioned and until June 9, 1935, at which time it was adjudged insolvent and a receiver appointed, a building and loan association operating on the mutual plan. On June 4, 1932, it loaned appellees $1,500 for which they executed their joint promissory note, due May 1, 1943, with interest at 9 per cent. per annum, payable monthly on the first day of each month after date. Said note was secured by mortgage on installment savings certificate of the association, No. 6344, of the value of $1,500 when ma-

tured, and on certain real property in the city of Conway, Arkansas. Said mortgage provided for the payment of interest monthly and in addition a monthly sum to be applied to the maturity of said savings certificate, which, when fully matured, might be applied by appellees to the payment of said loan. The usual provisions for foreclosure in the event of default were also set out therein. Said installment savings certificate provided for the payment of $7.50 in advance on the first day of each month for 130 months, at which time the association would pay $1,500 upon presentation and surrender of the certificate.

In January, 1933, appellees purchased full paid certificate No. 1143, issued by the association in the sum of $1,500 from Union Trust Company of Little Rock at a price of $825 and in February, 1933, tendered same to the association, together with $90 in cash, in full settlement of their indebtedness to it, which offer was refused. Thereafter, on March 18, 1933, they brought suit to compel the association to accept said full-paid stock and tender in full satisfaction and to enjoin it from transferring or assigning said note and mortgage. A temporary injunction was so issued and has not been modified. On December 19, 1933, the association brought suit to foreclose its mortgage, payments being in default, and appellees answered renewing their offer to pay said indebtedness with said full-paid certificate and an additional sum sufficient to cover accrued interest.

On June 9, 1935, the association was judicially decreed to be insolvent, a receiver was appointed, and, for a valuable consideration, he sold the assets, including the note and mortgage of appellees, to appellant, who was made a party to both actions. These actions were consolidated. The case was submitted on an agreed statement of facts, substantially as above related and such other facts as may be hereinafter stated, and on certain oral testimony to the effect that the association had, prior to insolvency, permitted the witnesses and others to offset against their mortgage indebtedness to it full paid investment stock or certificates issued by the association and bought up at a discount by them for the purpose. Trial resulted in a decree for appellees on the ground that the

association had, by permitting others to off-set indebtedness or pay same with full-paid investment certificates, estopped itself to deny appellees the same right. The case is here on appeal.

To sustain this decree, appellees rely on the provisions of § 987 of Pope's Digest, being § 7 of act 236 of 1931, and estoppel. Said section is as follows: "Any borrower from a domestic Building and Loan Association which shall be in voluntary or involuntary liquidation or which has been legally declared insolvent, who, at the time of such liquidation or insolvency is indebted to the said association, shall be charged with the amount due on said loan and/or advance, and any other indebtedness due said association by such borrower, at the time of liquidation or insolvency, and shall be given credit on his loan and/or advance for the amount theretofore paid on his stock, bond, investment certificate, membership certificate, or other evidence of shares as the case may be, less any fees, fines or penalties due said association by such borrower."

Particular reliance is placed on that part of said section which says: ". . . and shall be given credit on his loan . . . for the amount theretofore paid on his stock, bond, investment certificate, membership certificate, or other evidence of shares as the case may be . . ." We agree with the trial court that this statute does not authorize the off-set contended for. This language refers to the investment certificate appellees applied for and received in connection with said loan and which was mortgaged or pledged to the association as security therefor. But for that statute, the amount paid on such investment certificate could not have been credited on said note. *Hale* v. *Phillips,* 68 Ark. 382, 59 S. W. 35; *Taylor* v. *Clark,* 74 Ark. 220, 85 S. W. 231; *Courtney* v. *Reap,* 184 Ark. 112, 40 S. W. 2d 785.

In *Lacefield* v. *Taylor,* 185 Ark. 648, 48 S. W. 2d 832, in commenting upon the effect of the above quoted statute, this court said: "The advantage of § 7, above quoted, to the borrowing member is apparent. It enables him to terminate his relation with the association without

loss, although it is insolvent. He is given full credit for all *dues paid,* and is required only to pay the difference between the total amount of dues paid and the amount of his loan. It is equally as apparent that this preference is given at the expense of the investing stockholder, as sufficiently appears from the opinion in *Courtney* v. *Reap, supra,* and the whole system of mutuality is destroyed." (Italics supplied.)

To hold that the borrowing stockholders could go out and buy full-paid investment stock or certificates at a discount or otherwise, and then off-set them against their debts to the association would be to extend the statute and further destroy "the whole system of mutuality."

In *Home Building & Savings Ass'n* v. *Clay,* 188 Ark. 943, 68 S. W. 2d 103, 98 A. L. R. 84, it was held that the holder of matured stock, which was converted into a certificate which promised to pay "upon thirty days' written notice, given after one year from the date hereof," a certain sum of money with dividends at 6 per cent. per annum, conditioned that said certificate shall be subject to the laws of Arkansas and the by-laws of the association, continued to be a stockholder and not a creditor of the association, which left the stockholder subject to the statutes and by-laws of the Association governing payment of withdrawals. It was also held that a by-law prohibiting application of over half of its monthly receipts to payment of withdrawals was applicable to fully paid-up stock certificates, and that a demand for payment could not be complied with in violation of such by-laws.

The above holding is applicable here. The association had a by-law similar, if not an exact copy of that in the Clay case, *supra.* The fully paid certificate purchased by appellees contained this provision on the face of it: "This certificate is issued subject to the provisions of the articles of incorporation and by-laws of the association and the privileges, terms and conditions printed on the back hereof, all of which are made a part hereof as fully as if set out in the face of this certificate." One of the conditions on the back thereof was:

"This certificate may be withdrawn at any time by giving thirty days notice. To protect the mutual interest of investors and borrowers alike, and to avoid the sacrifice of the securities, the association shall not be required, without the consent of the directors, to use more than one-half of the money received from monthly payments in any month, in payment of those withdrawing, and then in the order in which the certificates may have been registered upon the Association's books for withdrawal." Moreover, there is a positive statute regulating the matter (§ 988, Pope's Digest) as follows: "Credits on any or all classes of shares, stock or certificates, except guaranty permanent stock, in every building and loan association may be made withdrawable at such times and under such terms and conditions as the association in its by-laws may prescribe. Provided that it shall be unlawful for such by-laws to provide or prescribe, or for any association or any officer or any employee to promise or advertise that the association will pay applications for withdrawals on demand. Provided that at no time shall more than one-half of the monthly receipts of the association in any month be applicable to the payments of withdrawals for that month, except by consent of the board of directors. No member or certificate holder shall be permitted to withdraw, whose shares are pledged to the association as security, for a loan, unless at the same time such loans are fully repaid.

"Applications for withdrawals shall be paid in the order filed as fast as funds are available for that purpose as provided in this section. Provided further: That the amount of dividends or profits paid on such withdrawals shall not exceed the amount of dividends or profits apportioned or appropriated to the shares withdrawn."

So it will be seen that by both the by-laws of the association and the statute, neither the association nor its assignee, appellant, can be compelled to accept fully paid stock in payment of indebtedness due it by the borrower, as to do so would violate both.

We cannot agree with the trial court that the association estopped itself to insist upon enforcement of its by-laws, and certainly not upon the positive provision of statute. No matter how often it may have violated the law by permitting persons to obtain a preference by off-setting fully paid stock against indebtedness, out of turn, it could not be estopped to obey the law.

The decree will, therefore, be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

DEPARTMENT OF PUBLIC UTILITIES *v.* MCCONNELL.

4-5566 130 S. W. 2d 9

Opinion delivered June 5, 1939.

Thomas Fitzhugh, J. T. Hornor, Jr., John Sherrill and *Howard Cockrill,* for appellant.

Chas. B. Thweatt, for appellee.

Chas. D. Frierson and *Chas. Frierson, Jr., amici curiae.*

GRIFFIN SMITH, C. J. The question is, May the Department of Public Utilities be required to condition a certificate of convenience and necessity in such manner as to compel rural electric co-operative corporations to indemnify telephone companies, or the owners of telephone lines and equipment, to the extent that the use of such telephone facilities has or will be impaired by reason of inductive interference?

Act 342, approved March 25, 1937 (Pope's Digest, §§ 2315-2351), authorizes the creation of co-operative, non-profit-sharing membership corporations ". . . for the purpose of engaging in rural electrification." (Pope's Digest, § 2317 *et seq.*) A requirement is that such corporations shall secure from the Department of Public Utilities (hereinafter referred to as the Department) a certificate of convenience and necessity ". . . for the construction or operation of any equipment or facilities supplying electric service in rural areas."

The act further provides (§ 31) that all corporations chartered under the authority conferred ". . . shall be exempt in any and all respects from jurisdiction and control of the Department of Public Utilities of this State."

Two orders of the Department are involved in this controversy. They are identified as Docket No. 272, and Docket No. 275.

In March, 1938, the Department held a general hearing to determine whether certificates of convenience and necessity issued to rural electric co-operative corporations should be conditioned upon the applicant's obligation, as an incident of the certificate, to compensate damages. Notice of the hearing was sent to all electric companies, rural electric co-operatives, and all telephone companies, within the state. The Arkansas Telephone Association appeared and represented approximately 190

independent rural telephone organizations. The Southwestern Bell Telephone Company was notified, but did not appear. The Department's ruling was that the certificates should be unconditional. (Docket No. 272).

Another hearing was held when the Carroll County Electric Co-operative Corporation made application for a certificate of convenience and necessity. A rural telephone company appeared for the purpose of resisting issuance of an unconditional certificate, and for the purpose of presenting particular facts relating to alleged inductive interference.

Order of the Department (Docket No. 275) was adverse to the telephone company, the same rule being applied as that promulgated in Docket No. 272.

On appeal to Pulaski Circuit Court the causes were consolidated. The court held that the general order of the Department on the subject of inductive interference was illegal ". . . in that it prescribed a general rule under which certificates of convenience and necessity granted to power companies [would] not be conditioned in any manner so as to require the power companies to make compensation to the telephone companies for damages to telephone service due to inductive interference caused by the operation of electric power lines, [and] the Department's order should have provided for such compensation as a condition precedent to the granting of the certificates."

The judgment directed that the Department's order be set aside, and that ". . . the entire matter be . . . remanded to the Department for further procedure not inconsistent with the judgment, and with directions that all certificates to construct or operate electric power lines shall be conditioned so as to require that just compensation be made to owners or operators of grounded telephone lines already built or in operation, for all damages to service due to inductive interference caused by the operation of the power lines, and that the certificate granted to the Carroll County Electric Co-operative Corporation be conditioned so as to require the payment of such compensation to R. O. McConnell."

In its orders the Department found that there are two types of rural telephone construction in general use throughout the state; one a metallic circuit, the other a grounded line. The so-called metallic system has two wires to complete the circuit. The wires are transposed or crossed at intervals, the result being that magnetic energy caused by electricity from parallel or contiguous transmission lines is eliminated. The second type of telephone construction utilizes the earth to complete the circuit, and is peculiarly sensitive to interference occasioned by highly charged electric wires.

As far back as 1885 telephone companies were granted the right to use public highways of the state and streets of cities and towns for the construction of their lines. In 1907 the same right was granted electric companies.

Section 2111 (b) of Pope's Digest is: "Every public utility which owns, operates, manages or controls along or across any public or private way any wires over which electricity or messages are transmitted shall construct, operate and maintain such wires and the equipment used in connection therewith in a reasonably adequate and safe manner, and so as not to unreasonably interfere with the service furnished by other public utilities."

This section, appellees insist, is authority for their demand that rural electric co-operative corporations construct their lines in such manner as not to unreasonably interfere with telephone service. It is admitted that the manner of construction proposed by the co-operatives will occasion inductive interference, but it is urged that the system of grounded circuit telephones is outmoded; that it is obsolete in all respects, and that modern methods for supplying domestic and commercial electricity to rural sections are not to be dispensed with nor construction burdened because of the antiquated system and equipment of the telephone companies. On the other hand, the latter say that cost of metallicizing rural telephone circuits in the more sparsely settled areas would be disproportionate to the available revenue, and therefore prohibitive to patrons.

The record contains testimony in respect of two types of powerline construction. The method used at present in rural electrification is the "Y" type. Another system is known as the "Delta" plan. The former is said to occasion greater inductive interference than the Delta system, but the latter is more dangerous and more expensive.

In the view we take of the controversy it is not necessary to decide any of the questions raised other than the right of the Department to issue unconditional certificates of convenience and necessity.

The admission having been made that rural electrification will interfere with grounded systems of telephone communication, insistence is that such interference is not unreasonable. This, also, we do not decide.

What we do decide is that the Department, by express language of the statute, is denied jurisdiction over the co-operatives in questions other than a determination of whether public convenience and necessity will be served in the particular territory or area into which, or throughout which, the applicant proposes to operate.

While it is true that under § *43 of Act 324 of 1935* the Department of Public Utilities is empowered ". . . to attach to the exercise of the rights granted by [a certificate of convenience and necessity] such terms and conditions, in harmony with [the] act, as in its judgment the public convenience and necessity may require," we are of the opinion that such power of limitation relates to methods of construction and the quality and extent of service in relation to rates, etc., rather than to controversies between contending utility companies in respect of matters involving damages to their properties. Determination of the former is legislative in its nature, while the latter is judicial. The Department, in effectuating the legislative intent through promulgation of rules and regulations within the scope of the authority conferred, acts as a law-making body. In enforcing such rules and regulations, the Department acts in an administrative capacity.

In one instance, and in one only, may the Department assess damages. If, after determining that a rate is un-

reasonable, discriminatory, or that it in other respects violates the law, and in consequence of such determination a just rate is announced, the Department may, in connection therewith, fix the amount to be refunded to consumers, and it may enforce its order by bringing suit.

The judgment is reversed, and the consolidated causes are remanded with directions to enter an order approving the Department's actions in issuing unconditional certificates of convenience and necessity.

OAK GROVE CONSOLIDATED SCHOOL DISTRICT NO. 9 v. FITZGERALD, TREASURER.

4-5585 129 S. W. 2d 223

Opinion delivered June 5, 1939.

Kirsch & Cathey, for appellant.

Bratton & Coleman, for appellee.

SMITH, J. In 1937, the appellant school district obtained from the State Board of Education a loan in the sum of $14,800 from the Revolving Loan Fund. Prior to obtaining the loan the electors of the district voted a continuing levy of 7 mills against the property in the district subject to the tax, pursuant to the provisions of § 11553, Pope's Digest.

Such loans are made for various periods of time, but for not more than 20 years, and are "secured by a mortgage or deed of trust executed to the state of Arkansas, State Commissioner of Education, and his successors in office, as trustee, . . ." The borrowing school district executes what is called a "School Bond," which contains an amortization of the loan, which is effected by annual payments of a sum sufficient to pay the loan and the interest thereon at the end of the period of time for which the loan is made. Coupons are attached to the bond for the amount of these annual payments, and recite the portion thereof due as interest and the amount paid as principal, the two items being the amount of the coupon. These bonds are not sold, but are pledged as security for the payment of bonds issued by the State Board of Education, which the latter had sold in the open market to investors desiring to buy them.

The loan contract by which the school districts borrow money from the Revolving Loan Fund does not contemplate partial payments of these coupons or of any

sum in excess of their face. If an annual payment were made in excess of the coupons due in the year in which the payment was made, another amortization of the loan would be required, if proper credit were allowed for the payment. This could be done only by withdrawing the particular bond which had been pledged as collateral to the bonds of the State Board of Education and reissuing it.

It is contemplated that these coupons shall be paid as they mature. Before the loan is made the State Board of Education is furnished with a statement of the assessed values of property within the school district against which the school tax will be levied, and upon this basis the State Board of Education estimates the number of mills which should be voted by the electors to mature the loan. This number of mills must be voted pursuant to § 11553, Pope's Digest, before the loan is made, and after it has been voted it becomes a continuing levy until the loan has been paid. *Parsons* v. *Barnett,* 189 Ark. 1057, 76 S. W. 2d 83. Section 11554, Pope's Digest, so provides.

By way of additional security for the payment of these loans, § 11557, Pope's Digest, provides that "Should the district default in paying any maturity of principal or interest on said loan, the State Board of Education, the Commissioner of Education, and the county court shall retain from said district all allotments of the State Common School Fund and apply them on the past-due items of principal and interest of said loan, until all past-due items are paid in full."

In the instant case the appellant school district, after making all payments due prior to January 1, 1940, had a surplus of $997.36 which is not required for payment on the Revolving Loan Fund loan, since there are no payments due and none will mature until another year's revenue has been collected under the 7-mill levy. The directors of the school district applied to the county treasurer to permit the surplus to be used for general school purposes. The treasurer refused to do so, and application was made for a writ of mandamus requiring that action.

This relief was denied, and this appeal is from that judgment.

It is conceded that § 11555, Pope's Digest, if constitutional, entitled the school district to the relief prayed. That section reads as follows: "The proceeds of such levy and collection shall be set aside from year to year in a separate fund to be known as the 'Loan Fund,' and used for no other purpose than to pay the principal and interest on the bonds herein authorized until all such maturities for such bonds in any year have been paid in full, or a fund sufficient to pay them has been set aside in cash, when the district may use for other school purposes the excess of funds remaining after making annual payments."

The insistence is that the section of the statute just quoted is violative of amendment No. 11 to the Constitution, which amendment reads as follows:

"Section 1. That Article 14, § III, of the Constitution of the State of Arkansas be amended to read as follows:

" 'The General Assembly shall provide by the general laws for the support of common schools by taxes, which shall never exceed in any one year three mills on the dollar on the taxable property in the state, and by an annual per capita tax of one dollar, to be assessed on every male inhabitant of this state over the age of twenty-one years. Provided, that the General Assembly may, by general law, authorize school districts to levy by a vote of the qualified electors of such districts a tax not to exceed eighteen mills on the dollar in any one year for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings.

" 'Provided, further, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied.' "

It will be observed that this amendment permits as much as 18 mills for school taxes to be voted for any one or all of the three following purposes: (a) Maintenance of schools; (b) the erection and equipment of school

buildings, and (c) the retirement of existing indebtedness for buildings.

The 7-mill tax for retirement of existing indebtedness was, therefore, authorized by the Constitution, but it is said that, having been voted for that specific purpose, it may not be used for either of the other two, and the cases of *Horne* v. *Paragould Special School District,* 186 Ark. 1000, 57 S. W. 2d 568, and *Pledger* v. *Cutrell,* 189 Ark. 562, 74 S. W. 2d 646, 75 S. W. 2d 76, are cited to support that contention.

The bonds involved in the Horne Case, *supra,* were issued prior to the passage of act 169 of the Acts of 1931, of which act § 11555, Pope's Digest, herein quoted, was a part, while the bonds here involved were issued subsequent to the passage of act 169. Section 11555, Pope's Digest, must, therefore, be read as a part of the bond contract here involved unless that section is unconstitutional.

In the Horne Case, *supra,* the directors had voted 6 mills for the bond payment fund, and 12 mills for general school purposes in the year 1931, payable in 1932, and taxes were collected pursuant to that levy, but the question of a continuing levy had not been voted upon.

There were maturities of bonds and interest in the Horne Case amounting to over $40,000, which was just $13 less than the total gross receipts of the school district from all sources. The bondholders sought to apply, not only the proceeds of the 6-mill levy, but the entire revenues of the school district from all sources to the payment of matured bonds and interest. In denying the relief prayed it was there said: "The electors of any school district may vote a tax at any rate they wish for any or all said purposes, provided the tax voted for all does not exceed 18 mills. For instance, they might vote 6 mills for bond and 12 mills for school purposes, as they did in this case, and, when so levied and collected, neither sum could 'be appropriated for any other purpose . . . than that for which it is levied.' "

In that case the district was unable to pay its maturing obligations. Not so in this. There was no attempt

there to divert the taxes collected upon the 6-mill levy for refunding purposes. The attempt was to divert to that purpose taxes which had been levied and collected for another purpose, and the holding in that case was that this could not be required.

Here, there is no attempt to divert any part of the taxes derived from the 7-mill refunding levy, required for that purpose, to another, nor is it questioned that the proceeds from the levy are ample to discharge the matured obligations of the district, both principal and interest. If § 11555, Pope's Digest, were construed to permit the use of any part of the 7-mill levy, which was required to discharge the maturities, which it was voted to secure, it would be violative of amendment No. 11. But such is not its purpose, and we do not so construe it. The 7 mills, or so much thereof as is needed, is irrevocably dedicated to the purpose for which it was voted, that of discharging maturities which it was voted to secure, and no part of it may be otherwise used, so long as any part of it is required to pay matured debts. Here, we have a surplus fund after all maturities have been met. The original contract and the district's bond, which evidences it, would have to be annuled or rewritten if this surplus were applied as payment on an indebtedness not due, and if it may not be thus used it must remain idle in the treasurer's hands until the bonds have been discharged.

We do not think it was the purpose of amendment No. 11, as construed in the Horne Case, *supra,* to accomplish any such result. The statute (§ 11555, Pope's Digest) in force when this loan was made had placed a different interpretation upon the amendment. The bondholders cannot—and do not—complain so long as no part of the 7-mill levy required to meet their maturities is not devoted to some other purpose.

Nothing was decided in the case of *Pledger* v. *Cutrell, supra,* which opposes this view. No continuing refunding tax had been voted in that case. No part of the tax in that case had been voted for refunding, but the entire tax had been voted for school maintenance, and it was there held that the tax having been voted for that purpose, it could not be used for refunding purposes.

A different question is presented in the instant case. The 7-mill tax was devoted to the purpose for which it was levied, and has accomplished that purpose. An excess of revenue remains after that purpose has been accomplished, and we perceive no reason why this excess may not be used for either of the other two purposes for which school taxes may be levied.

The exact question here presented was not involved in the case of *Merritt* v. *M. W. Elkins Investment Co.*, 188 Ark. 166, 65 S. W. 2d 15, but the reasoning of that case supports the view here expressed. In that case there was a surplus in the building fund, out of which the lower court had decreed that a broker was entitled to preferential payment for services performed in refunding the district's bonded debt. As to the payment of this obligation out of the surplus fund it was there said: "This surplus then may be used to pay any valid obligation of the district for which a proper warrant has been drawn, and consequently the surplus reverts to and becomes a part of the general fund." It was held, however, that to award the broker the right to a preferential payment out of the building fund surplus was error, but it was there said: "It would appear, therefore, that such surplus, if any, should revert to general funds of the district to be devoted to the payment of any school warrants in the order of their registration, those of the oldest registration having priority."

The effect of that opinion was to order the broker's fee to be paid out of the surplus in the building fund, which surplus became a part of the general fund, but not to be paid preferentially over other holders of warrants having prior registration.

We conclude, therefore, that the district was entitled to the relief prayed, and the judgment denying that relief will be reversed and the case remanded, with directions to award the writ of mandamus against the treasurer, as prayed.

Opinion delivered June 5, 1939.

[redacted]

D. L. Grace and *I. S. Simmons,* for appellant.

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

HOLT, J. A jury in the Fort Smith district of the Sebastian circuit court convicted Willie Butler, appellant, of the crime of robbery and fixed his punishment at twenty-one years in the state penitentiary.

The information upon which appellant was tried charges ". . . Willie Butler, of the crime of robbery committed as follows, to-wit: The said defendant, in the county, district and state aforesaid, on the 20th day of December, 1938, did unlawfully and feloniously and forcibly and by fear and intimidation, take, steal, and carry away $15.21 from the person and pos-

session of John Backen, against the peace and dignity of the state of Arkansas."

Appellant first contends that the above information is not sufficient for the reason that it does not contain the allegation that the $15.21 was gold, silver or paper money of the value of $15.21, or that said money had any value at all. We cannot agree with appellant in this contention.

A careful search of the record in this case fails to disclose that appellant filed any demurrer to the information in question, that any action was ever taken by the trial court on any such alleged demurrer, or that any exceptions were made by appellant and preserved in this record. This court in *Boatright* v. *State,* 195 Ark. 611, 113 S. W. 2d 107, in passing upon a situation similar to that presented here, said: "The transcript does not reflect that a motion to quash the indictment was filed by appellant or that any objection was made to overruling such a motion. It is true that in the motion for a new trial appellant states the trial court erred in overruling his motion to quash the indictment. However, the record does not show that such a motion was filed or that any objection was made to overruling same."

However, if we concede that the demurrer was duly filed, presented to the trial court, overruled, and appellant's exceptions duly saved and the alleged error properly preserved in the motion for a new trial, still we are of the view that the information in the instant case is good. In 1936 the people of Arkansas under the power vested in them by Amendment No. 7 to the Constitution of this state, commonly known as the initiative and referendum amendment, initiated Act No. 3 entitled, "An Act to Amend, Modify and Improve Judicial Procedure and the Criminal Law, and for Other Purposes." Among the provisions of this Act, as initiated, are the following sections of Pope's Digest:

"Section 3851. The language of the indictment must be certain as to the title of the prosecution, the name of the court in which the indictment is presented, and the name of the parties. It shall not be necessary to include statement of the act or acts constituting the

offense, unless the offense cannot be charged without doing so. Nor shall it be necessary to allege that the act or acts constituting the offense were done wilfully, unlawfully, feloniously, maliciously, deliberately or with premeditation, but the name of the offense charged in the indictment shall carry with it all such allegations. The state, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction.

"Section 3852. Form. An indictment may be substantially in the following form:

'The State of Arkansas,

vs.

'John Doe.

'In the Pulaski Circuit Court.

'The grand jury of Pulaski county, in the name and by the authority of the state of Arkansas, accuse John Doe of the crime of murder in the first degree (or other crime, as the case may be), committed as follows: The said John Doe, on January 1, 1936, in Pulaski county, did murder Richard Roe, against the peace and dignity of the state of Arkansas'."

By these provisions the form of indictment has been greatly simplified and the necessary allegations materially shortened. We hold, therefore, that the allegations of the information in the instant case are sufficient even though it is not alleged therein that the $15.21 taken from John Backen was gold, silver, or paper money, or that it had any value. Since the enactment of the above legislation, such technical allegations are no longer necessary. If the defendant felt that he was not sufficiently informed as to the act or acts upon which the state relied to convict him, § 3851, *supra*, gives him a remedy by requiring the state to furnish him a bill of particulars. He made no such request in this case.

The cases cited by appellant were decided prior to the enactment of the above legislation and do not control here.

Appellant next contends that there is a variance between the charge in the information and the proof in

that the information charges that the person robbed was John Backen when the proof shows it was John Brocken.

A careful search of this record again discloses that appellant does not raise this question of variance in the trial of this cause. He did not claim that the person he robbed was any one other than John Backen named in the information. He asked no instructions on the issue of variance nor did he attempt to set out the variance between the information and proof in his motion for a new trial and to raise this issue here for the first time on appeal comes too late.

This court in *Whitney* v. *State,* 176 Ark. 771, 4 S. W. 2nd 9, said: "The first assignment of error is an alleged variance between the indictment and proof with reference to the person killed. The indictment charged that appellant killed Sam Warren, whereas the proof showed that he killed Son Warren. No question was raised in the trial of the cause as to the identity of the person murdered. All witnesses referred to the person killed as 'Son Warren' or 'Son Morris.' Appellant did not claim in the trial that the person he killed was a different man from the man he was charged with killing. He did not ask any instruction on the issue of variance, nor set out the variance between the indictment and proof in his motion for a new trial. The issue of variance raised for the first time on this appeal was one of fact for the jury, under the rule announced by this court in the cases of *Bennett* v. *State,* 84 Ark. 97, 104 S. W. 928; *Woods* v. *State,* 123 Ark. 111, 184 S. W. 409, Ann. Cas. 1918A, 348; *Sutton* v. *State,* 67 Ark. 155, 53 S. W. 890. It is too late to raise this question for the first time on appeal. *Clayton* v. *State,* 159 Ark. 592, 252 S. W. 589; *Anderson* v. *State,* 162 Ark. 14, 257 S. W. 365."

Appellant next contends that the evidence is not sufficient to support the verdict. This record reflects that the victim of the robbery, John Brocken, was operating the Silver street gasoline station in the city of Fort Smith, Arkansas, on December 20, 1938. Appellant, Willie Butler, entered his station at about 8:15 p. m. and inquired the way to Spiro, Oklahoma, and quoting

Brocken's testimony: " . . . I told him the direction to Spiro; and he asked me how was business, and I told him pretty good; and he left and came back in about thirty minutes after that, and came in and closed the door behind him, and I was reading a magazine; and he had a gun, and he said, 'Have you got any money; I want it,' and when I saw the gun I got up out of the chair, and he took the money out of my pocket, and put it in his car; and so after he got the money—the bills—he told me to open the door, that he did not want to leave any finger prints on the door, and I opened the door and he backed out; I followed him out, and in just a second he acted as if he did not know what to do; and he said 'You better run down the highway'; so I went down the highway about thirty yards; and when I heard him run and get in the car, I ran back and telephoned the police, and they came out there. . . . Q. Can you identify the man that robbed that station? A. Yes, sir. Q. Do you see him here? A. That is him there (pointing to the defendant). Mr. Grace: I object to him pointing him out. The Court: If he can identify him he may do so. Witness: It is the boy with the black hair. The court: Sitting at the table? A. Yes, sir. Q. Did you see him later? A. Yes, he came back to my station with another boy, Christmas day, and bought some gasoline; the other boy bought the gasoline, he was in the car. I put the gasoline in and went up there where the other boy was, and I saw this Butler boy in the car, just as soon as they left I ran in and called the police again. Q. What time of day was that? A. Around four or five o'clock. Q. Now, how long was it before the officers brought you to the station? A. Three days. Q. What occurred at that time? A. They brought him out and just as soon as they brought him out, I told them that was him. They asked me to make sure before they brought him out, and I told them I was positive about it, and they put him back in. . . . . Q. About how much money did he take? A. Fifteen dollars and twenty-one cents. Q. Where did you have that money? A. In my pocket; the bills were in my billfold in my back pocket. Q. He held a pistol on you at the time? A. Yes, sir."

There was other evidence presented by the state of a corroborative nature.

Appellant's defense was that of an alibi. The question of alibi was a matter of defense offered by appellant, and the jury's finding on this question is conclusive in this court.

The case was submitted to the jury under proper instructions and we think the evidence amply sufficient to support the verdict.

No errors appearing, the judgment is affirmed.

BONE *v.* STATE.

4123 129 S. W. 2d 240

Opinion delivered June 5, 1939.

F. W. A. Eiermann, Scipio A. Jones, Wallace L. Purifoy, Jr., Elmer Schoggen and *Leon B. Ransom,* for appellants.

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

BAKER, J. An information filed in the circuit court charged Rome Bone and Mose Bone with having committed murder in the first degree by shooting and killing Mrs. Deaver. The offense was alleged to have been committed on September 8, 1938.

Thereafter, on Monday, December 19, 1938, when the case was set for trial the state appeared by the prosecuting attorney, or his deputies, who announced ready for trial, and the defendants both were present in person by their attorneys, and, according to the record, "upon roll call, all twenty-four jurors answer present. Thereupon J. H. Hollis, Louis Hart and Harry Lytle ask leave to be excused from the panel, which is by the court granted, and comes W. H. Smith, E. S. Scott and J. H. Cowan, who are duly summoned by the sheriff, being colored electors of Pulaski county, are found to be qualified electors, and are duly sworn as petit jurors, and placed on the regular panel which is designated as panel No. 1 of this term of court."

Before the beginning of the trial of the case the defendants filed a motion to quash the venire of petit jurors, from which venire it was proposed to draw the petit jury by whom the defendants were to be tried.

It was alleged in the petition that the petit jury was composed exclusively of white persons and that all persons of color, or of African descent, known as negroes, were excluded from said jury on account of their race and color and for no other reason.

It is also alleged that the total population of Pulaski county is 137,727 and that 97,212 are white people and 40,215 are negroes; that of this total, approximately 11,347 are legal electors and of the number of legal electors 1,500 are negroes or of African descent, qualified to serve as grand and petit jurors.

The alleged facts were stated in another form to the effect that the negro population is about one-fifth of the total population of the county and about one-eleventh of the total legal electors of the county are persons of color or of African descent, known as negroes, but were excluded from the petit jury because of their race and color and for no other reason.

There was a further allegation that in the selection and formation of the present panel of the petit jurors, negroes were excluded for no other purpose or reason except that they are negroes.

There was a further allegation that no negroes have been selected, but that negro electors have been systematically excluded from serving as grand and petit jurors in Pulaski county for more than forty years solely because they are negroes, which is a discrimination against the defendants who are negroes and such discrimination is a denial to them of equal protection of the laws of the United States as guaranteed by § one of the Fourteenth Amendment to the Constitution of the United States of America.

They alleged that by methods used there is a denial of due process of law by the State of Arkansas, through its administrative officers, and pray that the present venire of petit jurors be quashed.

This motion was signed by their attorney, signed by the two defendants and sworn to before a notary public, and was duly filed. Upon the filing of this motion, the court made the following order: "This day comes the defendants by their attorney, S. A. Jones, and files a motion to quash the present venire of petit jurors, which is by the court denied, for the reason that there has been three colored men placed on the regular panel

before motion herein was filed. To which action of the court in denying said motion defendants except."

After overruling the motion as set forth in the foregoing copied order made by the court, defendants were put to trial. Rome Bone was convicted of murder in the first degree and sentenced to death by electrocution, and Mose Bone was convicted of murder in the second degree and sentenced to the penitentiary for a period of twenty-one years. Upon this appeal several other alleged errors were presented and argued in a somewhat voluminous brief.

We prefer, however, for reasons that are obvious and that will appear later, to discuss what we think is the most important proposition upon this appeal, the alleged error in the overruling and denial of the motion above set out. It is urged now by the state that no evidence was heard upon this motion and on that account no prejudicial error appears therefrom.

We proceed to a discussion of this first problem. This is not a case of first impression on this subject in this state. A very similar matter was up for consideration and hearing nearly twenty years ago in the case of *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626. In that case a similar question was presented to the trial court, as was before the circuit court of Pulaski county in this case. A motion was filed in that case alleging identical facts, with a similar prayer, that is to say, that negroes had been excluded from jury service because of, and on account of their race or color, and that this was a denial of equal protection of the law under the provisions of the Fourteenth Amendment to the Constitution of the United States. In addition to the allegation of these facts, the pleader in the Ware Case offered by a statement in the motion to make proof of the facts alleged, but in that case, as in this, the court, without hearing any evidence, overruled the motion and put the defendants to trial. It may be said that in neither case does the record disclose what the proof would have been had the court not promptly overruled the motion filed. In the Ware Case, *supra,* the court held that the

challenge to the petit jury, made when the jury was called for the trial, was in due time.

One of the errors found in the Ware Case was in the fact, as disclosed by the opinion, that it was error to overrule the motion without hearing evidence in support of its allegation. Of course, this implies that had the court heard this evidence, and if it had been sufficient to establish the fact of the systematic exclusion from jury service of members of the negro race solely on account of race or color, it was the duty of the court, upon such finding, to quash the venire or jury panel so formed under such conditions and circumstances. The court so declared.

The last statement finds conclusive authority and support in many decisions of the United States Supreme Court, some of which will be cited in our discussion.

Counsel for the appellants in this case make very strong averments of the fact that they were present in court with witnesses, ready to offer proof in support of the motion they had filed. The record does not disclose that they tendered any proof, so we must rely upon the recitals of the record. We find the court denying the motion filed and giving the reason for the action taken. The order is copied above.

We accord to the trial court every consideration and reasonable inference to support the action of the court, but when the court sets forth the sole reason for an order made in a particular matter, we are not at liberty to assume that there was some other reason not specifically set forth and not a reasonable inference or conclusion from the statement made, so it must appear, as it does conclusively in this case, that the court overruled this motion, not because its statements were untrue, or were not susceptible of proof, but rather on account of the fact that the error was confessed by anticipation of the motion filed and an effort was made to cure this error by excusing three members of the regular panel and substituting in their place three qualified negro electors, and these were placed upon the first panel and made a part thereof, taking the places of the three regular

members selected by the jury commissioners. They had been excused by the court without any reasonable or formal excuses having been announced for their retirement. The record discloses further that upon an examination as to the qualifications of these three new jurors placed upon the panel, although each was declared qualified to serve, the state peremptorily challenged each one. This fact is not stated by way of criticism of the trial court, nor of the prosecuting attorney. Had these three negro electors been regularly placed upon the panel of the jury by the jury commissioners in the discharge of their duties, there could not have justly been any criticism on account of the fact that there might not have been a negro juror in the final trial of the case. We are attempting to make clear and emphasize the matter that the test lies not in the fact that there was no juror of the negro race upon the trial jury, but the vice is in an omission by administrative officers, jury commissioners, for instance, in the systematic exclusion of negroes from the regular jury panel. In this case it is made clear that the jury commissioners had selected twenty-four members who constituted the regular jury panel from which the juries were to be drawn in the trial of cases. It was charged that, not only in this case, but in the formation of juries, the selection of the two panels, the negro electors had been systematically excluded, and that this had been practiced continuously for a period of forty years in the circuit court of Pulaski county. There was no denial of this charge, either by the filing of a response or answer to this motion, or by any act or announcement on the part of the court in overruling the motion. In fact, the court by its ruling refused to hear any evidence and assumed that by the removal of some of the members of the jury and the placing thereon of qualified negro electors there was the full and complete answer to the objection made. This procedure, on the part of the court, may be analyzed in the light given us by a comparatively recent decision of the United States Supreme Court, rendered without a dissent, which opinion is not only binding upon the courts of that jurisdiction, but binds with equal force appellate

and inferior courts of all the states. The case referred to is *Hugh Pierre, Petitioner,* v. *State of La.,* 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757. It is true in the Pierre Case evidence was offered tending to show the systematic exclusion of members of the colored race from the grand jury and petit jury panels. The motion was filed in that case in due time, praying that the grand jury and petit jury panels be quashed. The motion was not essentially different from the one filed in the case under consideration. The evidence is not set out with any degree of detail in the opinion. The court, however, announces the fact that the Louisiana courts had decided the issues of fact contrary to what the Supreme Court believed was justified under the evidence, and for that reason the Supreme Court of the United States proceeded to settle the facts first and then announced its conclusions of law applicable, as this was in itself a federal question as held in *Carter* v. *Texas,* 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839. In order that this Louisiana case may be appreciated, we think it should be said that the trial court sustained the motion and quashed the petit jury, but refused to quash the grand jury panel or to enter an order of quashal of the indictment. The Louisiana Supreme Court, in what we consider a very able announcement of its position, held that inasmuch as an indictment found by the grand jury was no evidence of guilt, but that it was a mere charge that a crime had been committed, sufficient to put the defendant upon trial, the defendant suffered no substantial prejudice by reason of the fact that he had been indicted and charged with the commission of a crime by a grand jury, from which members of the negro race had been systematically excluded. Mr. Justice BLACK, in commenting upon these conditions said: "And the State concedes here, as the Supreme Court of Louisiana pointed out in its opinion in this case, that 'it is especially provided in the (Louisiana) law prescribing the method of drawing grand and petit jurors to serve in both civil and criminal cases that there shall be no distinction made on account of race, color or previous condition (of servitude),'" and "If . . . (qualified) members of the negro . . . race . . . have been sys-

tematically excluded from . . . service in the Parish of St. John . . . solely because of their race or color, the indictment should have been quashed." Exclusion from grand or petit jury service on account of race is forbidden by the fourteenth amendment. In addition to the safe-guards of the fourteenth amendment, Congress has provided that "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; . . ."

There are cited in support of these announcements of the rule the cases of *Strauder* v. *West Virginia,* 100 U. S. 303, 25 L. Ed. 664; *Carter* v. *Texas,* 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Martin* v. *Texas,* 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338.

In the cited case the court also announced that "his evidence was offered to show that Louisiana—acting through its administrative officers—had deliberately and systematically excluded negroes from jury service because of race, in violation of the laws and Constitutions of Louisiana and the United States."

There was cited by the court in this regard, the cases of *Norris* v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; *Neal* v. *Delaware,* 103 U. S. 370, 26 L. Ed. 567; *Carter* v. *Texas, supra; Hale* v. *Kentucky,* 303 U. S. 613, 57 S. Ct. 753, 82 L. Ed. 1050.

We think it perhaps unnecessary to do more than cite and call attention to these numerous decisions of the United States Supreme Court for the reason that there is no substantial dispute as among lawyers generally as to the effect of these laws and their substantial requirements, nor is there any substantial dispute among the courts, as the general proposition, about the effect of the constitutional provisions as set forth in Amendment No. 14 or acts of Congress in relation thereto. The only difficulty or trouble arises in the practical application of these well-known, and we think, universally recognized, propositions of law. The case at bar forms a somewhat startling example. The objection made and

urged by the defendants and their counsel was not as to any individual member constituting the panels of the jury before which they were to be arrainged for trial. The objection was broader than that. It was made as against the panels of the jury, the venire as made up by administrative officers, wherein there had been the systematic exclusion of members of the negro race qualified to serve. If the objection made was tenable, and, no doubt, it was, it must have operated not to remove from the jury panel three members in whose places there might have been substituted qualified jurors of the negro race, but this objection was to the entire panel, and as Mr. Justice BLACK said in the Pierre Case, *supra,* the venire should have been quashed. The removal of three from an improper venire upon which twenty-one improperly were left, certainly did not cure the error or meet the requirements of the substantive law of the land. The difference in this case and the Pierre Case is not the fact that an indictment was regularly found by the grand jury in the Louisiana case, while in the case at bar, under what we think is perhaps a more modern practice, defendants were charged and tried upon information filed by the prosecuting attorney, and, of course, in such instances grand jurors are not required and did not return any indictment.

We have just called attention, however, to the fact that even a grand jury indictment must be held bad and must be quashed, although it furnish no evidence of guilt of the accused and that fact be judicially ascertained and determined by announcement of the highest court of the state, yet notwithstanding that fact a defendant may not be so indicted if there is the substantial form and semblance of discrimination by the systematic exclusion of members of the colored race and one of that race be indicted by grand juries so formed. So in this case, which contains all the elements as set forth by the motion, which is undenied, proof of which, no doubt, was deemed available, there was error in the failure to quash the entire venire of the petit jury. On account of this error both of these cases must be reversed, and the cases be remanded for a new trial.

It is also urged and argued most forcefully that there are several other errors in the record. One of these arises out of the form of information which charges that both of these defendants shot and killed Mrs. John Deaver. It is argued that, since she was shot only one time, only one of the two shot her. Without expressing any opinion as to any of the pertinent facts in the case, we suggest that according to the evidence offered on behalf of the state, both of the defendants were making an unlawful, if not felonious assault upon John Deaver when his wife made an effort to render help to him and was shot. The effect of this charge is that the two were acting jointly, both were present, so there was no such condition as accessory before or after the fact. Therefore, both were deemed as principals, their guilt may be determined and their punishments be fixed accordingly as a jury may find. But it is urged by the defendants in this regard that they were merely attempting to protect themselves against threatened felonious assault of John Deaver, who had the pistol and was threatening to shoot one or the other or both of them, and that in a struggle to secure the pistol it was fired and Mrs. Deaver was shot. These contradictory matters were questions to be determined by a properly qualified and empanelled jury, so we hold that the court was correct in overruling any objections or demurrer to this information.

Defendants also argue that their rights were prejudiced by reason of the fact that the court gave certain instructions particularly in regard to the law of self-defense. This objection, we think, is wholly without merit for the reason that if the defendants were not acting in self-defense, they were certainly making an unjustified assault upon John Deaver at the time the fatal shot was fired. Their only excuse or explanation for being engaged in a controversy or embroilment with Deaver is that they were acting in the defense of their persons against being killed or suffering great bodily harm.

There was an objection also to evidence tending to show that Deaver was pretty badly beaten up and one

of the witnesses who testified on behalf of the state was addled, if not beaten into a semi-conscious condition. While it is true the commission of an offense may not be established by proof that another offense had been committed, yet that principle is not involved in the issues here presented. All these matters were part of the *res gestae*. The state might not establish any semblance of a case without proof of these facts, nor could have the defendants explained their conduct without also offering some proof of these same matters. If there were other errors, such as the alleged insufficiency of the evidence on any particular proposition, or other alleged erroneous action, it can serve no useful purpose to enter upon any discussion thereof under present conditions, for the reason that as the cases will have to be tried anew such alleged errors may not appear upon a second trial.

For the error indicated above, the judgments of conviction are reversed, and the causes are remanded for a new trial.

ARKANSAS-LOUISIANA GAS COMPANY *v.* PFEIFER.

4-5513 129 S. W. 2d 235

Opinion delivered June 5, 1939.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Taylor Roberts, for appellee.

SMITH, J. Mrs. Sophia Nathan, an elderly lady about 90 or 91 years old, resided at the home of her son-in-law and daughter, Mr. and Mrs. Sam Block, in the city of Little Rock. Mr. Block employed the Arkansas-Louisiana Gas Company to install two gas floor furnaces in his residence, which was a six-room cottage. One furnace was installed in a small hall between two bedrooms and adjacent to the bathroom. The gas company employees began the installation of the other furnace in the living room near French doors which opened into the dining room. In order to install this furnace the carpet was rolled back and a number of tools laid out on the floor near the hole which was being cut for the furnace. At noon the employees left the house to go to lunch. Soon after the employees left the house Mrs. Nathan stepped into the hole which was being prepared for the furnace and sustained serious and permanent injuries to compensate which damages were awarded in the judgment from which is this appeal in the sum of $800.

Mrs. Nathan had lost the sight of one eye and her vision in the other was impaired, and through her advanced age she had become very deaf and her memory very poor, facts unknown, however, to appellant's employees.

The case was submitted under instructions of which no complaint is made. These instructions were to the effect that there could be no recovery unless it were found that appellant's employees were guilty of negligence which was the proximate cause of the injury, and that the party injured was guilty of no negligence contributing to her injury.

The chief insistence for the reversal of the judgment —which is not complained of as being excessive—is that a verdict should have been directed in appellant's favor.

We are of opinion, however, that a case was made which should have been and was properly submitted to the jury. The hole was cut in a doorway leading from the living room to the dining room and was in the path of the most direct route one would walk in going from the living room to the dining room or kitchen. The hole

was left unguarded, uncovered and unattended while the workmen went to their lunch during the noon hour. During that time the aged lady undertook to walk from the living room, through the dining room, to the kitchen, and in doing so fell into the hole and sustained serious injuries.

We think the facts recited present questions of negligence and of contributory negligence, which questions were properly submitted to the jury and have been concluded by the verdict.

The judgment is, therefore, affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* LEACH.

4-5517 129 S. W. 2d 588

Opinion delivered June 12, 1939.

Westbrooke & Westbrooke, for appellant.

J. W. Watkins and *Denver L. Dudley*, for appellee.

SMITH, J. Earnest E. Leach was an employee of the Poinsett Lumber & Manufacturing Company, and, as such, held a certificate, which entitled him to the benefits of a group life insurance policy issued by the appellant insurance company to the lumber company. The certificate was for the sum of $1,500, and was payable "if death occur while the employee is in the employ of the employer, or within thirty-one days after the termination of his employment, provided the group policy is in force at the time of the death." The certificate provided, further, that if the employee became wholly or continuously disabled as a result of bodily injury or disease, so as to be unable to continue his employment, the insurance should be continued in force during the continuance of such disability.

Leach died, and his widow, the beneficiary named in his certificate, sued to collect the amount of the certificate. The insurance company defended upon the ground that Leach quit work and ceased to be an employee on May 7, 1937, and died August 21, 1937, which was, of course, more than thirty-one days thereafter. The case was brought and tried upon the theory that between those dates the insured was continuously and wholly disabled as a result of bodily injury and disease from engaging in any and every business or occupation and from performing any and all work for compensation or profit. If this were true, the policy, by its terms, continued in force until the death of the insured.

The testimony is to the effect that, after the termination of the employment, the insured left home, with $5 in his pocket, and was gone for several weeks, during which time his wife was not apprised of his whereabouts.

It became necessary to show insured's ill-health during this period, and to obtain that information much correspondence and several trips by the insured's attorney were required, the expenses of which were paid by him. These were not expensive trips, however, and the amount of the expenses was not shown.

There was a verdict and judgment for the face of the certificate, and interest thereon was allowed, together with the statutory penalty of 12 per cent. A motion was

made for the court to fix and allow a fee for the attorney, during the hearing of which motion it was indicated that an appeal from the entire judgment would be prosecuted. Testimony was heard by the court as to what would be a reasonable fee under the circumstances, and three practicing attorneys testified that, in their opinion, $600 would be a reasonable fee, and that fee was allowed by the court. An appeal was prosecuted, which has brought the entire record of the cause before us, but it is now insisted only that the fee allowed the attorney was excessive. No other question is raised.

It is obvious that the fee allowed is forty per cent. of the amount sued for and of the judgment recovered, which is greatly in excess of the per cent. previously allowed in any similar case, and we are of opinion that it is excessive and should be reduced. It is true reputable attorneys testified that $600 was a reasonable fee, and no one testified to the contrary. We have no doubt that this was the honest opinion of the witnesses, but we are equally certain that other attorneys, equally able and reputable, could have been employed for this service for a much smaller fee.

In construing the statute under which the fee was allowed in the case of *The Mutual Life Ins. Co. of N. Y.* v. *Owen,* 111 Ark. 554, 164 S. W. 720, we said: " 'The statute provides that a reasonable attorney's fee for the prosecution of the suit and collection of the amount of the loss under the policy shall be taxed against the company. This means such a fee as would be reasonable for a litigant to pay his attorney for prosecuting the case, and not a speculative or contingent fee based upon the uncertainty of the result of the litigation.' "

In discussing the weight to be given opinion evidence as to what the fee of an attorney should be when taxed by the court, we said, in the case of *Shackleford* v. *Arkansas Baptist College,* 181 Ark. 363, 26 S. W. 2d 124, that "Neither the trial court, nor this court on appeal, is bound by the testimony of appellant and his expert witnesses in determining the value of his services." Such testimony should, of course, be given, and always re-

ceives, due consideration, but it is advisory, and not conclusive, upon the court below nor upon this court.

In the case of *Aetna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310, the trial court allowed a fee of $500 upon the recovery of a judgment for $2,250 against the insurance company which had issued the policy there sued upon. The fee was held to be excessive and was reduced to $400. That case cites a number of earlier cases on this subject.

In this case we think the fee should not exceed $400, and will be fixed at that amount. It would be fixed at even less but for the fact that the record shows, as hereinabove recited, that time, labor and expense were required to make the showing that the insured's illness continued after he left home.

The judgment will, therefore, be modified by reducing the attorney's fee to $400, and, as thus modified, is affirmed.

SIRMAN *v.* SLOSS REALTY COMPANY, INC.

4-5530 129 S. W. 2d 602

Opinion delivered June 12, 1939.

Chas. W. Garner, for appellant.

Barber & Henry, for appellee.

BAKER, J. A suit was filed in the chancery court on September 15, 1938, to recover judgment and to foreclose a lien of a second mortgage on lot 9, block 4, Chesterfield Square Addition to the city of Little Rock. The appellants offered several defenses to prevent a recovery and foreclosure of this second mortgage. They insist that the receipt of a bond for the sum of $100 and a small cash payment delivered to the Sloss Realty Company by the HOLC and the execution by the Sloss Realty Company of a warranty deed to enable the Sirmans to give a first lien to the HOLC was a complete settlement of the original debt and that the second mortgage and the note it secured were without consideration. They argue that the second mortgage and note were unenforceable for the reason they were against public policy as fixed and determined by the HOLC act of 1933 and the rules and regulations of the HOLC board. They also allege that the mortgage and note were obtained by fraud, and that the note and mortgage are void because the mortgage was not acknowledged according to statutory requirements. They argue also there was error of the trial court in not requiring the appellee to give an itemized statement, or bill of particulars as to what items entered into the $900 note. The court decided all these

issues against the appellants and the appeal from the decree of the chancery court is to reverse that decree.

The view that we have of this situation as presented by this record is such that the three contentions made by the appellants are so inter-related and connected one with the other that they cannot well be stated as different subject-matters, nor may they be discussed as independent of the other and it may save time and space to state and present these several matters according to their connected relations with each other and in that way determine the merits of each and all of them as the facts may not be separated and all the matters be discussed separately without unnecessary repetition.

An effort will be made to present all these matters as above indicated and we shall attempt to make a statement of the facts without abstracting the evidence in detail. Sloss and his wife sold to the Sirmans the foregoing real property in 1925. Small payments were made from time to time upon the property until in 1931. The date of the original contract appears to be February 15, 1925, and on October 15, 1931, more than six years later, a new contract was entered into between the parties. By the agreement on that date, Sloss, the seller of the real estate, reserved the right to maintain on the real property a first mortgage not to exceed $1,500 and there were to be made certain payments by M. M. Sirman upon the property amounting to $27 per month and at the same time Sirman and his wife executed to Sloss a note in the sum of $2,944.19 as a balance then to be paid upon the $3,700 indebtedness upon the property. There was noted upon this note a credit of $400 as of date February 20, 1933, reducing the indebtedness by that sum to $2,431 as of that date. The note bears credits, the details of which are unnecessary to set forth. Thereafter, in February, 1934, Sirman made application to the HOLC to borrow money from this corporation to refinance this property he had bought from Sloss. He testifies that he did not know at that time the exact amount that he owed and that he made a statement in his application of the facts as he knew them and submitted this statement to Sloss who inserted in it figures or amounts

with which he was not familiar. The application, however, shows that there was upon this property a first mortgage securing a debt owing to Dora A. Bainbridge of $800, and to the Fidelity Company amounting to $450, and that there was due upon the second mortgage $1,144.51, including interest. It also showed there were taxes past due. A loan was finally granted in the sum of $1,500, after an appraisement showing the property was worth $2,066. The parties who held debts against this property, Dora A. Bainbridge and Fidelity Company, filed with the HOLC consent or agreements to accept HOLC bonds in settlement of the respective indebtednesses in the following sums: Dora A. Bainbridge, $800; Fidelity Company, $450, and the Sloss Realty Company, $323.99. These agreements, or "consents," as they were called, were filed, as we understand, prior to the date of the grant of the loan for $1,500. When the loan was finally fixed in that sum, it became necessary then to secure new "consents" or agreements from the creditors so that the amount of bonds that might be issued would be within the loan. Sloss, who represented the Sloss Realty Company, the owner of the Sirman paper, says that he knew that Bainbridge and the Fidelity Company would not scale down or reduce indebtedness that was owing to each of them, so it became necessary, if the loan went through, for him to reduce the amount that he was willing to accept in HOLC bonds. There was also a statement that taxes, special assessments, insurance, loan expense, etc., would have to be paid, which, upon final settlement, reduced the amount that would be paid to Sloss from $323 to $113.34, so in satisfaction of the lien that Sloss held against this property at this time, he accepted a bond for $100 and $13.34 in cash.

It is now insisted by the appellants that this was in satisfaction of the debt that was then due Sloss in the sum of $1,144.51 balance, which we think the record discloses was the obligation owing at that time by Sirman to Sloss in addition to the $1,500 represented by the mortgage to the HOLC. In the foregoing statements when we have referred to the appellee as Sloss we do so without distinguishing between Sloss and the Sloss Realty

Company, which took over the Sloss notes and papers after the settlement made October 15, 1931. This is a matter that is immaterial inasmuch as there is no controversy involving the period of time of ownership of this paper by Sloss as the individual or the corporation he represented. Many of the disputed questions of fact will be passed over without consideration, for the reason that they have been determined by the chancellor, and we think in that regard the chancellor's findings of fact were correct or at least not obviously contrary to a preponderance of the evidence.

Of these disputed questions of fact, one in regard to the amount that Sirman now claims to have paid upon this indebtedness should have been noticed. It is argued in his brief that though he does not know exactly what he paid, it was approximately $3,100 or $3,200. We find, however, from the excerpts of his own testimony that in 1931 when he executed the new note and accepted the new contract, he had not paid exceeding $1,000. There was an admitted indebtedness of $2,700. The proof is that for the next two years or up until the time of the execution of the HOLC mortgage his payments had not exceeded $75 or $80 per year. He admits in several instances that he does not know what he had paid. We, therefore, think that violence is not done to any of his rights in determining that the actual balance that he owed is clearly not in excess of what he is now willing to admit was at that time owing by him. In fact he was owing much more than the $900 note and mortgage that he then executed after he had executed the mortgage for $1,500 to the HOLC and after he had received credit for the $400 found in memorandum upon the margin of the $2,700 note.

It is argued that Sloss' agreement or consent to accept from the HOLC $323.99 should be conclusive and again when he did agree and accept the $113.34 that this was conclusive, and Sloss may not now be heard to say otherwise. We do not think so. When Sloss agreed to accept one bond and the small amount of cash, he noted by writing upon this consent or agreement the fact

that he expected to take from Sirman a second mortgage. The language used by him in this respect is harshly criticised, for he said, "except for a small second mortgage." In addition, it is urged that this reservation or notation that he expected to receive a second mortgage and the second mortgage are in violation of the public policy of the government as indicated by the Act of Congress under which the HOLC was organized, and that, inasmuch as the amount was not stated, it was an intentional deception of the HOLC, for the reason that the second mortgage, instead of being a small one, was a relatively large one. Whether that theory be true or false it was notice to the HOLC that Sirman and his wife would execute this second mortgage that would be received and taken by Sloss upon the same property that Sirman had mortgaged to the HOLC. Sirman and his wife denied they had executed this note and mortgage for $900. Upon inspection, however, of their signatures they admitted these to be genuine, but denied they acknowledged the mortgage and testified that when these instruments were signed they executed them or signed them without reading because Mr. Sloss represented to them that they were papers in connection with the HOLC loan for which they had applied. Sloss said all these matters were explained and understood and that numerous letters were written to Sirman immediately after the execution of this second mortgage demanding payment in accordance with its terms and that Sirman ignored these letters until suit was threatened and denied liability at all times, after his attention was called to the fact that he would be sued. The record in this case does not disclose as a fact that Mr. and Mrs. Sirman are ignorant of business affairs and ways and that they were the easy victims of deception, but we were rather impressed with the idea that Sirman and his wife understood the various transactions and that they intentionally executed this second mortgage and seek now to avoid the effect of their voluntary acts.

We believe the trial court was correct in failing and refusing to find that Sirman had paid $3,100 or $3,200 upon this indebtedness. We believe and support the find-

ing of the chancellor that this $900 note and mortgage securing it were less than the amount that was owing by Sirman to Sloss at the time the $900 note and mortgage were executed. This was an actual debt for the purchase money upon the above described real property. It is urged now that because Sloss executed a warranty deed conveying this property that this second mortgage is without consideration; that the two are in contradiction one with the other. This conclusion does not follow. It is a common practice to convey property by a deed reserving a lien for the unpaid portion of the purchase money, which in effect is a mortgage back for that amount, or property may be conveyed for a consideration and a mortgage be given for the full amount of the consideration and the two instruments will be read together as constituting the contract between the parties. The release executed by Sloss to the HOLC was not in contradiction of the mortgage back, nor was it in fraud of the HOLC and it may be said in relation to this fact that the HOLC is not making any complaint in that respect. It had notice that this second mortgage would be executed by Sirman in the language of Sloss, "except for a small second mortgage back." If there was fraud in the execution of this mortgage Sirman participated in it when he executed the mortgage. There is no evidence of fraud. In truth it appears that the parties were working together, understood each other, and that there was no deception unless Sirman was intending to deceive Sloss in the execution of this second mortgage and later intended to assert its invalidity. We do not even believe that was in his mind at that time.

In regard to the forceful assertion that Sloss' conduct was fraudulent and that on account thereof the note and mortgage executed by Sirman and his wife were void, there is need of very little comment. No substantial proof sustains this allegation and we only desire to add that violent denunciation will not supply lacking proof, nor will verbal castigation establish as a fact a matter that may be proven only by the production of evidence, wholly lacking here. Accord and satisfaction arise out of contract and the evidence presented upon this prop-

osition proves the parties did not so agree. But it is argued that this note and second mortgage are void on account of public policy; that the act of Congress for formation of HOLC did not contemplate the execution of second mortgages and that if not expressly forbidden by the act itself they were prohibited by the directions to applicants, or by the rules the corporation was empowered to make. Therefore, public policy as announced by many of the courts protects the appellants here from the enforcement of the note and second mortgage. We have tried to give due consideration to this theory of appellants' case. Public policy is a vague phantasmagoria of legal concepts, when an effort is made to give the term meaning aside from the consideration of Constitution and statutes. Ordinarily, public policy of the United States Government is shaped and defined by the Constitution and Acts of Congress. If we offer such a test in the present case we may eliminate the Constitution at once as it is not contended by the appellants that there is any constitutional question involved, but it is insisted by them that the Acts of Congress under which the HOLC was organized and operates determine the public policy of the National Government as it has been declared by decisions found in the Reporter systems, particularly cited are the following cases. *Cook* v. *Donner*, 145 Kan. 674, 66 Pac. 2d 587, 110 A. L. R. 244; *Stager* v. *Junker*, 188 A. 440, 14 N. J. Misc. 913; *Home Owners Loan Corporation* v. *Wilks*, 130 Fla. 492, 178 S. 161; *Pye* v. *Grunert*, 201 Minn. 191, 275 N. W. 615, 176 N. W. 221; *Jessewich* v. *Abbene*, 154 Misc. 768, 277 N. Y. S. 599; *First Citizens Bank* v. *Speaker*, 159 Misc. 427, 287 N. Y. S. 831; *Cheves County Building & Loan Ass'n* v. *Hodges*, 40 N. M. 326, 59 Pac. 2d 671.

Without going into and giving an analysis of the foregoing several cases we call attention to the fact that no one of the several decisions eminated from any United States court. Notwithstanding that fact, however, we give due regard thereto, having considered them for the purpose for which they were offered. While such decisions are persuasive they are by no means conclusive and we are not bound by the announcements in them unless

we find them in accord with the decisions of the United States Supreme Court or with our own conclusions. We accord to the United States Supreme Court not only the right, but the power and authority, to announce the public policy of the United States and until that court shall have made its own interpretation and conclusions, we are free to present what we believe to be the sound declarations upon such mooted questions as public policy. A fragmentary view of any of the activities of the United States government, without a consideration of its many agencies, organized for rehabilitation and relief, would most likely prove extremely deceptive. The very name of the HOLC when we realize that it was a creature formed by an Act of Congress, might tend to unculcate an erroneous idea of its purposes and activities. We emphasize the point that it is difficult to determine the public policy of the United States Government from any single activity for it may be said that the federal government is active in almost every sphere, looking to recovery from the effects of depression. It is furnishing money to relieve distress whether it be among the lending or the borrowing classes. It is not attempting to refinance and rehabilitate the debtor class only. For instance, through RFC there has been an attempt to refinance and rehabilitate loan organizations, building and loan associations being a special object of this national agency. But there has been no effort to favor the debtor group as distinguished from the creditor group. Surely, there seems to be no recognition of such differences of class distinctions, so it must appear, we think, that the idea that home owners are among those to be helped and provided for as distinguished from others who were just as needy, is without merit and not justified. It may be said without any reasonable contradiction that the purposes of the organization of the HOLC was not to support and uphold the home owners at the expense and detriment of creditors. We have already called attention to the fact that building and loan associations and other small creditor corporations were as much the objects of solicitude of the lending agencies of the federal government as were the home owners. The truth is, the HOLC is, as its name

implies, a corporation, one that may sue or be sued. It is controlled by a board of directors; it is engaged in private business, and while it has power to make rules and regulations for the conduct of its business, it cannot legislate. It may operate in the sphere for which it was created without any implication of the sinister purposes of furnishing aid to one class so that proportionally that class may profit, and prosper; and to the same extent destroy another class of citizens equally entitled to governmental protection. The idea of the HOLC was to refinance the home owner, amortize his debts and obligations so that he could not only continue to possess his home, but also to retain and maintain his integrity, and to rebuild his financial independence, and no part of these acts was intended to furnish a means for coercion or oppression of the home owner's creditors. The processes of its operation show that the home owner and his creditors had to agree or contract with reference to these refinancing operations. The right to agree and contract in regard thereto was fully recognized and this case is illustrative of the processes whereby Sirman and his wife were refinancing their home by agreement with Sloss about the debts they owed him. The implication is unfair that insists that the National Government and its agencies were seeking to aid or rehabilitate a Sirman at the expense of destruction of a Sloss.

Without attempting further analysis of the cases above cited, we call attention to the narrow basis of some of the decisions. One at least is founded on the fact that the directions to applicants indicated a public policy and that anything contrary thereto or in violation thereof was illegal. Several of the other decisions are grounded exclusively upon the proposition that since the HOLC board had power to make rules, that any violation of these rules was contrary to public policy. The narrow ledge upon which such a decision stands is that a rule of the board may not be violated. These rules were announced for the protection of the corporation and since Congress has not attempted to control or circumscribe the freedom to contract, it may be stated as a matter of extreme doubt that that board might do so. Of the two rules cited for

our consideration one permitted second mortgages, and the other limiting the amount of such second mortgages was not adopted until nearly six months afer Sirman executed the one in question here.

The appellee has cited and set forth in full a case of *McAllister, et al.,* v. *Drapeau, et al.,* 85 Pac. 2d 523. This decision comes from the district court of appeals, second district, division 1, California, and is a decision rendered December 15, 1938. This is not a court of last resort and we do not rely upon it as such, but because of the clear thinking and fine reasoning of that court we are pleased to call attention to it, although its decision has not yet become final. That is to say, we are advised that the opinion has been certified up or appealed to the highest appellate court of the state of California for final consideration.

Those who are interested in the questions involved will find much information and evidence of research by reading the cited case. It also abounds in a criticism of the authorities cited by appellants. It seems to us that most of these criticisms are not unfair. We borrow from that case a quotation taken by it from other authorities: "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Stephens* v. *Southern Pac. Co.,* 109 Calif. 86, 41 P. 783, 29 L. R. A. 751, 50 Amer. St. Rep. 17.

Other citations and authorities to the same effect would only tend to increase unnecessarily the length of this discussion without adding to its utility.

So we hold that the warranty deed and the release when considered in the light of, and under the authorities, announced in regard to the HOLC do not constitute a valid defense as pleaded and urged by the appellants. Nor was the release of them so that the HOLC might take and hold a first mortgage lien against the property a satisfaction of the indebtedness so that the continuing moral obligation on the part of Sirman to pay the pur-

chase price for the property did not constitute a valid consideration for the new note and second mortgage. We have already stated our conclusions to the effect that the facts fail to support the charge of a fraudulent procurement of the execution of the note and mortgage.

The next contention is that the note and mortgage are void because they are not acknowledged according to statutory form. The rule is stated in that regard in the case of *Wooten* v. *Farmers & Merchants Bank,* 158 Ark. 179, 249 S. W. 569. It is true these appellants deny they acknowledged this mortgage, but they also denied they executed or signed it. They now admit their error in the matter of the signatures, but still insist that they did not in fact acknowledge it and this is particularly true as to Mrs. Sirman. While this is a disputed fact sharply contested we certainly do not feel that we are justified in overturning the chancellor's decision in that regard. If there was an acknowledgment the certificate of the acknowledgment is conclusive of the manner in which it was taken. It was so held in the last cited case. Pope's Digest, § 7181, does make it necessary that the wife sign and acknowledge an instrument such as the second mortgage in this case for a part of the purchase money.

It is finally urged and argued, most seriously, by appellants that the trial court erred in refusing to grant the prayer of the appellants wherein they asked by motion that the appellee be required to set forth a bill of particulars or statement of account showing the manner of arriving at the indebtedness of $900, as evidenced by the note. We think the court was not in error in disposing of this matter in a rather summary manner. The note and mortgage imported liability evidenced by these instruments executed by defendants. If there were mistake or fraud the burden was upon appellants to show the fact, but upon this development of the whole case there appears not to have been either mistake or fraud.

We think the trial court did not err in denying the appellants' motion in that regard. Whatever else might

be said about this case would tend only to prolong it without adding any beneficial effect.

The decree of the chancery court is, therefore, affirmed.

St. Louis-San Francisco Railway Company *v.* Hurst.

4-5525 129 S. W. 2d 970

Opinion delivered June 12, 1939.

J. W. Jamison and *Warner & Warner,* for appellant.

Geo. A. Hurst and *Partain & Agee,* for appellee.

Sam T. Poe, Tom Poe and *Frank Pace, Jr., amici curiae.*

HOLT, J. On November 6, 1937, Virgil Hill filed suit against appellants in the Crawford circuit court to recover damages alleged to have been sustained by him on November 3, 1937, while in employ of appellants, engaged in removing a piling from a bridge on the St. Paul branch in Madison county, Arkansas. He was represented in this suit by George A. Hurst, an attorney at Fayetteville, Arkansas, and the firm of Partain & Agee, attorneys at Van Buren, Arkansas.

Prior to the institution of the above suit, Hill on November 5, 1937, had entered into a written contract with Mr. Hurst to represent him as his attorney in the cause. The contract provides: ". . . . First party has this day employed Second Party as his attorney to represent him in the presentation and prosecution of a certain cause of action he has against the St. Louis-San Francisco Railway Company for injuries sustained by him while he was helping to load piling on railroad short distance west of Baldwin, Arkansas, on the 3rd day of November.

"Second Party hereby accepts said employment and agrees to investigate said cause of action at his expense, and, if necessary, will prosecute said cause of action through all the courts, to the end that substantial remuneration be had for said injuries and for his attorney's fee and expenses. Second Party shall have fifty (50%) per cent. of all sums collected, either by suit or compromise, and in case nothing is recovered, then Second Party shall have nothing for his fee or expenses.

"It is further agreed that neither party hereto shall compromise or adjust this cause of action without the consent of the other. . . ."

Before the consummation of the above contract, Mr. Hurst engaged the services of attorneys, Dave Partain and Theron Agee, two of the above appellees, to assist him. Mr. Partain did not know Mr. Hill, had not discussed the case with him, and was not a party to the contract which Mr. Hurst made with Hill. Mr. Partain prepared the complaint at Van Buren upon the facts as detailed to him by Mr. Hurst.

After the filing of the suit the record reflects that Mr. Hurst attended court at the November, 1937, term at Van Buren. The case, however, was not reached for trial and continued to the March, 1938, adjourned term. Mr. Hurst stated that naturally he was out expense and time in connection with his attendance upon the court at Van Buren.

Plaintiff Hill, in explaining the manner in which he employed Mr. Hurst, stated that he went to Mr. Hurst's office on November 5, 1937, and remained there for about an hour and a half, detailing to Mr. Hurst the facts in connection with his case, and then signed the contract set out above. He conferred with Mr. Hurst two or three time thereafter at his office and at Mr. Hurst's home. The conference at Mr. Hurst's home lasted for about an hour and a half.

The plaintiff, Hill, met Mr. Joyce, appellants' claim agent at Combs, Arkansas, early in 1938, without previous appointment, and told Joyce that he wanted to settle his case; that he had contracted a venereal disease

and that he did not want his wife to find it out. Joyce advised him that he could not settle with him, but for Hill to see his attorney, and they agreed to meet in Fayetteville on January 7th. He met Joyce there on the 7th and told Joyce that he would settle for $100. Joyce then sent him to see his attorney, Mr. Hurst. Hill further testified that he saw Mr. Hurst at his office and told him that he wanted to settle his case and why, but did not tell Mr. Hurst the amount for which he proposed to settle, and that Mr. Hurst refused to agree to the settlement. He then went back to Joyce and told him that he would make the settlement. Joyce then told Hill that he would have to inform Hr. Hurst about it again and have Mr. Hurst come to Mr. Atkinson's office, the local attorney for the appellants in Fayetteville. Hill told Hurst what Joyce had told him and what he, Hill, was going to do, and requested Hurst to be present, but that Mr. Hurst stated he would not do it and requested Hill not to do so, saying, "No, you are not either, and you stay away from up there," but Hill went ahead and made the settlement anyway. Hill did not advise Mr. Hurst that Joyce had seen him at Combs.

Mr. Hurst testified that about the 1st of January, 1938, Hill came to him and stated that the claim agent hunted him up and told him he wanted to settle, and that, "I told him I wouldn't talk to him about the case; that I had a written contract where he had agreed not to settle the case without my consent." He stated that he told Hill not to be "messing" with the claim agent; that Hill told him he was going to see the claim agent at Mr. Atkinson's office; that Mr. Hurst stated to him, "You got no business over there." Hill stated that he wanted Mr. Hurst to go with him and let the claim agent tell him what they were going to do, and Mr. Hurst told him, "Virgil, you had better stay away from that place. If they were in earnest and wanted to settle this lawsuit, let the attorneys come and see me." Hill left Mr. Hurst's office and Mr. Hurst did not consent to the settlement.

The record further discloses that Mr. Joyce settled the claim with Hill, Mr. Hurst's client, on January 7,

1938, and that Hill signed a release for a consideration of $100. At the time, Hill signed a stipulation to dismiss the pending suit, and this was filed with the circuit clerk at Van Buren on January 13, 1938.

On February 1, 1938, above appellees as attorneys of record for plaintiff, Virgil Hill, in his suit against appellants in the Crawford circuit court, filed "Intervention and Motion" in that suit in which they sought to recover a reasonable attorneys' fee in accordance with the provisions and terms of Act 326 of the General Assembly of 1937, now § 668 of Pope's Digest, and prayed for a judgment in the sum of $1,500.

Appellant's in their response to the intervention of appellees, tendered $100 to appellees for their services rendered Hill as his attorneys. Upon the refusal of appellees to accept this amount in payment of their fee, by agreement, the cause was tried before the trial court, sitting as a jury, and resulted in a judgment in favor of appellees in the sum of $1,000. From the judgment so rendered comes this appeal.

On this state of the record, appellants first contend that intervener Hurst violated the contract, abandoned his client, and that interveners cannot recover.

Does the record reflect that attorney Hurst abandoned his client and thereby loses any rights that he may have under the contract in question? We do not think so. The facts are that Hill went to the office of attorney Hurst at Fayetteville, where a written contract was entered into, in good faith, whereby it was agreed that Mr. Hurst would represent his client in a personal injury action against appellants for fifty (50%) per cent. of the recovery. On this occasion Hill detailed to his attorney the facts in the case. Within a day or two, Mr. Hurst went to Van Buren, Arkansas, and there procured the services of a prominent firm of attorneys in that city, to assist him in the prosecution of his client's case. We must assume that whatever compensation associate counsel were to receive was to be paid by Mr. Hurst out of his part of any recovery, and not by his client, Hill. After Mr. Hurst had given the facts to

Mr. Partain, Mr. Partain prepared and immediately filed the complaint in the cause, and caused proper service to be had upon appellants.

Subsequently, at the regular November, 1937, term of the Crawford circuit court, Mr. Hurst went to Van Buren again on behalf of his client, and the case was continued and set for trial at an adjourned term of the court in March, 1938. Up to this point we think it certainly cannot be said that Mr. Hurst had, in any way, abandoned his client's interest.

Subsequently, and before the cause was reached for trial, Hill contacted Mr. Joyce, appellants' claim adjuster, and agreed to settle the cause for $100. This Hill did over the protest and against the advice of his attorney, Hurst. While it must be conceded that Hill had the right to control his lawsuit, and to settle it, with or without the consent of his attorney, we do not think that, because his counsel protested and advised against his making what he thought to be an improvident settlement, such action on the part of counsel constituted abandonment of his client and the forfeiture of any rights that he may have under the contract.

It is next contended that the contractual prohibition against compromise, without consent of intervener Hurst, was void. To support this proposition appellants cite cases decided prior to the enactment of § 668 of Pope's Digest, which is amendatory of Act 293 of 1909. Especially did they rely upon *Davis* v. *Webber,* 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81, decided by this court on February 11, 1899, long prior to the enactment of our first attorney's lien statute of 1909, *supra.* After the enactment of the 1909 statute, this court in construing that act held that a provision in a contract between an attorney and his client providing that the cause was not to be settled without the consent of the attorney, while void and unenforceable, still it is severable from the contract, and the remainder of the contract may be enforced.

In the case of *Sizer* v. *Midland Valley Railroad Company,* 141 Ark. 369, 217 S. W. 6, this court held,

quoting headnotes: "Where a contract between attorney and client stipulated that neither would settle the cause of action without the other's consent, such stipulation, though illegal, is severable from the remainder of the contract, which may be enforced." In this case, in the opinion written by the late Chief Justice Hart, the *Davis* v. *Webber* Case *supra,* relied upon by appellants, was discussed at length, and while the court held in the Davis-Webber Case that a provision in a contract between attorney and client, similar to the one in the instant case, was not severable and voided the entire contract, as the law then existed, since the passage of the 1909 Attorney's Lien Act, such provision in the contract is severable, and does not render the contract void.

Section 668 of Pope's Digest, which is amendatory of the 1909 act, does not alter the rule announced in the Sizer Case above, and we, therefore, hold that this second contention of appellants is without merit.

It is next contended that the attorney's lien statute, Pope's Digest, § 668, is unconstitutional in denying right of settlement to a party without his attorney's consent. Again we cannot agree with appellants. Pope's Digest, § 668, provides, in substance, that the compensation of an attorney for his services is governed by agreement, express or implied, "which is not restrained by law"; that from the commencement of an action the attorney who appears for or signs a pleading for him has a lien upon his client's cause of action, and it is provided that this cannot be affected by any settlement between the parties before or after judgment. To this extent, § 668 is the same as the former statute respecting an attorney's lien. Act 293, Acts 1909 (C. & M. Digest, § 628). In 1937 the former act was amended, and Pope's Digest, § 668, sets forth this amendment, which provides in substance that in case a settlement is made by the parties after suit is filed, "and without consent of such attorney," the court shall, upon motion, enter judgment for a reasonable fee in favor of such attorney and against the party in whose favor judgment may have been rendered if the cause had proceeded to trial; that the amount of such

fee shall not necessarily be limited to the amount of settlement, and if the settlement was affected by agent of such party, the judgment shall be entered against such agent, as well as the one against whom such attorney is entitled to judgment; and if such settlement is made with the knowledge or advice of the attorney of such party, the court shall also enter judgment against such attorney as well.

Is this § 668, in providing that no settlement can be made after suit is filed without the consent of such attorney, unconstitutional and void because it interferes with, or prohibits, the right of contract? We do not think so.

Missouri has an attorney's lien statute similar in all essential respects to our own statute on the subject. In the case of *O'Connor* v. *St. Louis Transit Company,* decided by the Missouri Supreme Court in June, 1906, 8 Ann. Cas. 703-707, the constitutionality of their attorney's lien law was before the court. In that case the court said (first quoting the provisions of the attorney's lien act):

"Section 1. The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, *which is not restrained by law.* From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

"Section 2. In all suits in equity, and in all actions or proposed actions at law, whether arising *ex contractu* or *ex delicto,* it shall be lawful for an attorney at law, either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the

institution of suit or action, or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service(s) of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, *without first procuring the written consent of such attorney,* shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client. . . .

"It is insisted by appellant that this act embraces more than one subject, and is therefore violative of the constitutional provisions now being discussed. We are unable to give our assent to this contention. It is clear that the subject of this act was the making of agreements between attorney and client a lien upon the cause of action, and the purpose of it was to prevent frauds between attorneys, clients and defendants. . . . ."

The court in analyzing the above provisions said: "Then follows the particular provision upon which the cause of action in the case at bar was predicated, that if any defendant or defendants, or proposed defendant or defendants, shall, after notice served as herein provided, in any manner settle any claim, suit, cause of action or action at law, with such attorney's client, before or after litigation instituted therein, *without first*

procuring the written consent of such attorney, he or they shall be liable to such attorney for such attorney's lien as is provided by this act. . . .

"The object and purpose of this act, the validity of which is challenged by appellant, was to provide a lien in favor of attorneys at law upon the cause of action, and we have repeatedly recognized the justness, as well as the constitutionality, of the lien provided for the mechanic, and the landlord on crops made by his tenant, and we are unwilling to say that a lien provided for the legal profession should be ignored and held unconstitutional. While the business of these classes may be essentially different, we are unable to assign any legal valid reason why a distinction should be made against the legal profession. This act in no way deprives the defendant or any one else of his rights without due process of law, and in view of the full discussion of that subject and the settled rules that have been made construing that part of the Federal Constitution, we deem it unnecessary to further discuss that proposition. . . .

"*It is insisted by appellant that this act restricts or destroys the defendant's right to contract.* We are unable to give our assent to this insistence. The provisions of this act simply create a lien upon the cause of action in favor of the attorney at law, and requires the defendant, after due notice, which creates such lien in dealing with the party as to such cause of action, that such lien shall be respected. If we are dealing with the owner of a horse, and have notice that there is a valid subsisting lien upon the horse, we would not contend for a moment that such lien could be ignored. So it is in respect to other property—in dealing with the owner of it, if we have notice of the existence of a lien, such lien cannot be ignored. Is there any difference if a defendant has notice of the existence of a lien of an attorney upon a cause of action, and the instances above cited? We think not. This law does not deprive a defendant of any of his rights. When the lien is created in dealing with the plaintiff in respect to such cause of action, he must act accordingly. It does not

deprive him of the right to make a settlement, but in making such settlement it simply requires that he shall take into consideration the fact that the attorney at law has a lien upon the cause of action, and if such lien is ignored he will be required to account to him in an action at law for the amount of such lien."

And quoting headnote: "Such statute is not unconstitutional, either as depriving the opposite party to the client's action of his rights without due process of law, or as restricting or destroying the opposite party's right to contract and to effect a settlement of the action."

We think the reasoning and principles announced in the above case are applicable here, and that § 668, *supra,* is constitutional and is not violative of the inherent right of a citizen to contract.

Appellants in their fourth assignment contend that Mr. Hurst's refusal to aid his client to negotiate a settlement violates his contract and defeats recovery. We think this contention is without merit, and has already been fully answered and covered in this opinion.

It is finally contended by appellants that the fee of $1,000 awarded appellees is excessive. In this contention we are of the view that appellants are correct.

The statute in question provides for a reasonable fee for the attorney against the parties to said action and that the amount of such fee shall not necessarily be limited to the amount of compromise or settlement between the parties litigant. We think this provision of the statute in question, in providing that the fee be reasonable and not limited to the amount of the compromise or settlement, in effect, provides for a fee on a *quantum meruit basis.* In determining what would be a reasonable fee we take into consideration the amount of time and labor involved, the skill and ability of the attorneys, and the nature and extent of the litigation.

In 5 Am. Jur., p. 380, the text-writer lays down the following guide: "Among other things to be considered are the importance and results of the case, the difficulties thereof, the degree of professional skill and ability re-

quired and exercised, the skill, experience and professional standing of the attorney. . . . The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit, although in the absence of other evidence, the court must be guided in estimating the value of attorney's services by the time or amount of labor performed as indicated by the record. Where the fee is to be contingent upon success, the magnitude of the result achieved or the doubtfulness of the case when instituted should be considered in estimating the value of the services rendered, and not the number of pleadings filed, or their length, or the number of times counsel appeared in court, or the number of hours consumed in oral argument."

In *Davis* v. *Webber*, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81, this court said: "It will not do to liken a case of this kind to a suit for damages for personal injury, or any other kind of a suit, where both the question of obtaining judgment and the amount thereof, if obtained, are trembling in the balance. This, in fact, is a suit upon a liquidated demand, where there was no issue as to the amount of the judgment, and no doubt about obtaining it. The proof shows that the lawyer's fee, based upon the contingency of final recovery, would be much less in the latter case than in the former. Necessarily so, because of the diminished labor in its prosecution, and the anxiety as to the result."

The record reflects that two disinterested attorneys testified on behalf of appellees that their services were reasonably worth $1,500, which represented fifty (50%) per cent. of the amount sued for in the case. Another attorney testified that in his judgment a reasonable fee for the services rendered would be $1,000.

Although this testimony was not directly contradicted by appellants, the trial court, and this court on appeal, are not required to lay aside their general knowledge and ideas of values of such services, and are not entirely controlled by testimony of this nature.

As was said by this court in *Lilly* v. *Robinson Mercantile Company,* 106 Ark. 571, 153 S. W. 820: "The court was sitting as a jury in the determination of the matter and took into consideration the facts of the service performed, as well as the interested attorney's opinion of the value thereof, but he was not required to lay aside his own general knowledge and ideas of such service and the value thereof, and should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinion expressed, and in no other way could he have arrived at a just conclusion.

"It may be conceded that the opinion of the attorney familiar with the subject was entitled to great weight, but it was not to be blindly received, it was to be intelligently examined by the court trying the case in the light of his own general knowledge of the subject of inquiry and should control only as it was found to be reasonable, otherwise the opinion of the witness would be substituted for the judgment of the court."

In the case of *Shackelford* v. *Arkansas Baptist College,* 181 Ark. 363, 26 S. W. 2d 124, this court said: "Neither the trial court, nor this court on appeal, is bound by the testimony of appellant and his expert witnesses in determining the value of his services."

In our efforts to determine what would be a reasonable fee we hold that the act does not contemplate the services of more than one attorney or firm of attorneys, and the statute did not contemplate a fee for one attorney and a firm of attorneys.

This court in *Indiana Lumbermen's Mutual Ins. Co.* v. *Meyers Stave & Mfg. Company,* 158 Ark. 199, 205, 250 S. W. 18, in passing upon the reasonableness of an attorney's fee, as provided under Act 115 of 1905, now § 7670 of Pope's Digest, said: "The court allowed attorney's fee of $1,000, and, in view of another trial of the case, we deem it proper to add that this allowance was excessive, for, in fixing attorney's fees under this statute, the allowance should not be made upon a contingent fee basis nor upon the basis of the payment of more than one

attorney or one firm of attorneys in the case. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720."

After careful consideration of this entire record, we have reached the conclusion that a fee of $500 would have been a reasonable fee for appellees in this case, and the judgment of the circuit court in allowing the sum of $1,000 will be modified so as to reduce the amount allowed appellees to the sum of $500. As thus modified, the judgment is affirmed.

HIRES *v.* DOUGLAS.

4-5516 129 S. W. 2d 959

Opinion delivered June 12, 1939.

Horace Sloan, James G. Coston and *J. T. Coston,* for appellant.

Frank C. Douglas, for appellee.

GRIFFIN SMITH, C. J. The question for determination is whether the chancellor erred in refusing appel-

lants' pleas to set aside foreclosure sales and confirmation orders affecting their lands in Blytheville Road Improvement District No. 5, and in Blytheville Road Maintenance District No. 5.

Suits were filed October 26, 1934, with decrees November 28 of the same year. It was alleged that taxes for 1932 had not been paid. Of the lands involved, 230 acres were owned by Edith Hale Howton, and 240 acres were owned by Orlena Hires. There was testimony that the Hires property was worth $25,000, and that the Howton holdings, if the lands had been cleared, would have been worth $75 an acre.

As to lands in the road improvement district, total taxes were $40.58. The decree recited that the sale be had for the taxes, statutory penalty of 25 per cent., and cost, and that if such sums be not paid on or before September 1, 1935, the sale be consummated. The commissioner (January 21, 1936) gave notices of sales, showing the delinquent taxes charged against each tract. The notices contained this statement: "In addition to the amount of tax or installment of benefits charged on the respective tracts, there was also adjudged against the several tracts a penalty of 25 per cent., attorney's fee of 10 per cent., and all costs."

The commissioner's reports show sales to Frank C. Douglas February 17, 1936. The first four tracts aggregating 155 acres under four descriptions were (according to the commissioner's report) sold for $16.05. The next two tracts, embracing 80 acres under two separate descriptions, were sold for $11.52, as were two other tracts of forty acres each; and 200 acres assessed as five separate forties were sold for $31.73, or a total of $70.80 for the twelve tracts.

Foreclosure suits in the road maintenance district show that notice of sale was identical with that of the road improvement district except as to the amount of taxes ($118.79), etc. The first four tracts were sold for $37.79, the next two for $27.82, two others for $27.82, and the next four for $82.95, a total of $176.38. The report was approved by the court February 24, 1936.

Numerous grounds of avoidance of the consequences of sale and confirmation are urged, only two of which will be discussed in this opinion. Either, we think, was sufficient to avoid the sales.

First. Although the several tracts were ordered sold separately for the taxes, penalty, and cost assessed and decreed against them, the commissioner's report shows sale *in solido,* and this the law does not permit.

Act 338 of 1915 authorizes assessments against "particular tracts of land, showing benefits per acre or assessed benefits per tract."

In *Montgomery, et al.,* v. *Birge,* 31 Ark. 491, Chief Justice English, speaking for the court, said: "It is sufficient to say of the tax deed relied upon by appellants that it is void on its face. It recites the sale of all the lands, a number of tracts in different sections, amounting to 960 acres, *en masse,* for the sum of $56.06, the gross amount of taxes, penalties, and costs charged upon the whole of them."

It was said in *Cocks* v. *Simmons,* 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28, as shown by the state report headnote, that "A tax deed which recites the sale, in a body and for a gross sum, of several sections of land severally assessed, is void."

A headnote in *Salinger* v. *Gunn,* 61 Ark. 414, 33 S. W. 959, is: "A [tax] sale in a body, and for a gross sum, of several lots of land separately assessed, is void."

Chief Justice Hill, in *LaCotts* v. *Quertermous,* 83 Ark. 174, 103 S. W. 182, said: "Appellees also insist that their tax title is good; but it is void on its face. It is shown that lots 1 and 2, block 21, in the town of Goldman, were sold as one tract for the sum of $8.92½ cents. Such tax sales are void."

In *Lawrence* v. *Zimpleman,* 37 Ark. 643, at page 646 it was said: "Moreover, it appears from the recitals of the tax deed that two tracts of land were sold together, for the tax due on the whole. Such a deed casts no cloud upon the owner's title."

Referring to some of the older cases which held a tax deed void if it showed upon its face that lands severally

assessed had been sold *en masse,* this court said in *Cairo & Fulton Railroad Company* v. *Parks,* 32 Ark. 131, at page 143: "Without reference to the particular state of case under which these decisions were made, it will be seen that in none of them have they given to the recitals in the deed a conclusive effect as evidence; but have held the deed only *prima facie* evidence of the truth of the recitals, and if there is wanting the necessary recitals to show *prima facie,* a compliance with the requirements of the statute in order to give power to sell, or which are in other respects essential to protect the rights of the taxpayer, the sale is held to be illegal, and no title passes to the purchaser under such sale."

While it is possible the commissioner, in the case at bar, grouped several tracts in his report and showed *in solidum* the amounts realized from the sales when the fact may have been that each tract was sold separately for the amount of the taxes, penalty and cost extended against it; yet, the only record before us is the commissioner's report, showing affirmatively the sales were not made in the manner directed by the decree, and as the law requires. Therefore we must hold, in consonance with former decisions, that the deeds executed by the commissioner (which do not appear in the record) are void.

Second. Neither the decrees of foreclosure nor the notices provided for payment of interest. Pertinent parts of § 25 of Act No. 338 of 1915 are printed in the margin.[1]

It will be observed that the court is *required* to render judgment for ". . . the amount of such taxes and

[1] If the assessment [of] the district as certified to by the clerk of the county court to the collector shall not be paid by the time fixed by law for the payment of county taxes, a penalty of 25 per cent. shall attach for such delinquency and the board of commissioners shall institute proceedings in the chancery court for said county to enforce the collection of said delinquency, and said court shall give judgment against said lands and the real property for the amount of such taxes and said penalty of 25. per cent. and the interest on the same for the expiration of the time for the payment of same to the collector at the rate of six per centum and for all cost of said proceedings. Such judgment shall provide for the sale of said delinquent lands for cash by a commissioner of the court after advertisement, as hereinafter set forth.

said penalty of 25 per cent. and the interest on the same . . . at the rate of six per cent. per annum, and for all cost of said proceedings."

It is urged in condonation of the omission that appellants, who would benefit through failure to include interest, are in no position to complain. But the law did not, in declaring the policy in question, contemplate equities of former owners whose rights had been forfeited. Its purpose was to include, in a single suit, all items properly chargeable against the delinquent lands.

Not only does § 25 require that interest be included in the decree, but the form of notice supplied conveys information that the lands will be sold ". . . for the purpose of collecting said taxes, *together with all of the interest,*[2] penalties and costs allowed by law."

In discussing a transaction somewhat similar to that presented in the instant case, the Supreme Court of Minnesota, in *Security Trust Company* v. *Hyderstaedt,*[3] said: "We think [that the provisions to which attention has been called] show beyond any question that the treasurer had no authority to sell to an individual for any amount less than the total due on the day of the sale, which is the judgment, interest and cost; and, if this total amount is not bid, then his duty is to strike the property off as sold to the city. His authority to sell is statutory and limited. . . . The treasurer was vested with power to sell in the way and for the amount so plainly prescribed in the statute. He could not assume the exercise of a power which was not conferred upon him, and sell for less than the amount due. . . . Sale was made, and the certificates issued to the purchaser showed upon their face that the latter as well as the treasurer had disregarded the statutory provisions. A purchaser under such circumstances could acquire no right or interest as against the owner of the property, for he was bound to know and observe the requirements of the law. The certificates were nullities, and constitute no defense in an action to determine an adverse claim."

[2] Italics supplied.

[3] 64 Minn. 409, 67 N. W. 219.

By § 27 of Act 338 it is provided that "In any case where the property is offered for sale by the commissioner, . . . and the sum of the taxes, together with interest, cost and penalty, is not bid for the same, the commissioner shall bid the same off in the name of the road improvement district, bidding therefor the whole amount due, as aforesaid, and shall execute his deed therefor."

The chancery court had no power to order a sale of the property for less than the statutory obligations, and such obligations included interest. Nor could the commissioner sell for an amount less than the taxes, penalty, interest and cost.

Appellee was charged with notice that his bid must include all of the items provided by law, and he could not purchase without paying the statutory interest requirement.

The decrees are reversed, with directions to avoid appellee's deeds to the lands in question, it being made mandatory upon appellants to pay the tenders.

LEE GIN COMPANY, INC. *v.* ARCHILLION.

4-5533 129 S. W. 2d 952

Opinion delivered June 12, 1939.

Reid & Evrard, for appellant.

Shane & Fendler, for appellee.

HUMPHREYS, J. Appellee brought this suit in the chancery court of Mississippi county, Chickasawba district, against appellant, to impress her landlord's lien upon the proceeds of eight bales of cotton grown on her land by T. L. Wall, her tenant in 1937.

Appellant denied her right to impress the landlord's lien on the net proceeds of the cotton because she authorized her tenant, T. L. Wall, to sell and dispose of the crop.

The trial court, after hearing the evidence introduced by the parties, impressed her landlord's lien upon the net proceeds of the cotton in the amount of $232.57, from which is this appeal.

The facts are practically undisputed and are, in substance, as follows: Appellant took a mortgage on March 2, 1937, from T. L. Wall to secure future advances it might make to him which mortgage contains the following recital: "My entire interest in all cotton, corn and other agricultural products grown on the following lands in Mississippi county, Arkansas, S 22, T 15, R 11 East, belonging to Mrs. Archillion. Also one dark bay mule, about 9 years old, name Dock. One light bay mule about 10 years old, name Jim. One Jersey cow, color white, about 2 years old. One wagon, No. 3 Thornhill, and all other farming implements."

Mrs. Archillion owned the land and rented it to T. L. Wall for the year 1937 under a written rental contract for $450. Eight bales of cotton produced on the land were ginned by appellant. It bought one bale of the cotton on September 28, 1937, from Wall. On October 9, 1937, it assisted Wall in placing three bales of the cotton produced on the land in the government loan, receiving the proceeds and on October 21, 1937, assisted him in placing four bales of the cotton produced on the land, receiving the proceeds except $50 paid to Mrs. Archillion for rent by appellant. Appellant furnished T. L. Wall in 1937

and bought one bale, and put seven bales of the cotton produced on the land in the government loan. The seven bales were put in the government loan in Wall's name, representation being made by him that he was the owner thereof and that same was not subject to any lien, but as stated above appellant received the net proceeds thereof holding same in suspension until the determination of this suit and did not credit the amount on Wall's furnishing account. The amount received is not sufficient to pay either the balance of the rent due appellee or the furnishing account due appellant. The gross proceeds of the eight bales was $393.89, but after paying Wall for picking, deducting the charges for ginning and the $50 check it paid appellee on rent it left a net amount retained by appellant of $232.57.

Appellant admits that the evidence is sufficient to show it knew or should have known that the land belonged to appellee and if she had not waived same was entitled to the landlord's lien on the net proceeds in its hands for the balance due her, so it is unnecsary to set out the evidence pro and con on that issue.

There was no written or oral waiver of rents by appellee to appellant. She knew that Wall was ginning with appellant and selling it there. She admitted that she allowed Wall to gin where he pleased and to sell the cotton to whom he pleased and pay her the rent out of the proceeds.

Appellant contends for a reversal of the decree because appellant testified that her tenants were free to take their cotton where they wanted to and to sell it to whomsoever they pleased. They argue that she waived her lien by giving her tenants the right to sell the cotton and they quoted the following question and answer in support of the waiver of the lien:

"Q. Then you have always permitted your tenants to sell cotton without making you a party to the sale and then to pay you from the proceeds of the cotton?

"A. Yes."

Its position is not sound for the reason that it was not a purchaser in the open market without any knowledge

of the landlord's lien. In other words they were not *bona fide* purchasers and did not part with any money in payment of the cotton when they purchased it. They assisted Wall in converting the cotton by acting as his agent in placing the cotton in the government loan. The proceeds from the government loan was not collected by Wall. Appellant retained the amount and still holds it and has never credited the amount on Wall's account. We think the instant case is ruled by *Fletcher* v. *Dunn,* 188 Ark. 734, 67 S. W. 2d 579, in which this court said: "Mere knowledge that her tenant was being furnished supplies by another would not be sufficient to constitute a waiver of appellee's lien. . . . Neither would the fact that appellee knew that appellants were receiving the cotton be a circumstance to estop her from asserting her lien. It was in evidence that the appellants knew that the tenant was farming appellee's land, and she might well assume that they would not attempt to convert the proceeds of the crops to her prejudice, and her acquiescence in their conduct is not shown to have worked any harm to them or placed them in a situation less advantageous than they would have been had she objected to their handling the cotton."

No error appearing, the decree is affirmed.

PHIFER *v.* PHIFER.

4-5519 129 S. W. 2d 939

Opinion delivered June 12, 1939.

J. Loyd Shouse and *John H. Shouse,* for appellant.

Virgil D. Willis, for appellee.

MEHAFFY, J. Howard Phifer and Mary Phifer were married in 1931, and are the parents of one child, about six years old. The present suit involves the custody of this child.

In July, 1938, the parties separated and Howard Phifer brought suit for divorce alleging indignities that rendered his condition intolerable. The complaint in the divorce case shows that they are the parents of one child, Barbara, who at the time the divorce suit was filed was five years old. Mary Phifer did not contest the divorce suit, but signed a waiver of service and entry of appearance. She, at the time, had the child with her. There was nothing said about the custody of the child in the divorce suit, but Mary Phifer, the mother, testified that she did not contest the divorce because her husband Howard Phifer, told her that she could retain custody of the child and that he would support her and the child; that that was the reason she did not employ a lawyer, because she was most interested in retaining the custody of her child.

Howard Phifer testifies that he did not tell the mother of the child that she could have it all the time, but that he did tell her that while she had the custody of the child he would support her.

Shortly after the decree for divorce was granted, Howard Phifer returned to Louisiana, where he has been working for the past three years. He then wanted the child to visit with him, communicated with the mother, and she consented for the child to go to Louisiana on a visit. Howard Phifer testified that when he got the child and took her to Louisiana, he did not intend that she should return to her mother, but he did not tell the mother this. He admitted that if he had told her she would probably have refused to let the child go.

When the parties were first married, Mary Phifer was only seventeen years old. She wanted her husband to provide a home of their own, but instead of doing so he took her to his parents' home, where they resided most of the time until their separation.

After the father secured custody of the child, he and his mother came from Louisiana to Harrison, Arkansas, and both of them stayed at Phifer's sister's house in Harrison. They arrived at Harrison at night, and the next day Howard Phifer filed suit for the custody of the child. The suit was against Mary Phifer, mother of the child. Thereafter, on December 16, 1938, she filed answer and cross-complaint asking for the custody of their child and that the decree for divorce theretofore granted be canceled and set aside, and alleged that said decree was procured by fraud upon the court and against her.

Martha Phifer, the mother of Howard Phifer, filed inter-plea asking for the custody of the child, stating that she was its grandmother and it had nearly always lived with her; that she was a fit person and able to care for it, and that its father and mother were not fit persons to have its custody.

The chancellor entered a decree canceling the divorce decree and also held that, for the time being, the child should remain in the custody of its grandmother, and that the grandmother be required to execute a bond in the sum of $500 for the production of said infant in the court at Harrison on the second Monday in June, 1939, and upon the execution and filing of such bond, she be permitted to take said infant and keep her under the

orders of the court in her home in Louisiana until the second Monday in June, 1939. The court retained control of the infant and the cause of action, and further provided that the grandmother should return it to court for further orders of the court.

Howard Phifer did not file any answer to the interplea or intervention of Martha Phifer, his mother, although she alleged in her intervention that he was not a fit person to have the custody of his child.

Under the common law the primary right to the custody of the children was to the father. This rule, however, has been changed in many jurisdictions by statutes and by the decisions of courts.

Section 6203 of Pope's Digest makes the father and mother joint natural guardians, and § 6205 of Pope's Digest provides that where the parents are living apart, there may be an adjudication of the court as to the power, rights and duties with respect to persons and property of their unmarried, minor children, and in such cases there shall be no preference between the husband and wife, but the welfare of the child must be considered first.

There is no evidence that the mother is unfit to have the care and custody of the child. Howard Phifer, the husband, testified that she was extravagant, and he said that at times she treated the child all right, and at other times she did not try to treat her in any way but ugly. He does not attempt to say in what way she was extravagant or state any facts tending to show that she did not exercise good judgment.

Mary Phifer testified that when they lived together, the husband was receiving $75 per month; that she managed the expenses, paid the bills, and saved some money. This testimony is not disputed by anyone.

The grandmother testified that both father and mother were unfit to have the child because they were careless and went to parties and left the child with her. There is no substantial evidence in the record that tends to show that the mother is unfit to have the custody of the child.

The statements mentioned above are mere conclusions. Witnesses must testify to facts, and the court draws its conclusion from the facts testified to.

Prior to the adoption of the statute making the father and mother joint guardians of the child, this court said: "The father is the natural guardian of his child, and is *prima facie* entitled to its custody. This right of the father is not an absolute one, however, to be enforced under all circumstances; . . . 'When, therefore, the court is asked to lend its aid to put the infant in the custody of the father, and to withdraw it from other persons, it will look into all the circumstances and ascertain whether it will be for the real, permanent interest of the infant.' " *Andrews* v. *Andrews,* 117 Ark. 90, 173 S. W. 850.

"On appeal it is insisted that, as the father at common law is the natural guardian of his minor child, he is entitled to its sole care and custody, unless it is shown that he is incompetent or unfit for such duty. A number of our cases are cited in support of this contention, but this rule is not absolute and may be interpreted and enforced by the court placing the interest of the minor as of paramount importance." *Crawford* v. *Hopper,* 186 Ark. 1098, 57 S. W. 2d 1048.

It will, therefore, be seen this court held, even under the common law, that the right of the father was not absolute. While this was originally a suit between the father and mother of the child for its custody, it is here a contest between the mother and the grandmother. It is contended that the mother is not financially able to care for the child. The undisputed evidence shows that she went to school after the separation from her husband, and now has an opportunity to earn $75 a month; that her mother, if appellant wants her, will live with her, and her mother is receiving a pension from the railroad. Appellant's mother has two sons, 15 and 19 years of age.

On the other hand, the grandmother claims and testifies that she and her husband own a farm in Boone county; they do not testify anything about the amount of rent they receive from it, and do not testify anything

about its value; they do say that more than three years ago they left this home, moved to Louisiana, and there the husband is receiving $100 a month. They have no property in Louisiana and the evidence does not show how much rent they pay. The evidence shows that it is uncertain when they will return to Boone county, if ever, and there is no evidence tending to show the value of the property owned by the grandmother and grandfather. The child is going to school in Louisiana, but the school is 14 miles from where they live, and the little six year old child must go on the bus. She is making good progress in school; but the undisputed evidence shows that her mother, the appellant, taught her to read and write before she ever attended kindergarten.

There is no doubt but that both the grandmother and mother are attached to the child, and it has affection for them. That is not unusual.

"The law recognizes the preferential rights of parents to their children over relatives and strangers, and where not detrimental to the welfare of the children, they are paramount, and will be respected, unless special circumstances demand that such rights be ignored." *Johnston* v. *Lowry,* 181 Ark. 284, 25 S. W. 2d 436; *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726; *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513.

"Courts are very reluctant to take from the natural parents the custody of their child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life." *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474.

This court, in speaking of the right of the parents to the custody of a child, and defining the principles and circumstances that might justify a court in giving the custody to someone other than the parent, said: "It is impossible to define them, further than to say that they should be of such urgency as to overcome all considerations based upon the natural affections and moral obligations of the father." *Verser* v. *Ford,* 37 Ark. 27.

It is one of the cardinal principles of nature and of law that as against strangers or relatives, the parent, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone. *Verser* v. *Ford, supra.*

Appellant entered her appearance and permitted Phifer to get a divorce because she understood that she was to have the custody of the child, and that was the principal thing she wanted. She not only testifies very positively that this promise was made, but Phifer himself testifies that he told her he would support the child while she had the custody of it, and did not at any time intimate that he intended to try to get the custody of the child. When he got permission of the mother to take the child on a visit to Louisiana, he admits that he left the impression that she would be back in a few days, and did not intimate to her that he intended to keep the child; but he says that at that time he had the intention of keeping the child. He did not intend to return it to its mother.

The chancellor evidently thought that since the child was in school in Louisiana, it would be to the best interest of the child to continue with the grandmother until the term of school was closed. We think, however, that under the evidence in this case, the custody of the child should have been awarded to the mother.

The chancellor, of course, has the right to retain control of the case and if there are changes in the conditions which make it necessary to do so, he may change the custody of the child.

The decree of the chancery court is reversed, and the cause remanded with directions to enter a decree awarding the custody of the child to its mother.

4-5524 129 S. W. 2d 599

Opinion delivered June 12, 1939.

[redacted]

S. Hubert Mayes, for appellant.

L. B. Smead, for appellee.

McHANEY, J. Sometime in 1937, Henry Knickerbocker brought suit in the Cleveland circuit court against Roy Sturgis, doing business as Roy Sturgis Lumber Company, hereinafter called appellee, to recover damages for personal injuries sustained by him on March 9, 1937, while in the employ of appellee, through the negligence of one L. F. Griffin, a vice-principal of ap-

pellee and Harry Knickerbocker, a servant of appellee. An answer was filed denying all the material allegations of the complaint, and specifically that the plaintiff was not in appellee's employ, but that he was an independent contractor. Assumption of risk and contributory negligence were also pleaded in defense. Trial to a jury on January 5, 1938, resulted in a verdict and judgment against appellee for $550.

At the time of the injury to said Knickerbocker and thereafter appellee held a policy of liability insurance issued by appellant insuring him "against loss from liability imposed by law upon the assured for damages (direct or consequential) on account of bodily injuries, including death resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons other than the direct employees of the assured . . . ." Said policy also provided that appellant would defend any such action in the name of the assured. In paragraph VI it is provided: "This policy does not cover: . . . (2) any accident to any direct employee of the assured; (3) any accident caused directly or indirectly by any direct employee of the assured . . ."

On July 20, 1938, appellee brought this action in the Ouachita circuit court against appellant to recover the amount of the aforesaid judgment, $550 plus $25 court costs and $225 attorney's fee paid by him, or a total of $800. In his original complaint against appellant, appellee alleged, "that on the 9th day of March, 1937, Henry Knickerbocker was an employee of the insured." But in his "second amended and substituted complaint" he alleged that said Knickerbocker was employed "as a contractor of the assured" and "that the said Henry Knickerbocker was not an employee of the plaintiff herein at the time of the injury."

To the original complaint there was filed by appellant a plea of *res adjudicata* to which was attached as exhibits certified copies of the complaint, the answer and the judgment in connection with the action in the Cleveland circuit court in which Henry Knickerbocker was plaintiff and appellee was defendant. This plea

was overruled. To the amended and substituted complaint herein appellant filed its supplemental plea of *res adjudicata,* preserving its exceptions to the former action of the court. In the first plea it was alleged that the provisions of the policy do not cover direct employees and that in the suit by Knickerbocker against appellee, he alleged he was an employee which was denied by the answer, and "that the issue of the relationship of said Henry Knickerbocker and Roy Sturgis Lumber Company having been definitely adjudicated and concluded by the judgment in the case in the Cleveland circuit court, the plaintiff herein has no cause of action against the defendant on the policy sued on" and should be discharged. In the supplemental plea it was set up that, in the Knickerbocker complaint filed in the Cleveland circuit court, "it is alleged that Harry Knickerbocker and L. F. Griffin were employees of the Roy Sturgis Lumber Company and that through their negligence the said Roy Sturgis Lumber Company was liable for failure to perform certain duties required under law by an employer to his employees;" that the answer denied this negligence and it became an issue which was determined and concluded by that judgment; and that under the policy sued on there is no liability for injuries caused directly or indirectly by direct employees of the assured. This supplemental plea was likewise overruled. An answer was filed denying all material allegations of the complaint and asserting the grounds of the pleas as a further defense. Trial resulted in a verdict and judgment for $800, hence this appeal.

It is undisputed in this record that appellant was notified of the suit in the Cleveland circuit court and that it undertook its defense. It filed a demurrer to the complaint and then decided its policy did not cover the alleged injury and withdrew from the defense. Whereupon, appellee employed an attorney and defended the action with the result heretofore stated.

We think the court erred in not sustaining either or both pleas of *res adjudicata.* Two issues were joined in the suit in the Cleveland circuit court. One was

whether Henry Knickerbocker was an employee of appellee or an independent contractor. The other was whether his accident was the result of the negligence of Harry Knickerbocker and L. F. Griffin, admitted direct employees of appellee. There could have been no recovery in the Cleveland circuit court if Henry Knickerbocker had been found to be an independent contractor. Knickerbocker asserted that he was an employee, a servant, and the jury so found. It also found by its verdict that he was injured by reason of the negligence of Harry Knickerbocker and L. F. Griffin, or one of them. Otherwise there could have been no judgment against appellee. In either case there was no liability of appellant under the express terms of the policy.

The question that has given us most concern is, can appellant, not a nominal party to the action in the Cleveland circuit court, plead in this action the former judgment and record of said court? We think it may do so, and that its pleas to this end are sufficient and timely. It has frequently been held by this court that "a judgment of a court of competent jurisdiction upon matters in issue in a former proceeding or which might have been determined in that suit is conclusive between the same parties or their privies in a subsequent suit." Headnote to *Blackwell Oil & Gas Co.* v. *Maddux,* 182 Ark. 1152, 34 S. W. 2d 450. Numerous cases might be cited to the same effect. In fact, appellee concedes this to be the law, but says appellant was neither a party nor privy to a party to the action, and cannot, on this account invoke the plea. We cannot agree with appellee in this contention. We do not find a case in this court directly in point, nor has the diligence of counsel been productive in this regard. But there are well reasoned cases from other jurisdictions, cited by appellant, which support its contention. Such a case is *Edinger & Co.* v. *Southwestern Surety Ins. Co.,* 182 Ky. 340, 206 S. W. 465. In that case, to quote a headnote in the S. W., it was held: "Where indemnity policy exempted liability for injury from vicious animals, an injured blacksmith recovered judgment against the insured for kick from mule, upon the finding

that the mule was vicious, the judgment was *res judicata* as between the insured and the insurer; the insurer having been made a party by the service of notice of the action, though it refused to participate in the trial."

In that case Edinger & Co., had a policy, but which exempted it from liability for injury and resulting damage caused by vicious horses. Humphrey, a blacksmith, was kicked and injured while shoeing a mule for Edinger & Co. He sued to recover damages, alleging that the mule was vicious. Edinger & Co. denied that the mule was vicious. Trial resulted in a judgment against Edinger & Co. It then sued its insurer who defended on the ground that the judgment in favor of Humphrey was a conclusive adjudication of the fact that the mule was vicious and that by the terms of its contract with Edinger & Co., it was excused from liability to it. The trial court took that view and instructed a verdict for the insurance company. In affirming the judgment, the Kentucky court stated the question for decision as follows: "Was the verdict of the jury in the Humphrey case, and the judgment thereon, such an adjudication of the fact that the mule in question was a wild and vicious animal as to relieve the insurance company from liability on its policy contract, although it was not a party to the suit between Humphrey and Edinger & Co?" In answering the question in the affirmative, the court said: "There would seem to be no escape from this conclusion if the insurance company should be treated, as it must be, as a party to the suit of Humphrey against Edinger & Co., to the same extent as if it had been a party of record, or had undertaken, as it had the right under its contract to do, the control and defense of the suit for Edinger & Co.. The policy contract gave the insurance company the right to take charge of the defense for Edinger & Co., and when it was notified by them of the pendency of the action against it, and called on to defend the same, it was thereby put in the attitude of a party to the suit, and was as much bound by the judgment as if it had been in fact a party of record. This well-established principle was set down by the New Hampshire court in the early

case of *Littleton* v. *Richardson,* 34 N. H. 179, 66 Am. Dec. 759, and has been followed by a number of courts, including this, as may be seen by a reference to *Washington Gaslight Co.* v. *District of Columbia,* 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; *City of Portland* v. *Richardson,* 54 Me. 46, 89 Am. Dec. 720; *Westfield* v. *Mayo,* 122 Mass. 100, 23 Am. Rep. 292; *Catterlin* v. *City of Frankfort,* 79 Ind. 547, 41 Am. Rep. 627; *Board of Councilmen of City of Harrodsburg* v. *Vanarsdall,* 148 Ky. 507, 147 S. W. 1; *Woodward* v. *Allen,* 3 Dana, 164; *Elloitt* v. *Saufley,* 89 Ky. 52, 11 S. W. 200, 10 Ky. Law Rep. 958; *Walker* v. *Robinson,* 163 Ky. 618, 174 S. W. 503."

In *Littleton* v. *Richardson, supra,* the court said: "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared, or not, of every fact established by it."

So it would appear to follow necessarily that if Knickerbocker had recovered a judgment against appellee for injuries covered by the policy contract, such judgment would have been conclusively binding on appellant to such an extent, that it could not, in this action, have opened up or relitigated the facts on which such judgment was based. The converse of the proposition must also be true, that, a judgment based on facts not covered by the policy would excuse appellant from liability in appellee's suit on such judgment. In such cases the courts generally treat the insurer with notice of the suit as a party or privy to the action. When so considered our cases on *res adjudicata* apply. In line with the holding in the Edinger & Co., case *supra,* see *State* v. *Fidelity & Cas. Co. of N. Y.,* 156 Md. 684, 145 Atl. 182, 23 Cyc. 1273.

Whether appellant may have estopped itself from insisting that its policy did not cover the injury to Knickerbocker by its undertaking the defense of the action in the Cleveland circuit court, as above stated, is not here considered, as the question was not raised below nor here.

We, therefore, conclude that the pleas should have been sustained. The judgment is reversed and the cause dismissed.

FIREMEN'S RELIEF & PENSION FUND OF STUTTGART *v.* RITTMAN.

4-5542 129 S. W. 2d 595

Opinion delivered June 12, 1939.

Al G. Meehan and *John W. Moncrief,* for appellant.

Wm. C. Gibson and *Ingram & Moher,* for appellee.

McHaney, J. On January 3, 1935, appellee filed his petition with the board of trustees of Firemen's Pension Fund of Stuttgart, alleging that for more than twenty years prior to December 21, 1924, he had served continuously as a regular appointed and enrolled member in good standing of the fire department of the city of Stuttgart, as an active volunteer fireman of a part or full paid department, and consecutively for more than five years immediately preceding his retirement on December 21, 1924, and praying that he be declared entitled to participate in the relief and pension fund, beginning at that date. His petition was denied.

Thereafter, he brought this action in the circuit court for a writ of mandamus to compel appellants to enroll him as a pensioner. Defense was made on a number of grounds, including limitations, laches, failure to comply with the governing statute and by failure to cause a proper certificate, showing his service as a fireman, to be filed with the State Insurance Commissioner or Fire Marshal. Trial to a jury resulted in a verdict and judgment against appellants—hence this appeal.

The Legislature of 1921 enacted Act 491, p. 454, Acts of 1921, digested as § 7737 *et seq.,* Pope's Digest, which is the applicable statute. Section 4 of said act digested as § 7740 of Pope's Digest provides that: "Any person, at the taking effect of this act or thereafter, who shall have been duly appointed and enrolled and has served for a period of twenty years or more in some Fire Department in the State of Arkansas, as now constituted, five years of which shall have been consecutive, immediately preceding the end of such period, as a mem-

ber in any capacity or rank whatever, of a regularly constituted fire department . . . which is or may hereafter be subject to the provisions of this act, and his service in such fire department shall have ceased, shall be entitled to be retired from such service and . . . to be paid from such fund a monthly pension," etc.

This section contemplates membership in a fire department "at the taking effect of this act or thereafter." The member must have "been duly appointed and enrolled" and he must have "served for a period of twenty years or more in some fire department . . . as now constituted, five years of which shall have been consecutive, immediately preceding the end of such period," meaning the last five years of the twenty-year period. If, therefore, appellee was not a member of the fire department of Stuttgart at the date of the passage of said act, having been duly appointed and enrolled, or if he had not served as such twenty years, five years of which were consecutive immediately preceding his retirement, he is not eligible for a pension under the plain terms of the act. Section 16 of said act as amended by § 1 of Act 214 of 1927, digested as § 7752 of Pope's Digest, reads as follows: "It is hereby made the duty of the clerk of each city or town in the state in which an organized fire department is maintained having fire fighting apparatus of the value of $1,000 or more, to file on or before the 31st day of December of each year with the Commissioner of Insurance and Revenues or his successor in office having in charge the Insurance Department of the State of Arkansas, showing the existence of such fire department, the number of steam, hand, and other engines, hook and ladder trucks, hose carts, and number of feet of hose in actual service, the number of organized companies, and the system of water supply in use in such departments; the number of men, with their names, date of appointment, and date of expiration of term."

The city clerk of Stuttgart made and filed his first certificate in compliance with said section with the State Department on November 30, 1925, in which he listed the names of ten members of the fire department, and ap-

pellee's name was not included. Thereafter a certificate was filed annually, but in none of them did appellee's name appear. According to appellee he was a member of the fire department from 1899 to December, 1924. If so he was a member when the above statute was enacted and remained so for nearly three years thereafter. The certificate made pursuant to its provisions did not show him to have been a member at any time. The omission of this certificate to show him to be a member or having been a member is a strong circumstance tending to contradict his contention.

Moreover the city records do not show him to have been a member duly appointed and enrolled after March 18, 1912. He answered no roll calls, he received no pay and he was not listed as a member on any of the written or printed membership rolls or lists filed with the city in reporting fires and showing the firemen present or absent thereat, after said date. He says he attended fires after said date, but did not draw any pay. No doubt he did attend fires as did many other citizens, but the records contradict him and his witnesses that he served as a duly appointed and enrolled member of the fire department after said date. He delayed twenty-three years after the last date his name appears on any record, fourteen years after the passage of said act and ten years after the first certificate was filed with the State Department to claim membership therein and assert rights under the statute. We think he may not thus collaterally attack the records of the city and the fire department of Stuttgart, or thus attack collaterally the certificate made to the state. *Paragould* v. *Thompson,* 190 Ark. 847, 82 S. W. 2d 31.

The written and printed records of lists of enrolled members of the fire department, those present at fires and those absent, from March 18, 1912, show that he was not a member of the fire department of Stuttgart after that date, his name not being mentioned in any such list of members after that date, and constitute the best evidence of his membership, which would exclude oral testimony contradictory thereof, on collateral attack such as

this proceeding is. There is, therefore, no competent evidence in the record to show that appellee brought himself under the terms and conditions of said act so as to entitle him to be placed on the pension rolls.

The court erred in not so holding, and the judgment will be reversed and the cause dismissed.

CALDARERA *v.* MCCARROLL, COMMISSIONER OF REVENUES.

4-5599 129 S. W. 2d 615

Opinion delivered June 12, 1939.

J. Hugh Wharton and *Rose, Loughborough, Dobyns & House,* for appellant.

Frank Pace, Jr., Jack Holt, Attorney General, *Millard Alford,* Assistant Attorney General, for appellee.

Charles W. Mehaffy and *Joseph M. Hill, amici curiae.*

HUMPHREYS, J. Appellants are wholesale dealers of intoxicating beer and as such have brought this suit in the chancery court of Pulaski county to enjoin Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, from enforcing § 1 of Act 310 of the Acts of 1939 on the ground that it increases the excise or privilege tax imposed on wholesalers of intoxicating beer under Act 7 of the Acts of 1933, 108 of the Acts of 1935, and 236 of the Acts of 1937, and is in violation of § 2 of Amendment No. 19 to the Constitution of the State of Arkansas, which Constitutional provision is as follows:

"None of the rates for property, excise, privilege, or personal taxes now levied shall be increased by the General Assembly, except after the approval of the qualified electors voting thereon at an election, or in case of an emergency, by the vote of three-fourths of the members elected to each house of the General Assembly."

This provision of the Constitution inhibits the General Assembly from increasing the rates on property, excise, privilege or personal taxes now levied, except after the approval of the qualified electors voting thereon at an election, or in case of an emergency, by a vote of three-fourths of the members elected to each house of the General Assembly.

It is conceded by appellee that the qualified voters of the state have not authorized the General Assembly to increase the rates for property, excise, privilege or personal taxes and that Act 310 of the Acts of 1939 was not passed by a vote of three-fourth of the members

of the General Assembly, so it follows that if Act 310 of the Acts of 1939 increases existing rates of excise or privilege taxes imposed upon wholesale dealers of intoxicating beer the act is unconstitutional. The converse is of course true. If Act 310 of the Acts of 1939 does not increase the rate of existing excise or privilege taxes imposed upon wholesale dealers of intoxicating beer by other statutes then the act is constitutional.

The excise or privilege tax imposed upon wholesale dealers of intoxicating beer in the State of Arkansas under the acts mentioned above is at the rate of one dollar and fifty cents for thirty-two gallons (and proportionately for larger or smaller quanities) on beer received, handled, possessed, manufactured or sold. These acts do not authorize the wholesale dealer to collect the taxes from retailers or pass it on to consumers. Under those acts it was strictly an excise or privilege tax imposed upon the wholesale dealer.

The title and § 1 of Act 310 of the Acts of 1939 read as follows:

"An act to levy a consumers' sales tax upon liquor, beer and wines: 'To provide funds for the University of Arkansas School of Medicine and a charity hospitalization program in conjunction therewith; to provide funds for the sanatorium building fund; to provide funds for the hospitalization of indigent sick, for the county tuberculosis fund, for the State Health Department, and for other purposes.'

"Section 1. There is hereby levied and imposed upon all sales of beer at retail within this state a new tax to be known as the 'Beer Consumers Sales Tax' which shall be paid by the consumer and shall be collected as hereinafter provided. Said Beer Consumers Sales Tax shall be levied at the rate of three dollars and fifty cents ($3.50) per barrel of thirty-two (32) gallons, (and proportionately for larger and smaller quantities) and shall be collected by the wholesaler from the retailer, who in turn shall pass on said tax to the consumer, if the retailer elects, by an increase in the retail price of beer of no more than one cent per bottle or glass of approximately

twelve ounces. Said tax shall be collected by the Commissioner of Revenues from the wholesaler as heretofore provided in such manner and under such regulations as the Commissioner shall deem necessary. . . ."

There is no ambiguity in the language used in Act 310 of the Acts of 1939 that might be or could be construed to mean that the Legislature intended to increase the rate of the privilege or excise tax imposed upon the wholesale dealers of intoxicating beer by other acts of the Legislature. It is an excise or privilege tax imposed upon the retailer of intoxicating beer with the privilege of the retailers to pass it on to the consumers by increasing the retail price of intoxicating beer of no more than one cent per bottle or glass of approximately twelve ounces. It has nothing whatever to do with the excise or privilege tax imposed by existing acts upon the wholesale dealer. They are separate taxes imposed upon different classes of people which the retailer may pass on to the consumer by including it in the retail price under certain restrictions, or the retailer may absorb it himself if he wants to sell beer at the same old price.

The General Assembly expressed itself in such concise, clear and unambiguous language that there is no room for construction by the court. This court said in the case of *Cunningham* v. *Keeshan,* 110 Ark. 99, 161 S. W. 170, that: "There are certain elemental rules of construction to be observed in the interpretation of statutes from which we will not depart. One is that, where a law is plain and unambiguous, there is no room left for construction, and neither the exigencies of a case nor a resort to extrinsic facts will be permitted to alter the meaning of the language used in the statute."

And again said in the case of *Arkansas Valley Trust Co.* v. *Young,* 128 Ark. 42, 195 S. W.. 36, that: "Where the language of a statute is unambiguous the intention of the Legislature must be gathered therefrom. If we change it, we thereby encroach upon the peculiar function of the sovereign power lodged in a coordinate branch of the government."

Our conclusion is that the legislative intent by the passage of Act 310 of the Acts of 1939 was to levy a new tax upon different parties other than a tax under the previous beer laws of the state and is not an attempted increase of the taxes levied by previous acts upon wholesale dealers of intoxicating beer and that its passage was not inhibited by Amendment No. 19 to the Constitution of the State of Arkansas. We do not understand that appellants seriously contend that the General Assembly does not have the power to levy a new and distinctly separate tax from that existing under previous statutes upon the privilege of sale to the consumer of intoxicating beer, but their argument is that the effect of the passage of Act 310 of the Acts of 1939 was to impose upon wholesalers an increase in the rate of pre-existing taxes imposed upon them. We cannot agree with them as to the effect of the passage of Act 310 of the Acts of 1939. As stated above the effect was to impose a new tax upon a different party and to make wholesale dealers the agent of the state for collecting the new tax for the state.

No error appearing the decree is affirmed.

SMITH, MEHAFFY, and BAKER, JJ., dissent.

GRIFFIN SMITH, C. J., and HOLT, J., concur.

GRIFFIN SMITH, C. J., (concurring). Act No. 7, approved August 24, 1933, is an act to permit the manufacture, sale, and distribution of light wines and beers, and to provide for taxing such products.

The term "beer" was defined as "any fermented liquor made from malt or any substitute therefor, and having an alcoholic content of not more than 3.2 per cent. by weight."

"Intoxicating liquor" was declared to mean vinous, malt fermented liquor or distilled spirits with an alcoholic content in excess of 3.2 per cent. by weight.

Certain taxes were levied by § 4. By § 5 it was provided that funds realized from such taxes were to be used for the state's constitutional, educational, and charitable institutions and departments, such moneys to be deposited in the treasury to the credit of "The Beverage Tax Fund, which is hereby created."

Section 10 is: "The purpose of this act is to legalize the manufacture and sale within the state of beer and light wine of an alcoholic content not in excess of 3.2 per cent by weight, and to so regulate the business of manufacturing and selling such liquors as to prevent the illicit manufacture and consumption of liquor having an alcoholic content in excess of 3.2 per cent by weight, the manufacture and sale of which it is not the purpose of this act to legalize."

Section 13 directs that "Before any permit authorized by this act shall be issued and delivered to any applicant therefor, such applicant shall make and subscribe to an oath that he will not allow any intoxicating liquors as defined by this act, of any kind or character, including beer or light wine and distilled spirits having an alcoholic content in excess of 3.2 per cent. by weight, to be kept, stored, or secreted in or upon the premises described in such permit."

Section 19, in part, is: "It shall be unlawful for any brewer or distributor of light wines or beer to manufacture or knowingly bring upon his premises and keep thereon any beer or wine of an alcoholic content in excess of 3.2 per cent. by weight, or any distilled spirits of any alcoholic content whatever."

It will be noted that in creating the fund arising from the sale of light wines and beer, such fund is designated a "Beverage Tax Fund." However, in § 10, the wines and beer legalized by the act are referred to as "such liquors," the alcoholic content being expressly limited to 3.2 per cent.

There can be no doubt that the legislature intended to adopt, and did adopt, the definition found in the act of Congress generally refered to as the Volstead Act, the determination under the federal statute having been that beer containing not in excess of one-half of one per cent. of alcohol by volume was not intoxicating.

Act 108, approved March 16, 1935, legalized the sale of intoxicating liquors, title being "The Arkansas Alcoholic Control Act." Between 1933 and 1935 national prohibition was repealed, and this state proposed to aban-

don the so-called "dry" policy it had fostered for so many years.

The 1935 enactment (§ 6) 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 No. 7 of . . . 1933."

The word "malt" was defined as "liquor brewed from the fermented juices of grain and containing not more than 5 per cent. of alcohol by weight. 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 excepted from each and every provision of this act."

The effect of act 108 was to classify as malt liquor any commodity containing more than 5 per cent. of alcohol, and to designate as "malt beverages" those drinks having an alcoholic content of more than 3.2 per cent. and not more than 5 per cent. Act No. 7 had classified any malt fermented liquor having an alcoholic content of more than 3.2 per cent. as an "intoxicating liquor." Act 108 applied a new term to the commodity occupying the twilight zone between "3.2 per cent. and not more than 5 per cent.," in consequence of which "malt beverages" emerged for the purpose of sale and taxation, as distinguished from beer having an alcoholic content of not more than 3.2 per cent.

Recognition of *light wines and beer,* as defined by the 1933 enactment, was given by the general assembly of 1939. Section 4 of act 173 is: "Because doubts and uncertainties need to be speedily resolved as between the industries affected, the courts and the public, with respect to what apparently was, and is, the intention of the general assembly *to keep separate and apart the taxation, regulation and control of the manufacture, sale, and distribution of light wines and beers, as expressed in act No. 7 of 1933, from alcoholic liquors, as expressed*

in act No. 108 of 1935, an emergency is hereby declared to exist." [Italics supplied.]

While act 108 undertook to except from its provisions all malt beverages containing not more than 5 per cent. of alcohol, and to tax and regulate malt beverages containing more than 3.2 per cent. of alcohol and not more than 5 per cent. under the provisions of act No. 7 of 1933, yet in every sentence of every classification, and in every definition or explanation in the two acts, it was made clear that in the first instance a non-intoxicating malt beverage was legalized, while by act 108 an entirely different commodity was dealt with. Indeed, by the express language of act 7, any malt fermented liquor having an alcoholic content of more than 3.2 per cent. is an intoxicating liquor, *and it is not the commodity taxed or authorized to be sold.*

Amendment No. 19 to our Constitution was adopted in November, 1934. It prohibits any increase of the rates of property, excise, privilege, or personal taxes, *as then levied,* except by vote of the people, or in case of an emergency, then by a vote of three-fourths of the members elected to each house of the general assembly.

The tax on non-intoxicating malt beverages was an existing tax when the amendment was adopted, and therefore cannot be increased except in the manner mentioned.

Intoxicating malt beverages—those having an alcoholic content of more than 3.2 per cent. and not more than 5 per cent.—emerged from the legislative mill in 1935 as a new product, a separate and distinct commodity occupying the field between the extremes of intoxicating liquors and non-intoxicating beers. Being a new product, it was made legally saleable in this state *after* Amendment No. 19 was adopted, and therefore the taxes levied and the permits required by act 310 of 1939 are not within the purview of the amendment.

Mr. Justice HOLT concurs in the views herein expressed.

STANDARD COFFEE COMPANY *v.* WATSON.

4-5562 129 S. W. 2d 948

Opinion delivered June 19, 1939.

[redacted]

Huie & Huie, for appellant.

G. W. Lookadoo and *J. H. Lookadoo*, for appellee.

SMITH, J. Appellee, a resident of Pulaski county, recovered judgment for $12,500, in the Clark circuit court, to compensate an injury sustained in Grant county. At the time of his injury, appellee's employment was in the nature of an apprenticeship, learning the business of selling and delivering coffee to the customers of the appellant coffee company. His wages, while so employed, were $9 per week. He was under the supervision of David Ray, an experienced salesman. It was necessary for a new man to travel for about three weeks with a regular route salesman to learn the customers and the method of selling coffee, so that he could take a route of his own. Ordinarily, orders were taken for delivery two weeks later. Ray was provided with a truck in which he carried the coffee previously ordered.

Sheridan, Arkansas, was in Ray's territory, and he and appellee had been engaged, on the day of March 9,

1937, in taking orders and in making deliveries. They ate supper at a hotel in Sheridan, and about 7:30 p. m. drove away in the truck. Their purpose in doing so is one of the sharply controverted questions of fact. Appellee testified that it was their purpose to call on certain customers whom they had failed to see during the day, and that, while doing so, through Ray's negligence, they had a collision with another car, which was badly damaged, and appellee was hurt. Ray reported the collision to the company's manager at Little Rock, who came to the scene of the collision, and, being advised by Ray that the collision occurred while he was pursuing his employment, the manager paid the owner of the car with which the truck had collided for damages sustained to the car. Ray admitted making this statement to the company's manager, and admitted making the same statement to appellee's attorney before the suit was brought. He testified that statement was untrue, and had been made to save his job, as he knew he would be fired, if it were known that he had violated his instructions about using the truck for personal purposes. Ray, who was not employed by the appellant company at the time of the trial, testified that he and appellee had finished their day's work on March 9th, and had arranged for the next day's work, after which they left to visit a night club near Sheridan, and that they had no customers on the road out of Sheridan over which they drove to the night club. A lady employed at the club testified that Ray and appellee stopped at the club between 2 and 2:30 on the afternoon of the day of the collision, and that Ray said, in appellee's presence, that they would return that night to "dance a couple of numbers." Bates, the operator of the club, stated that he saw Ray and appellee after the collision, and again the next morning, and that he asked Ray, in appellee's presence, "Where in the world were you boys going in such a hurry?" and Ray answered, "Well, we were going out to your place." However, appellee testified that they were pursuing their employment, when the collision occurred, and that they had called on two customers, whose names he did not know. This conflict in the testimony made the question one for the jury, whether appellee and

Ray were pursuing their employment when the collision occurred.

It is insisted that the damages awarded were grossly excessive; and we think they were. It is true appellee testified that he suffered much pain the night he was injured, and was required to take four aspirin tablets to sleep, and his uncle, who slept in the room with him that night, testified that he had heard appellee groaning during the night. Appellee completed his apprenticeship and acquired a route of his own, but he suffered some pain every day when he drove his car, and on some days he would take an entire box of aspirin to obtain relief. He was finally compelled to quit work and rest up, and had sustained a loss in weight, and had become nervous and easily excited, and his general physical condition was not good.

Dr. R. L. Bryant testified that he took an X-ray picture of appellee, and had otherwise examined him. He found appellee to have "considerable tenderness and rigidity of the muscles, neck, back, and hips, and there was a visible curvature of the upper thoracic or chest portion of the spinal column to the left side. The curvature of the back is a very pronounced definite condition, and shows up in the X-ray, and there is an injury to a joint between the back and pelvis on the right side, or the right sacroiliac joint, with some separation at this joint, a space." And this witness attributed the curvature of the spine to an injury, although he admitted that he found no fracture or other evidence of an injury which could have caused the curvature of the spine. A hypothetical question was propounded to this witness, which contained a recital of the manner in which appellee stated he had been injured, this being that, as the truck collided with the car, cartons of coffee in the rear of the truck, weighing 60 pounds, were thrown upon him. The doctor said that such a condition as he found could have been caused by an injury of that kind.

This doctor admitted that he had never seen appellee until September 20, 1938, which was more than a year and a half after the collision occurred, and that the only evi-

dence of an injury which he found was a curvature of the spine. He admitted that appellee may have been born with this curvature, as many people were, and he also stated that, if one received an injury sufficient to cause the curvature, he would be put to bed immediately, and that he "did not believe that any one having that serious type of injury could go ahead at his work, stooping and lifting and physical exertion." He also admitted that such pains in the back as those of which appellee complained could be, and frequently were, caused by an enlarged and tender prostate.

Opposed to this testimony was that of a number of doctors, whose qualifications were admitted, who testified that they had made and had examined X-ray pictures of appellee, and that they found no evidence of any curvature of the spine or of any injury of any kind. There was one fact, however, upon which all the doctors were agreed, and that was that an injury sufficiently severe to cause curvature of the spine would, for some time at least, render incapable the injured party from doing any kind of active work.

Ray testified that none of the packages were thrown over the seat, and persons who assembled after the collision testified that they saw none which had been, although there was testimony that "the impact was strong enough that it knocked the wheels down on the car."

In view of the jury's verdict, we must assume that appellee was injured in the manner stated by him. However, there are certain facts relating to the extent of his injury which are undisputed, even by appellee.

After the collision appellee got out of the truck, and went to look at the road, and stood around the place of the collision for an hour or more, waiting for another party. The witnesses who saw him testified that he walked and acted naturally, and showed no evidence of an injury, and did not state that he had been hurt. Appellee reported for work the next morning and discharged his usual duties, which required him to get in and out of the car from forty to fifty times a day. The truck had been disabled and another car supplied. Appellee's employ-

ment required him to handle the heavy cartons of coffee. He continued in that employment for several months after his injury, and had acquired a route of his own, although he testified that he was assisted in loading the cartons of coffee into his truck. The testimony shows that appellee lost considerable weight, but it is undisputed that his tonsils were infected, and that he had an enlarged and tender prostate, and that he suffered from colitis. He had a chronic infection of his leg, for which he was twice operated upon, the last time in 1935, and he had a discharge from his penis in the fall of 1937 and the spring of 1938. While appellee consulted doctors for other purposes, he did not receive any treatment for the injury sustained in the collision. He was provided with and put in charge of a route of his own about the last of March, 1937, and his reports to appellant company continuing to the last of October, show that he was regularly employed each week during that time, with an increase of earnings. On May 7, 1938, he made application to another company for employment as a solicitor, in which he stated that he had no physical defects, and on the 18th of that month he wrote a letter to appellant's superintendent, in which he stated: "I take this opportunity of thanking you and Standard Coffee Company for all that you have did for me." The letter contained no intimation that he had received an injury while employed by appellant.

We must assume, however, in view of the verdict of the jury, that appellee did sustain an injury; but it appears to us that it would be an abdication of our function, to review trials in the court below, which come on appeal to this court, to affirm the judgment for the amount for which it was rendered. The undisputed testimony, including that of the expert physician who testified in appellee's behalf, is to the effect that, had he sustained an injury of sufficient severity to curve his spine, he would immediately have been confined to his bed. He was not confined, and consulted no doctor until he brought this suit, and he continued his employment without any loss of time on account of his injury.

It appears to us, therefore, that any recovery in excess of a thousand dollars would be excessive, and the judgment will, therefore, be reduced to that amount, and, as thus modified, is affirmed. *M. P. Rd. Co.* v. *Remel,* 185 Ark. 598, 47 S. W. 2d 548; *Coca Cola Bottling Co.* v. *Eudy,* 193 Ark. 436, 100 S. W. 2d 683.

HUMPHREYS, MEHAFFY and BAKER, JJ., dissent.

MEHAFFY, J., (dissenting). I cannot agree with the majority in holding, in effect, that this court has the right to sit as a jury and determine the amount of damages that an injured person is entitled to recover.

It is true that this court has several times decided that verdicts were excessive and reduced the judgment to the amount that this court believes is not excessive, and affirmed the judgment for such amount. I think when it does this, when it constitutes itself a jury to determine the extent of the injury and the amount the injured person is entitled to recover, it violates the Constitution.

Section 7 of art. 2 of the Constitution 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."

"What does the Constitution mean when it says "trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy"? Does that mean that when the jury decides a question of fact, decides the amount that an injured person is entitled to recover, this court, if it happens to disagree with the jury, can pass on the facts and fix the amount and compel the appellee to accept the amount so fixed? I do not think so. I think it means that the finding of facts by a jury, if there is any substantial evidence to sustain the finding, is conclusive; and this court cannot set aside the verdict if supported by substantial evidence. If this court could fix the amount it would be doing exactly what the Constitution says the jury shall do. This court has no more right to substitute its judgment for the judgment of the jury, than the jury

has to substitute its judgment for the court's on a question of law. In other words, questions of law are to be decided by the court, and questions of fact are to be decided by the jury.

Section 1538 of Pope's Dig. provides, among other things, that the verdict shall not be held excessive or be set aside as excessive, except for some erroneous instruction or upon evidence, aside from the amount of damages assessed, that it was rendered under the influence of passion and prejudice. Of course the legislature did not intend to say, and did not mean, that a verdict not supported by substantial evidence cannot be set aside; it has always been the rule, before and since the passage of the law referred to, that the verdict of the jury must be sustained by substantial evidence or it would be set aside; but where the verdict is sustained by substantial evidence, no court has any right to set it aside. To do so would invade the province of the jury and would be substituting the judgment of the court as to the facts for the judgment of the jury. If we can do this, there is no reason for having a jury.

It is true that this court, in the case of *St. Louis & N. Ark. Rd. Co.* v. *Mathis,* 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85, construed the above mentioned statute to mean "a limit on the jurisdiction conferred on the Supreme Court by the Constitution." That case, however, was first affirmed by this court, and then on rehearing was reversed, the court holding that the amount allowed by the jury was excessive, but it did not reduce it, as was done in this case. The court there held that if the appellee would remit a portion of the judgment, it would be affirmed; otherwise, reversed and the cause remanded for a new trial. That decision means, and can only mean, that the court did not think there was substantial evidence to sustain the full amount, but it did not then undertake to reduce and modify it. To do this is to pass on the facts, and that is the province of the jury and not the court. It is true we have modified and affirmed judgments; have reduced amounts found by the jury; but under the Constitution and laws we have no right to do that. If we do that, we are passing on the

facts and substituting our judgment for the judgment of the jury, which we have no right to do.

In the case of *M. P. Rd. Co.* v. *Remel,* 185 Ark. 598, 48 S. W. 2d 548, we said: "The amount of recovery in a case of this sort should be such, as nearly as can be, to compensate the injured party for his injury. The suit is for compensation, and compensation means that which constitutes or is regarded as an equivalent or recompense; that which compensates for the loss or privation, remuneration."

The same declaration of law was made in *Coca-Cola Bottling Co. of Arkansas* v. *Cordell,* 189 Ark. 1132, 76 S. W. 2d 307. In that case we also said: "While the discretion of the jury is very wide, it is not an arbitrary or unlimited discretion, but it must be exercised reasonably, intelligently, and in harmony with the testimony before them. The amount of damages to be awarded for breach of contract, or in actions for tort, is ordinarily a question for the jury; and this is particularly true in actions for personal injuries and other personal torts, especially where a recovery is sought for mental suffering."

This court, in the case of *Manhattan Const. Co.* v. *Atkisson,* 191 Ark. 920, 88 S. W. 2d 819, said: "Under our system of jurisprudence, it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given." *Cunningham* v. *Union Pac. Ry. Co.,* 4 Utah 206, 7 Pac. 795; *Equitable Life Assurance Society* v. *Felton,* 189 Ark. 318, 71 S. W. 2d 1049; *Healy & Roth* v. *Balmat,* 189 Ark. 442, 74 S. W. 2d 242; *Browne* v. *Dugan,* 189 Ark. 551, 74 S. W. 2d 640; *C. R. I. & P. Ry. Co.* v. *Britt,* 189 Ark. 571, 74 S. W. 2d 398.

Not only is this right to pass on the facts a constitutional right, and by the Constitution the jury is made the judge of the facts, but if there were no provision in the Constitution prohibiting us from passing on the facts, I am persuaded that there are but few men of such transcendent ability that they can take a printed record, read it in the office, and know more about whether an injured person has suffered pain and anguish, and the extent of such suffering, than twelve disinterested citizens who, under the law, must be of good character, of approved integrity, sound judgment, and reasonable information These twelve citizens see the witnesses and hear them testify, and frequently may be able to tell something about the pain and suffering by the appearance of the injured party, his expressions and his manner, and they can tell also whether the witnesses are telling the truth; that is, they are in much better position to judge of that than we are. Even if all witnesses told the truth, we would still lack the opportunity that the jury has of seeing the injured party himself. But we have good authority for the fact that all witnesses do not tell the truth.

"A faithful witness will not lie; but a false witness will utter lies." Proverbs 14:5.

How anyone can imagine that he can, from reading the printed record, arrive at a just conclusion or be better able to determine than the jury the extent of one's injury and the amount necessary to compensate him for such injury, I cannot conceive.

I think that if we reach the conclusion that there is not substantial evidence to support the amount of the verdict, the only thing we can rightfully do is to fix an amount which we think is not excessive and give the appellee an opportunity to enter a remittitur, or reverse the judgment and remand the case for a new trial.

I, therefore, respectfully dissent from the holding of the court in reducing the damages and also in holding that we have a right to assess the damages ourselves.

I am authorized to state that Mr. Justice HUMPHREYS and Mr. Justice BAKER agree with me in the conclusions herein stated.

AMERICAN FIDELITY & CASUALTY COMPANY *v.* MCKEE.

4-5515 130 S. W. 2d 12

Opinion delivered June 19, 1939.

Westbrooke & Westbrooke, James W. Wrape and *Louis Tarlowski,* for appellant.

H. M. Cooley, Horace Sloan, Chas. D. Frierson and *Charles Frierson, Jr.,* for appellees.

GRIFFIN SMITH, C. J. December 26, 1936, a bus owned by W. A. McKee[1] ran into the rear of a bus owned

[1] W. A. McKee, with headquarters at Jonesboro, did business as "McKee Bus Line."

and operated by Dixie Greyhound Lines, Inc., with consequent injuries to a number of passengers.

July 27, 1936, American Fidelity and Casualty Company issued to McKee its policy of public liability insurance, by the terms of which McKee was indemnified within certain limitations against loss. ". . . from the liability imposed by law upon the assured arising or resulting from claims upon the assured for actual damages to persons accidentally receiving bodily injuries . . . by reason of the ownership, maintenance or use of any of the automobiles or motor vehicles as enumerated and described in Statement VI of the schedule of statements only while being operated for the purposes stated and subject to the limitations in Statement VIII of said schedule."

Provisions of Statement VIII were: "The above-described automobiles and motor vehicles are and will be used only for transportation of passengers for compensation purposes, and will be operated as follows: On schedule over route from Jonesboro, Arkansas, to Cape Girardeau, Missouri, and from Paragould, Arkansas, to Sikeston, Missouri, as authorized by the Arkansas Corporation Commission and the Missouri Public Service Commission, and this insurance covers no other use or operation."

It is alleged that following the December 26th collision (which was promptly reported to the insurance company) an investigation was made by insurance adjusters and more than a dozen claims were settled, but agreements could not be made with the two most seriously injured passengers.

March 22, 1937, the insurance company (hereinafter referred to as the company) informed McKee and Dixie Greyhound Lines that it was not liable under the policy, and it refused to handle the unadjusted claims. Thereupon, McKee and the Greyhound Lines settled the two claims in question for an outlay of $2,981.91, inclusive of costs, attorneys' fees, etc.

Upon refusal of the company to reimburse McKee and the Greyhound Lines for amounts so expended, suit

was brought, resulting in a judgment in favor of McKee for $525.46, and in a judgment in favor of Greyhound for $2,431.45, from which is this appeal.

Business arrangements between McKee and Greyhound, in addition to the sale of tickets, were that McKee buses might, for a specific rental charge, be used by Greyhound over the latter's routes when press of traffic required additional facilities. On such occasions McKee would furnish a driver, and one of his buses would be operated for the account of Greyhound to carry its overload. This was the situation December 26th when the collision occurred.

On several occasions, when a McKee bus was to be so used, special insurance coverage was secured for the particular trip—this for the reason that the McKee bus, when so engaged, would not be operated over the route mentioned in Statement VIII of the policy.

It is the contention of appellees that to obviate necessity for procuring particular permits or special trip insurance coverage, a general endorsement was issued by the company, as follows:

"In consideration of a premium charged hereunder, it is understood and agreed that coverage under [Policy PT-21735, issued July 27, 1936] to which this endorsement is attached is extended to include the Dixie Greyhound Lines, Inc., of Memphis, Tennessee, as their interest may appear, in the operation of any equipment described and insured hereunder. This indorsement to be effective from the 28th day of August, 1936, . . . at the place where any operation covered hereby is conducted, as respects that operation, or at the place where any injury covered hereby is sustained, as respects that injury. Nothing herein contained shall be held to vary, alter, or waive or extend any of the agreements or conditions of [Policy PT-21735] other than as above stated."

By special indorsement of October 26, 1936, a 21-passenger "Mack" bus was added to the list of motor vehicles permissively used by McKee, and this was the vehicle rented to Greyhound December 26 for an over-

load from Jonesboro to Trumann, on Highway 63. The collision occurred about three miles from Jonesboro. McKee was a resident of Jonesboro.

Errors urged are (1) that the court should have sustained defendant's motion to quash service of summons, and should have dismissed for want of jurisdiction; (2) that the court erred in giving, on its own motion, instruction No. 2, over the exceptions of the defendant; (3) that the court erred in giving, on its own motion, instruction No. 3, over the exceptions of the defendant; (4) that the court erred in refusing defendant's request for a peremptory instruction at the close of plaintiff's proof, and again at the close of all the evidence; (5) that the court erred in refusing to give defendant's requested instructions numbered five and ten, and (6) that the verdict of the jury is against the law and the evidence.

First. The defendant appeared specially and moved to quash the summons. It alleged that American Fidelity and Casualty Company was a Virginia corporation, authorized to transact in Arkansas an automobile public liability and property damage insurance business; that it was not authorized to transact a surety business in this state; that at no time had it kept or maintained in Craighead county a branch office or other place of business, nor did it have in Craighead county an agent or person upon whom service of summons could be had. The summons it was sought to quash was served on E. W. Moorhead at Little Rock, who was designated by the defendant as its Arkansas agent.

Appellant's certificate recites that it is authorized "to transact the business of automobile public liability and property damage insurance within the state." The Insurance Commissioner, by a special communication, certified that the company was not authorized to engage in surety business in Arkansas.

Assuming that service was had under § 7760 of Pope's Digest, appellant urges that such statute, permitting the defendant to be sued in the county in which the plaintiff resides, applies only to surety companies,

and that the policy relied upon by appellees is not of the character contemplated when act 187 was adopted in 1903.

We concur in appellant's position that the section in question, by its express terms, applies only to surety companies. But it does not follow that because of this restriction there is no statute under which service could be had.

Section 1 of act 34 of 1887, as amended by act 24 of 1897, provides: "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."

It may be conceded that this statute would not authorize the proceeding with which we are dealing—being, as it is, limited to fire, lightning, tornado, life insurance, or "to one having a policy of accident insurance." Those who were injured in the bus accidents are not suing upon policies they carried. The suit is clearly one on a policy of public liability, and is not mentioned in the act just quoted.

However, in 1921, by act 493 (Pope's Digest, § 7676), there was this enlargement of the venue statutes: "All the provisions of the laws of this state applicable to life, fire, marine, inland, lightning or tornado companies shall so far as the same are applicable, govern and apply to all insurance companies transacting any other kind of business in this state, so far as they are not in conflict with provisions of law made specially applicable thereto."

Since § 7675 of Pope's Digest authorizes suits in the county of the residence of the party whose life was insured, or in the county where the death of such party occurred, in the case of life insurance, and since § 7676 directs that the provisions of § 7675 shall "govern and apply to *all* insurance companies transacting any other kind of business in this state," it must be held that public liability insurance is encompassed within the words "other kind of [insurance] business;" and necessarily the right to sue on the McKee-Greyhound policy would be in the Jonesboro district of Craighead county, where the collision occurred.

Second. On its own motion the court instructed that ". . . the plaintiffs are not covered by the policy of insurance in this case." However, the issue of waiver was submitted.

Appellant's contention is that coverage under the policy was limited to operations on McKee's routes from Jonesboro to Cape Girardeau, or from Paragould to Sikeston, and since the happening was not on either of these routes, there could be no recovery. Appellees argue that the route limitations applied only in those cases where McKee was using one of his buses for his own purposes, and that the indorsement of August 28 was meant to protect McKee and Greyhound when the latter elected to utilize a McKee bus in handling extra traffic. It is further urged that in the absence of an express limitation in the indorsement restricting operation of a McKee bus to a particular route in conformity to the original policy, its effect was to "extend" protection generally to such extrordinary operations as the trip of December 26. In the alternative, appellees insist that, if the endorsement is ambiguous, it was subject to explanation. Conflicting oral testimony was introduced. Therefore, appellees insist, a jury question was presented if in fact the policy and endorsements were ambiguous.

Bearing in mind the admitted course of conduct engaged in by the respective parties; that McKee had procured special indorsements for particular trips made by

Greyhound when the latter used his buses on a per mile basis; that the insurance company had knowledge of the several routes over which McKee and Greyhound were authorized to operate; that the endorsement was "in consideration of the premium charged *hereunder,*" and that over a period of three months following the collision appellant did not deny liability, but on the contrary seemingly recognized its responsibility and made numerous settlements and employed legal talent to procure releases for its benefit;—in the light of these facts and the affirmative conduct shown, we examine the endorsement to determine its effect.

"Coverage *under the policy to which this indorsement is attached,*" it is said, "is *extended* to include the Dixie Greyhound Lines, Inc., . . . as their interest may appear *in the operation of any equipment described and insured hereunder.*"

It was further provided that the endorsement would be effective " . . . at the place where any operation covered hereby is conducted, as respects that operation, or at the place where any injury covered hereby is sustained, as respects that injury."

A limitation was that "nothing herein contained shall be held to vary, alter, or waive or extend any of the agreements or conditions of [Policy No. PT-21735] other than as above stated."

The indorsement, by its express terms, formed a part of the policy. The equipment described "and insured hereunder" was the bus owned by McKee which featured in the collision, and coverage under the policy was *extended* to include Greyhound Lines, "as their interests might appear."

Interest of Greyhound was in its leased operation of the McKee facilities. The word "hereunder" used in the endorsement did not of itself describe any equipment. Reference must be had to the principal policy, and to other indorsements, to ascertain what buses or trucks McKee was permitted to operate.

When the construction we concur in is given the endorsement, and "hereunder" is held to identify and to tie in with the primary policy, it may be argued that coverage was to be effective only " . . . at the place where any operation covered hereby is conducted," and that "hereby," when so read, necessarily restricted insurance of Greyhound to a route designated in the policy. Such a construction, however, would paralyze rights granted by preceding expressions by which protection was extended to Greyhound "as its interests might appear . . . in the operation of any equipment described and insured hereunder."

It is argued (we think fallaciously) that Greyhound's interests went only to protection from contingent liability which might arise through acceptance or sale of interline tickets. Nothing is said in the endorsement about tickets. On the contrary, operation of *equipment* is the subject-matter.[2]

---

[2] In substantiation of its contention that there was no liability unless the transaction occurred on one of the McKee routes, appellant offered the testimony of Chigghizola, partner with Treadwell and Rabb in Underwriters' Service Agency. This agency was authorized to write policies for appellant. Chigghizola said that Bomer of the Greyhound Lines called Underwriters' Service Agency, asking if appellant had the McKee Bus Line insured. Witness answered in the affirmative. Bomer then stated that Greyhound had an interchange ticket arrangement with the McKee lines, and inquired if Greyhound could be insured in the McKee policy. For this reason, according to Chigghizola, the indorsement was attached.

McKee, however, testified that he had Bomer call the writing agency; that Bomer talked with Treadwell; that Bomer stated over the telephone that he wanted the McKee "rider" to protect both McKee and Greyhound in instances where McKee was transporting Greyhound overloads. Chigghizola testified that it was he, and not Treadwell, who talked with Bomer. McKee was then recalled and testified that Bomer had called the agency in his presence immediately after he (McKee) had been discussing the matter of insurance for bus overloads; that Bomer called for Treadwell; that he heard what Bomer said, and that Bomer did not say his company wanted a rider to cover interchange tickets, and that there "was no conversation along that line at all from Bomer's end of it." On cross-examination Chigghizola admitted that the insurance rider was signed by Treadwell, and that the letter forwarding the indorsement to McKee was signed by Treadwell.

If by the indorsement the insurance company intended to reserve to itself some advantage not expressed with clarity, or if it did not intend to grant some concession reasonably to be inferred from the words selected, and if by a fine shade of meaning or a literal evaluation of terms the insurer would be relieved of liability, it becomes the duty of courts to apply such common-sense construction or rational application as will give effect to the intention of the parties and to the obvious objective they had in mind, if such intent can be gathered from the writing. Since forms utilized in contracts of insurance and the indorsements concurrently or subsequently attached are almost invariably prepared by the insurer, the language utilized to declare an intent should be liberally construed in favor of the one who had no part in selecting phrases and transcribing them; or, expressed differently and more simply, such contracts should be strictly construed against the company.[3]

By holding as a matter of law, as we do, that under the admitted facts appellant's undertaking was to indemnify McKee and the Greyhound Lines against liability of the kind they incurred in the circumstances reflected by the record, it follows that the trial court was in error in instructing the jury that the policy with its indorsements was not effective primarily, but that appellant's only liability, if any, arose because of its conduct in assuming charge of the investigations and settling with injured passengers.

In the view we have taken its becomes unnecessary to decide the question of ratification or waiver, and other points advanced.

The judgments are affirmed.

---

[3] Blashfield's Cyclopedia of Automobile Law and Practice, v. 6, § 3521; *Gibson* v. *Continental Casualty Co.*, 178 Ark. 1090, 13 S. W. 2d 621; *Fowler* v. *Unionaid Life Ins. Co.*, 180 Ark. 140, 20 S. W. 2d 611; *Travelers' Protective Association* v. *Stephens*, 185 Ark. 660, 49 S. W. 2d 364.

TOOMER *v.* MURPHY.

4-5549 129 S. W. 2d 937

Opinion delivered June 19, 1939.

[redacted]

Coy M. Nixon and *J. M. Shaw,* for appellant.

H. Jordan Monk, for appellee.

GRIFFIN SMITH, C. J. Prayer of the complaint was that interests of the parties in eighty acres of land be fixed by partition; or, in the alternative, if the court found that the property was not susceptible of division in kind, that it be sold, etc.

It was stipulated that H. L. Toomer was shown by the records to have paid taxes on the Southeast Quarter of Section Six, Township Seven South, Range Nine West, from 1910 until 1917; that in February, 1920, all of the heirs of Miles Toomer, Sr., except Julia Moten, signed a certain partition deed; that Julia Moten is the daughter and sole heir of Will Toomer, who was a son and one of six heirs of Miles Toomer, Sr.; that H. L. Toomer and his wife mortgaged the lands to Mrs. Lois Murphy in May, 1920, in April, 1926, and again in May, 1926; that in 1933 Mrs. Murphy filed foreclosure proceedings, in consequence of which the commissioner's

deed, duly approved by the court, was executed in her favor and delivered April 9, 1934.

A witness for appellee testified that the 160-acre tract originally owned by the senior Toomer "had been divided on the tax books after 1921;" but such witness did not know whether H. L. Toomer or some one else had the change made. However, H. L. Toomer paid taxes on the "north 80" until 1930. Also, extensive repairs had been made on the dwelling house. J. M. Shaw, attorney "for the other side," asked witness if $100 would settle the controversy. If so, he believed he could make H. L. get up the money. Witness did not know whether Shaw represented only H. L., or all the heirs.

H. L. Toomer testified he was one of six children of Miles Toomer, Sr., and was living on the north eighty acres of the 160-acre tract left by his father; that he had lived there forty years, or since his father's death; that he had never claimed the land adversely to other heirs; that there was an attempt in 1920 to partition [the 160 acres]. By this act witness recognized interests of others. Such heirs, he said, would make regular contributions to help pay taxes. In making the mortgage to Mrs. Murphy he understood he was mortgaging only his part. He had asked some of the other heirs to sign with him, but they had refused. "Mr. Murphy" wrote the partition deed in 1920 "when it was attempted to divide the lands," and those who signed it did so in Mr. Murphy's office, but Julia Moten refused to sign. He denied having directed that the eighty acres in question be separated on the tax books from the south eighty for assessment purposes, and "supposed" Mr. Murphy did.

The voluntary partition deed recited that the persons enumerated therein "are all children and grandchildren and only surviving heirs at law of Miles Toomer, deceased, who hold by inheritance and in common." As to the north eighty acres, it was provided that H. L. Toomer "should henceforth hold possession in sever-

alty," etc. The south eighty acres were apportioned, and it is conceded that as to all of the heirs except Julia Moten, they are bound by the deed, which was promptly recorded.

Plaintiffs below were Miles Toomer, Mattie Toomer, Columbus Toomer, Ida Bullett, Sam Bullett, and Julia Moten. None testified. Julia Moten, now "forty-some" years old, did not explain her lack of interest in the property for thirteen years. During that period an uncle remained in possession. One of his first acts was to execute a mortgage. Thereafter two additional mortgages were given. He says it was his purpose to pledge only his own undivided interest, but effect of the mortgages was otherwise.

That Julia Moten knew of negotiations for execution of the partition deed is shown by testimony of H. L. Toomer, who said he took her to the lawyer's office.—"She took her lawyer with her, and the lawyer told her if she signed the deed she wouldn't have any money." Asked if Julia knew the deed had been signed by others, the witness did not reply.

It is a fundamental principle of law, as reiterated in *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96, that "one tenant in common cannot claim adverse possession against a co-tenant by the mere act of occupancy," the possession of one being the possession of all. But, in the same case it was said:

"If appellants knew that A. T. Morgan and Mrs. Edna Morgan were claiming the property as their own, to the exclusion of inheritances appellants now seek to establish, then the relationship of co-tenancy terminated when seven years had lapsed after such claim or hostile attitude was brought home to them. We cannot say that at a specific time or place A. T. Morgan, by any particular words, or through conduct expressly hostile to appellants' interests, on a designated occasion, brought home to them in a distinctive way that he was denying the rights they now assert. The record strongly indicates that this could not have been done for the reason that appellants at no time asserted any rights.

"By a strained construction it *might* be said that during all this time the claimants remained quiescent and inarticulate; that they were willing to allow A. T. Morgan and his family to occupy the premises as co-tenants with themselves, and that there were reservations in their minds known to their brother by which they expected, some day, to assert the right of entry. But such a construction would be out of harmony with every rule of reason, and contrary to a preponderance of the testimony; and it cannot prevail."

The instant case is somewhat similar. It is extraordinary in that H. L. Toomer, the only person who knew whether claims had been made against him, was a hostile witness. It is also novel in that Julia Moten, the only person who knew whether she had maintained her rights, did not clarify the controversy with testimony. While Toomer said "the other heirs paid [taxes] just as much so as me," he did not state that Julia Moten was one of the contributing heirs, although that inference might be drawn.

The court found that H. L. Toomer had been in adverse possession for more than thirteen years; that he paid taxes on the property and had it separately assessed in his name; and furthermore, that all of the plaintiffs were barred by laches.

We cannot say that such findings were contrary to the preponderance of the evidence. While there is no direct testimony showing that at a particular time, in a particular way, the hostile claim of H. L. Toomer was brought to the attention of Julia Moten, the situation here is somewhat analogous to that in the Jones-Morgan Case. There is no evidence that Julia Moten, after refusing to sign the partition deed, ever asserted a claim of any kind, and the inference is fairly deducible that she knew what had been done, and was informed as to the manner of settlement. If she chose to abandon the rights she at that time had, that was her own business; or, conversely, if she elected to retain her interest and treat her uncle as a co-tenant in possession, it was her privilege to follow such course. What she did not have a right to

do was to treat the partition deed as a closed chapter, allow H. L. Toomer to make improvements, occupy the lands, pay taxes, and execute mortgages to innocent persons. It is true there is no direct evidence she knew of the mortgages; but, in view of all of the circumstances, and in view of evidence not set out in this opinion at length, we feel that the chancellor reached a fair conclusion within the law, and the decree will not be disturbed.

Affirmed.

RAGSDALE *v.* HARGRAVES, MAYOR.

4-5605 129 S. W. 2d 967

Opinion delivered June 19, 1939.

John C. Sheffield, for appellant.

C. L. Polk, Jr., for appellee.

MEHAFFY, J. The appellant, Will Ragsdale, a property owner of the City of Helena, Arkansas, instituted this action seeking to enjoin the city of Helena from issuing bonds in the sum of $16,000. The complaint alleges that the city of Helena, by an ordinance duly passed, called for an election, and a notice in pursuance of the ordinance was given. The election was held on April 14th to determine if the city should issue bonds for the purpose of the purchase, development and improvement jointly with the city of West Helena of a flying field or airport. It is alleged that a similar ordinance was passed in the city of West Helena, calling for an election on the same day for the purpose of determining whether the city of West Helena should issue bonds in the sum of $4,500 for the purpose of the purchase, development and improvement, jointly with the city of Helena, of a flying field or airport. The election was held on the day named, and by the Mayors' proclamation of both Helena and West Helena, a majority had voted for a bond issue in each town. It is alleged that the mayor of Helena and the mayor of West Helena are preparing to advertise for the sale of bonds in each city, the proceeds of both issues to be used for the purpose of financing the purchase, development, and improvement jointly with each other of the flying field or airport, and that the council would levy a special tax, not to exceed three mills to pay the principal and interest on said bonds. It is alleged that under Amendment No. 13 of the Constitution there is no authority for the issuance of bonds and levying of a tax by each city for the purpose of development and improvement of a flying field or airport to be controlled by both cities and that the amendment only authorizes the issuance of bonds for a separate airport in the city; that the tax to be levied would be a cloud on appellant's real estate, and the prayer was that appellees be permanently enjoined from advertising the bonds for sale, and be en-

joined from delivering them to anyone, and from levying the tax to pay for them. It is alleged by the appellant that the suit is brought for himself and all others similarly situated who wish to join in the suit.

The appellees filed a demurrer stating that the complaint did not state sufficient facts to constitute a cause of action. The court sustained the demurrer and dismissed the complaint for want of equity, and the case is here on appeal.

It is the contention of appellant that Amendment No. 13 does not give authority to a city to go into a joint project with a neighboring city to develop and purchase an airport.

Amendment No. 13 provides, among other things: "Provided that cities of the first and second class may issue by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election as follows: . . . for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality."

Act No. 80 of the Acts of 1939 provides: "Any two or more municipal corporations in the State of Arkansas may own and hold in joint tenancy, by gift or purchase, lands for use as airports or flying fields, which may be located either within or without their corporate limits; and may enter into contracts or agreements with each other, duly authorized by ordinances, for their joint operation, control, maintenance, improvement and development."

Amendment No. 13 has been construed by this court in a number of cases. In the last case, *Todd* v. *McCloy*, 196 Ark. 832, 120 S. W. 2d 160, this court said: "The term 'for the development and improvement of public parks' is broad enough to include a stadium where visitors in the park may seat themselves to witness ball games or other forms of athletic entertainment incident to community life. Such a stadium would be an 'im-

provement' within the meaning of the amendment in question. Nor is validity of the objective impaired because of location of the property. The improvements may be 'either within or without' the corporation's territorial area."

Constitutional provisions should receive a reasonable construction, the purpose being to ascertain the meaning of the framers of the provision of the Constitution, and the intention of the electors in adopting the provision.

Amendment No. 13 gives express authority for the purchase, development and improvement of flying fields or airports located either within or without the municipality, and the legislature of 1939 adopted the emergency clause in Act No. 80, *supra,* and declared that for the public stafey, it was necessary to facilitate the construction of airports.

If a city may issue bonds for the purpose of acquiring or building airports without the aid of anyone, the fact that they get the aid of another city does not violate the provisions of the Constitution.

"The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court therefore should constantly keep in mind the object sought to be accomplished by its adoption and the evils, if any, sought to be prevented or remedied." *Snodgrass* v. *Pocahontas,* 189 Ark. 819, 75 S. W. 2d 223; 12 C. J. 700.

It was contended, in the case of *Terry* v. *Overman,* Mayor, 194 Ark. 343, 107 S. W. 2d 349, that while Amendment No. 13 authorized the issuance of bonds for the construction of a library, it did not authorize the issuance of bonds to construct an addition or improvement to the structure already in existence. This court said: "The purpose of construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people in adopting it, and to this end it should receive a reasonable construction." Citing *Snodgrass* v. *Pocahontas, supra; Downen* v. *McLaughlin,* 189 Ark. 827, 75 S. W. 2d 227.

The manifest purpose of Amendment No. 13 was to authorize municipalities to purchase, develop and improve public parks and flying fields. If it was the intention to authorize municipalities to purchase, develop and improve flying fields, the mere fact that two cities instead of one undertake the improvement does not violate the Constitution.

It is contended, however, that cities cannot hold property jointly. The Supreme Court of California, in the case of *DeWitt et al.* v. *The City of San Francisco et al.*, 2 Cal. 289, said: "But in addition to this, there is a positive law passed on the 10th of April, 1852, which gives full power to the corporation of the city of San Francisco to purchase or rent a suitable building for a city hall, for said city, provided the amount to be expended does not exceed $125,000. This law does not conflict with the charter of 1851, in any of its provisions or restrictions. It is full and complete, and is as much obligatory and authoritative for all purposes within its purview as if it had been made part of the charter at its passage. And the only question in the way is, whether the title proposed to be acquired is contrary to the nature and character of the rights and existence of the corporation.

"It will be observed from the framing of the ordinance authorizing the purchase, that this particular state of the case was probably kept in view.

"The ordinance provides that the corporation shall purchase the undivided moiety of the building, and hold it in common with the possessor of the other undivided moiety which was to be bought by the county of San Francisco. To do this was lawful."

The California Court also said in that case: "The books and cases do not afford any instance in which this right of holding lands as tenants in common either with each other or with natural persons is denied to corporations. Not one of the reasons which work a want of capacity to hold as joint tenants would prevent their holding as tenants in common, for this estate requires but one unity, that of possession.

"So far from the corporations not being able to hold lands in common, the original condition at common law of the largest class of corporations known to the law, was that of holding all their lands in common with each other; and they were never separated until the original position produced inconveniences."

Airports are said to be as important to commerce as are terminals to railroads or harbors to navigation. The possession of an airport by a modern city is essential if it desires the opportunities for increased prosperity to be secured through air commerce. Wenneman on Municipal Airports, 418.

In 1926, the City of Pittsburgh, Pennsylvania, entered into a contract with Alleghany county, Pennsylvania, which provided for the appointment for a city-county Air Board, and prescribed the duties of the board. The director of the Department of Public Works representing the United States Government was a party to the contract. Wenneman on Municipal Airports, 637.

There is nothing in the Constitution that prohibits the Legislature from passing a law authorizing two cities to acqure and own a flying field, and the Legislature, as we have shown, has provided that two cities may do this, and if they have this authority, they necessarily have the authority to issue bonds and levy a tax to pay for said airport.

We find nothing in the Constitution that prohibits two cities from owning property as tenants in common.

The decree of the Chancery Court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HARRIS.

4-5538 129 S. W. 2d 944

Opinion delivered June 19, 1939.

T. B. Pryor and *Daggett & Daggett,* for appellant.

A. M. Coates, for appellee.

BAKER, J. In September last, the appellee filed his suit in the Phillips circuit court alleging that he was moving corn, household goods, and some farming tools, from his former home in Desha county, to a point not far distant from Elaine, in Phillips county. At a point where the paved highway crossed the railroad he alleges that the crossing was not kept up and the wheels of his wagon became blocked behind the rails, and though he worked for several minutes he was unable to move the wagon and it was struck by a train moving in a northerly direction. The wagon was wrecked, other property damaged, and some corn lost. He sued for $151.50 and recovered judgment for $149.50. Appellant does not complain that the judgment was excessive, or that the court committed any error in the instructions given, except that he insists that there was no substantial evidence to support the finding of the jury on the question of liability. This question of liability has been narrowed to the single proposition of the proper maintenance of the crossing by the appellant. The parties themselves, in the submission of the case, eliminated the questions of proper lookout or discovered peril. The court properly instructed the jury that it was the duty of appellant to exercise ordinary care to keep the crossing in such condition as to be reasonably safe for ordinary and convenient use of the traveling public. The appellant argues that the evidence was not sufficient to make a jury ques-

tion upon this proposition and that the court should have directed a verdict for appellants on account of the insufficiency of the evidence to support the verdict. It becomes necessary, on account of this contention, to state some of the evidence and in making the statement to sustain this judgment we are not unmindful of the decisions in this state that such statements shall be most favorably set forth to sustain the verdict.

The appellee was a negro farmer who lived in Desha county. He was moving his personal property to a point not far from Elaine in Phillips county, where he was expecting to make a crop during the year 1938. He left home on Sunday and presumably he must have camped somewhere on the highway Sunday night. He states that on Monday morning, January 10th, about 3:30, he started from where he had spent the night and about 5 a. m. reached the crossing of the highway over the railroad tracks. He says that his wagon was loaded with about 50 bushels of corn, some household goods, some farm implements, and that a cultivator was hitched on behind. When he drove upon the railroad tracks, he says the wheels of his wagon were blocked. Part of his testimony would indicate that his front wheels were blocked by reason of getting caught between the rails of the railroad track. Later, upon cross-examination, his testimony indicates that pavement of the highway came within about 18 or 20 inches of the railroad track and that the rear wheels were caught in this space between the pavement and the rail. Harris goes into detail and explains how he attempted to extricate his wagon from this position. He first attempted to roll the wheels with his hands as he tried to drive his mules and make them pull the wagon out. Failing in this, he then hitched his team to the end of the wagon tongue in an effort to see-saw or jerk the wagon over the rail. Unsuccessful in this effort, he took a chain and hitched his mules to the rear of the wagon and attempted to pull it back and was unable to release it in that way. According to his statement, he looked down the railroad track and saw the headlight of a train coming. He attempted to signal

the train by waving a board. He states that he was answered by the engineer's signal of sounding the whistle. However, the train continued on its way until the wagon was wrecked and the corn scattered and some of the household goods damaged. The details of the damages are unnecessary to state here. Harris states that after the wrecking of this wagon the employees upon the train backed the train up and made an observation of the crossing at the place where the wagon had been struck. He testifies to certain statements made by these employees to the effect that his wagon had been blocked, and other statements which he says were made are unnecessary to repeat here. Such statements tended only to show these employees obtained certain information concerning which they did not testify. Harris is contradicted only by the section foreman, who testified in terms equally positive to statements made by Harris, that this crossing was made up of chat and that he had stopped only the evening before and made some slight repairs; that Harris' statement that the wheels dropped into holes could not have been true because he had filled the slight holes or depressions only the day before. When his attention was called to the fact that the day before was Sunday, he changed his statement, saying that he did the work only a little while before the time of the accident, and, finally, by suggestion, he said it was Saturday afternoon, about 3:30 o'clock. This section foreman also testified that the chat did not beat out or wash out. There was offered in evidence pictures showing how the chat had been used in building up the crossings. These pictures were made about thirty days after the accident, but were offered without objection, and it may be said that chat so used, as shown by these pictures, shows a crossing perhaps as nearly perfect as may be made. The section foreman, speculating upon the manner of the accident, says that the holes or hole was caused by the wheels of the wagon pushing or scooping out the chat in that place; that the wheels of the wagon had rolled off the chat at the crossing because the driver had gone too far to the right. This statement made by the section foreman was informa-

tion he alleged was gained from Harris himself. We think it may be said to be certain that if the crossing was in the condition on the morning of January 10th that is shown in the pictures made thirty days thereafter and offered in evidence as tending to show the condition of the crossing at that time, there was no liability. This condition, as repaired, disclosed no negligence in the maintenance of the crossing at that time, and it may be said that it would have been impossible for the wheels to have dropped in any hole or holes on the crossing and to have been blocked, either between the rails or on either side of them. The exact conditions that prevailed at the time of the accident are by no means so certain. There is no evidence that the chat washed out. The evidence is undisputed that this wagon was blocked by the rails. If we may judge from the picture offered, such blocking could not have occurred except upon a defective crossing, one wherein the chat was beaten out or left lower than the rails, at least the jury might have well reached this conclusion. The question of a proper or improper maintenance was one submitted to the jury under proper instructions. One of these was asked by appellants in regard to the duty and obligation of the appellant to exercise ordinary care to maintain the crossing. Perhaps our last announcement upon the law is *Missouri Pacific Rd. Co.* v. *Wright,* 197 Ark. 933, 126 S. W. 2d 609.

Appellants insist that this statement of the appellee is not sufficient to show liability, "I started across the railroad there. There were some holes there and the front wheels fell in there and blocked the wagon between the two rails." This evidence, taken with the other statements made by appellee, showing his efforts to extricate the wagon from this blocked condition, certainly raises a question to be determined by the jury as to whether the appellants exercised ordinary care in the maintenance of this crossing. It was a question of fact, not a question of law. The jury determined the facts contrary to appellant's contention.

Affirmed.

C. I. STAFFORD & SONS *v.* SIMON.

4-5532 129 S. W. 2d 942

Opinion delivered June 19, 1939.

Rowell, Rowell & Dickey, for appellant.

Reinberger & Reinberger and *E. D. Dupree, Jr.,* for appellee.

HUMPHREYS, J. Appellee brought suit in the circuit court of Jefferson county against appellants for $1,388.20, the purchase price of a carload of cattle, which he alleged appellants purchased from him and in payment thereof issued their draft which they refused to pay after the cattle were delivered to and accepted by appellants. The draft was attached to the complaint as exhibit "A" and is as follows:

"Four States Commission Co. OK

TP

"Pine Bluff Stock Yards A No. 84

Pine Bluff, Ark.,

"22 cattle 12-6-1937

"At sight
"Pay to the order of Victor Simon..... Refused $1,388.20
"Thirteen hundred eighty eight 20/100 Dollars
"Four States
Commission Co.
Pine Bluff Stock Yards.
C. I. Stafford and Sons, per E. M. Rucker.
"This draft collectible at par
through the Simmons National
Bank, Pine Bluff, Ark.
(There appears on the left end of Exhibit No. A, the following) Livestock draft
"C-5 No Pro
84-11
(There appears on the reverse side of Exhibit A, the following)
"Victor Simon sale stable.
(There appears several rubber stamp indorsements and cancellations that are not legible.)"

Appellants filed an answer denying the allegations of the complaint and for further answer stated: That the appellants did not authorize said purchase of cattle from appellee herein, but the Four States Commission Company, a partnership composed of O. A. McFadden and E. M. Rucker, represented by E. M. Rucker, made the purchase of cattle from appellee and drew draft on the Four States Commission Company. That the draft, upon being presented to appellants for payment, was refused, as appellants were notified by O. A. McFadden, a partner in the Four States Commission Company, not to pay said draft. That these appellants were not in any way connected with said appellee and if there is any cause of action in favor of appellee herein, it is against the Four States Commission Company, as the Four States Commission Company was not and is not at the present time representing said appellants, nor was the purchase made or the draft drawn with the knowledge or consent of these appellants.

The cause was submitted to a jury on the pleadings, testimony introduced by the parties and instructions of

the court resulting in a verdict and consequent judgment for $1,388.20 with interest at the rate of 6 per cent. from December 7, 1937, against appellants, from which is this appeal.

At the conclusion of the testimony each party requested a peremptory instruction which was refused by the court over their respective objections and exceptions, but other instructions were given at the request of the parties.

A motion for a new trial was filed by appellants setting out a number of reasons why same should be granted one amongst them being that the court erred in denying appellants' request for a directed verdict in their favor and in failing and refusing to grant a new trial. This ground raised the insufficiency of the evidence to support the verdict and judgment.

In denying the request for a new trial the court made the following finding:

"On the question of agency the court finds that from a preponderance of the testimony the agency of E. M. Rucker to purchase the cattle in question for C. I. Stafford & Sons is not established; but the court is permitting the verdict of the jury in this case to stand solely on the question of ratification or estoppel."

Appellants contend for a reversal of the verdict and judgment because the only issue joined by the pleadings and evidence introduced in the case was whether E. M. Rucker had actual or implied authority to purchase the cattle for C. I. Stafford & Sons and to issue their draft in payment of same, and that the court having found that the agency of E. M. Rucker to do so was not established by a preponderance of the evidence, it was the court's duty to grant a new trial. After a careful reading of the pleadings, evidence adduced and instructions of the court we have concluded that the sole issue involved was whether E. M. Rucker had actual or implied authority to buy the cattle for C. I. Stafford & Sons and issue their draft in payment of same. Ratification and estoppel were not pleaded and instructions were not requested or given on the issues of ratification or estoppel.

The theory of appellants was that they had not given E. M. Rucker any authority whatever to buy the cattle and to issue their draft in payment of them and that they had done nothing from which such authority might be implied.

The theory of appellee was that E. M. Rucker had express or implied authority to purchase the cattle for C. I. Stafford & Sons and to issue their draft in payment of same.

Eliminating, therefore, the issues of ratification and estoppel, which were not issues in the trial of the cause below, the only remaining question on this appeal is whether the court erred in refusing to grant a new trial after finding that the issue of agency was not established by a preponderance of the testimony.

This court said in the case of *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851, that: "If the trial court finds and announces that the verdict of the jury is against the preponderance of the evidence on a material issue of fact then he must set aside such verdict." The rule announced in the Twist Case, *supra,* was reiterated in the cases of *Spadra Creek Coal Company* v. *Harger,* 130 Ark. 374, 197 S. W. 705; *Mueller* v. *Coffman,* 132 Ark. 45, 200 S. W. 136, and *Bean* v. *Coffee,* 169 Ark. 1052, 277 S. W. 522.

The pleadings, the evidence and findings of the trial court in the instant case bring it within the rule announced in the cases referred to above and the court should have granted appellants a new trial.

Appellants contend, however, that appellee was not entitled to a judgment under the pleadings and undisputed proof and for that reason should have peremptorily instructed a verdict for them and for that reason this court should reverse the judgment and direct the trial court to enter a judgment for appellants. We do not think so, for there is abundant testimony in the record tending to show that appellants gave E. M. Rucker authority to buy the cattle and issue their draft in payment of same. E. M. Rucker testified positively that appellants conferred that authority on him. His testimony was corroborated by

other testimony to the effect that C. I. Stafford & Sons through agents, employed and paid by them, placed in the hands of E. M. Rucker a book of drafts with the printed name "C. I. Stafford & Sons" as drawer, on the draft and that appellants paid out many dollars on the same kind of drafts in the purchase of cattle over an extended period of time prior to the execution of this draft. The record also reflects that E. M. Rucker purchased three carloads of cattle prior to the purchase of this carload and drew drafts in payment thereof furnished him by appellants exactly like the draft he used in payment of this carload of cattle and that the other cars were received at the stockyards of appellant in Pine Bluff, and when the drafts were presented they were paid by appellants. The record also reflects that appellants received the money for which the carloads of cattle sold and now have same in their hands, but since they were sold for less than the purchase price they refused to pay the draft unless appellee would accept the amount for which the cattle sold instead of the amount he was to receive for the cattle as evidenced by the draft. The record also reflects that on another occasion Rucker used the drafts which had been furnished him and purchased cattle for C. I. Stafford & Sons in Gillette, Arkansas. We cannot say that the undisputed evidence in the case shows that Rucker was without authority to buy the cattle or to issue appellants' draft in payment of them.

The judgment must, therefore, be reversed and the cause remanded with directions for the trial court to grant appellants a new trial.

MANN *v.* MCCARROLL, COMMISSIONER OF REVENUES.

4-5615 130 S. W. 2d 721

Opinion delivered June 26, 1939.

Burk Mann, Coleman & Riddick and *Cockrill, Armistead & Rector,* for appellants.

Jack Holt, Attorney General, *Leffel Gentry,* Assistant Attorney General, and *Frank Pace, Jr.,* for appellee.

Daggett & Daggett, for interveners.

Lee Baker and *Brickhouse & Brickhouse, amici curiae.*

BAKER, J. In April of 1937, plaintiff Mann purchased in the State of Alabama, for use in his gin in Lee county, gin machinery and equipment, paying therefor, as we understand the complaint, a little more than $13,000. There was demanded of him, on the 10th day of May, 1939, by Z. M. McCarroll, Commissioner, a tax of $296.02, purported to have been levied under paragraph (F) § 4, act 154, p. 516, of the Acts of 1937.

In this suit the Rose City Cotton Oil Mill, a corporation, intervened and alleged that it was engaged in the business of processing cottonseed, manufacturing therefrom oil, meal, lint and other products. Its mill is located in Pulaski county. It was further alleged that McCarroll, as commissioner, proceeding under the same provision of said act 154, after an audit made on May 5,

1939, demanded of the intervener a tax on 209 articles purchased outside the State of Arkansas, for use in its mill and being of the value of $27,237.58.

Interveners, W. H. and John C. Howe, partners, doing business under the name of Howe Lumber Company, of Wabash, Arkansas, filed their intervention and alleged that on the 22nd day of March, 1938, the 29th day of March, 1938, and the 9th day of December, 1938, the interveners purchased in the city of Memphis, Tennessee, 39 mules for which they paid in cash the sum of $5,160; that the mules were thereafter transported to their plantation in Phillips county, and have been continuously thereafter in said county and that they have been used in the cultivation, production and harvesting of crops planted and produced on their lands in the year 1938, and subsequent thereto. It is further alleged that the mules were duly assessed as personal property belonging to interveners in said county for the year 1938 and that the tax levied thereon has been paid. The commissioner, however, has notified these interveners that under said § 4, sub-section (F) a tax in the sum of $103.02 was due the state on said mules.

They further alleged that they purchased, in July of 1937, from Hardwicke-Etter Company, f. o. b., Sherman, Texas, gin machinery and equipment of the value of $13,780.95, and that said machinery was transported and has been installed in their gin at Wabash, Arkansas; that in July, 1937, the interveners purchased from Fairbanks-Morse & Company, f. o. b., St. Louis, Missouri, an engine and boiler and certain equipment therefor, and transported the same to Wabash, Arkansas, paying therefor the sum of $9,850 for such equipment and that they paid to the State of Missouri two per cent. sales tax, levied thereon and that now they are charged, under said act 154, with the two per cent. tax.

The provision of said act 154, under which all this litigation has arisen, is as follows: (F) "Every person, as defined in this act, shall report to the Commissioner as a retail sale the use or consumption by him of

anything on which the sales tax has not been paid under this act which would have been levied had it been sold at retail in this state, and shall pay the sales tax thereon."

It is alleged by the plaintiff and the interveners that the act does not in itself levy or impose a tax on the use or consumption of property, but on the contrary, that the levy of the tax was upon retail sales only and that if said provision of § 4 (F) is interpreted as a levy upon the use or consumption it is in contravention of § 11, art. 16 of the Constitution.

It is also alleged in effect that if the tax be treated as a sales tax upon the purchases made outside of the State of Arkansas it is a burden upon interstate commerce and in conflict with the commerce clause of the Constitution of the United States and is, therefore, void.

There is also an allegation that act 154 originated as bill No. 4 in the Senate of the State of Arkansas, on January 13, 1937; that it was passed on January 27, 1937, but that said Senate bill, on February 7, 1937, was amended in the House of Representatives by the addition or insertion of the questioned paragraph (F) of § 4, and then was returned to the Senate for further consideration and that thereafter, on February 10th, the Senate returned the bill to the house of representatives, where on February 12th the House again amended the bill by adding said paragraph (F) of § 4. On February 16th, said Senate Bill No. 4 was passed by the House as amended and on February 18th the emergency clause was duly adopted and the bill as amended was returned to the Senate. On the 23rd day of February, 1937, the amendment thereto, which had been adopted by the House of Representatives, was duly approved and concurred in by the Senate, and on February 24th the Senate passed the Senate bill as amended and adopted the emergency clause thereto. Said bill thereupon became act No. 154 and was approved by the governor on February 26, 1937.

It is now contended that this provision or amendment, introduced and passed by both the House and Senate, is so much in conflict and contrary to the original

purposes of the bill if given the construction contended for by the appellee, McCarroll, Commissioner, it is in violation of § 21, art. 5, of the Constitution of the State of Arkansas.

The prayer of the plaintiff and of the several interveners was that McCarroll, as Commissioner, be enjoined from attempting to collect the alleged tax, which it was asserted was an illegal exaction.

A demurrer was filed by the Commissioner of Revenues upon the ground that the complaint and several interventions did not state facts sufficient to constitute causes of action. This demurrer was sustained by the trial court, and plaintiff and interveners refusing to plead further, their several actions were dismissed and from this order and decree of dismissal they have prayed an appeal to this court.

We may say in the beginning of this discussion that the view we have taken of this case will make it unnecessary to discuss all of the several matters set forth in the complaints and interventions and dismissed by the trial court. We may, however, discuss some of these propositions to some extent, in order to clarify the respective contentions. Whether the so-called use tax is a property tax has received rather serious consideration, in view of some of our former decisions, and for such light as may be shed upon the present controversy by reason of the recent decision of the United States Supreme Court in the case of *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814, wherein Justice CORDOZA, writing the opinion, said: "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191, *supra; Bromley* v. *McCaughn,* 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226; *Burnet* v. *Wells,* 289 U. S. 670-676, 53 S. Ct. 761, 77 L. Ed. 1439. A state is at liberty, if it pleases, to tax them all collectively, or to separate the fagots and lay the charges distributively. Ibid. Calling the tax an excise when it is laid solely

upon the use (*Vancouver Oil Co.* v. *Henneford,* 183 Wash. 317, 49 Pac. 2d 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership."

We hope we will not be deemed unduly critical of the opinion of this most learned jurist when we suggest that in many instances a use tax upon property necessarily is a tax upon the property itself, and in all such matters our own Constitution must be the controlling factor.

No doubt, there is much good reason and common sense in the learned Justice's statement that a state is at liberty if it pleases to tax "the privilege of use as only one attribute, among many, of the bundle of privileges that make up property or ownership." He says that the state is at liberty if it pleases to tax them all collectively, or to separate the fagots and lay the charges distributively. No doubt, this is true as to certain classes of property, in some jurisdictions, but it may not be true as to other classes of property. For instance, in many classes of property the use of the property is the only material part or "fagot," so to speak, inherent therein. In such cases wherein the use of the property is the only element of property that gives it value, then there is no refinement of reasoning whereby such use might be taxed without the tax being a tax upon the property itself and not upon some of its attributes. We are saying that a use tax is sometimes necessarily a property tax. No metaphysical distinction can serve any practical purpose to distinguish in such instances a so-called use tax from an actual property tax. This matter was discussed in regard to the so-called gasoline tax, nor do we recall a single case in which this court has upheld the tax on the use of gasoline itself. The material element of property in gasoline, if not its sole and exclusive element, is its use. At least, the one use by which it takes on value, when employed, destroys it. So its almost sole and exclusive use is its value, the property itself. This is true of practically all toilet goods, gun powder, dynamite, all solvents, chemicals, and lubricants used in mining and manufac-

turing. Some of the most common place articles have their value in their use, such as soap. The tax on the use of such article is necessarily a tax on the property. *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753.

The state government and its sub-divisions pay their obligations by the issuance of warrants or vouchers to those to whom they are indebted. A tax upon these warrants was held to be a property tax. *Hixon* v. *School Dist. of Marion,* 187 Ark. 554, 60 S. W. 2d 1027; *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. 2d 182. See further discussion in case of *Ft. Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679.

No one seriously entertained an idea that the tax was one upon the use of representatives or declarations of value, the *indicia* of property in the Hixon case, *supra,* instead of actual property.

We have called attention to these matters merely by way of suggestion and as intimation, at least, that a use tax, so-called and imposed on many articles might not be enforceable, particularly because of that provision of our State Constitution which makes for uniformity and prevents multiple taxation on values. Art. 16, § 5.

Each state has the inherent right and exclusive power to construe and interpret its own constitution. Therefore, in such instances wherein use of property may constitute its sole practical value we might feel constrained to hold that all such taxes come within the purview of the foregoing uniformity provisions of our organic law.

Literally dozens of citations might be set forth to emphasize the practical application of this time honored provision of our constitution. Since the foregoing is not said by way of decision of the controverted question, we omit all such citations and call now special attention to the fact that in the levy of a use tax appropriate and certain language must be employed for that purpose in order not to impinge upon the foregoing salient and absolutely mandatory constitutional provision relating to *ad valorem taxation.*

The view we have taken, however, of the matter now before us does not make it necessary that we decide all the questions and problems suggested above, but this is done by way of introduction of the real controversy presented for consideration. We hope we have made clear the idea that a tax levied must be certain and definite, not only as to the purpose for which it was levied, but as to the fact that such levy was made and imposed upon the property or right therein.

The title of act 154, as appears from the published acts, is "Arkansas Retail Sales Tax Law." It is an act to provide for the raising of revenue for certain purposes; it provides the machinery for the collection of the sales tax. In § 3 definitions are given of the terms used. A sale at retail is defined. There is an express provision that a sale at retail shall not include an isolated or occasional sale of tangible personal property, substance or things, by a person not engaged in such business. The term retailer is defined to mean any person, persons, or partnership firm or corporation, engaged in "sales at retail."

Section 4 is specific in that it levies a tax. "There is hereby levied upon and shall be collected from all retail sales, as herein defined, a tax of 2 per cent of the gross proceeds derived from said sales." In this same § 4 there is this statement that: "The tax imposed by this section shall apply to:" then follow the several paragraphs designated as "(A)," "(B)," "(C)," "(D)," "(E)," and "(F)," the questioned paragraph, and provision. Now all the foregoing designated paragraphs to "(E)," inclusive, beyond doubt, relate to the sale tax and its application to things sold. Following a natural and orderly sequence we look to "(F)," also to demonstrate or even expand or enlarge the field for the application of the sales tax. It would, indeed, be unusual, if not actually grotesque, to discover in this situation the levy of a new or different tax with a provision for its collection.

If (F) does not relate to the sales tax why should the "person" mentioned report as a retail sale the use, etc.,

of property on which "sales tax has not been paid under this act?" The concluding provision is: "and shall pay the sales tax thereon." There is no provision similar or dissimilar for the payment of a "use tax."

There is no controversy about these several sub-divisions (A), (B), (C), (D), and (E), but (F) is the questioned provision. Now it is contended by the appellee that sub-division (F) in itself levies or imposes the use tax. We have just called attention to the imposition of the sales tax in a quoted portion of said § 4. The only tax, therefore, that is imposed is a sales tax. We seek in vain for any language that lays or imposes a "use tax." We may not so amend an act of the Legislature to levy and collect a tax apparently not even contemplated by the law-making body. If sub-division (F) be given any interpretation or construction at all, it must be such interpretation or construction as will relate to the only tax that is imposed by said act 154, and that is the retail sales tax. Apparently the Commissioner of Revenues gave only one interpretation or construction to this provision for approximately or about two years from and after the passage of the act and that is, that this particular provision was such as to aid in the collection of the sales tax that had been imposed by the first part of said § 4 above quoted. This section had been in existence for approximately two years, had been enforced as a part of the sales tax provision, a complement thereof, before it was interpreted to levy a use tax on property that was bought outside of the state and brought into it.

Substantially the appellee argues that no sales tax could be levied on a sale made in another state which was thereafter to be brought into the state; that such a tax, that is a sales tax, on a sale made in another jurisdiction would be an unwarranted burden on interstate commerce in violation of the commerce clause of the United States Constitution, and, therefore, invalid.

The quoted first part of § 4 above set out indicates clearly that the Legislature knew a tax had to be levied or imposed before it could be collected and there can be

no question that it levied a sales tax. There is no language whereby a use tax was levied or by which such fact might be determined by actual or necessary implication. In fact, the very provisions which the appellee now argues are sufficient to levy a use tax and provide for its collection designate such tax as was levied as the sales tax levied in the first part of this section.

What we have said about the fact that this provision of the statute as heretofore construed by the Commissioner of Revenues is not intended in any manner as a criticism of that officer for any dereliction of duty. No such criticism would be warranted. But it is a fact, not now open to controversy that if the Legislature did intend to levy and provide machinery for the collection of a use tax, that fact was so hidden and concealed as not to be readily discoverable. As we have heretofore stated, it is conceded that if this provision of the act must be treated as a sales tax on sales made in other states, it is illegal and unenforceable. It is on that account that the Commissioner of Revenues now argues that it is a use tax, although the language used in this provision refers only to a sales tax.

It may be said in passing that a sales tax and a use tax are by no means identical. The rule is that in a sales tax the property sold changes hands. There is a change of ownership. The new owner who purchases pays the sales tax to the seller who becomes the agent for the state for its collection.

The buyer pays the tax as an incident to the price. In a use tax there is no change of possession, no change of ownership, but the owner pays this tax which is an excise or exaction charged because of the owner's privilege to exercise or assert some of the elements of ownership over the property. In the use tax the seller does not collect the tax as an agent for the state, but the buyer, according to the contention made here, must account for the property which he actually owns and pay a tax allegedly of the same percentage as a sales tax. The appellants, or interveners in this case are not in the position of one

who contends that his property is exempt from some general tax, and that, therefore, he must show, as was recently held, practically beyond a reasonable doubt that his property is exempt. See *McCarroll, Commissioner* v. *Mitchell, ante* p. 435, 129 S. W. 2d 611.

The question raised here is whether a use tax has been levied or imposed upon the property. The law is, as we understand it, that the imposition or levying of a tax shall be direct and specific, and, if there is any doubt about the fact of the levy, such doubt must be resolved in favor of the taxpayer. See *McDaniel* v. *Byrkett,* 120 Ark. 295, 297, 179 S. W. 471; *United States* v. *Updike,* 281 U. S. 489, 50 S. Ct. 367, 74 L. Ed. 984.

Indeed, every citizen has a right to know and be informed whether a tax has been levied that affects his property or the exercise of any of his rights of ownership therein and such levy will not be construed as having been made to supply and fill in an apparent omission or dereliction of the lawmaking body. That is neither our duty nor purpose, and by the foregoing expression we do not mean to imply that there was or is the possibility of such omission or dereliction. In fact, the language of subdivision (F) of § 4 aforesaid, is clearly illustrative of the contrary theory.

The purpose of the said sub-division (F) aforesaid, is valid beyond a question if it be treated purely as part of the machinery to aid in the collection of a sales tax, and not in fixing liability upon property not subject thereto.

But if there are two or more interpretations to be given a provision of the statute, one of which is legal and enforceable, and the other, of at least doubtful legality, if not admittedly illegal, it becomes our duty to adopt that construction consistent with the language admitted to be legal. The suggestion that the retail dealer who takes from his stock articles held therein for retail sale by him, upon which tax should be collected, is subject to the tax is not inconsistent with the language used and must admittedly be an interpretation under which the language

so interpreted must be regarded as legal and enforceable. Well known business practices make clear what was intended. Mr. Retail Dealer, for the purposes of knowing what he is doing in the conduct of his business, for the maintenance of his insurance contracts, takes careful invoices and checks all his purchases. He deducts therefrom his daily sales and these daily sales, if his books are correct, must include also his own abstractions from his stock, so he in form, at least, is Mr. Consumer who purchases from Mr. Retail Dealer. Mr. Retail Dealer should, therefore, under this provision of the law account for such sales tax to the same extent as if he had bought his goods from his neighbor next door. It is true in some instances there may not be a parting of title or possession as between seller and purchaser, but there is the sales and the taking from the stock the goods the consumer accepts to the same extent and with the same effect as if they had been bought by one, a total stranger to the business. This interpretation of the questioned provision of the law is in conformity with its language with a declared purpose and constituting a part of the machinery set up by the Legislature to aid in the collection of these revenues due and owing to the state and does not permit a discrimination whereby a retail dealer may be exempt from sales taxes and his neighbor be forced to pay them. We are, therefore, of the opinion that this sub-division does not levy or impose a use tax and until such tax is levied and imposed, of course, the question does not arise as to its validity, whether it be a property tax or otherwise.

We call attention to the fact that it has been argued that unless this provision of the statute be declared as one imposing the use tax, fixing the amount thereof and providing the machinery for collection, the state will lose immense amounts of revenue that would otherwise be collectible. It is also argued that merchants are entitled to have this construction placed upon this act of the Legislature for their protection, in order that local citizens will not make purchases abroad in order to avoid the sales tax. We acknowledge the forcefulness and cog-

ency of these statements and the only answer we desire to make to them is that they are proper arguments to be made to the legislative assemblies, and they become proper to present to judicial tribunals only when it is apparent from the language of the act itself that it was the legislative intent so to safeguard the public revenues and to protect one class of its citizens against the alleged wrong doing by others in the evasion of taxes by trading in tax-free areas.

Our attention has been called to the fact that the Legislature was not unmindful that people might be tempted to trade in other states in order to avoid the taxes imposed. Provisions have been made for the reduction of taxes where the local citizen could secure an advantage by merely going across the state line to make his purchases. Our attention has heretofore been called to certain matters of this kind and has been given due consideration, but they are problems for legislative solution and not for correction by judicial interpretation. *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. 2d 91. *Kibler* v. *Parker,* 191 Ark. 475, 86 S. W. 2d 925.

From what we have said, we think the other interesting questions stated in the beginning of this opinion need not be discussed as it is apparent that the court erred in sustaining the demurrer to the complaint and the several interventions.

The judgment is, therefore, reversed, with directions to overrule the demurrer and take such further action as may be necessary not inconsistent with this opinion.

STATE BOARD OF EDUCATION *v.* AYCOCK.

4-5602 130 S. W. 2d 6

Opinion delivered June 26, 1939.

Jack Holt, Attorney General, *Leffel Gentry,* Assistant Attorney General, and *J. F. Koone,* for appellants.

Mann, Mann & McCulloch, for appellee.

McHaney, J. The General Assembly of 1939 enacted Act 345, which "empowered and directed" the State Board of Education "to lend the sum of Four Hundred Thousand Dollars ($400,000) from the Permanent School Fund to the State School Equalizing Fund," and to issue a sufficient number of Certificates of Indebtedness for the purposes of the Act which "shall be correctly and numerically registered by the State Treasurer and shall be in such amounts as to cover the loan made at the time the Certificate or Certificates are executed." They shall bear interest at 4 per cent. per annum, payable on January 1, each year and mature on January 1, 1959. Payments of interest or principal shall be indorsed on the certificates, giving date of such payment, and all payments shall be made by vouchers on the State School Equalizing Fund. All or any part of

the loan may be repaid prior to maturity. Sections 1 and 2. Section 3 provides: "When the Certificates of Indebtedness as herein provided are properly executed and filed with the State Treasurer, he shall transfer the amount of said Certificates from the Permanent School Fund to the State Equalizing Fund." An emergency is declared on account of the insufficiency of available money in the State Equalizing Fund and that the sources of revenue for same "are inadequate to provide the money to keep the public schools open for a normal term."

Appellee, a citizen and taxpayer, brought this action against appellants, the Commissioner of Education, the State Board of Education and its members, and the State Treasurer, to enjoin the carrying out of the provisions of said Act. The complaint alleged that under the Statute creating it, § 11569 of Pope's Digest, the Permanent School Fund shall remain inviolate and be kept intact, be securely invested and safely preserved, and only the interest thereon be expended for the maintenance of the Schools of the State; that the transfer or loan as contemplated by the Act would be violative of §§ 1 and 2 of Art. 14 of the constitution in that it would amount to a diversion of the Permanent School Fund; that while the act denominates the transaction as a loan, it would in fact be a donation, resulting in a depletion of said Fund; that the consummation of the transaction would be violative of Amendment No. 20 to the constitution; and that, by § 11585 of Pope's Digest, the annual receipts of the State Equalizing Fund have been pledged to secure the payment of bonds issued by the State Debt Board, and that the certificates of indebtedness authorized would be without security, and, therefore, invalid.

To this complaint a general demurrer was interposed and overruled. Appellants declined to plead further, stood upon their demurrer, and the court enjoined and permanently restrained them from performing any of the provisions of said Act.

We think the learned trial court erred in so holding and in not sustaining said demurrer. The Permanent

School Fund and the State Equalizing Fund were created and established by the legislature. Neither has any particular constitutional protection except in § 2 of Art. 14 of the Constitution it is provided: "No money or property belonging to the public school fund, or to the State for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs."

Prior to 1931, Act 169, what is now known as the Permanent School Fund was designated Common School Fund of the State, § 8989, Crawford & Moses' Digest, being the Act of March 15, 1897, and the same language as to the security and safety of the fund is used in both acts.

While the language of the above constitutional provision is mandatory and would, we think, bar legislative sanction to use such funds for other than the support of the common schools, if levied and collected for that purpose, or for universities, if levied and collected for that purpose, we cannot agree that the proposed use of the money so borrowed is for other than school purposes. The emergency clause recites that the money is to be used or that it is needed "to keep the public schools open for a normal term." In *Ruff* v. *Womack,* 174 Ark. 971, 298 S. W. 222, we held that the Permanent School Fund might lawfully be loaned to needy school districts through the Revolving Loan Fund. The State Equalizing Fund is a fund to be used by the State Board of Education in assisting needy districts to keep their schools open for a normal or reasonable term. It is not a loan, but a gratuity. In *State, ex rel.* v. *State Board of Education,* 195 Ark. 222, 112 S. W. 2d 18, we said: "By appropriate Legislation either the State Debt Board, or the State Board of Education, may be authorized to lend the assets of the permanent school fund through any properly designated instrumentality, such as the revolving loan funds, and as security for the loans so made, bonds of school districts may be accepted. Either board may act as a business or accommodation agency and issue and sell its own bonds in substitution of the bonds pledged by the

school districts, paying only such interest as it receives from the districts, and being liable only to the extent of the collateral which it pledges. Any excess interest paid by such school district becomes revenue of the state and a part of the assets of the permanent school fund. The public characteristics, attributes, and state ownership of such revenue are expressly affirmed."

We think this holding is authority for the proposed action under said Act 345. Instead of the Revolving Loan Fund, the State Equalizing Fund is seeking to borrow from the Permanent School Fund. Instead of bonds, certificates of indebtedness are to be issued. Instead of being secured by the bonds of the school districts to whom the funds were loaned in that case, the security is the relatively large income of the Equalizing Fund from the various sources dedicated to it by different acts of the legislature, more than one million dollars annually although it is not pledged. So we fail to find any wrongful or unconstitutional diversion of the Permanent School Fund under said Act.

It is also alleged that the transaction would in fact be a donation and not a loan. The Act provides it shall be a loan, for which interest bearing certificates of indebtedness shall be issued. There can be no merit in this contention.

Another allegation is that the certificates of indebtedness to be issued would be void as violative of Amendment No. 20, and great reliance is placed on the decision of this court in *Walls* v. *State Board of Education,* 195 Ark. 955, 116 S. W. 2d 354. We cannot agree that Amendment 20 is violated or that *Walls* v. *State Board of Education* is controlling. There is nothing in said Act 345 that in any way pledges the full faith and credit of the State nor is any of its revenues pledged. There is no pledge of any kind. The State Board of Education, under legislative direction, has the control and management of the Permanent School Fund as also the State Equalizing Fund. The former, it is directed to lend, safely keep and preserve, and only the income therefrom may be used for the common schools, not any part of the

principal. Whereas, the latter has a large income. During the last 12 months, June 1938 to May 1939, both inclusive, it had an income from cigar and cigarette stamps and permits of $552,914.49; from vending machine taxes, Act 201 of 1939, three months only, $4,381.94; from income taxes, $162,375.91; and a contingent appropriated income from land redemptions $300,000.00, a grand total of $1,019,672.34. As above stated, this money is used to assist impoverished school districts in operating a normal term of school. The money is not loaned to them, but is donated. But for this fund, many school districts in the State would have no adequate schools. In the Walls case, the Act provided for a loan to the board of control of the Blind School to be used to construct new buildings, and it was there argued that the school for the blind is part of the public school system, and to lend it the funds for such purpose would not be a diversion thereof. The court refused to accept such theory, as it was there said: "Throughout the years the Blind School, as an entity separated from the common school system, has been supported and maintained by the State, and so far as we are advised by citations or otherwise, in the briefs presented to us, there does not seem to have ever been a time when the Blind School had a call upon the public school funds for support or maintenance. If there was ever a time when it was intended that the Blind School should be deemed a part of the public school system that fact has not been evinced by any suitable or appropriate legislation."

And it was there further said: "It would be using the funds for purposes never intended in the collection and accumulation thereof to convert them into a building fund for the erection of a non-income producing structure subject to obsolescence and decay. Even if it be a loan, as argued, there is no security for a part thereof, except the unacknowledged obligation of some future legislature to restore the fund."

Here, the situation is wholly different. The Permanent School Fund is not being diverted to a different purpose. It is to be used for the public schools,—the im-

poverished and the needy schools, to keep them "open for a normal term." It is not being converted "into a building fund for the erection of a non-income producing structure." Its repayment does not depend upon "the unacknowledged obligation of some future legislature," except in the sense that it must be appropriated. The legislature of 1937, by § 6 of Act 283, appropriated, "for the purpose of complying with the provisions of the State Equalizing Fund Law," for the biennium, $2,000,000 and in 1939, by § 9 of Act 236, $2,400,000. It cannot be presumed that the legislature would create this fund and give it this large income, and then refuse to appropriate it for the purpose for which it was created.

In 1931, the legislature enacted Act 207 which authorized the State Debt Board to sell the obligations of the State for such sums as it deemed necessary to pay the salaries of teachers in the public schools for that scholastic year, payable not later than two years from the date of the Act, and to deposit the proceeds in the State Treasury to the credit of the State Equalizing Fund which might be pledged as additional security. Two million dollars of obligations were sold and so deposited. This fund was then loaned, not donated, to school districts and their obligations taken. The above amount has been paid in full, not by said fund, but from the repayment to the fund by the school districts to whom it was loaned. So far as we are advised, the State Equalizing Fund is perfectly solvent, that it owes no indebtedness and that its income is not in any way pledged. It met the emergency as above stated and retired the pledge of its resources promptly.

We cannot assume or presume that any future legislature will destroy this fund by diverting its present sources of income or that it will fail to make appropriations for the purposes of its creation.

We conclude, therefore, that said Act 345 is a valid enactment, and that the court should have sustained the demurrer of appellants. The decree is reversed, and the cause dismissed.

MOTORS SECURITIES COMPANY, INC. *v.* DUCK.

4-5529 130 S. W. 2d 3

Opinion delivered June 26, 1939.

J. V. Spencer and *Sam Goodkin,* for appellant.

Surrey E. Gilliam, for appellee.

HUMPHREYS, J. This is a replevin suit brought in the circuit court of Union county by appellant against appellee to recover the possession of a Ford automobile under the provisions of a conditional sales contract for failure of appellee to pay the balance of the purchase money therefor evidenced by note with agreement to pay same in monthly installments. The conditional sales contract and note were made exhibits to the complaint. Appellant alleged the right to possession of the automobile by reason of an assignment of the note and conditional sales contract to it by the Ramsey Motor Co., Inc., who sold the automobile to appellee for a valuable consideration before maturity. The sales contract contained a provision that Ramsey Motor Co., Inc., or its assignee might retake the automobile in case appellee failed to pay the monthly installments as they became due.

Appellee filed an answer denying the material allegations of the complaint and pleading further that the contract was made in Louisiana and was void *ab initio* in that state. The cause was submitted to the court sitting as a jury upon a stipulation as follows:

"That the conditional sales agreement attached as Exhibit to the original complaint, and which is made a part of this stipulation, was made, signed, executed and delivered in Farmerville, Louisiana, in Union Parish, and that the car involved therein was delivered to the purchaser, Horace Clyde Duck, in Farmerville, Louisiana. That a note was executed at the same time as a part of the purchase price, and that it likewise, was signed by Horace Clyde Duck in Farmerville, Louisiana.

"That both said contract and note were executed on August 29, 1937, but bear date of August 30, 1937.

"That the plaintiff is in arrears on his payments provided for, and that under the terms of the contract the total amount thereunder, in the sum of $448.49, is the accrued amount due under said contract and note,

provided it is found that the instruments are valid, and that any amount is due thereunder.

"That immediately after the execution of said contract and note the Ramsey Motor Company, Inc., sold the note and contract to the Motors Securities Company, Inc., for a valuable consideration; that said sale of the note and contract were made to the Motors Securities Company, Inc., before any payments under the contract and note became due.

"That after the assignment to the Motors Securities Company, Inc., the defendant made payments, the last payment being made to the Motors Securities Company, Inc., on the 12th day of September, 1938, and under the note and contract there is now due a balance of $448.49, should the court find that the contract and note are valid, together with six per cent interest on and after September 12, 1938.

"It is further stipulated that the car is of the value of $500.

"It is further stipulated that neither the Motors Securities Company, Inc., nor the Ramsey Motor Company, Inc., have been authorized to do or transact business in the state of Arkansas; and it is further admitted that both of them are corporations which were not organized under the laws of the state of Arkansas.

"It is further stipulated that the note and contract provide that fifteen per cent. attorney's fee be added should the note be placed in the hands of an attorney for collection.

"It is further stipulated that said note and contract are made a part of this agreed stipulation of facts as Exhibit 'A' to plaintiff's testimony.

"It is further stipulated that Horace Clyde Duck is a resident of the state of Arkansas, and was such during all of the times mentioned."

The court found that the conditional sales agreement was made in Louisiana, and since under the laws of Louisiana, a conditional sales agreement has no effect as such, the appellant could not maintain its action of re-

plevin and dismissed the complaint over the objection and exception of appellant.

A motion for a new trial was filed assigning as ground therefor that the court erred in holding that the contract should be governed by the laws of Louisiana. The motion was overruled whereupon appellant prayed and was granted an appeal to this court.

Appellant's first contention for a reversal of the judgment is that, even though the conditional sales contract was a Louisiana contract, it was valid in that state and, therefore, valid and enforceable in any other state. The first question for determination, therefore, is whether the conditional sales contract was a valid and enforceable contract in the state of Louisiana. The answer to this question is found in the case of *Barber Asphalt Paving Co.* v. *St. Louis Cypress Co., Ltd.*, 121 La. 152, 46 So. 193, expressed in the syllabus stated by the court, which is as follows: "A so-called conditional sale, or sale by which the vendee is to become at once unconditionally bound for the price, and the vendor is to continue to be owner of the property until the price is paid, is not possible under the laws of this state. A petition wherein the vendor under such a contract claims the ownership of the property sold shows no cause of action."

The effect of this decision is to hold that a conditional sales contract, in so far as it seeks to reserve or to retain title to personal property in a vendor until the purchase money has been paid, is void and will not be enforced by the courts of Louisiana, and that when such a contract is entered into the absolute title to the personal property immediately passes to and vests in the vendee, just as if the title had not been retained or reserved in the vendor until the purchase money should be paid. That being the case replevin does not lie in Louisiana to recover the possession of the property and, therefore, cannot be resorted to to recover the property in any other state. The case referred to above has never been overruled. In fact, the doctrine therein announced

has been reaffirmed in the case of *Overland Texarkana Company* v. *Bickley,* 152 La. 622, 94 So. 138.

Appellant contends for a reversal of the judgment, however, because the intention of the original parties in the conditional sales contract was to make same with reference to the laws of Arkansas both as to its validity and its enforcement in the state of Arkansas. Such an intention does not appear in the stipulation, and we are unable to find any such intention expressed in either the conditional sales contract or the note. Had such been the intention of the parties the intention could have been easily inserted in the contract. The fact that they failed to do so is a strong circumstance indicating that they had no such intention. The stipulation shows that the contract was entered into in Farmerville, Louisiana. The automobile involved in this suit was sold and delivered to appellee in Louisiana. The down payment was made in Louisiana. Both the note and conditional sales contract were executed and delivered in Louisiana, and both were assigned to appellee in Louisiana. The conditional sales contract and note provide for the payment of the unpaid purchase price at the office of Motors Securities Company, Inc., at Monroe, Louisiana. According to the conditional sales contract, the note and stipulation, everything in connection with the transaction from its inception to its completion occurred in Louisiana and payments of the installment for purchase money were to be paid in Louisiana.

The general rule is that the law of the state where contracts are made govern as to the construction and enforcement thereof unless otherwise provided in the contract or unless it clearly appears that the parties intended for it to be construed and enforced in accordance with the laws of some other state. *Smead* v. *Chandler,* 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353.

As further showing the intention of the parties that the contract was not to be construed or its validity determined by Arkansas laws, the contract uses terms, conditions and provisions entirely unknown to and unrecognized by the laws of the state of Arkansas. It is

provided in the conditional sales contract that same shall be recorded at the expense of the buyer. Such a contract is not required to be and not being acknowledged cannot be recorded in this state. It is also provided in the contract that the buyer waives right of inquisition on real estate. No such right of waiver exists in this state. The sales conditional contract also provides that the buyer may appear by a prothonotary and confess judgment. There is no such officer in the state of Arkansas.

In the stipulation it is admitted that the contract although bearing the date of August 30, 1937, same was actually made and executed on August 29, 1937, which was Sunday. A contract executed on Sunday in this state is void. *Edward* v. *Probst,* 38 Ark. 661.

These provisions foreign and unknown to the laws of Arkansas indicate that the contract was not made with reference to the laws of Arkansas.

Appellant also contends that it is an innocent purchaser of the note. As before stated the conditional sales contract was void *ab initio* under the laws of Louisiana and it follows, of course, that one cannot be an innocent purchaser of such a contract. But even if the law were otherwise this contract was payable to the appellant at its office in Monroe, Louisiana, and with such a provision in the contract appellant must have known all about same when it took the assignment thereof immediately after the execution of the contract.

No error appearing, the judgment is affirmed.

HANCOCK *v.* HANCOCK.

4-5612 130 S. W. 2d 1

Opinion delivered June 26, 1939.

Partlow & Bradley, for appellant.

Fred H. Stafford, H. P. Maddox and *J. G. Waskom,* for appellee.

SMITH, J. The question at issue in this case arose between Pearl Hancock, the mother, and Kate Hancock, the stepmother, of a thirteen-year-old boy, and involves the right to the custody of the child.

A former appeal in this case reversed the decree of the chancellor in refusing to entertain jurisdiction of the cause, for the reason that the probate court had appointed Kate, the stepmother, as the guardian of the child. *Hancock* v. *Hancock,* 197 Ark. 853, 125 S. W. 2d 104.

In reversing that decree, we said: "Our conclusion is that the chancery court erred in dismissing the petition and 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."

Upon the remand of the cause testimony was heard upon this issue, and, without hearing all the testimony offered showing fitness of Pearl, the mother, to have the custody of her child, the court announced this finding: "It is apparent, from the evidence, that the mother of

the boy is fit and capable to have its care and custody, no doubt about that, in my mind."

Without reviewing the testimony, it may be said that it fully sustains this finding, but, notwithstanding this finding, the court did not award the custody of the child to its mother:

In explanation of this holding the court said: ". . . When she (the mother) should have had the custody of the child, she did not have it, and did not try to obtain custody of it. If what the child says is true, some one has committed a serious wrong—its father or whoever it was—to turn the child's mind against its mother." The judge then referred to certain statements which the boy said his father had made about his mother, and proceeded to say: "But it is very evident for some reason, whether good or bad, that he should not have been told this. . . . It is an unfortunate thing, but it can't be helped. A change would not result in any good to him now. He probably would not remain where he is sent. His mother waited a long time to ask for custody." Counsel for the mother interrupted to say: "Just three years, Your Honor," to which remark the judge replied: "But that's the time she should have asked for it. The custody will not be disturbed. The child will have the right to visit its mother and the mother to visit the child, and, if at any time she is not received, I will change the custody and put it in its mother." From that decree the mother of the boy has appealed.

As both parties to this litigation are referred to by the witnesses as "Mrs. Hancock," we refer to them by their given names to distinguish them, Pearl being the mother and Kate the stepmother.

On October 25, 1928, a separation agreement was entered into between the father and the mother of the child, in which it was agreed that they should "at all times hereafter live separate and apart." There was a property settlement, and it was recited in the separation agreement that ". . . The wife surrenders and does hereby surrender the care and custody of their three-year-old child, John V. Hancock, to the husband, to be

at all times hereinafter in the care and custody of the said husband, subject, however, to the friendly visitation of the wife." The recitals of this instrument strongly suggest that it was prepared by the father's attorney.

As recited in the opinion on the former appeal, the father obtained a decree from the mother on the ground of adultery. This decree was rendered December 24, 1928. The parties subsequently lived together as man and wife.

Pearl testified that she was induced to resume that relation upon the representation made to her by her former husband that he had not obtained a divorce. The decree in that case was rendered upon a waiver of service of summons and an entry of appearance, and recited that the mother of the child was an unfit person to have its custody, which was awarded to the father. Pearl denied knowing that this decree had been rendered, and denied having waived service of summons or having executed an entry of appearance in that case.

The father married Kate in January, 1933, and the following year the boy was taken out of school in Memphis, Tennessee, where he had been placed by the mutual consent of his father and of Pearl, and since 1934 the child has lived in Marked Tree, Arkansas. He lived with his father and Kate until July 5, 1938, the date of his father's death, since which time he has lived with Kate. A petition for a writ of *habeas corpus,* was filed by Pearl on August 18, 1938, and this litigation has since been in progress between Pearl and Kate, both of whom love the child dearly, and to award the custody of the child to either one of these women will wring the heart of the other.

It appears that Pearl labored under the apprehension that the father of the child had a preferential right to its custody, but it is certain that she never abandoned it. Her visits to the child became less frequent, but she explained that this was true because they became more and more unpleasant, made so by the hostile attitude of Kate. Pearl appears to have preserved such contacts

with the child as were reasonably possible under the circumstances. She sent him a number of small gifts, many of these being her own handiwork, and she corresponded with him. She sent him, among other things, a Boy Scout knife, which he returned. Under date of January 12, 1938, he wrote Pearl that his father did not wish him to receive any more gifts from her. But before writing this letter, he wrote another in most affectionate language, in which he suggested that he get a postoffice box so that the correspondence might not be interrupted. The import of this suggestion cannot be mistaken.

The testimony of the boy shows that he possesses a very high degree of intelligence for one of his age, and it shows also that he not only has a deep affection for Kate, but that he has acquired a fixed aversion for his mother. He attributes his attitude to Pearl to what he said his father told him about her.

It may be that Pearl will be unable to win back her son's love and devotion, but we think she should have that opportunity. This remains to be seen. It is true Pearl surrendered the custody of her child when, as the chancellor said, she should have contended for it, but that custody was surrendered to the father, and, as we have said, there is no evidence that she ever abandoned the child, and she sought to recover its custody as soon as the child's father died. Pearl had never surrendered the custody of the child to Kate, but to its father, and, as we have said, she labored under the impression that the father had this preferential right, which was the law prior to the passage of the act now appearing as § 6205, Pope's Digest.

The recent case of *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474, announces the rule which we think is applicable here. We there said: "Courts are very reluctant to take from the natural parents the custody of their child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life. When, however, the

natural parents so far fail to discharge these obligations as to manifest an abandonment of the child and the renunciation of their duties to it, it then becomes the policy of the law to induce some good man or woman to take the waif into the bosom of their home, and when they have done so and, through their attentions to it, have learned to love it as if it were their very own child, this bond of affection will not then be severed, although the natural parent may later repent his breach of the laws of nature and of the state and offer to resume the duties and obligations which he should never have ceased to perform."

We conclude, therefore, that the decree, awarding custody of the child to Kate, should be reversed, and its custody will be awarded to Pearl.

[redacted]

PERDUE *v.* PERDUE.

4-5555 130 S. W. 2d 703

Opinion delivered July 3, 1939.

[redacted]

Claude E. Love, for appellants.

Floyd Stein, for appellees.

HOLT, J. Appellants bring this appeal from the Union chancery court, first division.

J. Madison Perdue died intestate in 1937, owning eighty acres of land in Union county, Arkansas, and left as his sole surviving heirs: Harry Perdue, Maggie Deason, Cammie Deason, Clara Wallace, S. M. Perdue, J. W. (Walter) Perdue, John A. Perdue, and Mrs. C. F. Enis.

In 1926, J. Madison Perdue executed a warranty deed to one of his children, J. W. (Walter) Perdue, conveying to him twenty acres of land, and at about the same time gave by warranty deed to John A. Perdue, another son, a twenty-acre tract.

On August 26, 1938, appellants, Harry Perdue, Maggie and Cammie Deason, Clara Wallace, S. M. and John A. Perdue, and Mrs. C. F. Enis, filed suit against J. W. (Walter) Perdue, setting up in their complaint, among other things, that they became on the death of their father, J. Madison Perdue, tenants in common and owners of all the lands of which their father died seized and possessed; that prior to his death their father had conveyed to the defendant, J. W. Perdue, twenty acres of land as an advancement to him in lieu of, and substitution for, his right of inheritance in the estate of the said J. Madison Perdue, and likewise a similar conveyance of a twenty-acre tract to John A. Perdue, for the same purpose, and that said conveyances were given for and accepted by each in lieu of their right of inheritance, and that the said John A. Perdue admits this allegation of appellants' complaint to be true and makes no claim for any interest in said estate.

They further allege that appellee, Walter Perdue, is wrongfully asserting some interest in the property of which the said J. Madison Perdue died seized and possessed, and prayed they be declared the owners of all the lands described, of which the said J. Madison Perdue died seized and possessed, and that their title be quieted and confirmed against the defendant, J. Walter Perdue.

To this complaint defendant answered, admitting the allegations thereof except that he denied that at the death of his father, J. Madison Perdue, the land in question descended to appellants to the exclusion of his (appellee's) interest therein, and alleges that he, appellee, is a co-tenant along with appellants.

He further set up the defense of statute of frauds and alleged that at the time he married, some thirty years ago, his father deeded him the twenty-acre tract of land in question, as a gift; and that it was not intended to be and was not considered, by his father, as an advancement to him or in lieu of his right of inheritance in his father's property.

The chancellor found "that the said J. W. (Walter) Perdue is a tenant in common with the plaintiffs in this case, and has the same right, claim, interest and equity in the property left by the said J. Madison Perdue as that of the plaintiffs, and that the plaintiffs and defendant are tenants in common in owning said property described in the plaintiffs' complaint and set out in this decree. . . . That J. Madison Perdue did convey to the defendant, J. W. (Walter) Perdue (twenty acres of land) during the year of 1904, and that the conveyance of said land was not an advancement and was not deeded to the said J. W. (Walter) Perdue in lieu of his inheritance, or in substitution for his right of inheritance in the estate of the said J. Madison Perdue; and that the complaint of the plaintiffs filed herein should be dismissed for the want of equity."

From the judgment on this decree comes this appeal.

We think the only question presented by the record for review here is: Was the twenty-acre tract of land given to appellee, J. W. (Walter) Perdue, in 1904 and later conveyed to him by warranty deed in 1926 by his father, J. Madison Perdue, an advancement?

We think the preponderance of the testimony shows that it was an advancement and so intended to be by J. Madison Perdue, and that the chancellor erred in finding to the contrary.

Appellee urges that the judgment should be affirmed for failure of appellants to comply with Rule IX of this court. While we agree that better practice requires that the testimony should have been more fully abstracted, on the issue here presented, we think the abstract sufficient.

We set out briefly some of the testimony as given by the eleven witnesses who testified on behalf of appellants:

H. G. Pendleton testified that about twenty years ago he had a conversation with J. Madison Perdue. "Q. Did he make any statement about giving Walter his interest in the estate. A. He says I have twenty acres apiece for them, and I have given John and Walter theirs, that is the words he said. . . . Q. He didn't tell you at the time he was going to disinherit Walter and John and that they couldn't participate in anything he left, did he? A. He didn't say anything about that; he said he had twenty acres of land apiece for his children, and I heard him say he had given Walter and John theirs time and time again, when I first moved there."

Bill Blackman testified: "Q. Did you ever hear J. Madison Perdue in his lifetime make any statement concerning twenty acres of land he had given to each, John and Walter? . . . A. Yes, sir. Q. What was that statement? A. Well, he just said to me he had given Walter twenty acres of land for his part. Q. What did he say about John's? A. Well, he said he had give John his part. Q. Are you related to the Perdues in any way? A. No, sir."

W. J. McNeil testified: "Q. J. Madison Perdue told you it was Walter's land, that he had given him twenty acres? A. Yes, sir. Q. Did he say anything to you at any time during your conversations with him as to whether or not this was Walter's part of the estate, this twenty acres? A. He told me he gave Walter the twenty acres and gave John his twenty acres."

B. W. Perdue, brother of J. Madison Perdue, testified as follows: "Q. During your brother's lifetime did he ever talk to you about the land he had given Walter and John Perdue? A. Yes, sir. Q. What did he say about it? . . . A. He said he had given John and Walter twenty acres of land as their part of the land at that time, and later on he sold some of the land and he didn't have that much for the other children."

Jim McKay testified: "Q. Did you have any conversation with J. Madison Perdue in his lifetime about the land he gave Walter? A. I did. Q. What was the occasion for that conversation? . . . A. I came to El Dorado, Christmas, 1914, to spend the Christmas, he was my uncle, at that time I lived at Locust Bayou, and we got to talking about his land, and he told me how much he had, and he said he had give Walter twenty acres, his part of the estate, and he intended to give the rest of the children that much as they become married, and in the spring of 1915 I moved here to study law and I went to his home on frequent occasions and he told me about the same thing along about April, 1915."

John Perdue, a brother of appellee, testified: "Q. Did you ever hear your father say anything about Walter having received his part of the estate? A. Well, he said there was twenty acres apiece for all of us kids and he gave us that. . . . Q. Since he executed that deed and gave Walter twenty acres and gave you twenty, do you claim any interest in the estate now? A. None whatever."

J. Walter Perdue, appellee, testified in his own behalf: "Q. In what way did you accept this twenty acres of land? A. As a gift. I told him, I says I am going to marry and he says, well, I will give you this twenty acres of land. Q. Twenty years later you got a deed to it, and that was some ten years before he died. Tell the court about procuring the deed. A. Well, he put it off from time to time, I knew he would make me a deed any time I got ready, and he married the second time before I did, but he married the third time and after he stayed with his wife about a year and they separated, he went and got a divorce, and as soon as he got it he made me a deed to the twenty acres." He further testified that when his father deeded him the land in 1926 he made no mention that it was to be in lieu of his inheritance and further: "Q. You say he gave you this land in 1906? You didn't pay him anything for it, did you? A. No, he gave it to me. . . . Q. I asked you what was the consideration for this deed? In 1906? A. There wasn't any considera-

tion. Q. What was the consideration in 1926? A. I think I gave him a dollar or paid for the deed; so far as paying him anything, I don't think I did."

As reflected by this record, appellee himself admits that the twenty-acre tract of land in question was a gift to him, during his father's lifetime.

It has long been the established rule of law in this state that a gift of a considerable portion out of the body of the estate from a parent to a child during the lifetime of the parent is *prima facie* evidence of an advancement; that it was so intended, and that this presumption must be overcome by a preponderance of the testimony.

The rule is well stated in Volume 1, American Jurisprudence, p. 766, § 116, as follows: "It is the general rule that, in the absence of clear and convincing evidence to the contrary, it will be presumed that a parent who during his lifetime makes a substantial gift to a child intended such gift to be an advancement; and hence it is often stated that a gift to a child or an heir by an ancester in his lifetime is *prima facie* an advancement. The rule owes its almost universal adoption to the strength of the equitable doctrine which assumes that a parent desires to distribute his estate equally among all his children, in accordance with a natural equal affection for each child."

In the case of *Jackson* v. *Richardson,* 182 Ark. 997, 33 S. W. 2d 1095, this court said: "The party asserting that it was the intention of the donor to make an advancement makes a *prima facie* case where he shows that the facts surrounding the supposed advancement are such that a presumption arises that the gift by the donor was an advancement. It then becomes necessary for the party claiming that the transaction was not an advancement to introduce evidence to overcome this presumption. In this state the presumption is that a conveyance or gift by the father to his daughters is an advancement. *Eastham* v. *Powell,* 51 Ark. 530, 11 S. W. 823. . . . The evidence necessary to overcome the presumption of an advancement, in a case like this, and prove a resulting trust, must not only be distinct and credible, but preponderate."

Again in *Stacy* v. *Stacy,* 175 Ark. 763, 775, 300 S. W. 437, the rule is clearly stated in the following language: "An advancement is a gift by a parent to a child in anticipation of that which it is supposed the child will be entitled on the death of the parent. The question as to whether or not a conveyance or transfer of money or property is regarded as a simple gift, or advancement, or a sale, is to be determined by the intention of the parent. The question as to what was the intention is generally purely one of fact to be ascertained from the circumstances of the transaction. The donor's intention is the controlling principle, and, if it can be said from all the circumstances surrounding a particular case that the parent intended a transfer of property to a child to represent a portion of the child's supposed share in the parent's estate, such transfer will be treated in law as an advancement."

On the whole case we are of the view that the preponderance of the testimony reflects a clear intention on the part of the father, J. Madison Perdue, that the twenty acres deeded to appellee, was an advancement, and the chancellor erred in holding otherwise.

The decree is, therefore, reversed and remanded with directions to the trial court to enter a judgment declaring appellants to be the owners of the lands in question, of which J. Madison Perdue died seized and possessed, and quieting and confirming their title thereto.

PALMER, LIQUIDATOR OF CHICAGO LLOYDS *v.* MCDONALD.

4-5558 130 S. W. 2d 728

Opinion delivered July 3, 1939.

Buzbee, Harrison, Buzbee & Wright, for appellant.

A. F. House, for attaching creditors.

Armstrong, McCadden, Allen, Braden & Goodman and *John Sherrill,* for D. Canale & Company.

SMITH, J. The record in this case is singularly free from material conflicts in the testimony, and reflects the following facts.

D. Canale & Company is a Delaware corporation, having its principal place of business in Memphis, Tennessee, and has branches thereof in Newport, Jonesboro and West Memphis, in this state. It domesticated itself in this state by fully complying with all the requirements of law authorizing foreign corporations to do business in this state. In connection with its business in this state, the Canale Company maintains at each of the three cities above-named an office and warehouse in which are kept stocks of the goods in which they trade. The company buys and sells merchandise in this state, and operates a number of trucks wholly within this state, on which the licenses imposed by the laws of this state have been paid.

The Canale Company carried a policy of liability insurance on its trucks operating in this state, which was issued April 14, 1937, by the Chicago Lloyds, an association, and not a corporation, located in Chicago, Illinois, and engaged in writing insurance of various kinds. That insurance company had been denied permission to enter this state by the Insurance Commissioner of this state, but the commissioner was required to grant this permit under the opinion of this court in the case of *Lloyds America* v. *Harrison, Insurance Commissioner,* 193 Ark. 576, 101 S. W. 2d 438. Following this decision Chicago Lloyds made application to the Insurance Commissioner for a certificate to transact business on March 3, 1937, and that certificate was issued April 19, 1937, authorizing it to transact business in this state.

On November 1, 1937, while said liability insurance policy was in full effect, a truck owned by the Canale Company, and insured under the terms of the policy, collided with another truck, in which 39 persons were being transported, which collision resulted in killing three persons being transported in the other truck and injuring, more or less seriously, about 30 of the other occupants. Numerous suits for damages arose out of this collision, which occurred in this state, and the liability of Chicago

Lloyds under its policy was recognized and has never been questioned.

McDonald & McDonald, attorneys at law, with offices in Memphis, Tennessee, representing Chicago Lloyds in West Mississippi and in the States of Tennessee and Arkansas, employed M. W. Gannaway, an Arkansas attorney, to represent the insurer. Lawrence A. Gouldman & Company, Inc., insurance investigator and adjuster was also employed, as was C. E. Yingling, an attorney residing in Searcy, Arkansas, where a number of suits were pending.

Extensive investigations were made, and protracted negotiations were conducted, which had proceeded to the point where settlements had been agreed upon in a number of cases, and drafts were drawn on Chicago Lloyds by McDonald & McDonald, their authorized attorneys. These drafts were not paid, however, as Chicago Lloyds was adjudged insolvent on February 15, 1938. That proceeding was had in the superior court of Cook county, Illinois, and the director of insurance of that state was appointed liquidator. That official immediately notified Canale & Company that Chicago Lloyds would no longer defend the tort actions against Canale & Company growing out of the collision, and would not effect any further compromises of any claims, and that Canale & Company should undertake settlements at its own cost and expense.

Canale & Company thereupon paid certain drafts issued by Chicago Lloyds in settlement of certain claims, and compromised other pending suits, at a total cost of $29,337.39. No one questions the necessity and advantage of these settlements. They were made with the assistance of the attorneys and the insurance adjuster above mentioned.

When Chicago Lloyds received the certificate of authority to do business in this state, it executed the bond required by law to cover liability sustained in this state by its policy holders. The insurance commissioner prepared the bond required by law, which was executed by Chicago Lloyds, but instead of giving surety in the sum of $20,000, as required by law, Chicago Lloyds deposited

United States two and one-third per cent. treasury notes with the Insurance Commissioner in the sum of $20,000. The receipt for this deposit conformed to the bond, and expressed its purpose to be to indemnify persons who had been insured by Lloyds in this state.

The attorneys and the adjuster filed suit on February 14, 1938, against Chicago Lloyds for the compensation alleged to be due them, and attached the deposit in the hands of the Insurance Commissioner. McDonald & McDonald and the adjuster had assigned their claims to Gannaway, but the assignors were made parties plaintiff to this suit.

On April 14, 1938, the attorney general of this state filed suit in the Pulaski circuit court, praying the appointment of a receiver to take over the assets of Chicago Lloyds in this state, and Elmo Walker was appointed receiver for that purpose. After the appointment of the receiver the court fixed September 15, 1938, as the time limit for filing claims in the receivership proceeding.

On May 4, 1938, the Insurance Commissioner of Illinois, as liquidator of Chicago Lloyds under appointment of the Illinois court, filed an intervention in the Pulaski circuit court, in which he alleged that Chicago Lloyds had issued no policies in Arkansas, and that there were no creditors in this state. He prayed that the United States treasury notes, deposited with the Insurance Commissioner of this state by way of a bond, be delivered to him for general liquidation purposes. As the claims of the attaching creditors did not exceed $7,000, they consented to the release of $13,000 of the attached bonds or notes, to be delivered to the receiver appointed by the Pulaski circuit court, and the court made an order directing the Insurance Commissioner to turn over to the receiver $13,000 of the treasury notes. This was done, and the receiver executed his receipt to the commissioner for $13,000 in bonds under date of May 19, 1938.

On May 17, 1938, the court entered an order consolidating the attachment suit with the receivership proceeding, and on August 28, 1938, Canale & Company filed its claim in the receivership proceeding. This claim, was

based upon the liability policy hereinabove referred to and the claims it had been compelled to pay arising out of the collision between its truck and another truck. No one questions the liability of Chicago Lloyds for the full amount of this claim, nor is its liability under the policy for the adjustment expenses and the attorney's fees incident to the settlement of the claims questioned by any one.

In settling these claims a loan was made to Canale & Company by the Memphis agent of Chicago Lloyds who had written the policy, to be repaid out of the anticipated collection of the insurance policy, a circumstance which we regard as unimportant.

Upon this record a judgment was entered sustaining the attachment, and a first lien was given the attaching creditors on the deposit. Canale & Company was awarded judgment for $29,337.39, which was adjudged a second lien. The liquidator's claim was denied, and the receiver was allowed a fee of $2,000.

The most important question in the case is whether the court should have ordered the bond deposit turned over to the Illinois liquidator. The record establishes the fact that on April 14, 1937, Chicago Lloyds issued a rider to the original policy previously issued to Canale & Company, which rider covered such damages as arose out of the collision. At that time Chicago Lloyds had not received its certificate of authority from the insurance commissioner of this state, although the application therefor was pending, and the certificate was actually issued April 19, 1937. The original policy and the rider thereon were issued and delivered in Memphis, Tennessee, and Chicago Lloyds issued no other policy in this state.

We think there is no question as to the purpose or effect of the bond deposit. It was intended to offer additional protection to policy holders whose claims might arise in this state, and this deposit, when made, inured to the benefit of any holder of such policies, even though the deposit was made after the policy was issued. We are of opinion also that this deposit inured primarily to the benefit of the holders of policies covering liabili-

ties arising within this state. It was held in the case of *Standard Lumber Co.* v. *Henry,* 189 Ark. 513, 74 S. W. 2d 226, (to quote a headnote): "Assets situated within the State of an insolvent foreign corporation for which an ancillary receiver has been appointed belong to the State receivership for administration and distribution by courts of this State; and, after paying the costs of administration, so much of the balance as may be necessary will be distributed to creditors within the State, and any balance remaining will be paid to the domiciliary receiver."

The decision of the Supreme Court of the United States in the Case of *Clark, Commissioner of Insurance, etc.,* v. *Williard,* 294 U. S. 211, 55 S. Ct. 356, 79 L. Ed. 865, 98 A. L. R. 347, sustains that holding.

It is argued that Canale & Company do not come within the holding in this Henry Case, for the reason that the policy was issued and delivered in Tennessee, and that the breach of the conditions of the contract of insurance occurred in that state when the insurer failed and refused to pay as the insurance contract required, and, further, that Canale & Company being a foreign corporation should not be permitted to share in a fund designed to protect Arkansas claimants.

It is argued also, upon the authority of *National Liberty Ins. Co.* v. *Trattner,* 173 Ark. 480, 292 S. W. 677, that the courts of this state will not enforce this transitory action. But we think the distinction between the instant and the Trattner Case is obvious. There a nonresident sued upon a policy issued in another state to recover damages from a fire to property situated in another state, and we declined to entertain jurisdiction. But an entirely different case is here presented. Here, we have a deposit, by way of a bond, to insure payment of claims arising in this state. The policy insured against damages done by trucks operated within this state. The damage insured against occurred within this state, and suits to recover for these damages were brought in this state, and were compromised and settled here. If the rider to the policy did not cover this damage done in this state, it was a

mere scrap of paper, having no value, notwithstanding the premium demanded had been paid.

It is argued that Canale & Company is not an Arkansas claimant, and is not, therefore, entitled to participate in the bond, because it is a foreign corporation. And so it is, but it is a domesticated foreign corporation.

In the Case of *Southwestern Gas & Electric Co.* v. *Patterson Orchard Co.,* 180 Ark. 148, 152, 20 S. W. 2d 636, we said: "Of course, by complying with said statute, the foreign corporation does not surrender its identity as a foreign corporation, but continues for jurisdictional purposes to be a corporation of the state of its creation, and may remove proper cases to the federal courts. It is, however, domesticated in this State, and, to all intents and purposes, in connection with its business in this State, is a corporation of this State. It becomes the adopted child of this state. But not so as to all other foreign corporations. Nowhere do we find in our foreign corporation laws any language that makes them corporations of this state. Upon compliance with our laws they are given all the powers of domestic corporations, except such as are prohibited by the Constitution. The power of eminent domain is expressly extended to traction, light and power companies organized in this state by §§ 4042 *et seq.,* Crawford & Moses' Digest, but not to foreign companies, the Legislature evidently considering that it had no power to do so without first requiring them to become domesticated."

But however that may be, the fact remains that Canale & Company seeks to enforce a claim arising in this state against the deposit to indemnify claimants. Had the policy here sued on been a fire—rather than a casualty—policy, and had the loss been the destruction by fire of any one of the warehouses owned by Canale & Company in this state which was covered by the fire policy, and secured by the statutory bond it would hardly be questioned that the insured was entitled to the protection which the bond was intended to afford. A nonresident, whether an individual or a corporation, might own and insure against fire property located in this state, and in

the event of a fire loss would have the same right to participate, if found necessary, with resident citizens and domestic corporations in the protection which the statutory insurance bond was intended to afford. The nonresident would not be denied that right because of nonresidence, but would be accorded that right, for the reason that he has a claim arising within this state, which is entitled to the security of payment which the bond was intended to afford. In the case stated the insured is a creditor within this state notwithstanding his nonresidence, because the event insured against occurred in this state, and was indemnified by the bond which the insurer executed.

It is insisted that Canale & Company is not entitled to participate in the distribution of the deposit, for the reason that it is a member of Chicago Lloyds. We do not so interpret the policy. If Canale & Company may not have the benefit of this deposit, no other policyholder may.

We conclude, therefore, that Canale & Company should be allowed to share the benefits of this deposit; and we are of opinion also that it was error to subordinate their claim to that of their attorneys and the adjuster. We perceive no reason why those claims should have priority over that of Canale & Company. They all have the same origin. The attorney and the adjuster may recover only because the policy so provides, but the policy also provides that Canale & Company may recover. They are all Arkansas creditors, but they are equally so, and we know of no authority for preferring one over another. The parties to this litigation are the only persons who have filed claims with the receiver, and as all cannot be paid in full, they must be paid equally and ratably, and the judgment will be modified to so provide. The attached bonds will be added to those in the hands of the receiver, and the sum total, or the proceeds thereof, will be prorated after costs have been paid.

While, as stated, no one questions the reasonableness of the attorney's fees as to the amounts charged, it is insisted by counsel for the Illinois liquidator that no fees

should be paid, and that the entire deposit should be turned over to the liquidator. We have held against that contention, but it does appear that the entire fee claimed by McDonald & McDonald should not be allowed for this reason. Their claim was for the sum of $2,745.35, and was allowed in that amount. It is conceded, however, that of this total only $1,244.95 was charged as fees and expenses in connection with this case. The difference was for other fees and services rendered Chicago Lloyds. McDonald & McDonald are not Arkansas creditors as to this difference; they are general creditors as to this difference, and must present their claim for this difference to the Illinois liquidator, for allowance. The fact that they are Arkansas claimants to the extent of the fee earned in this case does not entitle them to add to this fee other independent claims which they have against Chicago Lloyds.

The judgment in favor of McDonald & McDonald will be modified by reducing it to the sum of $1,214.95.

It is insisted that the fee allowed the receiver is excessive. And so it is. The insolvency of an insurance company requiring appointment of a receiver should not be regarded as an opportunity to earn large fees, but, rather, as a calamity or misfortune, which should be palliated as much as may be to protect the interests of persons involved. Of course, sufficient fees should be paid to induce competent persons to serve as receiver or to render other essential service, and the capacity and responsibility of the receiver is not an improper matter to take into account in fixing his fee. Here, there is no question about the capacity and responsibility of the receiver, nor of the efficiency with which he discharged his duties. But, even so, his duties were not involved or arduous, and the record does not show the performance of any duty for which a greater fee than a thousand dollars should have been allowed. The judgment will be modified to reduce the receiver's fee to that amount.

As modified in the particulars indicated, the cause will be remanded with directions to the Pulaski circuit

court to distribute the treasury notes, or the proceeds thereof, in the manner herein indicated.

HUGHES, GUARDIAN *v.* EDWARDS.

4-5561 130 S. W. 2d 713

Opinion delivered July 3, 1939.

R. W. Tucker, S. M. Casey and *Shields M. Goodwin,* for appellant.

Sam C. Knight and *Dene H. Coleman,* for appellees.

HUMPHREYS, J. Frank Divers, who was a first cousin of Willie Sturdivant and her sole heir at law, brought an ejectment suit through his guardian, C. H. Hughes, for an eighty-acre tract of land in Independence county against J. Clyde Edwards and E. Claude Edwards who deraigned their title to said eighty-acre tract through mesne conveyances from J. I. Sturdivant who claimed title thereto under the will of his wife Sarah L. (Divers) Sturdivant. Appellants herein were the plaintiffs below and the appellees herein were defendants below.

The cause was submitted to the court upon the complaint of appellants, the will of Sarah L. (Divers) Sturdivant which was attached to the complaint and made a part thereof and a demurrer filed by appellees to said complaint. The court sustained the demurrer to the complaint, and appellants failing to plead further the court dismissed the complaint from which is this appeal.

According to the facts set out in the complaint and the exhibit made a part thereof the eighty acre tract of land in question was the south eighty of a one hundred and sixty acre tract owned by H. C. Divers in his lifetime. At his death the one hundred and sixty acre tract of land passed under the law of descent to his only children, Dave Divers, and Sarah L. (Divers) Sturdivant, the wife of J. I. Sturdivant. Thereafter, Dave Divers died leaving surviving him, as his sole heir at law, his son, Frank Divers, who has been an incompetent person for more than thirty years. After the death of Dave Divers, a partition suit was had the result of which was that the north eighty was set apart to Frank Divers and the south eighty was set apart to his paternal aunt, Sarah L. (Divers) Sturdivant. Under the partition suit each of them became the fee simple owner of eighty acres of land which they inherited from H. C. Divers, father of Sarah L. (Divers) Sturdivant and the grandfather of Frank Divers.

On September 20, 1892, prior to the partition suit Sarah L. (Divers) Sturdivant executed her last will and testament which was made an exhibit to the complaint and which is as follows:

"Last will and testament of Mrs. Sarah L. Sturdivant.

"I, Sarah L. Sturdivant, of Newark, Arkansas, Independence County, being of sound and disposing mind and memory and recognizing the uncertainty of life and the certainty of death and desiring to provide for the future welfare and maintenance of my daughter, Willie Henry Sturdivant, do make and ordain and establish this as my last will and testament.

"I give, devise and bequeath unto my said daughter Willie H. Sturdivant all of my undivided one half interest in and to the following described real estate, lying being and situated in the county of Independence, State of Arkansas, to-wit:

"The west half of the northeast quarter of the west half of the southeast quarter of section seven (7) and the west *said* of the south part of the east half of lot two of the northeast quarter of section five (5) all in township twelve (12) north, range four (4) west.

"It is my will that in the event that my said daughter Willie should die leaving no bodily heirs that then the aforesaid property shall go to and become the property of my said husband, J. I. Sturdivant.

"I nominate and appoint as executor of this my last will and testament my husband, J. I. Sturdivant.

"In witness whereof I have hereunto set my hand, signed, sealed and published and declared this instrument to be my last will at Batesville, Ark., on this 20th day of September, 1892.

S. L. Sturdivant Seal.

"The said Sarah L. Sturdivant at said Batesville on said September 20th, 1892, signed and sealed this instrument and published and declared the same for her last will. And we, at her request and in her presence and in the presence of each other have subscribed our names as witnesses.

J. C. Yancey.
S. D. Fulkerson."

The lands devised in the will was Sarah L. (Divers) Sturdivant's one half interest in the one hundred and sixty acre tract.

Sarah L. (Divers) Sturdivant died on December 18, 1902. The will was probated on January 20, 1913. Willie Sturdivant, her daughter, was a person of unsound mind for many years, and died in the State Hospital for Nervous Diseases on December 5, 1911, leaving surviving her as her sole and only heir at law, Frank Divers, who was her first cousin. The appellees are in possession of the

south eighty in question and deraign their title under the will of Sarah L. (Divers) Sturdivant and mesne conveyances made thereafter. The rental value of the eighty acre tract in question is $400 per annum.

The question involved on this appeal is whether, under the will of Sarah L. (Divers) Sturdivant, Willie Sturdivant, her daughter, took a life estate in the property with the remainder in fee simple to J. I. Sturdivant. In other words if Willie Sturdivant took an absolute fee simple title to the eighty acre tract under said will at her death appellant, Frank Divers, inherited the fee simple title from Willie Sturdivant. The effect of the decree of the trial court in sustaining the demurrer to the complaint was to construe the will as giving to Willie Sturdivant a life estate in the land with the fee simple title in remainder to J. I. Sturdivant. The rule in the construction of wills is to give effect to the intention of the testator in view of all the provisions of the will. This court said in the case of *LeFlore* v. *Handlin,* 153 Ark. 421, 240 S. W. 712, that: " 'Over and over again we have said that the rule in the construction of wills is to give effect to what appears to be the intention of the testator in view of all the provisions of the will.' *Cook* v. *Worthington,* 116 Ark. 328, 173 S. W. 395. See, also, *Eagle* v. *Oldham,* 116 Ark. 565-573, 174 S. W. 1176."

The clear implication is that all the provisions of a will should be taken into consideration in determining the intent of the testator. This rule applies with all its force and power if there is no repugnancy between the various provisions of the will. Appellant contends that under the first devising clause of the will Willie Sturdivant was clearly granted the fee absolute in the eighty acre tract and that it was beyond the power of the testatrix by a later provision to modify or qualify the first provision so as to limit the first grant to a life estate. We do not think when both provisions are read together that it was the intention of the testatrix to give her daughter an absolute fee simple title in the first clause. Willie Sturdivant was a person of unsound mind for many years and died in the State Hospital for Nervous Diseases in Little

Rock on December 5, 1911. By reference to the will it will be seen that the testatrix stated that it was her intention to provide for the future welfare and maintenance of Willie Sturdivant and then followed the statement by giving, devising and bequeathing to Willie Sturdivant her undivided interest in certain real estate describing it and immediately following the description of the property she stated:

"It is my will that in the event that my said daughter Willie should die leaving no bodily heirs that then the aforesaid property shall go to and become the property of my said husband, J. I. Sturdivant."

By giving both clauses of the will a reasonable meaning when read together it is manifest that the testatrix intended that if Willie Sturdivant died without bodily issue her husband, J. I. Sturdivant, should have the remainder estate in the eighty-acre tract. By giving the two clauses when read together any other construction, it would be tantamount to eliminating the last clause entirely. If we should give the first clause the construction contended for by appellant it was wholly unnecessary for the testatrix to include the latter clause in the will. We think there is no repugnancy whatever between the two provisions because when read together to ascertain the intention of the testatrix it is manifest that she intended to give her daughter a life estate in the eighty acre tract with the remainder estate to her husband. Really when the intent of a testatrix is being ascertained the last clause in a will governs if there is any conflict between the provisions. *United States of America* v. *Moore.* Where there is no conflict or repugnancy there is no necessity for rules of construction to be invoked in determining the intent of the testator.

No error appearing, the judgment is affirmed.

HOOD *v.* HINDS.

4-5553 130 S. W. 2d 711

Opinion delivered July 3, 1939.

E. R. Parham, for appellant.

Ben D. Rowland and *Wayne W. Owen,* for appellee.

HOLT, J. Appellant, O. W. Hood, has prosecuted this appeal to reverse a judgment rendered against him in favor of appellee in the Pulaski circuit court, third division, for damages growing out of the alleged breach of a rental contract, for space in appellant's building for restaurant purposes.

Appellee, among other things, alleged in his complaint that on October 1, 1936, he rented from appellant a store building located at 212 East Sixth Street, in the city of Little Rock, on a month to month basis for a consideration of $30 per month; that he immediately took possession and began to operate successfully a restaurant therein; that he continued to operate successfully until June 7, 1938, when appellant, "his agent and servant took charge of the said business, located in the above described premises and wrongfully assumed control over the said building and converted the same to his own use."

He further alleged that appellant converted to his own use property of appellee of the value of $149.43, and that by reason of appellant's wrongful entry, possession, and conversion, he, appellee, lost his equity in his equipment to the extent of $123, and that his business and good will attached thereto had been damaged, all in the total sum of $772.43, for which he prayed judgment.

To this complaint appellant filed answer and cross-complaint. He denied every material allegation set out in the complaint and by way of cross-complaint sought to recover from appellee rents due and moneys advanced to appellee.

On a trial to a jury, a verdict was returned for appellee for the sum of $200 and in favor of appellant, on his cross-complaint, in the sum of $62. Appellant brings this appeal from the judgment rendered against him.

It is (1) urged here by the appellant that the trial court erred in refusing to direct a verdict in his favor at the close of all the testimony in the case, and (2) that the court erred in giving certain instructions on behalf of appellee, after modifying same, and in refusing to give a certain instruction requested by appellant.

The evidence in this case, on which recovery was based, is conflicting, and we think it would serve no useful purpose to review it. Suffice it to say that we have carefully examined it and find that there is some evidence of a substantial nature to support the jury's verdict, and under the well-established rule in this state, we do not disturb it here.

Appellant next contends that the trial court erred in giving, after having modified same, two instructions requested by appellee, and in refusing to give a certain instruction requested by him.

The record in this case reflects that a total of fourteen instructions was requested by the parties, that eight were given as requested, two were given as modified, and four refused.

The two instructions given by the court, and about which appellant complains here, and the instruction re-

quested by appellant, and refused by the court, are the only instructions which appellant attempts to abstract in his brief. He fails to favor us with an abstract of the remaining eleven instructions requested by the parties. He only makes a general objection to the two instructions about which he complains, and unless they are inherently wrong—and we do not think they were—we must assume that the other instructions given by the court, in the absence of a complete abstract of such instruction here, properly covered the issues, and cured any objectionable features in the two instructions complained of.

As to the instruction requested by appellant, and refused by the court, we must also assume that the theory embraced in this instruction was fully covered by other instructions which the court gave and which are not abstracted by appellant.

In *Keller* v. *Sawyer,* 104 Ark. 375, 149 S. W. 334, this court said: "The refusal to give a certain instruction cannot be relied upon as error unless all of the instructions are set out in the abstract. *DeQueen & Eastern Ry. Co.* v. *Thornton,* 98 Ark. 61, 135 S. W. 822, 36 L. R. A. N. S. 1194."

In the Thornton Case, *supra,* at page 63, this court said: "Counsel for appellant assign as error the action of the court in refusing a certain instruction, which they set out in their abstract. They contend that the refused instruction is not covered by any other instruction given. But they have not set out the other instructions, and the court might differ with them as to their construction of the omitted instructions. Under rule IX, counsel must abstract them, or we will assume that the theory embraced in the refused instruction was fully covered by the other instructions given which are not abstracted. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 78 Ark. 374, 95 S. W. 783.

Again in *Karatofsky* v. *Fybush,* 90 Ark. 230, 118 S. W. 1009, this court said: "There was a trial before a jury, and a verdict returned in favor of appellees for the sum of $917.17. The case is here on appeal. The

only assignment of error is based upon the action of the trial court in refusing to give a certain instruction asked by appellant. This instruction is set out in appellant's abstract, but it appears that other instructions were given by the court, and that they are not set out in appellant's abstract. Rule IX of this court requires that the instructions given, as well as those refused, by the court should be set out. The rule was adopted for the purpose of facilitating the work of this court, and is a very salutary one."

We conclude, therefore, on the whole case, that the judgment should be affirmed, and it is so ordered.

HOGAN *v.* HALL, SECRETARY OF STATE.

4-5631 130 S. W. 2d 716

Opinion delivered July 3, 1939.

Moore, Burrow & Chowning, for plaintiff.

Jack Holt, Attorney General, *Frank Pace, Wallace Davis, J. F. Holtzendorff, Joe Norbury* and *Tom W. Campbell,* for defendants.

MEHAFFY, J. The only question involved in this proceeding is the sufficiency of the ballot title. A petition was filed by the requisite number of legal voters asking that the act be referred to the people of the state, to the end that the same may be approved or rejected by a vote of the legal voters of the state at the biennial regular general election to be held on November 5, 1940.

C. G. Hall, Secretary of State, held the petition and ballot title sufficient. The complaint in this case was then filed, praying that the action of the secretary of state in accepting and filing said petition and declaring the same sufficient, be reviewed by this court, and that the petition be declared insufficient and that the secretary of state's action be declared null and void, and that the State Board of Election Commissioners be restrained and enjoined from placing said measure upon the ballot under the title of said measure, or any other ballot title, to be voted upon in the general election to be held November 5, 1940, and that said petition be declared to be insufficient as not complying with the Constitution and laws of the state of Arkansas, and that said act be declared to be a legal statute effective June 8, 1939.

To this complaint there was a general demurrer filed, stating that the facts were not sufficient to constitute a cause of action.

Amendment No. 7 to the Constitution provides that the legal voters, by petition, may order a referendum against any general act or measure passed by the General Assembly; that such petition shall be filed with the secretary of state within a certain time. The amendment further provides that the sufficiency of the petition shall be decided in the first instance by the secretary of state, subject to review by the Supreme Court of the state, which shall have original and exclusive jurisdiction over all such causes. It is also provided that the exact title to be used in the ballot shall be submitted with the petition.

The ballot title submitted is the legislative title of the act, and is as follows: "AN ACT to Fix the Venue of Actions for Personal Injury and Death."

This court has many times passed on the sufficiency of ballot titles and has held that certain ballot titles, using the legislative title, would be insufficient, where, for instance, the legislative title of the measure simply states that a certain section of the digest is repealed or amended, and does not identify the proposed act and does not fairly show the general purpose thereof.

In the case of *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, it was said: "As the ballot title here submitted might mislead, we have concluded that it was defective and insufficient and that the amendment was not sufficiently complied with in this respect."

Certainly no one could be misled by the ballot title in the instant case. No one could prepare a ballot title that would suit everyone, and the legislative title of the measure is a sufficient ballot title for the act which petitioners seek to have referred.

There is nothing in the constitutional amendment stating what the ballot title shall be. The requirement is that the exact title to be used on the ballot shall be submitted with the petition. The legislative title of the measure is the exact title that is to be used on the ballot.

The only question to be determined is: Does the title, as designated and used on the ballot, come within the purview of the Constitution?

This court said in the case of *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81: "The ballot title should be complete enough to convey an intelligible idea of the scope and import of the law, and it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must contain no partisan coloring."

We think that under the ruling in the Westbrook and Walton cases, and other cases, the ballot title in the instant case is sufficient.

It was also said in the Walton Case, *supra*: "Perhaps, no set rule or formula can be announced as to what a ballot title shall contain, but it may be safely stated that, if it shall identify the proposed act and shall fairly allege the general purposes thereof, it is sufficient."

This court quoted with approval the following, from the Supreme Court of Maryland: "It has never been understood that the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the statute relates. . . .

When the general subject is indicated, no detail matters need be mentioned in the title. 'The primary object of the provision, undoubtedly, is to exclude all foreign, irrelevant, or discordant matter from the statute and to confine the statute to the single subject disclosed in the title.' *Phinney* v. *Trustees,* 88 Md. 636, 42 Atl. 58.'' *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248.

There is no doubt about the sufficiency of the ballot title in the instant case.

The writ is denied and the complaint dismissed.

CAVE *v.* ZIMMERMAN.

4-5552 130 S. W. 2d 717

Opinion delivered July 3, 1939.

W. P. Beard, for appellant.

Chas. A. Walls, for appellees.

MEHAFFY, J. The appellees, William Zimmerman and Leah Zimmerman, his wife, on January 1, 1926, made, executed and delivered to the New England Securities Company, their mortgage bond for the sum of $4,000, due and payable on January 1, 1933.

On May 18, 1933, they deeded to their daughter, Faye Dickerson, land in Lonoke county which was not included in the mortgage. A suit to foreclose the mortgage

was instituted in the Lonoke chancery court in April, 1935. A decree of foreclosure was entered and the land was sold to satisfy the debt, but left a balance due of $1,851.46.

There is practically no dispute about the facts. The appellees, William Zimmerman and Leah Zimmerman, executed a mortgage to the New England Securities Company on land not involved in this suit; at the time the mortgage was given, Zimmerman did not own this land; he inherited it from his father; his father made a will in which the land involved in this suit was bequeathed to appellee, Zimmerman, and three other children of his father, Peter Zimmerman. Peter Zimmerman died in 1931 about five years after the mortgage was executed. The evidence does not show when the will was probated and just when appellee, Zimmerman, came into possession. His deed to his daughter was made May 18, 1933, practically two years before this suit was begun.

A decree was rendered on October 7, 1938. The chancellor found that the deed from William Zimmerman to Faye Dickerson, dated May 18, 1933, was executed for a good and valuable consideration, and that it was not executed in fraud of his creditors, as alleged in the complaint; that the intervention of J. R. Moery should be sustained, insofar as his right to remove the pumping and rice equipment and electric motor from said premises is concerned, as said equipment was installed on said premises with the right to remove it; that the complaint of Thomas H. Cave should be dismissed for want of equity, and the writ of attachment sued out herein, canceled and dismissed; that the intervention of G. W. Smith, John Zimmerman, Edward Zimmerman and Lydia Helmuth should be dismissed for want of equity, and the writ of execution levied on said premises in favor of G. W. Smith should be canceled, and the sheriff's deed based on said writ of execution and levy should be canceled, set aside and held for naught.

Thomas H. Cave prosecutes this appeal to reverse said decree and urges that the deed from William Zim-

merman to his daughter is a voluntary conveyance and made in fraud of creditors.

William Zimmerman inherited from his father only one-fourth of the 108.5 acres which are involved in this suit. The evidence tends to show that William Zimmerman owed his daughter $500; that is, he had given his other daughters wedding presents of that amount, and decided to give her the same value. Zimmerman also testified that he owed Charles H. Dickerson $651.95. Charles H. Dickerson is the husband of Faye Dickerson to whom the conveyance was made.

The first case to which appellant calls attention is *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913. It is true that in that case the court said: "It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an 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."

The rule announced in the case of *Wilks* v. *Vaughan, supra,* has been approved many times by this court; but it does not apply to subsequent or secured creditors. The court also said in the above case, immediately following the above quotation: "Certainly, these conveyances, made so shortly before this judgment, divesting the debtor of all tangible assets, to near relatives, were sufficient to cast the burden of proving the good faith upon the parties to them. The chancellor has held them fraudulent, and this court cannot pronounce that finding contrary to the preponderance of the evidence."

The conveyance in the instant case was made about two years before the judgment. In the Wilks case the chancellor held that the conveyances were fraudulent. In the instant case the chancellor held that it was not fraudulent. Another difference is that in the Wilks case the creditor seeking to set aside the conveyances was not a subsequent or secured creditor.

The next case to which attention is called by appellant, and upon which he relies, is *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054. That case quoted with approval the statement made in *Wilks* v. *Vaughan, supra.* In that case the court did not find that the conveyance was void as to subsequent or secured creditors, and the chancellor in that case found the conveyance was voluntary and void as to existing creditors.

Appellant next calls attention to the case of *Melton* v. *State,* 177 Ark. 1194, 10 S. W. 2d 500. That is one of the cases where the court ordered the opinion omitted and not published, as of no value as a precedent.

Appellant calls attention to a great number of cases holding that voluntary conveyances are presumed to be *fraudulent* if the grantor is insolvent; but as we have already said, this rule does not apply to subsequent or secured creditors.

In an opinion written by the late Chief Justice McCulloch, in the case of *Home Life & Accident Co.* v. *Schichtl,* 172 Ark. 31, 287 S. W. 769, the rule in this state was well stated: "We have a case now of mortgage indebtedness, and the real question, so far as the case relates to presumption, is whether or not such conclusive presumption should be indulged in favor of the holder of the secured debt. The reason for indulging presumptions does not apply, we think, under those circumstances, and the authorities support the view that there is no presumption under those circumstances. May on Fraudulent Conveyances, p. 188; *Welch* v. *Mann,* 193 Mo. 304, 92 S. W. 98; *Cromby* v. *Young,* 26 Ont. 194. The reason for this distinction in putting secured creditors in the same category as subsequent creditors is that, whatever presumption is to be indulged, the creditor, in selecting his security, has, unlike a general creditor, disregarded other property of the debtor and looked only to his security for the collection of his debt, hence he is entitled to no presumption of fraud in the conveyance of other property. Such a creditor is one who has already been given a preference over others, and is not in the attitude of an existing general creditor, hence his reliance is deemed

to have been founded on his security rather than on the solvency of the debtor."

This court again said that is thoroughly settled that conveyances made to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care, and when they are voluntary, they are *prima facie* fraudulent. The court added, however: "The above rule does not apply in favor of subsequent creditors, nor creditors whose debts, at the time of the conveyances, are secured. The latter are in the same category as subsequent creditors, for the reason that it will be presumed, and must be assumed, that creditors whose debts are secured will be fully paid when their security is resorted to, and, if there be a deficit, this is treated as in the same attitude as a subsequent debt." *Gavin* v. *Scott,* 172 Ark. 234, 288 S. W. 391.

If the conveyance in the instant case was voluntary, there would be no presumption of fraudulent intent; but the burden would be on one attacking the conveyance to show actual fraud. The chancellor held that the conveyance was not voluntary, but was executed for a good and valuable consideration, and was not in fraud of creditors. We do not think the chancellor's finding was against the preponderance of the evidence.

The decree is affirmed.

BURTON *v.* PYRAMID LIFE INSURANCE COMPANY.

4-5546 130 S. W. 2d 706

Opinion delivered July 3, 1939.

Wilson & Wilson, for appellant.

Verne McMillen and *H. B. Stubblefield,* for appellee.

GRIFFIN SMITH, C. J. November 15, 1926, Pyramid Life Insurance Company issued policies numbered 960 and 961 on the life of Finis E. Burton, agreeing to pay appellant the principal sums in the event of the insured's death.

Premiums on each policy, if paid annually in advance, were $112.78; if paid semi-annually in advance, $58.65; if paid quarterly in advance, $29.88. There were provisions for cash surrender or loan values.

Annual premiums were paid to November 15, 1931, but the premiums then due were not paid by the insured, nor did he thereafter make any payments. He died June 18, 1937.

The cash surrender or loan values [1] were from time to time applied in payment of premiums under authority of automatic loan provisions of the contracts. Each policy was issued in the principal sum of $2,500; and because each (in all respects material to this opinion) is similar, discussions are confined to a single policy.

After hearing all of the testimony, the trial court concluded that questions of law only were presented, and judgment was given for the defendant.

[1] At end of first and second years, nothing. At end of third year, $130; fourth year, $200; fifth year, $270; sixth year, $345; seventh year, $420; eighth year, $497.50; ninth year, $577.50; tenth year, $660; eleventh year, $745.

It is urged by appellant that the testimony of her accountant-witness was in conflict with that of appellee's assistant secretary and treasurer, who was also an expert accountant; that the conflicts went to substantial questions of values and to the accuracy of computations, and that only through witnesses skilled in respect of such matters can the alleged fallacious methods of accountancy employed by appellee be shown.

We agree with the court below that conclusions to be drawn from the evidence involve questions of law. All factual bases having been admitted, the result must be determined from a construction of the policies, essentials of which are copied in the margin.[2]

---

[2] If any premium shall not be paid on or before the due date (a grace period of 31 days without interest being allowed), liability of the company shall be "as herein provided." The insured had the privilege, during his lifetime, of receiving all cash values, loans, and other benefits that might accrue. The reserve was to be computed according to the American Experience Table of Mortality, with interest at 3½% per annum, ". . . on the basis of a one-year term insurance for the first year, and thereafter on the plan [provided in the policy] at an advance of one year in the entry age of the insured At any time after three full years' premiums have been paid, and while the policy is in full force, the company will loan, upon proper assignment of the policy, and upon the sole security thereof, an amount which, with interest thereon to the end of the current policy year, shall not exceed the cash surrender value, at the end of the said year, deducting therefrom any unpaid portion of the premium for said current policy year, any existing indebtedness on the policy, and interest on the loan to the end of the current policy year. Interest on the loan will be at a rate not exceeding six per cent. per annum, payable annually in advance. . . . After three full annual premiums have been paid on the policy any premium thereon, or other indebtedness, which shall not be paid when due, or within the period of grace, shall be charged as an automatic policy loan, with interest at six per cent. per annum, payable annually in advance, as long as the then loan value, in accordance with the table of guarantees [herein] set forth are sufficient to cover such loan and all other indebtedness to the company. If at any time the loan value, less all indebtedness to the company, be not sufficient to pay the entire premium then due, such value shall be used to pay the premium for a proportionate period. No grace will be allowed under this provision. At any time while this policy is thus continued in force, payment of premium may be resumed without any evidence of insurability being required by the company."

Attention is first directed to the provision that ". . . After three full annual premiums shall have been paid on the policy, any premium thereon, or other indebtedness, which shall not be paid when due, or within the period of grace, shall be charged as an automatic policy loan, with interest at six per cent. per annum, payable annually in advance, as long as the then loan values, in accordance with the table of guarantees hereinafter set forth, are sufficient to cover such loan and all other indebtedness to the company."

The fifth policy anniversary was attained November 15, 1931. No premium was then paid by the insured, nor was it paid within the grace period of 31 days. The company invoked the automatic loan provision by charging a premium against the accumulated values. No independent funds having been remitted by the insured to pay interest in advance on the loan, an additional charge of $7.22 was extended to cover this service. Annually thereafter similar loans were made until November 15, 1935. At that time the company's records showed an insufficient balance in the loan account to pay a full year's premium. Accordingly, a letter was directed to Finis E. Burton informing him of the claimed status of the policy;[3] that the full cash value was $577.50, against

[3] May 11, 1936, the company wrote the insured: "As you know, your Pyramid Charter Policies provide for your insurance to be kept in force so long as there is any cash value left in the policies. Since you did not pay the premium due Nov. 15, 1935, on policy No. 960 and 961, we made automatic loans on each of the policies at the time, paying your premiums up to May 15, 1936. The full cash value of each policy amounts to $577.50. Against this we have an automatic loan of $527.87. The semi-annual premium due November 15, 1935, [was] $58.65, less dividend accumulation of $56.28 [the difference being $2.37]. Interest to November 15, 1936 [was] $33.83 [or a total indebtedness of $564.07], leaving available on each policy at this time $13.43.

"Feeling that you would prefer to carry these as regular loans rather than automatic loans [we are] enclosing a policy loan agreement on each of your policies in the amount of $564.07, and ask that you please sign these . . . and return to us at once, together with the policies for endorsement of the loans. We will then make the necessary entries to our records and forward you receipts for the semi-annual premiums, paying your policies until May 15, 1936.

which automatic loans aggregating $527.87 had been made; that dividends had accumulated to the amount of $56.28; that a semi-annual premium of $58.65 had been paid by an equal loan; that interest to November 15, 1936, amounted to $33.83, and that the credit difference in his favor was $13.43.[4]

There was no reply to the company's letter of May 11, 1936, but April 21, 1937, Burton's attorney wrote, mentioning the two policies, and stating: "I will appreciate your writing me the status of [these contracts]; that is, as to loan values and extended insurance, or term insurance. . . . In other words, please give me detailed information as to the exact status." Reply to this letter is shown in the footnote.[5] A second letter (April 26, 1937) was written by the company, explaining certain dividends, but they are not to be considered here.

Evidence on behalf of appellee (consisting of records and personal testimony), and matters under attack of appellant, show that the controversy revolves around methods of bookkeeping and accountancy employed by

"Therefore, I am enclosing notices of payments due May 15, 1936, on each of the policies, and if these quarterly premiums of $29.88 each are paid before June 15th, your insurance will be paid until August 15, 1936. If these are not paid before that time, it will be necessary for us to apply the $13.43 to pay your premiums as far as that will carry it, then your protection will lapse. We should regret very much to see you lose this protection, for it is protection which cannot be replaced at anything like the same price. For this reason [we] hope you will sign the loan agreements and return to us, and also be able to take care of the premiums, so that your policies will not lapse."

[4] The letter of May 11, 1936 fixed the balance of $13.43.

[5] April 22, 1937, the company wrote the insured's attorney: "We have your letter of April 21 in regard to [the policies]. Mr. Burton paid the premiums on these policies through the annual premium which was due Nov. 15, 1930, and this was the last payment which he made on these policies. Under the terms of the policies the premiums were to be carried by automatic loans so long as there was any value left in these policies. The automatic loan feature carried these policies until July 15, 1936, and the policies lapsed as of that date. We shall be glad to consider the reinstatement of these policies at any time Mr. Burton furnishes evidence of insurability and paying the necessary premiums."

appellee subsequent to November 15, 1931, when the first policy loan was extended.

Accrual of dividends (as distinguished from cash or loan values) constituted a policy credit of $56.28. Since the difference between the cash or loan value (hereafter referred to as the loan value), when supplemented by the dividends, was not sufficient to pay a full year's premium, such dividends were deducted from a semi-annual premium, the difference being $2.37;—that is, the accumulated dividends were $2.37 less than the semi-annual premium of $58.65, which was at that time loaned.

The $2.37 differential was added to the debt of $527.87 existing as of November 15, 1935, making a total of $530.24. A year's interest on $530.24 at 6% was charged, and a credit extended to November 15, 1936. This interest, according to the company's method of calculating, was $33.83, making a total indebtedness of $564.07. While the semi-annual premium only carried the policy to May 15, 1936, interest on the loan was charged "annually in advance," and such interest, therefore, was paid to November 15, 1936. The loan value as of November 15, 1935, being $577.50, difference between it and the indebtedness was $13.43.

These results, as arrived at by the company, are based upon a system of computation which assumes the right, in lending the insured an annual, a semi-annual, or a quarterly premium, to also advance an amount sufficient to pay interest on the loan.

For example, $112.78 at six per cent. for one year would call for interest of $6.77. If the insured had paid such amount from his own funds, $6.77 would have been the payment required to carry $112.78 a year. By the method applied in the instant case the company charged interest on the item of $6.77, amounting to 41 cents, and it also charged interest on 41 cents, amounting to 2 cents. The total amount chargeable under this plan would be $7.20. However, the company made this item $7.22.

An illustration of the method of calculation, found in appellant's brief, assumes a loan of $100 at six per

cent, on which interest for a year is $6. Interest on $6 is 36 cents, and interest on 36 cents is 2 cents. It is assumed (and this is true) that the company loaned not only the full amount of the premium (in the hypothetical case $100), but that it also advanced $6 to pay the interest on the interest on the interest. Hence, it is stated, 6.00 plus .36 plus .02 gives 6.38.

Applying this system to the case at bar, the company, in arriving at the sum chargeable to the borrower, multiplied $112.78 by 6.38. The result would seem to be $7.1953, and not $7.22, as the entries show.

May 15, 1936, an additional premium fell due; and, under the company's rules, the balance of $13.43 being insufficient to pay a quarterly premium (shortest period allowed under the contract), the residue was applied as a fractional premium to keep the policy alive one month and eight days. But, in reality, the extension was for two full months—to July 15, 1936.

For the purpose of determining what balance would have remained in the loan values had interest on the loans been computed without allowing for interest on interest on interest, the tabulation shown in the footnote [6] has been prepared. The result shows the "carry over," or unused loan value balance, would have been $20.64 instead of $13.43. This fund, if applied in the manner use was made of the item of $13.43, was sufficient to have extended the policy slightly more than two months beyond May 15, 1936; and, inasmuch as the company arbitrarily credited premiums to July 15, 1936, the difference of $7.21 is not material, and we do not determine here whether the company had a right to charge interest as

[6] Computing interest on the various loans at 6 per cent., without allowing "interest on interest on interest," we have the following results: November 15, 1931; Premium, $112.78; interest, $6.77. November 15, 1932: Premium, $112.78; interest on $232.33, $13.94. November 15, 1933: Premium, $112.78; interest on $359.05, $21.54. November 15, 1934: Premium, $112.78; interest on $493.37, $29.60. November 15, 1935: Difference between semi-annual premium of $58.65 and accumulated dividends of $56.28, $2.37—$525.34. November 15, 1935: Interest on $525.34 for one year (to November 15, 1936), $31.52; total, $556.86. November 15, 1935: Loan values at end of ninth year, $577.50. Balance, $20.64.

it did. The question is moot, in view of the showing to be made *infra* that even if $7.21 had been added to certain apportionable loan values, the combined fund was not sufficient to keep the policy alive.

While the loan value at the end of the ninth year was $577.50, and while the company declared the policy lapsed as of July 15, 1936, it is contended by appellant that at the expiration of six months from November 15, 1935, one-half of the tenth-year loan value became available, and that a new credit of $41.25 [7] was in the company's hands because the contract permitted payment of semi-annual premiums. *Security Life Insurance Company* v. *Matthews,* 178 Ark. 775, 12 S. W. 2d 865; *Smith* v. *John Hancock Mutual Life Insurance Company,* 195 Ark. 699, 114 S. W. 2d 15.

We think the cited cases sustained appellant's views, and require apportionment, unless there is something in the contract expressly or by necessary implication preventing it. The policy provides for automatic loans. ". . . as long as the then loan value, in accordance with the table of guarantees hereinafter set forth are sufficient to cover such loan and all other indebtedness to the company."

The words, "in accordance with the table of guarantees" would refer to nothing but the annual values, and a strict construction would not permit apportionment. However, the Matthews Case is authority for the rule that when loan values are shown by the printed tables to be available only at the end of designated policy anniversaries, yet if the contract authorizes semi-annual or quarterly payment of premiums the loan values must be regarded as divisible, and are to be prorated accordingly. There are no provisions in the policies before us which would bring them within an exception to the rule in the Matthews Case.

We hold, therefore, that one-half of the loan value in question—that is, one-half of the difference between the ninth and the tenth year values, or $41.25—must be

[7] The item of $41.25 is arrived at by taking one-half of the difference between the ninth-year loan value and the tenth-year loan value.

credited to the insured's account as of May 15, 1936, and such sum should have been used at that time to supplement the residue.[8]

For the purpose of this opinion we use the larger figure—$20.64—instead of $13.43, and find that the credit balance is $20.64 plus $41.25, or $61.89.[9]

To keep the policy alive by applying loan accretions, it was necessary to pay at least a quarterly premium from accumulated values. The balance remaining when the premium is paid ($29.88 from $61.89) is $32.01. Interest at six per cent. is payable. For six months this would be 90 cents.[10] Payment of the quarterly premium is mentioned for the purpose of analysis—to show that if the company's methods of computing interest had been proper, and that if the residue as of May 15, 1936, had been correct ($13.43), the item of $41.25, when added to such residue, would have resulted in a credit of only $54.68—an amount insufficient by $3.97 to pay a semi-annual premium.

Having (for the purpose of comparison only) adopted $20.64 as the balance tentatively to be used in supplementing the apportionable loan value of $41.25, we proceed with the total of these items—$61.89—to determine whether by any permissible method of computation the policy could have been kept alive until June 18, 1937.

If payment of a semi-annual premium had been made from the automatic loan fund May 15, 1936, interest on such amount ($58.65) to November 15, 1936, would have been $1.76, to which date all other interest had been paid, and the unused portion of $61.89 would have been $1.48.

At this point interest on loans is payable annually in advance; and, to maintain the policy, not less than

[8] Under the company's method of computing interest, the item of $20.64 shown as a balance in note No. 6 would have been $13.43.

[9] If the company's "residue" of $13.43 should be used, the credit would be $54.68.

[10] The contract requires payment of interest "annually in advance," but for the purpose of computing interest on this item to the maturity of other loans, the interest has been arbitrarily calculated and charged for six months only.

a quarterly premium must be paid if the loan values are to be apportioned. If the residue is not sufficient to pay a quarterly premium, it must be applied to carry the policy for the correct number of days.

By recapitulation it is found that the old balance—indebtedness—as of November 15, 1936, was $617.27. To this must be added the quarterly premium, or a total of $647.15. One year's interest in advance is $38.83, a grand total debt of $685.98. Total credits are $681.25, or a difference of $4.73 in the company's favor, constituting a charge against the policy which cannot be offset by any available credit. The item of $681.25 includes $21.25,[11] this being one-fourth of the difference between the tenth and the eleventh year loan values.

If this analysis is correct, there is only one item not accounted for, of which no mention is made in the proof, nor is there any reference to it in the briefs. Dividends aggregating $56.28 were credited in November, 1935. These annual dividends varied from $12.15 in 1932 to $14.65 in 1935. But even if they had amounted to $15 from 1935 to 1936 and had been payable under terms of the policy (which was not the case),[12] still there was not a sufficient balance for payment of a quarterly premium,[13] without which the policy could not be kept alive.

Having, in order to determine whether by any favorable method of calculation and contractural construction, appellant would be entitled to recover, and having concluded that when all permissive values have been applied they were insufficient to have maintained the policies to June 18, 1937, it follows that the judgment must be affirmed. It is so ordered.

---

[11] An amount which would not be available for credit until February 15, 1937.

[12] Dividends are based upon the company's annual net profits, and cannot be determined until the *end* of the year, and are therefore not apportionable.

[13] Loan value Nov. 15, 1936, ($660) plus hypothetical dividend, of $15 make total estimated credits of $675. Total charges, including quarterly premium of $29.88 due Nov. 15, 1936, plus interest of $38.80 for one year in advance, make $685.98—a deficit of $10.98.

BILLERT *v.* PHILLIPS.

4-5526 130 S. W. 2d 715

Opinion delivered July 3, 1939.

[redacted]

J. F. Quillin, for appellant.

M. M. Martin, for appellee.

SMITH, J. This suit was filed under the authority of Act 119 of the Acts of 1935, page 318, to confirm the sale of certain lands to the State for the nonpayment of taxes due thereon for the year 1933. Before the rendition of the decree of confirmation T. A. Phillips filed an intervention, in which he alleged his ownership of an 80-acre tract of land involved in the suit and the invalidity of the tax sale, for the reason that the notice of sale was not published in the manner and for the time prescribed by law, and that the record of the lands returned delinquent did not carry the certificate of the clerk of the county court covering the publication of the advertisement. Phillips made the necessary tender to redeem.

Intervenor's ownership was admitted, and his allegations as to the invalidity of the sale were established. The testimony shows also that the notice of sale was published only one time in the Mena Weekly Star, and on the same date was published in the Mena Evening Star, one newspaper being a weekly, the other a daily. There was no other publication. That such publication was insufficient was expressly held in the case of *Edwards* v.

Lodge, 195 Ark. 470, 113 S. W. 2d 94, in which case, as in this, the lands involved were sold for the nonpayment of the 1933 taxes.

The recent case of *Hirsch and Schuman* v. *Dabbs and Mivelaz,* 197 Ark. 756, 126 S. W. 2d 116, arose out of a proceeding under act 119 of the Acts of 1935 to confirm a sale to the state for the nonpayment of the 1933 taxes. In that case a confirmation decree was rendered before the land owner intervened, but he did intervene within a year from the date of the confirmation decree. We there said that the land owner might intervene even after confirmation, but within one year of that date, who could show that he had no knowledge of the pendency of the confirmation suit and had a meritorious defense to the complaint upon which the decree was rendered, and that it was a meritorious defense to show that the sale was invalid for any reason.

We there also said that the legislation there reviewed, which is also reviewed in the briefs in the instant case, had not dispensed 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 right of redemption was accorded in that case although the sale had been confirmed.

Here, the land owner intervened before the confirmation decree was rendered, and upon the showing that the sale for the 1933 taxes was invalid, for the reasons stated, he was accorded the right of redemption, and this appeal is from that decree.

The decree was correct, and it is, therefore, affirmed.

BENEDUM-TREES OIL COMPANY *v.* SUTTON.

4-5547 130 S. W. 2d 720

Opinion delivered July 3, 1939.

McRae & Tompkins, for appellant.

Bush & Bush, for appellee.

McHaney, J. Appellee, a roustabout in a crew of six men working for appellant, brought this action against it to recover damages for personal injuries sustained by him. He alleged that he and the others were engaged in hauling tools and equipment to one of appellant's oil wells by means of a tractor and trailer and that said equipment was operated by the foreman and had reached said well and backed up to it for the purpose of unloading the equipment to be used in swabbing the well; that the trailer was attached to the tractor by a pin which connected the draw bar of the trailer to the rear of the tractor; that when they reached said well, the foreman directed him to pull the pin to disconnect the trailer from the tractor before another employee was ready to assist him; and that, when he pulled the pin, the weight of the load on front end of the trailer caused the draw bar or coupling pole to drop or fall about fourteen inches, striking the great toe of his left foot and causing a fracture. The

negligence laid is that the foreman negligently ordered him to remove said pin when he (the foreman) knew, or by the exercise of ordinary care could have known, that appellee's fellow servant was not ready to assist him, also that said foreman knew or should have known that the ground on appellee's side of the trailer was wet and that the trailer would settle and turn when the pin was removed. The defense was a general denial, a plea of contributory negligence, assumed risk and a settlement and full release.

Trial resulted in a verdict and judgment against appellant for $400. This appeal followed.

We think the court erred in refusing to direct a verdict for appellant at its request on two grounds: 1. that if any negligence was shown appellee assumed the risk, and 2, that he settled his claim with appellant and executed a valid and binding release of all claims for damages.

Appellee had been working for appellant in the same character of work about eight months. Appellant was operating a number of oil wells in the Nevada county field and it was the duty of a roustabout crew to keep said wells working. The particular well on which they were about to work when appellee was injured was Grove No. 1. It had sanded up and the crew had gone there to pull the rods and clean out the tubing, called swabbing the well so that it would flow or pump. The tools and equipment were loaded on the trailer with the greater part of the load toward the front end to keep the two wheel trailer from kicking up when disconnected from the tractor by pulling the pin. The accident happened about 7:30 a. m., September 1, 1937. It had rained the night before and the ground was wet, soft and slippery, all of which appellee knew as well as the foreman did. He knew they had some trouble in spotting the trailer next to the derrick because of this condition. He says the foreman directed him to pull the pin before the fellow-servant was ready to help him hold the draw bar and keep it from falling. The fellow-servant was standing by pulling on his gloves. He knew that fact. He made no request for assistance. He

knew that when he pulled the pin the draw bar would fall and yet he went ahead and pulled it with his foot in a position that the end of the draw bar fell on it breaking his great toe. It is difficult to perceive wherein appellant was negligent, but if we assume negligence from the giving of the order, appellee knew the fellow workman was not ready to assist him and he must be held to have assumed the risk of going ahead and not waiting momentarily until he had assistance. It is well settled that an employee assumes all the ordinary risks and hazards incident to his employment and where his knowledge thereof equals or exceeds that of the employer there is no liability. *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. 2d 228; *Kurn* v. *Faubus,* 191 Ark. 232, 84 S. W. 2d 602; *Stevenson* v. *Phillips,* 191 Ark. 418, 86 S. W. 2d 422; *Union Saw Mill Co.* v. *Hayes,* 192 Ark. 17, 90 S. W. 2d 209; *Mid Continent Quicksilver Co.* v. *Ashbrook,* 194 Ark. 744, 109 S. W. 2d 448; *J. L. Williams & Sons, Inc.* v. *Thompkins,* 195 Ark. 1146, 114 S. W. 2d 845.

Appellant and appellee made two settlements of this controversy. The accident happened, as before stated, September 1, 1937. He was on the same day taken by appellant to a doctor in Camden, who x-rayed his foot, found the broken toe, set the bone and placed the whole foot in a plaster cast. This cast was removed October 11, 1937, at which time the doctor advised him his foot would be all right. On September 27, fifteen days before the doctor so advised him, he settled with appellant and executed a release for the sum of $60.75. This release was not introduced in evidence, but appellee admitted its execution and sought to avoid it by stating this was a payment for half time. On January 11, 1938, he executed another release to appellant for an expressed consideration of $160.75. This release is in the record and completely exonerates appellant from further liability. Appellee seeks to avoid this result by saying he relied on the doctor's statement on October 11, that his foot would be all right. This second release was executed exactly three months after the doctor is said to have made the statement, during all of which time he says his foot was

not all right. Under these circumstances he was not justified on relying on the doctor's statement and must be held to have settled on his own judgment. See *Toland* v. *Uvalde Construction Co., ante* p. 172, 127 S. W. 2d 814.

The judgment will be reversed and the cause dismissed.

MATTHEWS *v.* BAILEY, GOVERNOR.

4-5648 130 S. W. 2d 1006

Opinion delivered July 10, 1939.

Beloit Taylor and *E. Chas. Eichenbaum,* for appellant.

Jack Holt, Attorney General, *Walter L. Pope* and *Thompson, Wood & Hoffman,* for appellees.

Caudle & White, Shields M. Goodwin, Rose, Loughborough, Dobyns & House, Coleman & Riddick and *Burke, Moore & Walker, amici curiae:*

GRIFFIN SMITH, C. J. Appellant Matthews, alleging ownership of certain highway refunding bonds issued by the state under authority of Act 11, approved February 12, 1934, seeks to restrain the Governor and members of the State Board of Finance from carrying into effect an Executive Order issued June 25, 1939, by the terms of which it is proposed to issue state highway refunding bonds aggregating in face value $140,537,253.20.

It is alleged, and the record discloses, that the Order in question was approved by the Board.[1]

Other allegations are:

(1) That the Governor, in promulgating his Order, assumed to proceed under powers conferred by Act 130, approved February 24, 1937, as amended and supplemented by Act 151, approved February 24, 1937, and Act 278, approved March 19, 1937.[2]

---

[1] The resolution adopted by the Board of Finance follows:

"Be it resolved by the Board of Finance of the state of Arkansas that the conclusions of the Governor as recited in his executive order made in accordance with act 130 of the General Assembly of the state of Arkansas of 1937, dated the 25th day of June, 1939, be and the same are hereby concurred in and that the Board of Finance approve and it does so approve the action of the Governor in the issuing of such executive order."

[2] Act 278 of 1937 is entitled: "An Act to provide for the carrying out of the provisions of Acts No. 130 and 151 of the Fifty-First General Assembly, . . . to make appropriations therefor, and for other purposes." It appropriated $150,000,000 to "effectively, effi-

(2). That the three mentioned Acts contemplate separate issues of bonds for the purpose of refunding each of the several groups of bonds delivered under authority of Act 11 of 1934.[3]

(3) That Act 130 expressly provides that the refunding bonds of each issue shall bear interest at a rate lower than that borne by the new bonds so authorized, except that as to outstanding bonds bearing interest at three per cent., and those bearing interest at three and one-half per cent., the existing rates may apply.

(4) That Act 130, as amended, does not permit more revenue to be pledged than was pledged by Act 11.

It was further averred that the Executive Order does not authorize separate bond issues to refund the several existing issues, but on the contrary it contemplates a single issue of $140,537,253.20 to be used in refunding all of the outstanding bonds and other obligations issued under authority of Act 11.

(5) That the Order assumes unauthorized powers in directing inclusion of refunding certificates of indebtedness and funding notes, whereas Act 130 permits issuance of bonds only to refund bonds (as distinguished from certificates of indebtedness and funding notes) authorized by Act 11.

(6) That the attempt, as expressed in the Order, to make the new bonds a first charge upon the highway fund, is violative of express limitations found in Act 130.

(7) That the Order undertakes to authorize issuance of three per cent. refunding bonds to retire interest-free bonds issued under authority of Act 11.

---

ciently and speedily refund or refinance the obligations provided for in Act 11 [of 1934]." There were no material enlargements of the powers conferred on the Executive by Act 278. The appropriation of $150,000,000 expired by constitutional limitation two years from its enactment. (Art. 5, Sec. 29, Constitution of 1874.) Act 151 created the Board of Finance. By Act 257 of 1939 a presently available appropriation of $142,000,000 was made.

[3] References to "Act 11" are to the measure approved February 12, 1934, and the year of enactment will not be repeated. Likewise, references to "Act 130" are to the legislation approved February 24, 1937.

(8) That pledges made in the Order will result in a diminution of moneys available to the county highway fund.

(9) That the Order directs issuance of $140,537,-253.20 of refunding bonds dated October 1, 1939, drawing interest from such date, notwithstanding the fact that existing bonds aggregating $47,534,668.72 do not mature, nor are they callable, prior to January 1, 1940.

(10) That during the intervening months (October, November, and December, 1939) there will be a duplication of indebtedness, in violation of the Constitution of Arkansas.

(11) That duplicate interest will be incurred on such item of $47,534,668.72.

(12) That Act 130 is void because it was not passed in compliance with §§ 21 and 22 of Art. 5 of the State Constitution.

It is a matter of common knowledge, of which we take judicial notice, that when the highway debt of $159,-900,503.84 was refunded, the state's financial status was at an all-time low. From the standpoint of economics, the country was in the trough of a far-reaching depression, and Arkansas was faced with the alternative of continuing in its defaults or making common purpose with its creditors in a manner satisfactory within the circumstances and acceptable to those whose money it had borrowed and had used. It chose the latter and the courageous course; and it thereby made commitments under legislative and executive sanctions which in principle have been honorably kept. The result, as it is said in one of the excellent briefs filed in this case, has been that highway bonds have attained a much higher rating in the nation's money markets.

Commenting upon conditions existing at the time Act No. 11 was passed, Special Justice WOOTEN, who wrote the opinion in *Scougale* v. *Page*,[4] quoted with approval the following: "The two committees [negotiating the refunding measure] realized that it would be

[4] 194 Ark. 280, 106 S. W. 2d 1023.

useless to adopt a program which the states would be financially unable to carry out. In view of the depleted revenues and enormous debts of the state, the bondholders' committee made concessions which were more than generous."[5]

It is now asserted that the period of financial stress has passed; that highway revenues have consistently increased; that obligations of $19,363,250.64 have been paid through redemption accounts established in 1934; that confidence in the state's resources and in its pledges has been fully restored, and that men of money stand ready to take bonds at lower rates of interest, redeemable in not more than forty years,[6] and to supply funds with which the existing indebtedness may be discharged.

The Governor, wisely anticipating a day when this eventuality might ripen, suggested to the Fifty-First General Assembly that provision should be made for possible refunding, with the result that Act No. 130 emerged.

We are to determine, therefore, (1) whether the Act is in conflict with the Constitution, and (2) if it is not, then whether powers the Governor proposes to exercise exceed those conferred upon him and upon the Board of Finance.

---

[5] The opinion in the Scougale-Page Case approvingly quoted the following from one of the briefs: "In 1933, the state defaulted in the payment of the current interest due on the highway bonds. The state was so financially distressed that it not only could not pay the interest on its highway obligations, but it was unable to meet some of the ordinary expenses of government. It was without funds to meet the expense of the legislative session; the penitentiary had accumulated an enormous debt; contractors' claims for construction of highways exceeded a million dollars; the charitable institutions were suffering for lack of funds and the treasurer was unable to cash the warrants for the salaries of state officers. The highway bonds were selling on the open market at 30 cents on the dollar. The state of Pennsylvania had filed a suit in the Supreme Court of the United States against the state of Arkansas to collect highway bonds owned by it."

[6] It was stated in oral argument on behalf of appellees that maximum maturity dates would probably be thirty-five years, rather than forty years as set out in the Executive Order.

Summarizing Act 130 as to powers conferred upon the Governor, it is found:

(1) That discretion reposes in the Governor to determine whether it is for the best interest of the state to sell or exchange bonds.

(2) If that discretion is exercised, the Governor shall file with the Secretary of State an executive order setting the refunding machinery in motion. He shall declare, in effect, that it would be in the interest of the state that general refunding bonds be issued and sold or exchanged, subject to conditions contained in § 1 of the Act; but (Act 151) "No power or authority given the Governor by the provisions [of Act 130] may be exercised except with the approval [of the Board of Finance] at a meeting called by the Governor."

(3) The Governor may enter into a contract or contracts on the part of the state with an agency or agencies to assist him in marketing or exchanging bonds as contemplated by the Act, ". . . and to fix and determine the conditions and provisions of such contract or contracts, within such limitations as to expenditures and compensation as may be determined by legislative appropriation."

(4) Maturity dates of bonds, not exceeding forty years, may be fixed by the Governor, and denominations of the bonds, the place or places of payment, and like matters, may be determined by the Executive.

(5) At the time of directing issuance of bonds, the Governor, in his Executive Order, may pledge to the payment of the principal thereof, all, or such portion as may be necessary, of the revenues pledged under Act 11 ". . . to the payment of the principal of those certain bonds which are then to be refunded."

(6) If the Governor determines to refund, such intent shall be certified to the Refunding Board, and a request shall be made that the Board proceed under authority of § 16 of Act 11 to call for redemptions on the next interest payment date.

(7) Reductions of percentages of the state highway fund set aside under § 2 of Act 11 pledged for the payment of bonds may be made by the Governor from time to time in proportion as the bonds secured thereby are exchanged or redeemed.

(8) Before bonds may be sold or exchanged, the Governor must first direct the Treasurer of State to advertise for sealed bids. . . . "All bids shall be opened by the State Treasurer in public and in the presence of the Governor, and the Governor shall have the right to reject any and all bids; provided, however, that nothing in this section contained shall be construed to prevent the exchange of general refunding bonds for a like principal amount of outstanding bonds bearing a higher rate of interest, without previous advertisement as herein required in the case of the sale of such general refunding bonds."

(9) The Governor may, at his option, authorize issuance of bonds containing a clause reserving to the state the right to call for redemption prior to maturity, on thirty days' notice.

Assuming that Act 130 conferred upon him all of the powers necessary to do those things set out in the Executive Order, one provision of the Order is:

"Said bonds shall be dated October 1, 1939, and shall bear such rates of interest and shall mature at such time or times not exceeding forty years, as shall be hereafter fixed by executive order approved by the Board of Finance; provided, however, that the interest rates borne by the refunding bonds shall be so fixed that for the aggregate amount of outstanding obligations bearing any one rate of interest there shall be at least an equal amount of refunding bonds bearing a lower rate of interest, except that there may be an amount of refunding bonds equal to the amount of outstanding obligations, which bear interest at the rate of 3½ per centum per annum, which may bear interest at a rate not exceeding such rate, and an amount of refunding bonds equal to the amount of outstandng obligations, which bear interest at

the rate of 3 per centum per annum, or no rate of interest, which may bear interest at a rate not exceeding 3 per centum per annum."

If authority for the procedure affirmed in the Order has been expressly conferred by Act 130; or if, by fair construction, it can be said that the things the Governor contemplates doing were intended by the Legislature, and if that intent can be gathered from the language used, then the lower court's action in denying injunctive relief should be sustained.

While questions of public policy are for the General Assembly, and matters of administration are of executive address, it is the court's duty to construe the law. Through praiseworthy initiative of the two co-ordinate branches of government, the third branch now called upon to determine legality of the questions presented. In approaching the subject we assume that negotiations attending the Executive Order were characterized by the utmost good faith and sincerity of purpose.

It must be conceded that Act 130, in its relation to Act 11, is subservient to the latter if the two measures conflict in any material sense affecting the rights of bondholders, or touching privileges retained by the state.

It would be difficult to express the legislative intent in clearer language than that used in § 6 of Act 130, where it is said: "The General Assembly hereby recognizes and confirms all of the obligations and duties created and established by and under Act 11, . . . and hereby declares that this Act is not in any manner to impair or to violate the terms of said Act 11. The percentage of the state highway fund set aside and pledged for the payment of bonds under § 2 of the aforesaid Act 11 shall be and remain as therein set forth, subject only to reduction from time to time in proportion as the bonds secured thereby are exchanged or redeemed out of the proceeds of the general refunding bonds herein authorized to be issued, and the Treasurer of State is hereby authorized to make such reduction upon certification of the Governor fixing the amount thereof."

When the quotation from § 6 is read in connection with parts of § 1 of the same Act, it is certain the General Assembly had in mind, and that those who wrote Act 130 intended, to provide machinery for refunding, in whole or in part, (and through sale of bonds and purchase at interest-paying periods, or by the exchange of bonds of a new issue bearing a lower rate of interest than the old securities)[7] such portions of the bonds issued under authority of Act 11 as might by agreement with holders be negotiated. This intent is reflected by the expression in § 1 that "Such general refunding bonds may be issued in such amount or amounts and at such time or times, and from time to time, and in such manner, as the then Governor . . . may determine." By § 2 this plan is further shown by the expression: "The Governor may exercise the aforesaid authority at any time or from time to time, whenever he shall find and determine . . . that such general refunding bonds can be issued and sold or exchanged subject to the conditions contained in § 1 hereof."

It is contended by appellant that authority delegated by Act 130 permits the Governor, with approval of the Board, only to issue refunding bonds corresponding with the several issues outstanding; and, conversely, that power is lacking to market a single issue of sufficient magnitude to retire all of the outstanding obligations as a single transaction. Specifically, the complaint says it is *expressly* provided that ". . . the refunding bonds of *each such issue* shall bear interest at a rate lower than that borne by the issue of bonds to refund which such refunding bonds shall be issued."

Appellants are in error in stating that the Act, by *express* language, requires refunding bonds "of each such issue" to bear a rate of interest lower than that borne by the issue to be refunded. No such language

[7] An exception as to interest is that old bonds bearing 3 per cent. or those bearing 3½ per cent., might be exchanged for new 3 per cent., or 3½ per cent. bonds, or that new 3 per cent. and 3½ per cent bonds of an equal amount might be sold, and the proceeds used in retiring the old bonds.

was used in the Act. On the contrary, the authority is that such bonds may be issued ". . . in an amount or amounts not exceeding, in the *aggregate,*" . . . etc.

The only restriction in § 1 (other than with respect to 3 per cent., and 3½ per cent. bonds) is the phrase: ". . . provided such general refunding bonds are issued and sold at not less than par and accrued interest and bear a lower rate of interest than the bonds to be redeemed out of the proceeds of such sale."

We think when the quotation from § 6 is read in connection with parts of § 1 of the same Act, it is certain the General Assembly had in mind to authorize the refunding of such portions of the existing indebtedness as the executive might direct; or, in the alternative, to exchange new bonds for old bonds. In either event the transaction is to be consummated at an interest-paying period, and may include all or a part of any *issue* of existing bonds as identified by the original sale, whether such original sale was of bonds or notes or certificates of indebtedness first issued in one form and converted into a different form, or whether an indebtedness recognized under Act 11 was funded with obligations designated as bonds, notes or certificates of indebtedness; provided, that in respect of any issue of obligations, or of any series of securities sold or exchanged to retire an old obligation as classified by Act 11, the rate of interest to be paid on the new bonds must be lower than that borne by the old obligation, an exception being that old securities bearing 3 per cent. interest, or those bearing 3½ per cent. interest, may be exchanged for new bonds bearing rates of interest corresponding with the old rates; or new bonds bearing rates of interest corresponding with the old rates may be sold to retire, in whole or in part, the existing 3 per cent. or 3½ per cent. bonds, certificates, or notes.

For example, $77,397,000 of Series "A" bonds are dated January 1, 1934, maturing in stated amounts from 1945, to 1977. Of this series an issue of $12,946,000

draws interest at 4¼ per cent.[8] Another issue aggregating $12,572,000 draws interest at 4½ per cent., with maturities beginning in 1948, final maturities being 1958. A third group bears interest at 4¾ per cent. Maturities begin in 1945, omit 1954 to 1958, include 1959 to 1967; omit 1968, include 1969 to 1975, at which latter date final payments are made. The fourth group amounts to $34,624,000, on which interest is 5 per cent., with maturities from 1945 to 1977.

Four separate interest rates are shown in the series. We think the General Assembly, in dealing with the subject-matter of Act 130, had in mind that these issues could be grouped—that is, if the bonds were to be *exchanged,* then all bearing 4¼ per cent. interest might be so exchanged at any rate lower than 4¼, and so on in respect of each of the four issues; but, if new bonds were sold

[8] Refunding bonds originally issued, the par value of bonds retired, and the outstanding bonds as of July 1, 1939, are shown in the table below:

Classification	Par Value Issued	Par Value Retired	Par Value Outstanding 7-1-39
Highway Refunding, Series "A"	$ 84,000,000.00	$ 6,603,000.00	$ 77,397,000.00
Highway Refunding, Series "B"	9,156,050.00	151,424.72	9,004,625.28
Toll Bridge Refunding, Series "A"	7,220,000.00	1,489,000.00	5,731,000.00
Toll Bridge Refunding, Series "B"	918,173.00	48,213.80	869,959.20
DeValls Bluff Bridge Refunding	421,068.60	41,642.60	379,426.00
Road District Refunding, Series "A"	47,010,075.00	8,187,550.00	38,822,525.00
Road District Refunding, Series "B"	4,388,927.76	2,135,914.12	2,253,013.64
Refunding Certificate of Indebtedness (Street Aid)	6,175,222.30	420,147.67	5,755,074.63
(Contractors') Funding Notes	610,987.18	286,357.73	324,629.45
Totals	$159,900,503.84	$ 19,363,250.64	$140,537,253.20

Of the above outstanding obligations the State of Arkansas owns $654,050.96 par value, including $54,319.99 Road District Refunding, Series "B".

in an amount sufficient in the aggregate to retire the entire series in a manner showing an *average* saving in interest, this might be done.

Outstanding toll bridge refunding bonds, Series "A," amount to $5,731,000. Of this series $1,984,000 bear 4¾ per cent. interest, and $3,747,000 bear interest at 5 per cent. Maturities on the 4¾'s are from 1943 to 1965; on the 5's, final maturities are in 1964.

Other series are: Road district refunding bonds, Series "A," payable in 1949, and bearing interest at 3 per cent.—$38,822,525.

State highway refunding bonds, Series "B," payable in 1953, and bearing interest at 3½ per cent.—$9,004,625.28.

State toll bridge refunding bonds, Series "B," payable in 1953, and bearing interest at 3½ per cent.—$869,959.20.

Road district refunding bonds, Series "B," payable in 1949 without interest—$2,253,013.64.

DeValls Bluff bridge refunding bonds, payable in 1950, and bearing interest at 3 per cent.—$379,426.

Funding notes, payable in 1954, and bearing interest at 3 per cent.—$324,629.45.

Refunding certificates of indebtedness, payable in 1944, and bearing interest at 3 per cent.—$5,755,074.63.

Four of the preceding items—$38,822,525, $379,426, $324,629.45, and $5,755,074.63—draw interest at 3 per cent. They aggregate $45,281,655.08. Two items—$9,004,625.28 and $869,959.20 bear 3½ per cent. interest. They total $9,874,584.48.

The remaining item of $2,253,013.64 does not carry any interest, and is a principal subject of controversy.

It is difficult in many cases to ascribe to the law-making body a specific intent unless that intent is expressly affirmed. Complexity of the subject-matter with which the Fifty-First General Assembly was dealing, the known variants in interest rates, and the phraseology of Act 130, all lead to the conclusion that the separate

series, as distinguished from the several issues, were visualized. This construction is strengthened by the fact that bonds bearing 3 per cent. interest, and those bearing interest at 3½ per cent., were singled out, the four 3 per cent. items seemingly having been treated as one group, and the two 3½ per cent. items having been treated as another group. It was apparently contemplated that these low-interest bonds could not be refunded at lower rates.

It may be argued, and with force, that identification of two classifications (3's and 3½'s) had the effect of placing in another group *all* remaining bonds, notes, and certificates, and that, irrespective of varying interest rates, $55,156,239.56 of three percent bonds, and three and one-half percent bonds, were segregated from $140,537,253.20 merely for the purpose of permitting bonds bearing higher rates of interest aggregating $83,128,000 to be refunded at any interest lower than the average total; or, in the alternative, allowing refunding of any part of this total. When the sum of $2,253,013.64 representing interest-free bonds is added to the item of $83,128,000 the result is $85,381,013.64, and this, with the $55,156,239.56, gives the grand total of $140,537,253.20.

We do not believe it was the purpose of the Legislature to allow $2,253,013.64 of non-interest bonds to be included in any arrangement whereby interest would be generally lowered by virtue of this concession. These interest-free securities are known as road improvement district "B" bonds, and were issued in 1934 in evidence of past-due interest. Under Act 11 they are tied in with road improvement district "A" bonds, for the payment of which, after 1936, 33.6 per cent. of net highway funds was pledged. The bonds have ten years yet to run. If they should be refunded at 3 per cent. such increased interest would be $774,848.29. This, over a ten-year period, when added to the principal, would be $3,027,861.93.

If it had been the intention of the Legislature to permit these bonds to be included in a group and refunded on an interest basis, that intent should have been expressed in language sufficiently clear for reasonable

men to understand it. We do not think the plan contemplated a departure so completely shrouded in general terms from which the result contended for by appellees may only be guessed.

It is conceded that it is *possible* to draw from the language utilized the urged construction; but, believing as we do that the General Assembly not only did not intend such, but that the idea was not even entertained as a possibility, it must be held that authority for the refunding in that respect is lacking.

Nor do we think there is sanction for paying interest from October 1, 1939, to January 1, 1940, on $47,534,-668.72 of bonds issued to retire an equal amount of bonds not callable until January. The result would be that the old bonds would draw the interest now specified, and also, covering the same period, $475,346.68 of additional interest would be paid, if the new rate should be four per cent. Section 5 of Act 130 seems to be conclusive of this proposition. There it is declared that "When the Governor shall determine to exercise the authority hereunder conferred upon him to sell general refunding bonds, he shall certify to the State Refunding Board . . . a request that said Board proceed under the authority of § 16 of Act 11 to call for redemption, on the next interest payment date, the principal amount of outstanding bonds specified by the Governor, and it shall thereupon be the duty of said State Refunding Board to issue a call for the redemption of said bonds and give notice thereof as provided in § 16 of said Act 11."

The only authority delegated to the Governor to call bonds for cancellation is that contained in § 5 of Act 130. The General Assembly had a right to say how the calling-in process should function, and it exercised that right in 1934. It did not say that in an emergency occasioned by condition of the money market, or due to requests of brokers whose offer to refund was conditioned upon immediate action, a discretion materially at variance with § 5 might be exercised; and since that discretion, if assumed and invoked, would involve a duplica-

tion of substantial interest payments, (though such sum should be absorbed through lower interest rates to be paid on the refunding bonds) we cannot say that the General Assembly would, if informed of the circumstances, have legislated differently. In brief, a judicial determination that a broader discretion ought to have been conferred, even if we should feel that the situation warranted such, cannot be substituted for a non-existent authority, or one to be implied alone from seeming necessity and financial impatience.

The next question is, Does Act 130, or do any of the other Acts, permit issuance of non-callable bonds? Our answer is that we find no such authority .

Section 16 of Act 11 has been referred to, *supra.* It affirmatively declares that the state shall not issue highway obligations unless a provision was inserted reserving the right of redemption before maturity, at par and accrued interest, at any interest paying date.

Act 130, § 8, enlarges this right by providing that any new bonds shall contain a clause reserving to the state the right, at its option, to call in, pay, and redeem prior to respective maturity dates, and that this right may be exercised, not at an interest-paying period only, but after notice of intention had been published for one insertion (not less than thirty days) as directed. There is the further provision that "Bonds issued hereunder to refund bonds bearing interest at the rate of three or three and one-half per centum per annum may provide for call at a premium."

Under Act 11 bonds may be called only at interest paying periods. Under Act 130 they may be called at any time, after the 30-day notice has been given. If the provision in Act 130 had been inserted in Act 11, then the power the Governor seeks to exercise in calling, as of October 1, 1939, bonds upon which interest is not payable until January 1, 1940, could be invoked, and the overlapping interest would not be payable; provided, of course, that when the bonds were issued the option spoken of in § 8 had been exercised.

Some meaning must be ascribed to § 8 of Act 130—a section obviously expressed negatively if the purpose is to confer the power insisted upon by appellees.

It will be noted that the Act does not, in respect of bonds other than 3's and 3½'s, authorize issuance of non-callable securities. (§ 8 is printed in the margin.[9]) If the intent had been to delegate authority to issue $83,128,000 of non-callable bonds, in addition to those callable upon payment of a premium, that purpose would have been expressed affirmatively. We conclude, therefore, that the only modification of § 16 of Act 11 is authorization that bonds may be called at any time on thirty days' notice. It follows that non-callable bonds may not be issued except as expressed in Act 130 unless the Legislature shall so provide, which at its discretion it may.

In all matters of conflict, Act 130 must yield to Act 11. This is true because § 44 of Act 11 declares: "This Act shall constitute a contract between the state and such creditors, including the affected improvement districts, and the terms of such contract or contracts shall never be impaired by any subsequent legislation." Act 130 affirms the pledge.

Act 11 provides: "The first charge upon the state highway fund shall be the cost of maintaining the state highway system and the operation and maintenance of the toll bridges, and the Treasurer of State shall trans-

[9] "Section 8. In the event that the Governor should determine to issue bonds hereunder containing a clause reserving to the State the right, at its option, to call in, pay and redeem such bonds prior to their respective maturity dates, which he is hereby authorized to do, he shall provide in his aforesaid executive order that such general refunding bonds shall provide that notice of the exercise of such option be published for one insertion, not less than thirty days before the date set for the redemption of such bonds, in a newspaper published in the City of Little Rock, Arkansas, in a newspaper published in the City of St. Louis, Missouri, and in a financial journal published in the Borough of Manhattan, City of New York, New York, and such bonds shall show such provisions on the face thereof. Bonds issued hereunder to refund bonds bearing interest at the rate of three or three and one-half per centum per annum may provide for call at a premium."

fer from said state highway fund to the highway maintenance fund 25 per cent. of the total amount credited to said state highway fund during any fiscal year, such credit to be not less than $166,666 monthly."

It is then enacted that the state highway fund ". . . shall next be applied to the payment of interest upon the bonds and other obligations to be issued or paid under the provisions of this Act." The balance of the highway fund, after deducting maintenance and interest, is credited by the Treasurer of State to the payment or redemption of the principal of state highway obligations. This is the balance pledged by Act 11 for the payment of obligations issued under its authority.

Section 4 of Act 130 provides that the Governor ". . . may pledge to the payment of the *principal* [of the bonds to be issued] all, or such portions as he may deem necessary, of the revenues heretofore pledged under the aforesaid Act No. 11 to the payment of the principal of those certain bonds which are then to be refunded." The only revenue authorized by Act 130 to be pledged is the *balance* remaining after 25 per cent. of all highway revenues has been put aside for maintenance.

The Executive Order, we think, transgresses this limitation when it directs: "For the further securing of this bond there is hereby pledged the revenues of the state highway fund consisting of the proceeds of motor vehicle license fees and taxes, and the proceeds of the tax of five and three-quarters cents per gallon on gasoline or other motor vehicle fuel."

Section 5 of the Order contains the following covenant, to be incorporated by reference in the bonds:

"It is further covenanted on behalf of the State of Arkansas that it will in each fiscal year beginning with October 1, 1939, segregate and set aside the first revenues of the state highway fund until all of the debt service requirements of such refunding bonds for such year shall have been paid or provided for. Such debt service requirements shall consist of annual interest due upon all

outstanding refunding bonds in such fiscal year, the amount of principal thereof maturing in such year, and the amount of any reserves required to be set up in such year as may be fixed and determined by executive order approved by the Board of Finance."

Effect of the Executive Order and of Act 11 is to express two preferences—one comprising 25 per cent. of the highway fund, to be not less than $166,666 monthly. The other is the fund designated in the Executive Order and pledged to be ". . . segregated and set aside [from] the first revenues of the highway fund [for debt service requirements"]. The law and the Order cannot stand together; and necessarily validity must be given the former.

Holders of bonds issued under authority of Act 11 accepted them with the imposed condition, to which they will be held as a matter of law to have impliedly agreed, that highway maintenance should be a first charge against highway funds, and this status must remain until the state, through its legislative department, waives the benefits it retained.

Act 130, § 3, directs: "The general refunding bonds issued under the authority of this Act shall bear such date, shall be of such denomination or denominations, shall contain such provisions as to registration of principal, shall bear interest at such rate or rates, payable semi-annually, shall be payable in such place or places, within or without the state, and shall be payable at such time or times not exceeding forty years from date thereof, and shall be in such form, as the Governor shall determine and direct, subject to the limitations and provisions herein contained."

In derogation of these limitations upon executive authority, the Order under review contains the following covenant:

"Whenever in any fiscal year the revenues of the state highway fund shall exceed $20,000,000, the General Assembly of the State of Arkansas shall have the right to reduce the tax upon gasoline, or other motor vehicle

fuel, below the rate now levied to such rate as it is estimated will produce, for the state highway fund, not less than $20,000,000 per annum. And it is hereby covenanted that if, as a result of such reduction in the tax upon gasoline, or other motor vehicle fuel, the amount produced annually for the state highway fund shall fall below said sum of twenty million dollars, the General Assembly of the State of Arkansas will restore such tax to not exceeding the original rate, so that there will be produced, for the state highway fund, not less than $20,000,000."

This authority cannot be inferred from Act 130. Section 51 of Act 11 is: "Whenever the net revenue credited to the state highway fund in any fiscal year shall exceed $10,000,000, and the Refunding Board finds that a reduction of the tax on gasoline during the succeeding year could be made without reducing the net revenue below $10,000,000, the Board may, in its discretion, determine the definite amount of such possible reduction, not to exceed one-half of one cent a gallon. The Board shall thereupon order a reduction in the gasoline tax of one-half of such definite amount, and the revenue derived from the other one-half, which shall be collected, or so much thereof as shall be in excess of $10,000,000, shall be transferred from the state highway fund to the county highway fund, and shall be distributed in the manner now provided by law."

By Act 11, approved April 1, 1938, the extra quarter of a cent per gallon of the gasoline tax was given to the counties.

We do not construe the Executive Order as an express pledge to maintain the highway fund at $20,000,000, or that the tax on gasoline will not be reduced until the fund reaches such maximum. Rather, it is a statement of what the General Assembly shall have a right to do in respect of rate reductions; yet, inferentially, there is the thought that no reduction will be made until existing rates produce $20,000,000 annually. There is an express covenant that if the rates should once be reduced, and

thereafter the revenue does not attain the maximum of $20,000,000, the reduction will be discontinued and the tax restored to its former figure. Lacking authority to make commitments of the kind in question, the Governor did not intend the expression as a definite guarantee.

Although the Governor has the right, under § 7 of Act 130, to *exchange* refunding bonds ". . . for a like principal amount of outstanding bonds bearing a higher rate of interest, *without previous advertisement,* . . ." he must advertise that bonds will be *sold,* and he has the right to reject any and all bids. However, there is not a word in the Act *requiring* that the lowest bid be accepted. This omission is one the Legislature may, or may not, have intended.

A perplexing question is, Was it the purpose of Act 130 to require the Governor to issue a second Executive Order in which terms in detail would be set out before a binding contract could be made? We think it was so intended.

The form of bond it is proposed to issue, showing general characteristics, is set out in the Executive Order. Dates of maturity and interest rates are not shown. The bond is secured by a pledge of the full faith and credit of the state and ". . . the revenues of the state highway fund, consisting of the proceeds of motor vehicle licenses, fees and taxes, and the proceeds of a tax of five and three quarters cents per gallon on gasoline or other motor vehicle fuel."

While the difference between revenues at present pledged by law to the county turnback and revenues to be realized to the turnback under the Executive Order might be regarded as *de minimis,* it is our view that the Legislature, and it alone, possesses power to make apportionments of the kind in question. Until action has been taken by that body prorating such revenues, no pledge differing from that provided by law can be regarded as inviolate.

Finally, we hold that until the General Assembly shall have acted, there is no power in the Governor and

the Board of Finance (a) to issue non-callable bonds; (b) to give a pledge on highway revenues prior to highway and toll bridge maintenance;[10] (c) to pay interest on $2,253,013.64 of "B" bonds which, under the provisions of Act 11, are interest free; (d) to pay overlapping interest during October, November and December, 1939, on bonds not callable until January 1, 1940; (e) to pledge revenues affecting turnback percentages.

We hold that Acts 130, 151, 278, and 257, mentioned in the pleadings, were lawfully passed, and that no constitutional impediments void the measures.

The cause is reversed with directions to overrule the demurrer.

SMITH and MCHANEY, JJ., dissent.

MEHAFFY, J., disqualified and not participating.

LEE *v.* PATE.

4-5551 131 S. W. 2d 8

Opinion delivered July 10, 1939.

[10] In addition to 25 per cent. of highway funds for highway maintenance, Act 11 authorizes an expenditure of not more than $100,000 per annum for maintenance of toll bridges.

Arthur L. Adams, for appellant.

Denver L. Dudley, for appellee.

BAKER, J. The plaintiff, J. C. Pate, sued defendant, J. W. N. Lee, for damages for certain alleged personal injuries and recovered a judgment for $600. The defendant has appealed.

The defendant presents only two propositions urged for reversal: (1) the lack of substantial evidence to support the verdict and consequent judgment; (2) error on account of plaintiff's alleged intentional injection into the case the fact that appellant had liability insurance.

For the reason that it would unduly extend this opinion to quote from the evidence, we state the facts and conclusions therefrom with every inference to sustain the verdict.

Appellant Lee, as contractor, was constructing a building on the campus of the State A. & M. College, at Jonesboro. Appellee Pate and John Wimpy were employed on the job as steel tiers. These two worked together, neither having any control over the other. Their immediate superior was Jim Reese, who probably gave them directions as to what particular forms were required as the work progressed. They needed no advice or instruction in the manner of the performance of their duties. Both were experienced. Pate had been doing the same kind, or similar work since 1920. He had been

working on this particular job about two and one-half months when he was hurt.

He and Wimpy were engaged in making spirals and other forms from steel reinforcing rods 3/4″ to 7/8″ in diameter, about 13½ feet long. Some of the forms required five rods, some seven, and others perhaps more. The spirals were used at corners and square forms were used as pillars to support walls. These steel rods were joined or tied together by "hooks," as Pate described the means of fastening one to another. At all events these rods were so joined by steel connecting pieces as to hold them in the shape desired for corners and pillars and were so placed in the building process as to reinforce the concrete mixture to be poured around them. Sometimes shorter rods, two or three feet long, were used by these men as tools to aid in shaping the forms, and even shorter pieces, perhaps 20 to 24 inches long, were used to hammer or drive the steel connecting links or "hooks" to the desired place in the form. None of these shorter pieces appears to have been in use on the date Pate was injured, but they were somewhere on the grounds.

On the day and at the time the injury complained of occurred two or three forms had been built at a new location and each had been rolled off or moved off the sawhorses or trestles at the side thereof, and the space immediately adjacent to the trestles was filled when the last of these steel forms made that day was finished. These men had placed the trestles in a driveway, or road, because it was dry there, as was stated by Wimpy. To open this roadway the spiral just finished had to be moved and the trestles also had to be taken from the road. In moving the spiral Pate took the front end and walked "backwards and sideways", as he described his movements. They proceeded to a gravel pile, upon which they placed the spiral. About the time they had reached the place where they intended to lay down this steel form, Pate stepped upon one of the short rods. He thinks it was not the one offered as an exhibit, but was like it, except the one he stepped on was not rusty, but bright. It rolled forward under his foot, causing him to fall. The

steel form he was helping to carry fell upon him, causing the injury. Wimpy did not support this statement of Pate's, but, since the verdict of the jury forecloses dispute, we treat this statement as true. Since the evidences disclosed that Pate was at the front end of this form, the bottom of which was about eight inches from the ground, we think it probable that Pate, in falling, involuntarily raised the form, as his foot and the lower part of his body were carried forward by the rolling rod. Pate could not explain why this rod was at that point, except it was "throwed down by somebody." "I can't see the idea of the rod being there without somebody picked it up and throwed it there."

The evidence showed that Pate and Wimpy worked northwest of the building under construction, southeast of it, and north of the building, moving from place to place when they pleased, and probably as required for materials, and maybe, because of the necessity of having the finished forms near places they were to be used. They were then producing building forms for use on the fourth story. They were working then, just the two of them together, without any superior or immediate overseer to advise or control the manner of the performance of their duties. They formed a complete working unit, not connected with about forty other workers, and were required only to have the forms ready when needed.

Now, what was the negligence relied upon to sustain the action or support the verdict and judgment?

A failure to use ordinary care to furnish a reasonably safe place to work.

Appellant insists that there is not only no evidence to sustain the charge of negligence, but that appellee's own testimony discloses a case of assumption of risks and also contributory negligence.

We consider the foregoing facts in the light of numerous authorities which announce long settled principles of law, controlling in similar situations.

The servant assumes ordinary risks and dangers, including those hazards known to him and those which are

open and obvious. He is not required to make inspections. *Asher* v. *Byrnes & McCauley,* 101 Ark. 197, 141 S. W. 1176. *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. 2d 676; *International Harvester Co.* v. *Hawkins,* 180 Ark. 1056, 24 S. W. 2d 340.

The foregoing authorities furnish illustrative tests of that class of cases in which there is no breach of legal duty, hence no negligence, as well as another class of cases in which there may be dangers from which injuries are suffered by a servant without liability on the part of the master, where they are ordinary risks and hazards which the servant assumes by his contract of employment.

In the case at bar there is no negligence established by any of the foregoing facts, admittedly true for the purposes of this appeal. There was upon the ground a steel rod upon which the appellee stepped. It rolled under his foot causing the injury. There is no evidence that Lee, the master, or Jim Reese, the foreman, placed the rod where the appellee stepped upon it, or that either had ever seen it there, or that it was at a place or location where it might reasonably have been anticipated that Pate or any other servant would step upon it, under such circumstances as Pate indicated caused him to fall and hurt himself. Pate says that it seems to have been "throwed to that place." Assuming there was something to indicate that fact to his mind, there is no evidence that it had been at that place for such a length of time that it might have been observed by any kind of ordinary inspection. If its location made that place one of danger, the evidence is wholly lacking to show any breach of duty on the part of Lee or any one acting in his place or stead. In truth, the only evidence that this particular rod, or piece of steel, or a similar one, had been handled, thrown or placed where Pate stepped upon it, is the evidence that Pate and Wimpy were the only employees handling or using such rods of steel.

We have already called attention to the fact that they moved about from place to place, as the building progressed, or, as they said, on the last occasion to get to a dry place in the road. They made their own place of

work and moved away from it, at least, sixteen feet, at the time Pate was injured, to place the form or spiral upon the gravel bank, and, since that is the place where Pate fell, it is also the location fixed by him as the one where he stepped upon the piece of rolling steel.

Authorities are without limit almost that under such circumstances wherein the parties choose their own place to work, the rule requiring the master to exercise ordinary care to furnish a reasonably safe place to work does not prevail. *Arkansas Cotton Oil Co.* v. *Carr,* 89 Ark. 50, 115 S. W. 925.

One of our recent cases upon this proposition, and it is controlling here, is *M. E. Gillioz, Inc.,* v. *Lancaster,* 195 Ark. 688, 113 S. W. 2d 709. The cited case is determinative of the issue of negligence presented for our consideration here.

A still more recent case is *St. L.-S. F. Ry. Co.* v. *Ward,* 197 Ark. 520, 124 S. W. 2d 975.

We have already shown that no proof was offered tending to show any breach of duty owing by appellant to appellee, and consequently no negligence, as there is no presumption of negligence arising out of the mere fact that a bar of steel was found upon the grounds where a building was under construction, and structural steel to be used therein, and other building materials and supplies were scattered about or piled in close proximity to the building under construction.

But the appellee is confronted with another condition or situation which would prevent recovery in the instant case. He does not plead, nor does he insist that there was any latent or hidden danger. The only danger he insists upon is that there was a rod of steel placed where perhaps it should not have been. It was as open to his observation as it was to appellant's. If we should consider that it was in the road where he now argues it was, though the evidence shows that it was upon the gravel pile, it would have been the more easily observed in the open driveway than on the pile of gravel. He may not excuse himself for failing to see what was clearly

observable. Had he looked before he started to walk backwards, he could not have failed to see what he said was a bright and shiny rod of structural steel, twenty inches long. In that regard the rights of the parties are fixed and determined by the announcement made by this court in the case of *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. 2d 228. See *Missouri Pacific Rd. Co.* v. *Vinson,* 196 Ark. 500, 118 S. W. 2d 672.

Without burdening our comments with unnecessary citation, we shall content ourselves with the mention of *Caddo River Lbr. Co.* v. *Henderson,* 194 Ark. 724, 109 S. W. 425, wherein was cited the case of *Missouri P. Rd. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. 2d 1047, and from which last mentioned case we quoted in announcing the rule as to the degree of care required in furnishing an employee a reasonably safe place to work.

Having reached the conclusion stated, the second alleged error is not important.

From the foregoing it appears that the court erred in not directing a verdict for the appellant. The case has been fully developed and shows no matter of merit that might be presented upon a new trial.

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

McCarroll, Commissioner of Revenues *v.* The Southwest Distilled Products, Inc.

4-5647 131 S. W. 2d 5

Opinion delivered July 10, 1939.

[redacted]

Jack Holt, Attorney General, *Leffel Gentry,* Assistant Attorney General, and *Frank Pace, Jr.,* for appellant.

Brickhouse & Brickhouse and *Vol T. Lindsey,* for appellee.

McHaney, J. Appellee is engaged in the business of buying and selling of rectified distilled spirits, a portion of which it rectifies itself under two permits so to do, one at its West Memphis, Arkansas, plant and the other at its Sulphur Springs, Arkansas, plant. On June 9, 1939, appellant, acting on the advice of the attorney general, issued the following regulation: "(6) No Rectifier may sell liquor received into this state unless such liquors have been rectified, blended or mixed by said rectifier, and unless a five cent tax has been paid thereon in accordance with paragraph 4." Appellee brought this action to enjoin the enforcement of this regulation on the ground that the statute does not authorize the making of any such regulation. Appellant demurred to the complaint, which the court seems to have treated as an answer, as testimony of one witness was taken in open court on a stipulation that it might be transcribed and treated as a deposition. The court, after hearing the evidence and argument of counsel, entered a decree permanently enjoining appellant from interfering with appellee "in the purchase and sale of liquors both in bulk and in case lots, when all taxes enjoined upon it to be paid—have been paid at its place of business in West Memphis and Sulphur Springs, Arkansas."

It, therefore, appears to us that the only question to be determined by this appeal is one of law, and that is whether a person, as defined by act 108 of the acts of

1935, holding an Arkansas Rectifier's Permit may purchase and sell rectified distilled spirits other than those rectified, blended or mixed by such person. If such question be answered in the affirmative, then the regulation issued by appellant as above quoted is without authority of law and void, and the injunction granted was proper.

Section 14108 of Pope's Digest, being § 4 (a) of Article III of said act 108 of 1935, provides: "Any person may apply to the Commissioner of Revenues for a permit for rectifying, purifying, mixing, blending or flavoring of spirituous liquors or the bottling, warehousing or other handling or distribution of rectified distilled spirits. Such application shall be in writing and verified and shall set forth in detail such information concerning the applicant for said permit and the premises to be used therefor as the Commissioner shall require. Said application shall be accompanied by a certified check, or cash, or postal money order for the amount required by this Act for such permit. If the Commissioner shall grant the application, he shall issue a permit in such form as shall be determined by rules. Such permit shall contain a description of the premises to be used by the applicant and in form and in substance shall be a permit to the person therein specifically designated to purify, mix, blend or flavor spirituous or vinous, liquors, or to bottle, warehouse or otherwise handle or distribute rectified distilled spirits in the premises therein specifically authorized. The Commissioner shall have absolute discretion as to the location of the premises to be used."

It will be noticed that the statute authorizes any person to apply "for a permit for rectifying . . . spirituous liquors or the bottling, warehousing or other handling or distribution of rectified distilled spirits." By the latter part of said section, if the commissioner grants the application, "he shall issue a permit in such form as shall be determined by rules." It shall describe the premises to be used by the applicant, "and in form and in substance shall be a permit to the person . . . to purify, mix, blend or flavor spirituous or vinous liquors, or to bottle, warehouse or otherwise handle or distribute recti-

fied distilled spirits in the premises therein specifically authorized." By sub-section (b), a rectifier's customers are limited to wholesalers, other rectifiers and export out of the state.

The language above quoted in § 14108 is mandatory. If the commissioner issue a rectifiers permit, it says what its form and substance shall be. There is no discretion left to the commissioner as to this. But it is insisted that the word "or" was used by the legislature in the sense of "and" where the statute authorizes any person to apply for a permit for "rectifying . . . *or* the bottling, warehousing or other handling or distribution of rectified distilled spirits." We cannot agree that it was so used, because the legislature used the same word "or" in saying what the form and substance of the permit should contain. The context does not justify us in changing the word "or" to "and" in either instance. We think the legislature knew exactly what it was doing and used the correct word to express its intention.

It is undisputed in this record that a rectifier pays $1,500 per year as a privilege tax, whereas a distiller pays only $1,000 and a wholesaler only $750 per year. It is also undisputed that a rectifier does by custom and usage throughout the United States act as a jobber or distributor of rectified spirits other than those rectified by him, and it is stipulated that all spirits handled by appellee, whether of its own bottling or not, are "rectified, distilled spirits." It is also undisputed that a small part of appellee's business is the sale of spirits rectified by it. Evidently the state was granting some additional privileges to a rectifier over a wholesaler or a distiller, because of the privilege tax paid.

Moreover, the second paragraph of § 14109 of Pope's Digest seems to us to settle the question conclusively against appellant, if there should be any lingering doubt as to the meaning of section 14108. It provides: "A person holding a distillers or rectifiers permit need not obtain a wholesalers permit in order to sell at wholesale spirituous or vinous liquors. No person after

this act becomes effective, other than a person holding a distiller's, manufacturer's, rectifier's or wholesaler's permit shall sell spirituous, vinous (except wines) or malt liquors at wholesale and no wholesaler holding a permit shall sell or buy from others unless they hold permits, but such wholesalers may export from or import into this state, such liquors under rules and regulations promulgated by the Commissioner of Revenues."

That section specifically authorizes a person holding a rectifier's permit "to sell at wholesale spirituous or vinous liquors," and there is no language contained therein that attempts to limit a rectifier's sales at wholesale to products rectified by himself. He is something more than a wholesaler and he pays $750 annually more than does a wholesaler for the privilege of being this something more. If he is a wholesaler, and he is, with limited customers, then of necessity he should have the right to sell the products that a wholesaler may sell to the classes of customers permitted by statute. In a sense a rectifier is both a wholesaler and a distiller with a limited market for his merchandise.

We do not discuss or decide what taxes appellee is required to pay in addition to the $1,500 required for a permit, as that question is not involved in this litigation. We are asked to do so by appellant, but, if we did so, whatever we might say would be obiter, as the question is not presented or briefed.

We conclude that the regulation above quoted is contrary to the express provison of the statute and is without effect. The decree of the trial court so holding is correct and it is affirmed.

The Chief Justice, and Mr. Justice HUMPHREYS and Mr. Justice HOLT, think that § 4 of Act 108 only authorizes rectifiers to handle the liquors actually rectified without payment of the additional tax.

SLIMAN *v.* MOORE.

4-5559 131 S. W. 2d 1

Opinion delivered July 10, 1939.

[redacted]

Jas. G. Coston and *J. T. Coston,* for appellant.

A. F. Barham, Bruce Ivy and *Myron T. Nailling,* for appellee.

MEHAFFY, J. On May 20, 1932, the appellee, D. M. Moore, executed to Moses Sliman three promissory notes all dated May 20, 1932, and payable as follows: $5,000 six months after date; $5,000 one year after date; $7,500 eighteen months after date.

D. M. Moore and his wife, Susan Moore, executed and delivered a deed of trust to certain real estate in Osceola to secure the payment of said notes. These notes and deed of trust were executed and delivered about four months before Moore's creditors filed petitions in the bankruptcy court and Moore was adjudged a bankrupt. He was insolvent at the time the notes and deed of trust were made, and it is admitted that there was no consideration for the notes or deed of trust. Moore did not owe Sliman anything and received nothing from him when the notes and deed of trust were executed.

Moore and Sliman are both Assyrians and are related, and Sliman was simply assisting Moore to defraud his creditors. The notes had been marked "paid" by Sliman and he admitted his signature and admitted that the notes had been marked "paid" and delivered to Moore, but he said that Moore forced him to mark the notes "paid" and sign them; that Moore threatened him and told him that if he did not mark them "paid" he would have him indicted and sent to Atlanta.

The deed of trust contained a power of sale authorizing the grantee to sell the property described in the deed of trust at public sale, public notice of time and place of sale having been given for twenty days by advertising in some newspaper published in said county, or by notices posted in two public places in the county, and it authorized the grantee to convey said property to anyone purchasing at said sale and to convey absolute title thereto.

On April 29, 1938, the trustee published a notice that he would, on May 20, 1938, sell said property, describing it, for the purpose of paying the note, principal and interest.

After the publication of said notice of sale, on May 12, 1938, appellee Moore filed his complaint in the Mississippi chancery court against the appellant Sliman and the trustee, alleging that the notes and deed of trust were without consideration and that appellees received no consideration whatever for said notes and that Moses Sliman paid appellees nothing whatever, and that appel-

lee Moore was not, at the time of the execution of said notes, and is not now, indebted to Moses Sliman; that said notes had been marked "paid" by appellant Sliman; that notices had been published of the sale of said property; that said deed of trust constituted a cloud upon the title of appellees, and that they were entitled to have the same canceled; that unless J. W. Spann, trustee, is restrained, he would on May 20, 1938, proceed to sell said land, thereby creating a further and additional cloud on the title and working further, greater, and more irreparable injury. They prayed that the trustee, Spann, be enjoined; that said deed of trust be canceled, and the restraining order be made perpetual.

The appellant, Moses Sliman, filed answer in which he denied each and every allegation in the complaint. Thereafter the Jefferson Standard Life Insurance Company filed an intervention claiming a superior lien on said property, and the Florida Real Estate Loan Company filed an intervention and cross-complaint.

The suit to cancel the deed of trust and restrain the trustee from selling the property was based entirely on want of consideration. There was no suggestion about a fraudulent conveyance. The answer denied the allegations of the complaint, and there was no suggestion of fraud in the answer.

On February 20, 1939, a decree was entered by the chancery court holding that there was no consideration for the execution of said notes and deed of trust; that at the time the instruments were executed the appellees were not indebted to the appellant, Moses Sliman, or to J. W. Spann, trustee, and that appellees received no consideration whatsoever for the execution and delivery of said notes and deed of trust, and that the restraining order should be made perpetual, and the deed of trust canceled.

This appeal is prosecuted by Sliman to reverse said decree.

The appellant Sliman does not claim that there was any consideration for the notes and deed of trust; does not claim that Moore owed him anything at the time or owes him anything now, but bases his right for a reversal

on the maxim that "He who comes into equity, must come with clean hands." The undisputed evidence in this case shows that the notes and deed of trust were executed for the purpose of defrauding the creditors of Moore who was at that time insolvent.

There is some conflict in authority as to the application of this maxim, especially as to the exceptions or circumstances under which the maxim does not apply. In discussing this maxim and its application, this court, said:

"But although this doctrine is of general, it is by no means of universal application. For, besides the admitted and well established exception of that class of cases where the agreement or other transactions are repudiated on account of their being against public policy, (where the relief is said to be given, not to the particeps criminis, but to the public through him, because of the duty of the court to uphold and maintain the laws and prevent their infraction. 1 Story Eq. § 289. Tucker, 2 Lec. 393. 1 Rand. 76,) there are many anomalous cases, not impugning the general principle, but supposed to be placed beyond its influence by the particular circumstances of the case; as where the party has been seduced from the path of rectitude by the allurements of strong circumstances and by these means been made in some sense the slave of another's will; the law, in compassion of the infirmities of his nature, has supposed that he did not enjoy that freedom of will without which he cannot be justly regarded as a moral agent, (*Austin's Adm'x* v. *Winston's Ex'r,* 1 Hen. & Munf. 33, 3 Am. Dec. 583), or where the circumstances were such that the relief granted could be supposed to be, not the actual enforcement of the fraudulent or illegal contract, but simply a suit brought for the recovery of money received by the defendant for the plaintiff though founded upon a transaction originally fraudulent or illegal, as in the case of *Anderson & Tilley* v. *Moncrief,* 3 Desseau 133, where the agent had received a consignment of Africans with instructions to sell them, and, having effected the sale, refused to account and pay over the proceeds on the ground that the act which had brought the money into

his hands was a direct violation of the laws against the slave trade." *Irons* v. *Reyburn,* 11 Ark. 378.

In the instant case the appellant Sliman does not claim that Moore is indebted to him or that there was any consideration for the notes and deed of trust; and yet he claims the right to sell under the power of sale and deed of trust, and thereby acquire the property, and invokes the maxim above quoted to prohibit Moore from making any defense. The purpose of the maxim is to secure justice and equity, and not to aid one in an effort to acquire property to which he has no right.

In the case of *Loughran* v. *Loughran, et al.,* 292 U. S. 216, 54 S. Ct. 684, 78 L. Ed. 1219, the United States Supreme Court said: "The suit at bar was brought after termination of the marriage by death to enforce existing property rights growing out of the marriage in Florida and the decree entered in Virginia. It was not brought to enforce any transaction had within the District; nor was it brought to enforce an illegal contract; or to further an illegal relation. Equity does not demand that its suitors shall have led blameless lives. Neither the doctrine of clean hands, nor any kindred principles on which courts refuse relief, is applicable here."

In the case of *Chesser* v. *Chesser,* 67 Fla. 6, 64 So. 357, the court said: "It is contended by the appellee that this cannot avail the appellant by reason of the fact that he executed the note and mortgage for the purpose of defrauding his creditors. To this contention we cannot agree. As was held in *Wearse* v. *Pierce,* 24 Pick. (Mass.) 141: " 'In an action brought by the administrator of a mortgagee against the mortgagor to recover possession of land mortgaged to secure the payment of a promissory note, it is a good defense that the note was given without consideration; and the demandant cannot rebut such defense, either by direct evidence showing that the note was also given with a view to defraud the creditors of the mortgagor, or by arguing to the jury, from other evidence in the case, that it was so given.' ".

The maxim: "He who comes into equity must come with clean hands" means no more than that he who has defrauded his adversary to his injury in the subject matter of the action, will not be heard to assert a right in equity. While courts will not, as a rule, measure equity between wrongdoers, they are quite as careful to deny to any man the advantage of his own wrong. *Langley* v. *Delvin,* 95 Wash. 171, 163 Pac. 395, 4 A. L. R. 32.

In the case of *Anderson* v. *Lee, et al.,* 73 Minn. 397, 76 N. W. 24, the court held that the mortgagor was entitled to show that the mortgage was given without consideration although it was made for the purpose of defrauding creditors. The court said in that case: "It is always competent, in defense of an action or proceeding to foreclose a mortgage, or in an action to restrain such foreclosure and to have the apparent lien of the mortgage canceled, to show that there is nothing due on the mortgage because there was no consideration for the note or obligation it purports to secure. *Devlin* v. *Quigg,* 44 Minn. 534, 47 N. W. 258, 10 L. R. A. 665, 20 Am. St. Rep. 592; *Wearse* v. *Peirce,* 24 Pick. 141; 1 Jones, Mortg. § 613."

The maxim may not be invoked by one himself guilty of fraud, as that would be to violate the clean hands principle. Lawrence on Equity Jurisprudence, Vol. 2, § 1091.

In the instant case appellant Sliman admits that both he and Moore were parties to the fraud and this is a suit to prevent him from profiting by the fraudulent transaction, and he seeks to avoid the injunction and the cancellation of the deed of trust by showing that it was made to defraud creditors and that he himself participated in the fraud.

The maxim was not intended to and does not protect persons who themselves are guilty of fraud.

Again, the mortgage could not be either foreclosed or the property sold under the power of sale, if there was no debt, and the notes had been marked "paid" and signed by Sliman. It is true he says he was forced to do this because he was afraid he would be prosecuted for

some crime which he says he did not commit; but under the circumstances and evidence in this case the chancery court was justified in finding that there was no debt.

The decree of the chancery court is affirmed.

Mr. Justice BAKER disqualified and not participating.

WHITE *v.* WHITE.

4-5554 131 S. W. 2d 4

Opinion delivered July 10, 1939.

Geo. A. Hall, for appellant.

HUMPHREYS, J. This suit was brought in the chancery court of the northern district of Logan county on December 29, 1937, to obtain judgment on a note against Arabella White, widow of Bud White, and to foreclose a mortgage on certain real estate to secure same, making the sole and only heirs of Bud White parties to the action, who are the appellants herein. The note and mortgage were made exhibits to the complaint. The note and mortgage were executed by Bud White, and Arabella

White, his wife to J. N. White and G. W. Apple, the appellees herein, on July 12, 1927, and the due date of the note was December 24, 1927. The following payments appear on the note:

"Jan. 18, 1928, credit by lumber to J. N. White.....$18.00
June 1, 1929, credit by timber to G. W. Apple..... 25.00
October 1, 1933, credit by hay to J. N. White..... 2.00
August 1, 1935, credit by hay to G. W. Apple..... 5.00."

The complaint alleges that appellants paid taxes of 1929 in the sum of $6.88, taxes of 1930 in the sum of $6.67, taxes for 1933-1936 in the sum of $23.16, which amounts together with interest thereon aggregate the sum of $44.22, and that the total amount due on the note with interest including taxes less the credits amount to the sum of $341.28, for which amount judgment is prayed with interest thereon from January 1, 1938, until paid at the rate of ten per cent per annum.

An answer was filed by appellants denying the material allegations of the complaint and averring that the credits appearing on the note were made without the authority or direction of appellants and that the date and right of foreclosure of the mortgage is barred by the statute of limitations.

The cause was heard on the seventh day of October, 1938, on the pleadings, exhibits and evidence introduced by the parties resulting in a judgment against Arabella White for $338.51, and declaring same a first lien upon the land and decreeing a foreclosure of the mortgage and order of sale of the land to satisfy the judgment and costs, from which is this appeal.

A motion was filed to strike the purported bill of exceptions of the proceedings and evidence because same was not properly brought into the record which was sustained by this court, hence this court can only review errors, if any, apparent on the face of the record. The record before us for review consists of the complaint, exhibits thereto, the answer and the decree of the court. We must indulge the presumption that the evidence introduced sustained the allegations of the complaint which

shows that payments were made and credited on the note that kept it alive beyond the time suit was instituted. *Strode* v. *Holland,* 150 Ark. 122, 233 S. W. 1073; *Oil Fields Corporation* v. *Cubage,* 180 Ark. 1018, 24 S. W. 2d 328.

Appellant contends that since the record shows on its face that the suit was not brought within seven years after the cause of action accrued the right to bring the action is barred under § 8918 of Pope's Digest which reads, in part, as follows: "No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their rights to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed."

The section of the statute relied upon applies to actions to recover land and does not govern suits to foreclose mortgages.

Section 9465 is the section which governs relative to the foreclosure of mortgages which is, in part, as follows:

"In suits to foreclose or enforce mortgages, deeds of trust or Vendor liens, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given."

Since the debt was not barred when this suit was instituted the decree for the debt, foreclosure of the mortgage and order of the sale of the land to pay the judgment was correct and is, therefore, affirmed.

4-5501 131 S. W. 2d 620

Opinion delivered May 29, 1939.

Arthur J. Johnson and *Coleman & Riddick,* for appellants.

E. W. Brockman and *Rose, Loughborough, Dobyns & House,* for appellee.

HOLT, J. Appellants bring this appeal from the Lincoln chancery court.

The Kersh Lake Drainage District, embracing lands in Jefferson, Lincoln and Desha counties, was created by an order of the Circuit Court of Jefferson county on August 24, 1912, under Act 279 of 1909. Benefits were

assessed against each tract of land in the district in the total sum of $272,782.12, payable in annual installments. A contract for the improvement was let, the work completed and certificates of indebtedness issued to the contractor in payment.

A. J. Johnson, one of the appellants, owned and still owns 160 acres of land in this district the benefits to which were originally assessed at $1,600. Prior to 1931, he had paid installments of these tax benefits in the total sum of $1,628. The other appellant landowners to this litigation paid the full amount of benefits originally assessed against their lands, but counsel have agreed that such appellants will abide the decision of this court with reference to the Johnson land as controlling as to these other appellants.

In 1931, the commissioners of this district, acting upon the authority of Act 467 of 1919, made an additional assessment against the lands in question, such assessment being the interest on the original assessment as contemplated in the act. This tax levied as additional assessment on the Johnson land amounted to $104.

A suit was then filed by Johnson in the Lincoln chancery court against the district in which he alleged that the limits of the benefits accruing to his 160 acres of land in the district, amounted to $1,600, and prayed that the additional assessment of benefits made under Act 467, *supra,* be annulled. On October 19, 1931, the court found the issues in favor of Johnson and held that all legally assessed benefits had been paid, annulled the additional assessment, and permanently enjoined the district from collecting any additional taxes on Johnson's land. From this judgment of the court no appeal was taken.

The other appellants here brought a similar suit against the district, praying for similar relief to that granted Johnson, which prayer the court granted on June 15, 1932, and from this judgment of the court no appeal was taken.

The State Bank & Trust Company of Wellston, Missouri, in 1935 filed a suit at law against the Kersh Lake

Drainage District in the federal court for the eastern district of Arkansas, in Little Rock, in which it sought to recover a judgment against the district on certain of its certificates of indebtedness which had been assigned to it by the contractor. In this cause, the Federal District Court entered a judgment in favor of the trust company against the district for $54,655, and this judgment was subsequently affirmed by the Circuit Court of Appeals. *Kersh Lake Drainage District* v. *State Bank & Trust Company,* 85 Fed. 2d 643.

Thereafter the State Bank & Trust Company instituted suit in the federal court in Little Rock against the same commissioners of this same district, joining the county clerks and sheriffs of Jefferson, Lincoln and Desha counties, asking for a mandatory injunction to compel the collection of a tax of 6½ per cent. a year on the assessed benefits in the district to pay this judgment. The court issued the mandatory injunction as prayed for as follows: "It is, therefore, considered, ordered and decreed that a mandatory injunction issue requiring the defendant county clerks, N. M. Ryall and M. D. Newton, to extend upon the tax books of their respective counties a tax of 6½ per cent. of benefits assessed against each tract of land, railroad, and tramroad in the district for each of the years 1936 and following years until the whole of this decree has been satisfied. . . . It is further considered, ordered and decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as commissioners of said district, be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary, as commissioners of said district, to insure the prompt collection of the drainage taxes." This judgment of the court was affirmed by the Circuit Court of Appeals. *Kersh Lake Drainage District* v. *State Bank & Trust Company,* 92 Fed. 2d 783.

In accordance with the provisions of this mandatory injunction the county clerk of Lincoln county extended

a tax of 6½ per cent. on the original assessment of benefits of $1,600 against Johnson's 160-acre tract in this county. Johnson refused to pay this tax and the assessment against his land was returned delinquent.

The Kersh Lake Drainage District filed the present suit in the Lincoln chancery court pursuant to the order of the federal court to collect the delinquent tax against Johnson's land and the delinquent assessments against the other appellants to this litigation. In his answer, Johnson alleged that the tax sought to be collected was void and set up as a complete bar the decree of the Lincoln chancery court rendered on October 19, 1931, *supra,* in the former suit brought by him against the district, pleading *res judicata.* He also alleged that his lands were not embraced within the terms of the mandatory injunction for the reason that the injunction directed the county clerk to extend a tax on the assessed benefits in the district, and that there were no unpaid "assessed benefits" against his land. The other appellants here made similar allegations in their answer with respect to their lands and also pleaded the decree rendered by the Lincoln chancery court on June 15, 1932, in their favor as *res judicata.* The chancery court overruled the defenses set up by these appellants, entered a decree for the taxes and ordered the lands sold to satisfy them. The trial court was of the opinion that it was precluded by the federal court's order from considering any of the defenses interposed by Johnson or the other appellants.

The decree of the Lincoln chancery court, heretofore referred to, in the cause in which appellant, A. J. Johnson, was plaintiff and Kersh Lake Drainage District was defendant, and rendered on October 19, 1931, recites, among other things, the following: "The court being advised as to the law and facts in the premises, finds that the plaintiff is the owner in fee of the SW¼ of section 8, township 9 south, range 5 west; that said lands constitute a part of the Kersh Lake Drainage District of Jefferson, Lincoln and Desha counties, that said drainage district was organized by the judgment of the Jefferson circuit court on August 24, 1912, under act No. 279 of the Acts of 1909, and that said land was assessed

benefits of $1,600 by the assessors of said Kersh Lake Drainage District and said assessment of benefits was duly confirmed by the judgment of the circuit court of Jefferson county on February 3, 1913; that subsequent to the confirmation of the assessment of benefits, taxes were annually extended against plaintiff's said land, and from January 1, 1914, to and including the year 1929, payable in 1930, the plaintiff paid a tax in favor of Kersh Lake Drainage District and as a credit on the assessments of benefits made and confirmed against his land the total sum of $1,628; that the defendant commissioners over the protest of the plaintiff extended a total and further tax of $104 for the year 1930, payable in 1931, in favor of the Kersh Lake Drainage District, and the plaintiff has refused to pay and the foregoing described lands have been certified by the collector of Lincoln county to the chancery court of Lincoln county as delinquent for said amount, and said commissioner is about to sell said land for said delinquency.

"The court further finds that upon the payment by the plaintiff of the total assessed benefits in favor of Kersh Lake Drainage District in the sum of $1,600 against the SW¼ of section 8, township 9 south, range 5 west, all of the lien, right or interest of the Kersh Lake Drainage District against said lands by virtue of the improvement made by the board of commissioners in and for the Kersh Lake Drainage District became duly paid and satisfied, and the commissioners are without authority to extend further taxes against plaintiff's land collectible in the year 1931, or any other years.

"It is, therefore, considered, ordered and decreed that the lien of the Kersh Lake Drainage District against the SW¼ of section 8, township 9 south, range 5 west, by virtue of its assessment of benefits in the sum of $1,600 is fully satisfied and released; that the tax extended by the commissioners for 1930, collectible in 1931, is without authority and void, and the clerk of this court shall satisfy the record of the delinquent lands returned to him in 1931 as far as SW¼ of section 8, township 9 south, range 5 west, is concerned, and the defendant commissioners are permanently restrained from extend-

ing other and further taxes against the plaintiff's said land . . ."

The decree in the cause of W. A. Fish and others (the other appellants in the instant case) v. Kersh Lake Drainage District which was entered on June 15, 1932, is similar in effect.

In the instant case the decree of the lower court is in part as follows: ". . . said cause is heard upon the complaint filed, proof of publication of the notice of the advertisement of said lands, the certified list of delinquent lands filed by the collector of Lincoln county for the years 1935 and 1936, tax records including said lands for said years, separate answer of A. J. Johnson, with certified copy of the decree of the Lincoln chancery court in the case of *A. J. Johnson* v. *Kersh Lake Drainage District,* and in the case of *W. A. Fish, et. al.* v. *Kersh Lake Drainage District,* attached as exhibits to said answer, together with all amendments thereto, and the written statement of Victor Felly, from all of which the court finds: . . .

"And the court further finds that since the filing of the complaint herein, separate answer filed by A. J. Johnson, claiming to be the owner of the following tract of land lying and being situated in the county of Lincoln and State of Arkansas, to-wit: southwest quarter (SW¼) of section eight (8), township nine (9) south, range five (5) west, it being contended in said answer that the total amount of the original assessed benefits against said lands had been fully paid; that the postponed installments of benefits so assessed did not bear interest and that the lien created against said land by the original assessment of benefits had been fully discharged. In said answer the said A. J. Johnson also contended that the decrees in the cases of *A. J. Johnson* v. *Kersh Lake Drainage District* and *W. A. Fish, et al,* v. *Kersh Lake Drainage District* were *res judicata* of the issues in this suit. Said answer also contained a prayer for relief for the owner of said lands and for the owners of other lands similarly situated. . . .

"The court finds all of the issues against the said A. J. Johnson and other property owners similarly situated, which said issues were set out in the answer filed by A. J. Johnson and amendments thereto."

The decree then adjudicates that the taxes levied on the lands of A. J. Johnson and the other answering defendants were delinquent and ordered the commissioners to sell the lands to satisfy the taxes. From this decree of the court comes this appeal.

Appellants state the issue before us in the following language: "The question in this case is whether or not a decree, in a suit by a landowner against a drainage district, adjudicating that the owner had paid the full limit of benefits accruing to his land, and perpetually enjoining the district from collecting any more taxes on it, is *res judicata* in a subsequent suit by the district to collect additional taxes on the land, brought in obedience to an order of the federal court directing the county clerks of three counties 'to extend upon the tax books of their respective counties a tax of 6½ per cent. of the benefits assessed against each tract of land' in the district, to pay a judgment rendered in that court against the district."

We are of the view that the judgment of the Lincoln chancery court in favor of Johnson on October 19, 1931, and that rendered in favor of the other appellants on June 15, 1932, are *res judicata* in the present suit brought by the district against these same parties to collect additional taxes on their lands brought in obedience to an order of the federal court.

In this case the appellee drainage district has sued appellants for drainage taxes alleged to be due from them to the district. These appellants defend upon the ground that they have already paid in full all the tax benefits assessed against their lands and that they have done all that the law requires of them. In support of their position, appellants set up specifically, as *res judicata* of the issues here, the former decrees in 1931 and 1932, *supra*, in the same court from which this appeal

comes, in which the same parties were involved, involving the same taxes, and in which it was adjudicated that they had paid in full the taxes lawfully assessed against them. They insist, and we think correctly so, that these decrees in a suit between the same parties, involving the same issues and the same subject-matter are *res judicata* of the questions involved in the instant case.

As we view it, the power of the federal court to make the mandatory order, which it made, is unquestioned, but the effect of this order was a direction to the commissioners of the drainage district to institute proper proceedings, in the proper state court, to enforce the payment and collection of all delinquent taxes assessed against the property owners in the district as a class, who were delinquent on their assessed benefits. The effect of this federal court order was not to deprive the individual taxpayer and landowner of any right that he might have in the state court to resist collection of the additional tax assessed against his particular lands. Each taxpayer was entitled to be heard not only upon the validity of the tax levied, but also upon the amount of the tax. The mere fact alone that the federal court directed the appellee district to bring the present suit in the state court was a recognition by the federal court of the power of the state court to decide the issues involved. The federal court order directed the county clerks of the counties in which the lands in question in the district were located to extend a tax of 6½ per cent. of the benefits assessed against each tract and directed the appellee district to bring suit for the collection of these taxes. If the clerks erroneously extended such taxes and the district brought the suits to collect nonexistent taxes under a mistaken conception of the scope of the federal court order, the appellants lose no right of defense. They could make the same defenses against such suits as they would have been entitled to make had the commissioners brought the suits without orders from the federal court. It was not the purpose of the federal court to enforce the collection of taxes in this district after they had been paid, nor to exact benefits in excess

of those lawfully assessed against appellant's property. As we view it, the federal court suit, in which the certificate holders secured a judgment against the district, appellee, did not involve the validity of the assessments against the appellant landowners. It simply involved the liability of the district to the holders of the certificates. The federal court correctly held the district liable to the bondholders, but the effect of that holding does not deny to the individual taxpayer the right to resist the collection of the tax in question.

In the present case appellants are not resisting the order of the federal court directing the district to assess and collect a tax. They concede the validity of that order and the duty of the district and its officers to obey it. These district officers have levied the tax and have brought suit to collect it against the property owners in the district, as a class, who have not paid the tax, but not against appellants who have actually paid the tax as shown by the judgment of a state court of acknowledged jurisdiction.

In the case of *State of Arkansas for the use and benefit of Craighead County* v. *St. Louis-San Francisco Railway Company,* 269 U. S. 172; 46 Sup. Ct. 66, 70 L. Ed. 219, the facts were that the Maccabees secured a judgment in the federal court in Craighead county on certain county warrants. In aid of this judgment the Maccabees instituted mandamus proceedings and the federal court made an order directing the taxing officials to assess at full money value all property in Craighead county and to continue said assessment until the judgment of the plaintiff had been paid in full. The assessment was made by the taxing authorities in attempted compliance with the order of the federal court.

Thereafter the State of Arkansas for the use and benefit of Craighead county sued two railroad companies for the collection of the taxes as assessed under the order of the federal court. These companies defended on the ground that the assessment ordered by the federal court was not properly made and, therefore, in violation of the state constitution. The state court sus-

tained their defense and this decision was affirmed by the Supreme Court of the United States in which it held, quoting the headnotes:

"A mandamus issued by the federal district court for the purpose of satisfying a judgment previously entered therein against a county, and commanding tax officials to assess all property in the county at its full value and continue so doing until the judgment shall be paid, but laying down no further details as to the manner of making assessments, is to be taken as requiring that they be made in accordance with the laws of the state, leaving the question whether an assessment, when made, complies with those laws to be determined in appropriate proceedings by that court, or by the state courts.

"Hence where, in purported compliance with such mandamus, the property in the county was assessed at full value for county taxes (out of which the federal court judgment was to be paid) but at one-half its value for state, municipal and school taxes, and the state supreme court, adjudging that the discrepancy was contrary to a uniformity requirement of the state constitution and not in accord with the direction of the federal court, refused to enforce collection of the county taxes for more than 50%—*held,* that the judgment of the state court plainly did not deny the authority or question the validity of the mandamus of the federal court, and was not reviewable in this court under § 237, 28 Jud. Code, p. 176. (28 Jud. Code, p. 176, 344.)"

We think the principles announced in this case are applicable here.

The object of a writ of mandamus or a mandatory injunction is merely to require public officials to perform an existing duty, and courts cannot require them to do more than the law permits them to do. As was said in *United States* v. *County of Macon,* 99 U. S. 582, 582, 25 L. Ed. 331: "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing

powers into operation." And even though the federal court properly rendered the judgment in favor of the certificate-holders against the appellee district and properly ordered the officials of the district to collect a tax upon the property of each citizen therein to pay the judgment, nevertheless this order did not deny to appellants and the individual tax-payer in that district the right to set up any defense against the tax assessment that he might have.

Appellants in the instant case are not attempting to set up a class defense nor one that is common to all the landowners in the district; they are asserting a defense, which is peculiar to themselves alone, based on the decree of the state court which perpetually enjoined the district from collecting any more taxes on these lands. We hold that these decrees are *res judicata,* and we do not think it material in the present case whether these decrees of the state court were right or wrong, there being no allegation of fraud nor want of jurisdiction. No appeals were taken from them. The Supreme Court of the United States in *Jeter* v. *Hewitt,* 22 How. 352, 16 L. Ed. 345, said: "*Res Judicata* renders white that which is black and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.*" The decrees in these suits rendered in 1931 and 1932, *supra,* could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken and no fraud on the court in which decrees were rendered is reflected by this record.

On the whole case we conclude, therefore, that the chancellor erred in holding that the lands of appellants are liable for any additional tax assessments in the appellee district, and the judgment is accordingly reversed with instructions to enter a judgment not inconsistent with this opinion.

SMITH, MCHANEY and BAKER, JJ., dissent.

SMITH, J. (dissenting). The majority opinion discovers a new method whereby old debts may be discharged without payment, even in cases where there is no

question of limitations in favor of the debtor, or imputation of laches against the creditor. I, therefore, dissent.

I think it unimportant whether there was collusion in the rendition of the decree which is pleaded as *res adjudicata.* It suffices to say that the majority opinion opens wide the door for such collusion and affords easy opportunity to defeat the collection of substantial parts of an improvement district's obligations.

Of the innumerable improvement districts, of various kinds, which have been organized throughout the state it is doubtful whether in any instance the property owners were required to discharge the betterments assessed against their lands in a single payment. Certainly the rule is to distribute these payments of betterments over a period of years, and when this is done numerous cases have held that interest may be charged upon these betterments. These cases are all to the effect that the interest charge does not operate to increase the betterments, but is a charge made for the indulgence of extension of time in paying the betterments. Among other cases so holding are the following: *Oliver* v. *Whittaker,* 122 Ark. 291, 183 S. W. 201; *Pfeifer* v. *Bertig,* 141 Ark. 531, 217 S. W. 791; *Skillern* v. *White River Levee District,* 139 Ark. 4, 212 S. W. 90; *Massey* v. *Ark. & Mo. Highway District,* 163 Ark. 63, 259 S. W. 387; *Griffin* v. *Little Red River Levee District,* 157 Ark. 590, 249 S. W. 16; *Faulkner Drainage District* v. *Williams,* 169 Ark. 592, 276 S. W. 604; *Chicago Mill & Lbr. Co.* v. *Drainage District No. 17,* 172 Ark. 1059, 291 S. W. 810.

Act 467 of the General Acts of 1919, p. 343, provides that "Where assessments of benefits have been made in drainage districts organized either under general or special acts, the property owner shall have the right to pay such assessments in full within sixty days after the passage of this act, but if he does not avail himself of this privilege, the assessment of benefit shall bear interest at the rate of six (6%) per cent. per annum, and shall be payable only in installments as levied. The interest need not be computed until necessary to be sure that the

collections have not exceeded the total amount of benefits and interest; or the interest may be first collected."

The circumstance that the statute making the benefits bear interest was passed after the district was organized, and the benefits assessed is not of controlling importance. The decisions of the United States Circuit Court of Appeals of this circuit in the cases cited in the majority opinion involved the very taxes here sought to be collected.

That the statute above quoted is applicable to the instant case very clearly appears from the opinion of this court in the case of *Benton* v. *Nowlin,* 187 Ark. 738, 62 S. W. 2d 16. The theory upon which interest may be collected on deferred payments of installments of betterments was so thoroughly considered by the late Justice BUTLER in the case just cited that it would be a work of supererogation to pursue the question further.

Most—if not all—of the improvements constructed in this state, under our various improvement district statutes, have been paid for by the issuance of certificates of indebtedness or of bonds, the maturities of which are so distributed that they may be paid with the annual collection of installments of betterments.

Now, it may or may not be necessary to collect interest on these betterments; but the right to do so is unquestioned. The collection of this interest may be required to pay the district's obligations; but the majority opinion permits that right to be defeated. It is only required that the commissioners permit themselves to be sued, and for the showing to be made that property owners have paid their original assessments without paying the interest thereon. The commissioners of the districts, who are usually large property owners, are under the temptation to make no defense, as they profit, along with other property owners, in being relieved of proportionate liability for interest, and this relief may be awarded under the majority opinion, although the real parties in interest may be in profound ignorance of the suit until the right of appeal has been lost. This is the effect of the majority opinion, and I am constrained to dissent, and am

authorized to say that Justices McHaney and Baker concur in the views here expressed.

State, Use and Benefit of Garland County et al, *v.* Jones et al.

4-5537 131 S. W. 2d 612

Opinion delivered July 10, 1939.

C. A. Stanfield, for appellants.

Jay M. Rowland, Verne McMillan and *Murphy & Wood,* for appellees.

HOLT, J. This is a suit instituted by appellants in the Garland chancery court to recover from John E. Jones, circuit clerk of that county, certain excess fees and commissions over and above the lawful salaries allowed to the said John E. Jones and his deputy clerk, D. W. Parker.

The complaint, among other things, alleges that John E. Jones was during 1931 to 1935, inclusive, and now is circuit clerk of Garland county, and that during this time D. W. Parker was his deputy; that Jones, as clerk, was entitled to an annual salary of $3,000 in lieu of all fees, commissions, charges, and emoluments, and that his deputy, Parker, was entitled to an annual salary of $1,800 and no more; that the said clerk is required to make quarterly and annual settlements with the Garland county court and to pay into the treasury of Garland county all income from fees, commissions, etc., over and above the salaries and expenses of the office.

It is further alleged that in the settlements of Jones for the years 1931 to 1935, inclusive, with the said county court, he made no accounting for the income which he received as commissioner, or for preparing transcripts of records of the cases appealed to the Supreme Court, and that the amounts withheld from the treasury of Garland county and charged as salaries for himself and deputy are greatly in excess of the salaries they were legally entitled to retain and that they had fraudulently and illegally appropriated these sums to their own use, during and for the years 1931 to 1935, inclusive.

Plaintiffs prayed that all settlements made by the defendant, John E. Jones, from April 6, 1931, to January 16, 1936, inclusive, be re-examined, surcharged, and fal-

sified; that the amount due Garland county be determined and judgment rendered against John E. Jones and D. W. Parker for all moneys lawfully belonging to Garland county, together with interest thereon.

Subsequent to the filing of this complaint, C. A. Stanfield upon filing his petition duly verified, was permitted by the chancery court to be made a party plaintiff and allowed to prosecute the suit as a citizen and taxpayer.

Defendants filed a demurrer alleging that C. A. Stanfield was without authority to bring and prosecute the suit in the name and in behalf of the State of Arkansas and that the complaint did not state facts sufficient to constitute a cause of action against the defendants.

On the same day that the demurrer was filed, appellees filed a motion to strike Stanfield's petition. Later, Stanfield filed affidavit to the effect that he had been employed by the County Judge of Garland county to institute and prosecute the suit in question and that the prosecuting attorney had refused to act.

The Chancellor on June 3, 1936, sustained appellees' demurrer and motion to strike the petition.

From this action of the trial court, appellants prayed for and were granted an appeal to this court. The opinion on that appeal may be found in *State, use of Garland County,* v. *Jones,* 193 Ark. 391, 100 S. W. 2d 249. That decision determines the law governing this case. *Gantt* v. *Arkansas Power & Light Co.,* 194 Ark. 925, 109 S. W. 2d 1251. Under our former decision the case was reversed and remanded with directions to the court below to overrule the demurrer and proceed with the trial of the case according to law and not inconsistent with the opinion.

Upon remand of the case, appellees (defendants below) filed their answer alleging, among other things:

"1. Defendants admit that they are clerk and deputy clerk, respectively, of Garland county, but they deny each and every other material allegation of the complaint and of the said petition; say that all matters and things and all the alleged failures to properly account and pay over to the treasurer of Garland county, occurring prior

to January 7, 1933, are barred by the statute of limitations; and all alleged failures to pay over occurring within one year prior to January 16, 1936, were subject to correction by the county court and the court is without jurisdiction over that portion of the account.

"2. That Act 18, as amended by Act 658 of the Acts of 1921, is now modified by Special Act No. 43 of 1923.

"3. That Act 18 and Act 658 of 1921 were repealed by Act 95 and Act 216 of 1931, that Act 95 fixes the salary of the circuit clerk at $4,000 and allows him also the fees received as Commissioner in Chancery and for making transcripts for the Supreme Court and allows his chief deputy $2,400; that if it be said that Act 95 is a special Act, the difficulty is remedied by Act 216 of the Acts of 1931; defendants say that neither of them has ever drawn or retained any sum in excess of what is thus allowed them by law, and have actually retained less than was due them, and have paid into the treasury more than was required; that this action cannot be maintained against D. W. Parker, as deputy clerk, as there is no provision in law for maintaining an action against him for any failure to make proper accounting to the county court; that they are receiving the compensation provided by law, and neither of them owes Garland county any sum whatever.

"4. That their accounts have been audited as required by law, and that there is no reason for the appointment of a master, but if a master is appointed the court should require bond for the payment of the expense.

"5. Defendants pray that the complaint and the petition of the taxpayer asking to be made a party be dismissed for want of equity, for their costs, and for other relief."

To this answer appellants replied denying each and every defense set up therein.

Appellants (plaintiffs below) also filed a demurrer to the separate paragraphs of the answer and the court sustained their demurrer to the second, third and fourth paragraphs.

Upon a trial of the cause the court decreed, among other things, that C. A. Stanfield was without authority and legal capacity to prosecute the action; that Act 95 of the Acts of 1931 is a valid Act; that under the provisions of Act 216 of the Acts of 1931 any salaries or fees drawn under Act 95 were legal; that defendant, John E. Jones, acted in good faith in not keeping a record of his expenses as Commissioner in Chancery and in connection with transcripts for the Supreme Court; that John E. Jones has not received greater fees and allowances than he was entitled to receive under the law.

At the outset appellees urge affirmance on this appeal for failure of appellants to comply with rule IX of this court. In the view we take of this case, however, we think this rule has been fairly complied with by appellants and that this contention is without merit.

Appellees also insist that the finding of the chancery court that C. A. Stanfield had no authority to prosecute the case should be upheld and the decree affirmed for that reason. Our answer to this contention is that this court held on the other appeal in this case, *supra*, that Mr. Stanfield as a taxpayer had the authority to prosecute the suit. In that case we said:

"It is now recognized by the legal profession everywhere that suits may be maintained by, and in the name of the state, for the use and benefit of state agencies or municipalities or taxpayers to recover any shortage or liability, and to require it to be paid into the proper depositories or treasuries . . . .

"We know of no statute or law that prohibits a county from bringing a suit in the name of the state for the use and benefit of the county. We conclude that the court erred in sustaining the motion to strike Stanfield's petition, and in sustaining the demurrer. Of course, it is not necessary that both the county and the taxpayer be made parties, but the suit can be maintained in the name of the state for the use and benefit of the county, or by a taxpayer suing for himself and other taxpayers." The rec-

ord in this case reflects, in effect, that the prosecuting attorney refused to act.

Appellees also urge that we should hold Act 95 of the Acts of 1931 a valid Act. Again we point out that this court specifically held, on the other appeal in this case, that this Act 95 of the Acts of 1931 is a special Act and is, therefore, void and without effect, being in violation of Amendment 14 of the Constitution of the State of Arkansas.

Appellees finally contend that we should hold Act 216 of the Acts of 1931 to be valid and controlling here. Under the provisions of Act 216 it is sought to legalize all salaries and fees drawn under the provisions of Act 95. Since we hold that Act 95 of the Acts of 1931 is void, Act 216 can afford appellees no relief here.

On this record, we are of the opinion that the appellee, John E. Jones, as circuit clerk of Garland county, was only entitled to a salary of $3,000 per year as provided by Act 18 of the Acts of 1921, as amended by Act 658, and his deputy, Parker, to $1,800 per year, and that John E. Jones is liable for all fees, commissions, and emoluments drawn by his deputy and himself in excess of said salaries.

There appears to be no dispute in this record as to the amounts due each year in excess of legal salaries, as reflected by the State Comptroller's report and audit. The only remaining question for our determination is whether or not the three year statute of limitations, or the five year statute, should control in computing the total amount due Garland county from appellee, John E. Jones, as circuit clerk.

It is appellees' contention that in the event this court should hold them liable, then the three year statute of limitations controls and that the total amount due should be computed only for the years 1933, 1934, and 1935, inclusive. In this contention we think appellees are correct, and we hold that appellants are entitled to a judgment for all excesses paid to the circuit clerk and his

deputy above their salaries of $3,000 and $1,800, respectively, for the years 1933, 1934, and 1935, inclusive.

On the question as to whether the three-year or the five-year statute of limitations should apply, this court in a recent case in which the principles involved are not unlike those here, *Fidelity & Casualty Company of New York* v. *State, use of Columbia County,* 197 Ark. 1027, 126 S. W. 2d 293, said: "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 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 willful 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. 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 willful diversion."

In the case before us the record fails to disclose any intentional fraud, corruption, or willful diversion, on the part of appellees and we conclude that the three year statute of limitations applies. (§ 8928, Pope's Digest.)

On the whole case we are of the opinion that the chancellor erred in his findings in favor of appellees, and accordingly the decree is reversed and remanded with directions to ascertain the amount due, with interest, for the years 1933, 1934, and 1935, inclusive, in accordance with the State Comptroller's report and audit, and to enter a decree in accordance with that finding.

GRIFFIN SMITH, C. J., not participating.

GRAHAM *v.* LITTLETON.

4-5527 131 S. W. 2d 637

Opinion delivered June 19, 1939.

Gustave Jones, for appellant.

Fred M. Pickens, for appellee.

SMITH, J. Henry Littleton brought suit in the circuit court, which, on motion, was transferred to chancery court, upon four notes, each for the sum of $300, executed by Gus Graham to the order of Mrs. Minnie Littleton, which the plaintiff alleged he had acquired, for a valuable consideration, before maturity, and in due course of business.

An answer was filed, in which the execution of the notes was admitted, as was also the fact that they had not been paid. But the answer alleged that a decree had been rendered in a suit pending in the chancery court, in which the Farm Credit Corporation was plaintiff and Mrs. Littleton was the defendant, in which Graham had been sued as garnishee, and a judgment rendered against him as such for the sum of $1,500, that amount including the four notes here sued on and another note, which was also for the sum of $300. The five notes were all dated November 11, 1930, and were due one, two, three, four and five years from date, respectively. That decree recites that Mrs. Littleton made no defense and did not appear. Graham also made default, and the allegation, contained in the complaint of the plaintiff credit corporation, that he was indebted to Mrs. Littleton upon the five notes of $300 each, was not denied. Upon this state of the pleadings, a default decree was rendered against Graham for the sum of $1,500, and it was ordered that Mrs. Littleton be restrained from selling or otherwise disposing of the notes. This decree is pleaded in bar of the present suit.

That decree was not entered until May 22, 1934, at which time it was entered, under a *nunc pro tunc* order, as of November 22, 1932.

Testimony was offered to the effect that these notes were sold and assigned by Mrs. Littleton to her son

Henry on the day after their execution, which was nearly two years before the rendition of the decree in the suit of the Credit Corporation and about three and one-half years before the entry of the decree in that case. Henry Littleton was not a party to that proceeding, and the testimony in his behalf is to the effect that he had long been the owner of the notes before that suit was brought.

No attempt was made to show that Mrs. Littleton was insolvent, and the question of fact tried in the court below was whether she had sold and transferred the notes to her son. The court below found, upon testimony which is sharply conflicting, that she had, and we are unable to say that this finding is contrary to the preponderance of the evidence. If Mrs. Littleton did sell these notes, the sale was made before the institution of the suit by the Credit Corporation, and Graham was not then indebted to her, but was indebted to the owner and holder of the notes. There was no service upon Mrs. Littleton of this restraining order. The circumstance which lends strong support to the finding of the chancellor is the fact that Henry Littleton pledged the first of these five notes to a bank as collateral for a loan made him, and when the note matured he drew a draft on Graham for the amount of the note, which was duly honored.

This transaction occurred before the institution of the suit by the Credit Corporation, yet, notwithstanding this fact, Graham filed no answer when garnisheed. Had he done so, the law would have cast upon the Credit Corporation the burden of showing that Mrs. Littleton was the holder and owner of the notes.

In the case of *Knapp* v. *Gray,* 153 Ark. 160, 239 S. W. 757, the maker of a negotiable note was served with a writ of garnishment. The garnishee filed an answer admitting the execution of the note and his liability thereon when it matured, but he also alleged that he did not know who the legal owner of the note was and he prayed that the court require a surrender or impounding of the note before rendering judgment against him.

The opinion in that case recites that "a judgment was rendered against him (the maker of the note) without requiring proof that the note was non-negotiable or impounding it." In holding that this was error, it was there said: "This court said, in the case of *Head* v. *Cole,* 53 Ark. 523, 14 S. W. 898, that 'where it appears that the garnishee is a debtor on commercial paper given to or held by the defendant, the court should decline to render any judgment against the garnishee unless it first compels the delivery of the paper into court, or until the paper matures and it is made to appear that the defendant still holds it. That is to say, the court should protect the garnishee against the danger of paying a debt twice, without destroying the essential properties of commercial paper, which we are confident the Legislature never intended to impair by the enactment in reference to garnishments.' "

Graham filed no answer or other pleading, which would have afforded him this protection.

"The answer of the garnishee is taken as *prima facie* true of the allegations it contains; and if it is not contradicted or if issue is not taken thereon, it will be presumed to be absolutely true. If, therefore, there is no denial or traverse of the allegations of the answer of the garnishee, he is entitled to be discharged." *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646; *Magnolia Petroleum Co.* v. *Wasson,* 192 Ark. 554, 92 S. W. 2d 860.

While the garnishee could have protected himself as did the garnishee in the case of *Knapp* v. *Gray, supra,* he cannot ignore the garnishment. He may, by failing to answer, permit the allegation against him to be taken as confessed. The answer of a garnishee is, of course, not conclusive of the facts which it recites, but it is *prima facie* true, and must be controverted as provided by the statute (§ 6125, Pope's Digest).

The headnote to the case of *Kochtitzky & Johnson, Inc.* v. *Malvern Gravel Co.,* 195 Ark. 84, 111 S. W. 2d 478, reads as follows: "Where no pleading is filed controverting the answer of the garnishee denying that it

was, at the time of the service of the writ or since, indebted to the principal debtor, it is error to permit the introduction of evidence to vary or contradict the answer." But, here, as has been said, the garnishee filed no answer, and there was nothing for the plaintiff Credit Corporation to controvert, as Graham, by his silence and failure to answer, confessed the allegations of the complaint against him. He took that action, or, rather, remained inactive, at his peril, and now that it has been found that Mrs. Littleton was not the owner of the notes when the judgment was rendered against him, he must pay the notes to the true owner. This was the decree from which is this appeal, and it is, therefore, affirmed.

GUISE *v.* STATE.

4126 131 S. W. 2nd 631

Opinion delivered June 19, 1939.

C. E. Yingling, for appellant.

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

McHaney, J. Appellant was indicted December 5, 1928, charged with overdrafting, in that on January 13, 1928, he drew a certain check upon the Bank of Searcy, Searcy, Arkansas, for the sum of $774.90, payable to the order of and delivered to G. B. McDaniel, without having sufficient funds in said bank to pay same to his knowledge and did not make prior arrangements with said bank to pay same and did not immediately thereafter deposit in said bank sufficient funds to pay same. He went to trial February 8, 1939, was found guilty and his punishment fixed by the jury at one year in the state penitentiary, upon which judgment was entered.

For a reversal of this judgment appellant argues that the state failed to prove the venue, that is, that the alleged crime was committed in Searcy county, and within the period of limitations prescribed by law. It is undisputed and the record affirmatively shows that appellant purchased 14 bales of cotton from G. B. and W. M. McDaniel on January 13, 1928, in Marshall, Arkansas, for which he issued his check drawn on the Bank of Searcy for $774.90, on which payment was refused because of lack of funds. Also that the 14 bales of cotton were shipped over the M. & N. A. Railroad from Marshall, Arkansas, to Searcy, Arkansas. When the question of failing to prove the venue was raised, the court stated that it would take "judicial notice that Marshall, Arkansas, is in Searcy county." This was correct. *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833. See also § 26 of Initiated Act No. 3 of 1936, Acts 1937, p. 1384; *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 527. On the question of limitations, that is whether the proof shows the check was given within three years of finding of the indictment, the proof shows the cotton was sold and delivered to appellant in 1928 and the indictment was returned in December of the same year. This was within the three-year period.

The other question argued by appellant is the sufficiency of the evidence to support the verdict and judgment. We cannot agree that the verdict is without substantial evidence to support it. It was shown that the

check was delivered for the cotton which was delivered at the depot in Marshall and was promptly deposited in a bank there for collection. In due course it was presented to the Bank of Searcy and payment refused because of lack of funds. The cashier of the forwarding bank testified that he called appellant on the telephone and at appellant's request sent the check back again with the same result. W. M. McDaniels testified that he talked with appellant a number of times and was told by him he had received the cotton and he promised payment. Appellant testified to a state of facts that tended to exonerate him and the court instructed the jury as favorably as he requested, but the jury evidently did not accept his testimony nor that of his witnesses. He admitted himself that he bought the cotton at 18 cents and sold it for 22 cents per pound. He was given every opportunity to pay the check, but he declined to do so. The statute in force at the time makes it unlawful for any person to give a check on any bank without full authority to do so, or having such authority, "when there shall not be sufficient funds therein to cover the same, unless they shall have made prior arrangements with said bank . . . for said check or overdraft," provided, that if such person "shall, when notified of such check or draft, immediately make a deposit to cover same, they shall not be subject to the provisions of this act, . . ."

Appellant did have an arrangement with the bank by which he was permitted to overdraw to the extent of his collateral, but when his overdraft got larger than his collateral, the bank cut him off and took the collateral for the overdraft. He had no arrangement to take care of this particular check and when it reached the bank, payment was refused because appellant had already exceeded his collateral. There was substantial evidence to support the judgment, so it must be affirmed.

DUNNINGTON *v.* TAYLOR.

4-5541 131 S. W. 2d 627

Opinion delivered June 19, 1939.

E. W. Brockman, for appellant.

Galbraith Gould, for appellee.

HOLT, J. Appellees, Pinchback Taylor, and Fulton Murphy, Trustee, brought this suit in the Jefferson chancery court against C. F. Dunnington and Bessie Dunnington, appellants, to foreclose a deed of trust given to secure a note, in the total sum of $2,783.73.

The note and deed of trust were executed April 20, 1929, the note being due and payable one year after date,

bearing interest from date until paid at 8 per cent. per annum. Appellees filed suit on June 4, 1938, which was eight years, one month and fourteen days after the due date of the note.

Appellants defended the action on the ground that it was barred by the five-year statute of limitations. Pope's Digest, § 8933.

Appellees, plaintiffs below, defended against the bar of the statute on the ground that the note in question shows a credit indorsed thereon of $8.50 as of April 1, 1935, that said credit was indorsed on the record in the court house on the same date, April 1, 1935, and attested on November 4, 1936, and that C. F. Dunnington by his acts and conduct acknowledged the debt and thereby tolled the statute of limitations.

The trial court found: "That while the credit of $8.50 indorsed on the note as of April 1, 1935, was not authorized by the defendant, C. F. Dunnington, and was not a voluntary payment on his part, that the statements, acts and conduct on behalf of the defendant, C. F. Dunnington, reasonably inferred and acknowledged on his part of the validity of the debt to Pinchback Taylor, and, therefore, tolled the statute of limitations; that the complaint of plaintiffs should be sustained and that plaintiff, Pinchback Taylor, is entitled to the relief prayed for in his complaint."

From this finding of the chancellor and judgment thereon comes this appeal.

The questions for our consideration are purely ones of fact. If the findings of the chancellor, "that the statements, acts and conduct on behalf of the defendant, C. F. Dunnington, reasonably inferred an acknowledgment on his part of the validity of the debt to Pinchback Taylor and, therefore, tolled the statute of limitations," are not against the preponderance of the evidence, then we do not disturb his findings here. The evidence in this record is conflicting and we do not think it could serve any useful purpose to review it. We think, however, that it supports the chancellor's findings. It is well settled that an oral waiver of the statute of limitations,

or a promise not to plead it, does not fall within a statute requiring written acknowledgment of the outlawed debt. Pope's Digest, § 8943. Suspension of the statute by reason of a promise not to plead it is based on the doctrine of estoppel, and, in order for it to be effective, the promise must be an express one not to plead the statute, or the language of the promise must be such as to clearly convey an intention not to do so, upon which the creditor has a right to rely. See *Burnett* v. *Turner,* 105 Ark. 290, 151 S. W. 249.

But if an oral promise is to have the effect of waiving the statute of limitations; or, expressed differently, if either the conduct or words of the original promissor are such as to justify a court in finding that he intended to lull his creditor into inactivity, there must be some consideration for the conduct, or expressions, or attitude of the promissor.

In the instant case there was such consideration; namely, continued payment of insurance by Taylor.

We are of the view, also, that this case should be affirmed on an additional ground, and that is as appellees contend, that the payments of fire insurance premiums in the total sum of $201.90 by appellant, Taylor, under the terms of the deed of trust in question, tolled the statute of limitations. This court in so far as our search discloses has never passed directly upon this question, and, it, therefore, seems to be one of first impression.

It is undisputed that appellee, Taylor, paid the fire insurance premiums on policies of fire insurance carried on the property in question, each year, beginning with 1930 and continuing through 1937, the total amount of said premiums being $201.90. These policies were issued to appellant, C. F. Dunnington, and he was notified each year of the renewals of this fire insurance and he acquiesced in said payments, though the premiums were all paid by appellee, Taylor.

The deed of trust in question contains the following provisions:

"This sale is on condition that whereas, we are justly indebted to Pinchback Taylor in the sum of $1,500, evi-

denced by our one promissory note of even date herewith, due and payable one year after date, with interest at the rate of 8 per cent. per annum from date until paid and have agreed to pay all taxes and legal assessments assessed against the said property, and to keep the premises insured in the maximum amount obtainable against fire and tornado for the benefit of the said Pinchback Taylor.

"Now, if we shall pay said moneys at the times and in the manner aforesaid, and all the taxes, legal assessments and insurance, then the above conveyance shall be null and void, otherwise to remain in full force and effect.

"But, if we shall fail to pay said taxes or any legal assessments or to procure and pay for the said insurance, then the said Pinchback Taylor may do so, and all sums so expended by the said Pinchback Taylor, and all installments of interest due and unpaid, *shall be added to and become a part of the principal indebtedness hereby secured and shall draw interest from the date of such expenditure* or when said interest was due and unpaid, until paid at the rate of 10 per cent. per annum, and shall be due and payable on demand."

It will be noted that under the terms of the above provisions of the deed of trust Dunnington specifically contracted with Taylor that he, Dunnington, would keep the property in question insured and pay the cost of said insurance in order to protect not only his own interest in the property but the mortgage lien of Taylor, and in the event that Dunnington failed to pay the cost of said insurance that Taylor might himself keep the property insured and pay the premiums and that these payments, which were nothing more than advances for the benefit of Dunnington, in effect made at his request, should be added to and become a part of the principal debt "from the date of such expenditures."

There is nothing in the above provisions that would limit these advances of Taylor to cover these insurance premiums to the life of the deed of trust, or to limit these advances, or payments, to the time within which the note

sued on would not be barred by the statute of limitations. It must be borne in mind that the obligation to pay the debt in question continues indefinitely, and the legal and moral obligation to pay is never cut off until the defense afforded by statute is affirmatively set up and pleaded as a bar to the debt. So that we hold that the above provision in the deed of trust, which provides that the payment of a fire insurance premium on the property in question by Taylor might be added to and become a part of the principal indebtedness *from the date the insurance payment was made,* did not contemplate that such payment must have been made at a time before the debt might be barred by the statute of limitations, but that it did contemplate that these payments, or advances, for fire insurance might be made at any time up to the time of foreclosure, and we hold that these payments, or advances, when made were automatically added to and made a part of the original debt and that under the terms of the above provisions of the deed of trust, or mortgage contract, tolled the statute of limitations.

In a Utah case, *Hess* v. *Anger et ux,* 53 Utah 186, 177 Pac. 232, the court had before it for consideration a deed which, though absolute in form, was treated as a mortgage, and in considering a question similar to the one involved here, said: "So, too, a deed, when intended as a mortgage, may be given to secure an unliquidated claim, or whatever indebtedness may thereafter be contemplated to be contracted between the parties under it and the same foreclosed in a court of equity, 27 Cyc. 1059; *Anglo-California Bank* v. *Cerf,* 147 Cal. 384, 81 Pac. 1081. We find no merit in defendants' plea of the statute of limitations. The plaintiff, in pursuance of the terms of the parol agreement between the parties, and under the deed, continued to pay and discharge the indebtedness against the defendants' property, pay the taxes thereon, and made expenditures for its (the mortgagor) benefit right up to the time of the commencement of the action."

In *Cogswell et al.* v. *Grant,* 34 Nova Scotia Reports 340, the court (quoting headnote) held: "A mortgage made by G. to C., after providing for payment of premi-

ums of insurance by the mortgagor, G., continued: 'And in default thereof, the said C. . . . shall and may, as required, effect, renew, etc., such insurance, and charge all payments made for and in respect thereof, with interest after the rate aforesaid, upon the said mortgaged premises.' *Held,* (affirming the judgment of the trial court), that an amount paid for premium of insurance by the authorized agent of C., was, by the terms of the mortgage, without further act, made part of the principal on which interest was payable, and that the subsequent repayment of this amount by G. was a payment on account of principal which would take the case out of the statute of limitations, and entitle plaintiff to an order of foreclosure and sale."

The only difference, in principle, between the last cited case and the one at bar is that in the instant case Dunnington did not at any time pay back to Taylor these advances for insurance, whereas in the cited case the mortgager repaid to the mortgagee the amount paid for the fire insurance premium. We think, however, it sound to hold that under the terms of the mortgage contract before us the payment by Taylor of these fire insurance premiums tolled the statute of limitations as to the entire debt.

This court on the extent of the power to contract with reference to the extent of a debt secured by a mortgage, in *State Nat. Bank* v. *Temple Cotton Oil Co.;* 185 Ark. 1011, 50 S. W. 2d 980, said: "We must interpret the language of this mortgage to mean just what it says—that it secures any indebtedness incurred up to the time of foreclosure. It is a matter of contract between the parties, as there is no limitation upon the right to contract with reference to the extent of the debt secured by a mortgage, and the province of the court is merely to interpret the language and declare the rights of the parties in accordance with their intention as expressed in the language used."

On the whole case we conclude that the judgment of the chancellor should be affirmed, and it is so ordered.

STEWART *v.* PELT.

4-5504 131 S. W. 2d 644

Opinion delivered June 26, 1939.

[redacted]

Seth C. Reynolds and *McKay & McKay,* for appellants.

Gaughan, McClellan & Gaughan and *McRae & Tompkins,* for appellees.

HOLT, J. On April 14, 1938, appellants brought suit in the Lafayette chancery court against appellees seeking to establish interests in a two hundred-acre tract of land in Lafayette county.

The names of appellants are Barney Stewart, Etta Brown, Belle Reid Aulds, John Reid, Rucker Reid, Bessie Carter, Eva Belle Sparrow, Edith Fomby, Sarah Methvin, Lillie Page, Ben Reid, W. A. Moore, Clarence Eugene Moore, minor, and Frankie Moore, minor, by Mrs. Daisy Smith as next friend, Sarah Paralee Bird, O. N. Bird, James W. Massey, Belle Massey, G. C. Hurst, Carrie Smith and Ollie Parker, and the appellees are Louie Pelt, Irin Pelt, Milton Pelt, Minnie Pelt, L. W. Lindsey, Alice Lindsey, Louie Pelt as Administrator of J. D. Pelt and Mary J. Pelt estates, Byron H. Schaff, and Standard Oil Company of Louisiana, a foreign corporation.

The record in this case is so voluminous, containing approximately 575 pages, that it will not be possible, or practical, to make any extended abstract thereof within the compass of this opinion. We shall, therefore, make reference only to what we deem as essential to a decision of the issues involved.

The record reflects that John M. Massey and Seleter Massey, his wife, acquired one hundred and twenty acres of the land in question in 1860, that John M. Massey died intestate in 1862, and that his wife, Seleter Massey, died intestate in 1900, seized and possessed of eighty acres of this land which she acquired subsequent to her husband's death.

Six children, all now deceased, were born to John M. and Seleter Massey, as follows: Caroline Reid in 1847, John C. Massey in 1849, William Henry Massey in 1851, Carson A. Massey in 1854, Wallace Massey in 1856, and Albert Pike Massey in 1858.

After John M. Massey's death, his widow married a Mr. Simmons and to this union in 1866 was born one child, Monroe Massey Simmons. In 1873, W. H. Massey killed his step-father, Simmons, went to Texas and did not return to Arkansas for twenty years.

The record further reflects that many years before the death of Seleter Massey Simmons, the mother, in 1900, the living children had married, moved away, and had families of their own. Some went to Texas and others to Louisiana. There is evidence that Wallace Massey remained on the land with an oral agreement with his sister and brothers that he should have the land in consideration of caring for the mother during her lifetime. The evidence as to this agreement is contradicted.

In 1914, Wallace Massey obtained from his living brothers, J. C. Massey, W. H. Massey and A. P. Massey, a warranty deed covering the full title to the two hundred acres of land in question, and this deed he filed of record November 4, 1915. Prior to the acquisition of this deed he had obtained from appellants, S. B. Stewart, J. W. Massey, Sarah Paralee Bird, J. C. Reid, Mrs. Etta Brown, A. B. Reid, William Henry Reid, Lillie Page, and A. P. Massey, receipts showing the purchase from them of all interests claimed by them in said lands.

Wallace Massey married in 1901 and died in 1915. In 1903, he conveyed by warranty deed 53.77 acres of the land in question to W. R. Altom, being a stranger to the blood. Altom conveyed this tract by warranty deed to Birmingham, and likewise Birmingham to Rowe, Rowe to Force, Force to Lindsey, and Lindsey to Louie Pelt, Pelt being one of the appellees herein.

Wallace Massey and wife, Martha Frances, conveyed part of the land in question to L. W. Lindsey by warranty deed on November 30, 1914. L. W. Lindsey conveyed by warranty deed eighty acres of this land to appellee, Louie Pelt, for $2,500 on December 28, 1929, and recorded this deed on December 28, 1929. This was almost nine years before the institution of this suit.

After the death of Wallace Massey in 1915, his widow, as administratrix, sold his half interest at probate sale to L. W. Lindsey August 31, 1916, and on October 31, 1916, she conveyed her half interest to Lindsey. Wallace Massey and wife had no children. After making

this sale, Wallace Massey's wife moved to Louisiana where she has remained since for a period of nearly twenty-two years.

Lindsey continued in possession and ownership of the remainder of this land, after having disposed of the eighty acres to Pelt, from December 28, 1929, until December 10, 1931, at which time he conveyed by warranty deed to Louie Pelt the remainder of the land in question here for a consideration of $5,000.

During the time that L. W. Lindsey owned the land in question he occupied it, paid the taxes on it, and on five different occasions mortgaged this property to J. D. Pelt and in each instance warranted the title. J. D. Pelt died in 1927. Lindsey's deeds to the property had been duly recorded following their execution. None of the appellants have ever lived on the property in question, have paid no taxes on it, and some of them, though living in close proximity to the property, have never asserted any claim of interest or ownership.

The record reflects that several of the appellants are getting along in years. Belle Reid Auld is 67, Sarah Methvin is 70, Lillie Page is 68, Wallace Massey, Jr., is 62, and Paralee Bird is 63. This is true of many of the witnesses. Thad Eddy is 66, Jim Nix is 69, G. P. Baker is 72, Warren Nix is 82, Sam Force is 83, and John A. Cook is 83.

Prior to the discovery of oil on lands adjoining the property involved in this suit the value of this two hundred-acre tract was variously estimated as being worth from $10 to $15 per acre. Since the discovery of oil, however, on the adjoining lands the value has enormously increased to a point where its present estimated value is from $50,000 to $100,000.

In the court below, appellants (plaintiffs) sought to establish that they were the sole surviving heirs of John M. and Seleter Massey and as such became the owners and are still the owners of certain undivided interests in the lands; that their uncles, Henry, Pike, John and Wallace Massey, acknowledged before and after they had

conveyed their interests in the lands and up to their death their respective interests and shares in said lands and there was a common agreement and understanding among all the heirs, including appellants, that those who remained on the farm should pay the taxes and keep up the improvements for the use of the land; that L. W. Lindsey and appellee Pelt, knew at all times of the interests of appellants, and that the said Pelts have been from the date of the execution of all deeds and mortgages referred to herein, tenants in common with plaintiffs and have recognized continuously plaintiffs' rights in said lands; that B. H. Schaff, lessee, and Standard Oil Company, assignee of said oil lease, knew of plaintiffs' interests in the lands in question. Plaintiffs prayed for cancellation of all deeds, mortgages, and oil leases in so far as they purported to convey, or tend to cloud the title of the plaintiffs (appellants) and that the title of plaintiffs in and to said lands, oil, gas and other minerals be confirmed and established in them.

To this complaint appellees set up a general denial and in addition affirmatively pleaded laches, limitations and adverse possession and prayed for dismissal of the appellants' complaint, that the deeds of appellants to Hurst be canceled and that the title of appellees (defendants below) be quieted and confirmed.

The Chancellor found the issues in favor of appellees, canceled the deeds to appellant, G. C. Hurst, confirmed the titles to the lands in Louie Pelt and Milton Pelt, and the oil and gas lease of appellee, Standard Oil Company of Louisiana, and dismissed the complaint of plaintiffs for want of equity. From a judgment on this decree comes this appeal.

Appellants in their brief clearly state their position and claims in this litigation in the following language:

"That from the death of John W. Massey up until the execution of the deeds by L. W. Lindsey to Louie Pelt, the Massey family, consisting of Seleter Massey, Henry, John, Pike, Wallace and Monroe Massey and the plaintiffs and Mr. and Mrs. Lindsey, occupied and held said

lands as common property, recognizing the title of each other therein and of these plaintiffs; that it was understood by all the Massey family that those who cultivated these lands were to keep up the improvements and pay the taxes for the use of same; and that all acts of ownership were not adverse, but in recognition of the rights of all; that the deeds, mortgages, leases and assignment of leases, while on the face transferred full title, yet it was not so intended by the grantors nor the grantees, the title of plaintiffs remaining in full force down to present time."

Appellees contend that appellants are barred of any and all claims to said lands by the statute of limitations, laches, staleness of claim and adverse possession.

After a careful consideration of this record, we are of the view that appellees' claim that any interest that appellants may once have had are barred as to a part of the lands by the seven-year statute of limitations (§ 8918, Pope's Digest) and any interest or claim that they may have had to all of the lands in question are barred by laches and the staleness of their claim must be sustained.

This record reflects that five generations appear in the family tree presented in evidence by appellants. Many of the appellants are great-great grandchildren of John M. and Seleter Massey, who originally owned the land involved in this suit. All of the children of John M. and Seleter Massey are long since dead. We have already called attention to the extreme ages of many of the appellants and their witnesses.

Out of these twenty-one appellants not one of them ever lived on the land in question or ever offered to pay any taxes, and some of them had not even been near the land for a great many years. The attitude of some of the appellants, as reflecting their attitude toward these lands, is shown in a brief abstract of their testimony.

Mrs. Belle Reid Auld testified: "Q. You did nothing at all about it until the land became valuable for oil? A. We were just waiting. Q. And you never came back to see about it? A. No, sir. Q. And you knew

Mr. Pelt was in possession of it? A. Yes, sir. . . . Q. And you did not help Mr. Altom to pay the taxes? A. No, sir. Q. And he had a warranty deed to the land? A. Yes, sir. Q. None of you helped Mr. Birmingham to pay the taxes on this land? A. No, sir. Q. And none of you ever helped Mr. Pelt to pay the taxes on that land? A. No, sir. Q. And you never asked him to pay you anything for the use of the land? A. No, sir. Q. Why didn't you? A. Well, I was living in Louisiana and making a living, and didn't pay any attention to it." She further testified she first knew about the Pelt deed about eight or ten years ago at about the time the deeds were made.

Mrs. Sarah Methvin testified: "Q. So you've been gone fifty-two years? A. Yes, fifty-three, coming October. Q. And since that time you have never paid a cent of taxes on that land? A. No, sir, it was the agreement that the children who stayed on the land, occupied the place, was to keep it up, and pay the taxes. Q. Did that extend to Mr. Pelt, too? A. I don't know whether it did or not. Q. Did you know about Mr. Pelt buying the land? A. Not until about four years ago. Q. that was before oil was discovered in the vicinity of this land? A. Yes, sir. Q. You knew it then? A. Yes, sir. Q. And you did nothing about it? A. I couldn't do anything about it. I was so far away, and I wasn't able. Q. The other heirs, living here at Buckner, didn't do anything about it either? A. No, sir. Q. They found out about it long before you did, didn't they? A. Yes, sir. . . . Q. But when the McKean well came in, they (the heirs) did decide to do something? A. I guess so."

Mrs. Lillie Page testified: "Q. Well, you knew Wallace Massey was dead? A. Yes. Q. And you knew that Aunt Frances, his widow, was appointed administratrix of his estate? A. Yes, sir. Q. To wind up the estate? A. Yes, sir. Q. And you knew she sold some land to pay his debts? A. Yes, sir, I heard she did. Q. You knew that L. W. Lindsey bought the

land she sold at that sale? A. Yes, sir. Q. And you knew that she later sold her interest in the land, her dower interest? A. Yes, sir. Q. And you knew that after she wound up the estate, Aunt Frances Massey moved back to Louisiana? A. Yes, sir. Q. And you knew that L. W. Lindsey took possession of that land and went on to that land? A. Yes, sir. Q. And that was twenty-two years ago? A. Yes, sir. . . . Q. As a matter of fact, none of you paid any attention to this old, poor land up there, until they got oil in the McKean well? A. Yes, sir, it wasn't worth anything to anybody before."

Millard Page testified: "Q. Isn't it the truth of the matter that what started this was the discovery of oil—it waked up these people about the Massey farm? A. It waked up some of them, I reckon. Q. It waked up everybody interested in this lawsuit, didn't it? A. Yes, it waked them up, I reckon."

Ben Reid testified: "Q. But you paid no attention to it at all? A. Someone was on the place all the time. Q. But some of them were strangers to the Massey family—strangers to the blood? A. Yes, sir. . . . Q. Even you, and all of the other Massey heirs, neglected this place for the last quarter of a century, until oil was discovered at Buckner? A. Well, it didn't look like it was worth very much, and unless some of the others made a start, I could live without it, and I was just watching it. Q. You say it wasn't worth very much? A. No, sir, not very much."

Mrs. Belle Massey testified they were not able to do anything because they were poor folks and Mr. Hurst is furnishing the money for the expenses of the litigation.

Mrs. Ollie Parker's testimony was of a similar nature.

Barney Stewart testified: "Q. Have you ever paid any taxes on this land? A. No, sir. Q. Have you ever exercised any right of ownership over the land? A. No, sir. . . . Q. But you knew that somebody would have to pay the taxes on that land, didn't you?

A. I thought it belonged to L. W. Lindsey, Les Lindsey. Q. He thought it belonged to Les Lindsey, didn't he? A. Yes, sir, he thought he owned it. Q. And Mr. Lindsey thought he owned it, didn't he? A. Yes, sir."

Martha Frances Massey testified: "Q. While you didn't see these various receipts, signed, you knew of the existence of such receipts; your husband always kept these receipts, made no effort to get deeds from the parties executing the receipts, and after his death, you delivered these to L. W. Lindsey, who bought the land? A. Yes, sir. Q. You delivered these receipts to Lindsey with other deeds and evidences of title your husband had in his possession, when he died? A. Yes, that's right."

While a large number of witnesses, including appellants, testified that there was always a general oral understanding among all appellants and those who occupied this property that its occupants should have the use of the land in consideration for its upkeep and the payment of taxes thereon and that appellants' interests should be preserved, there is also much evidence to the contrary, and we cannot say that the chancellor's findings against this contention of appellants are against the preponderance of the evidence.

The record further reflects that Lindsey, Altom, Birmingham, Rowe, Force, J. D. Pelt, and Louie Pelt were all strangers to the blood.

We think it clear on this record that appellee, Louie Pelt's title to the 53.77 acres of land in question acquired by warranty deed on December 28, 1929, is good both by limitation and laches and that the chancellor was correct in so finding. Wallace Massey made a warranty deed in 1903 to this land to W. R. Altom. Altom was a stranger to the blood and that his possession and that of his grantees, Birmingham, Rowe, Force, Lindsey and Pelt, were adverse, is, we think, clearly shown by a preponderance of the testimony.

As to the remainder of the tract, appellants are barred by laches.

As was said by this court in *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905: "The doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent."

An excellent statement of the rule is found in *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847: "Mere lapse of time before bringing suit, without change of circumstances or in the relation of the parties, will not constitute laches. Not only must there have been unnecessary delay, but it must appear that, by reason of the delay, some change has occurred in the condition or relation of the parties to the property which would make it inequitable to enforce the claim. So long as the parties are in the same condition, a claim for land may be asserted within the time allowed by law. But when, knowing his rights, a party takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state if the rights should be enforced, delay becomes inequitable, and operates as a species of estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief. This doctrine has been recognized and applied according to the facts of the particular case in a great many cases by this court. . . .

"Of course, it is equally well settled that, when the question of laches is an issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known were such as to put the duty of inquiry upon a man of ordinary intelligence. *Walker-Lucas-Hudson Oil Co.* v. *Hudson,* 168 Ark. 1098, 272 S. W. 836. . . .

"After the changes of situation during all these years, after the changes of title, after the execution of the oil lease and the subsequent discovery of oil, and after evidence of the facts upon which they base their title has

been lost by the death of disinterested witnesses who best knew them, equity will not now enforce a claim which it seems would not likely have been asserted if oil had not been discovered on the land."

The doctrine announced in the above case is re-affirmed in the case of *Steele* v. *Jackson,* 194 Ark. 1060, 110 S. W. 2d 1, and in 10 R. C. L., p. 399, § 146, the text-writer announced the rule as follows:

"Since laches is generally regarded as being, not delay alone, but rather delay working a disadvantage to another, it is evident that there is and can be no fixed or determinate rule for the application of the doctrine, no exact time, to an hour, a minute, or a year, within which a party's claim to relief, or assertation of a right, is barred by lapse of time, but each case must depend on its own peculiar circumstances. In other words, the question is addressed to the sound discretion of the court. Nor in determining whether a claim is stale is the court confined to the statutory period, but may refuse relief in cases where the delay is less or greater than that named in the statute."

The question of cotenancy relied upon by appellants in support of their claims to said lands, we think, is answered against them in the recent case of *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96, and that the principles there announced apply with equal force here. In that case John Lee Morgan, one of five heirs at law, made a deed to his brother, A. T. Morgan, purporting to convey fee title. The brother went into possession, sold the crops, paid the taxes, disposed of the timber, made an oil and gas lease, and in all respects treated the property as his own. This continued for nearly thirty years. Then oil was discovered on nearby lands, and the other heirs brought suit to recover their interests alleging that they were cotenants of A. T. Morgan and that he was only living on the place looking after it as "manager of the estate and manager of the family." In the opinion this court said:

"From 1900 until 1937—thirty-seven years—the so-called 'heirs' of A. T. Morgan, Sr., and of Sophronia Morgan, permitted A. T. Morgan to occupy and cultivate the place, and by conduct to hold out to others that he was the owner.

"It is true there is no testimony that Morgan ever said to his sister or brothers, or to those claiming through them, 'I am claiming this land as my own; I deny your interest in it; take notice of my attitude!' Nothing of this kind occurred; and yet, for more than thirty years, his conduct, his situation, and his actions in dealings affecting the property, were tantamount to a declaration of hostility to the claims of all persons—and 'all persons' included those descending from the Morgans.

"It is highly improbable appellants were ignorant of what others knew so well. *Edwards* v. *Swilley,* 196 Ark. 633, 118 S. W. 2d 584.

"If appellants knew that A. T. Morgan and Mrs. Edna Morgan were claiming the property as their own, to the exclusion of inheritances appellants now seek to establish, then the relationship of cotenancy terminated when seven years had lapsed after such claim or hostile attitude was brought home to them. We cannot say that at a specific time or place A. T. Morgan, by any particular words, or through conduct expressly hostile to appellants' interest on a designated occasion, brought home to them in a distinctive way that he was denying the rights they now assert. The record strongly indicates that this could not have been done for the reason that appellants at no time asserted any rights.

"By a strained construction it *might* be said that during all this time the claimants remained quiescent and inarticulate; that they were willing to allow A. T. Morgan and his family to occupy the premises as cotenants with themselves, and that there were reservations in their minds known to their brother by which they expected, some day, to assert the right of entry. But such a construction would be out of harmony with every rule of reason, and contrary to a preponderance of the testimony and it cannot prevail."

On the whole case, we conclude, therefore, that the findings of the Chancellor are not against the preponderance of the testimony, and no errors appearing, the judgment is affirmed.

SINCLAIR REFINING COMPANY *v.* LOWERY.

4-5545 131 S. W. 2d 633

Opinion delivered June 26, 1939.

Henry H. Rightor, Jr., for appellant.

C. L. Polk, Jr., for appellee.

HOLT, J. Appellant, plaintiff below, brought this action of unlawful detainer to recover from appellee, defendant below, a filling station in the city of Helena, Arkansas.

The record reflects that appellee leased in writing the filling station in question from appellant for a period beginning September 21, 1937, and ending September 20, 1938, with the privilege to continue the lease from year to year, under certain conditions.

On the same day, September 21, 1937, appellant and appellee also entered into a Refined Oil Sales Agreement, covering the purchase and sale of gasoline. This agreement also ran for one year beginning September 21, 1937, with the privilege of renewal, under certain conditions. Two other agreements, not material here, were also entered into between these parties. The written lease agreement contained, among other things, the following provisions relating to its termination by either party: "That lessee may terminate said lease at the last mentioned date or on any succeeding anniversary thereof by giving written notice to lessor thirty days prior to the date upon which termination becomes effective and that lessor may terminate at any time by giving five days prior written notice to lessee. . . .

"All notices given under this instrument shall be in writing, and may be given either in the statutory method, if any, in the State where the premises are located or by depositing notice in the United States mail, postage prepaid, enclosed in an envelope addressed to the party to be notified at such party's address as shown in this instrument or at any other known address of Lessee, and the date upon which such notice is so mailed shall be treated as the date of service."

On September 9, 1938, the appellant informed appellee of its intention to cancel the lease on September 15, 1938, in the following letter:

"Mr. W. F. Lowery,
Cherry and Perry Streets,
Helena, Arkansas.

NOTICE:

"This is to notify you that Sinclair Refining Company has elected to cancel and terminate, and does hereby cancel and terminate, effective September 15, 1938, the following written contracts entered into with you, all in accordance with the terms and provisions thereof:

"Lease agreement—dealer, form 2073, dated September 21, 1937, covering service station premises located

"Cherry and Perry Streets,

"Helena, Arkansas.

"Refined Oil Sales Agreement, (tank wagon), form 731-D dated September 21, 1937.

"Equipment rental agreement, form 1800, dated September 21, 1937.

"Contract pertaining to the supplying of credit customers of the undersigned with petroleum products, form 2081-CS.

"Sinclair Refining Company,
/s/ A. M. Buck, Manager,
Southwestern District.

"AHB:fwe

Registered Mail
Return Receipt Requested
Deliver to addressee only."

This letter was received by appellee on September 12, 1938. Following the receipt of this letter, appellee refused to vacate, and to surrender the filling station to appellant on the 15th and thereafter on the 17th appellant served a three days' notice to vacate before filing suit in unlawful detainer. (Pope's Digest, § 6035).

Appellee moved off the property and vacated same on September 26, 1938, and on the next day appellant went into possession.

On September 20, 1938, appellant, plaintiff below, filed its complaint of unlawful detainer against appellee and asked for judgment for possession of said property and for damages "as will accrue and for the cost of this action."

To this complaint appellee filed answer and cross-complaint. Appellee admitted in his answer the execution of the lease contract and the agreement whereby appellant should furnish oil and gasoline. He further admitted that appellant might terminate the lease contract by giving five days notice. He denied, however, that appellant had given him the five days notice as required by the lease contract.

In his cross-complaint he sought damages for depreciation in the value of his equipment used in the station, for humiliation, embarrassment, loss of good will, and damage to his reputation on account of appellant's failure to furnish oil and gasoline to him, and sought recovery on his cross-complaint in the sum of $1,000.

Upon a trial to a jury, a judgment was returned against appellant in the sum of $400 on appellee's cross-complaint or counterclaim. From the judgment rendered on the jury's verdict comes this appeal.

The view that we take of this case makes it necessary to consider only the question of the sufficiency of the five days' written notice which appellant claims was given to appellee to vacate the property in question.

Was this notice sufficient under the terms of the lease? We think it was. That the parties involved here had the right to enter into the lease contract in question there can be no doubt. It is clearly provided under its terms in plain and unambiguous language that the lessor, appellant here, may terminate the lease at any time by giving five days' prior written notice to the lessee, appellee here, and it is further provided that this notice may be given by depositing same in the mail, postage prepaid, enclosed in an envelope addressed to the party to be notified at such party's address, and that the date upon which it is mailed shall be treated as the date of service.

It is undisputed in this record that the notice, *supra,* bearing date of September 9, 1938, was received in a registered letter by appellee in Helena, Arkansas, on September 12, 1938, and that said letter was sent by mail from appellant's office at Fort Worth, Texas. September 9th was on a Friday; September 10th, Saturday; September 11th, Sunday; and September 12th, Monday, the date appellee admits the receipt of the registered letter containing the notice in question.

The record reflects that the appellee, himself, introduced in evidence the notice in question bearing the date of September 9th. He admits receiving it through

the mails. We think he is bound by the contents of this letter, and is in no position to deny that the notice was written, as indicated by its date, September 9th, and mailed on that date, and reached him in due course of mail. Therefore, since we hold that he was given the full five days prior notice in accordance with the plain terms of the lease contract he was not entitled to continue to occupy the premises beyond September 15, 1938, and he is, therefore, not entitled to any judgment against appellant on his cross-complaint or counterclaim in this case.

We conclude, therefore, that the trial court erred in submitting the cause to the jury at the close of all the testimony, and the judgment is accordingly reversed with directions to dismiss the cross-complaint or counterclaim of appellee.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HOOD.

4-5544 131 S. W. 2d 615

Opinion delivered June 26, 1939.

Thos. B. Pryor and *Thos. B. Pryor, Jr.,* for appellant.

Bob Bailey, Jr., and *Bob Bailey,* for appellee.

MEHAFFY, J. This action was instituted by the appellee against the appellant in the Pope circuit court to recover damages for personal injuries alleged to have been received as the result of negligence of the appellants.

The appellee was riding in a wagon, driving a team, and attempted to cross the railroad track in Russellville, Arkansas. It is alleged that the crossing gates were lowered and about the time the team was about to pass off the crossing, one of the arms of the gate hit the mule on the back, bounced up and came down again, striking appellee in the small of the back.

The appellee testified that he was 47 years old, lives at Russellville and is a farmer; has always enjoyed good health, up to the time of his injury; prior to his injury he weighed 200 pounds; witness has not been able to work any since the injury, and now weighs 182; he was engaged in farming and bought cattle and traded and made approximately $100 a month prior to the accident; when he got to the railroad crossing he heard a train down east to his left; he pulled up like he was going to stop and either a conductor or a brakeman at the crossing motioned for him to come on; when witness got up to where he could see the train was coming on east on the main line; the gates were up when he entered the crossing, and as he was crossing over the track he saw the gates falling in front of him and saw it was going to hit his mule, and braced himself to hold the mule; witness tried to hold the mule when the gate hit him, and the mule jumped and jerked and tried to run, the gate came over across the small of witness' back; he

had his lines in his hand and was trying to bend over so the gate would not hit him; the team tried to run and witness stopped them in about 20 feet. The morning after the accident he went to the hospital and asked for Dr. Louis Smith; waited 20 or 30 minutes and Dr. Bob Smith came in and told him he would wait on him; witness told him how he was hurt and the doctor taped him up and gave him a prescription; he then went to the clinic and they treated him until the 25th or 26th of January. His injury occurred on December 20th. There was no bell ringing or anything to indicate that the gate was going to drop.

Appellee was asked on cross-examination if he did not, about ten days before the accident, fall out of a wagon backwards. He said he did, but that it did not hurt him at all.

W. E. Petree testified to substantially the same facts testified to by appellee.

There was a verdict and judgment in favor of appellee for $1,500. The case is here on appeal.

There was some conflict in the evidence as to the extent of the injury, but it would serve no useful purpose to set out the testimony in detail. It is sufficient to say that there was substantial evidence to support the verdict.

Numerous instructions were given, but all objections to instructions have been abandoned, and it is not urged in the brief that there was any error in the instructions.

It is, however, earnestly insisted that the case should be reversed and the cause remanded because of the improper remarks of the attorney for appellee, and appellants say that the verdict is accounted for in no other way except through the effective abuse and misconduct indulged in by the attorneys for the plaintiff.

The appellee's attorney stated, in his closing argument: "That the attorney for the defendant had spent $500 trying to beat this man out of $3,000."

Counsel for appellants objected to this statement and asked the court to declare a mistrial, whereupon the court

said: "The jury will not consider that. There is no proof to that effect."

Appellants call attention first to the case of *German-American Insurance Company* v. *Harper,* 70 Ark. 305, 67 S. W. 755. In that case it was conceded by appellant that if its local agent had notice of additional insurance, and failed to object thereto, the forfeiture was waived. Appellant's local agent testified that he had no notice of the additional insurance before the loss. Witnesses for appellees testified that he had such notice. This was a question of fact upon which the issue was sharply drawn, and Marshall, the witness upon whom appellant relied to establish the want of notice, testified that he had no such notice. One of the attorneys for the appellee said: "Gentlemen of the jury, if you knew Marshall's business methods, you would say, 'God save the plaintiffs, and God save all those who deal with him.' " This statement amounted to a charge against the witness of dishonesty in business and it was promptly objected to by counsel for the appellant. The court in that case, however, said: "Ordinarily, an objection by the opposing counsel promptly interposed, followed by a rebuke from the bench and an admonition from the presiding judge to the jury to disregard prejudicial statements, is sufficient to cure the prejudice; but instances sometimes occur in which it is not sufficient."

Appellants next call attention to *Arkansas Land & Lumber Company* v. *Manning,* 121 Ark. 633, 180 S. W. 474. In that case, in the closing argument to the jury, the counsel for appellee made the following statement: "You cannot sue a foreign corporation for more than $3,000 in the state courts, because it would be subject to federal jurisdiction and removal to the federal court." This statement was objected to and the court was asked to exclude the same from the jury and to admonish the jury not to consider it, but the court overruled the objection and refused to exclude the same from the jury. This court, it is true, said the statement was improper and that the court should have sustained the objection.

In arguing the objection to the remarks of the attorney, attorneys for appellants say that the verdict in the instant case is excessive. Appellants argue that it is impossible to conceive twelve jurors returning a verdict unless resort was had to compromise. We do not agree with appellants in this argument. We think it would be impossible to conceive twelve intelligent jurors, possessing the qualifications that the law requires them to possess, being in any way influenced by the remark of the attorney when the trial court told them that they must not consider this statement, and that there was no proof to that effect.

In the next case to which attention is called, *Kansas City F. S. & M. R. Co.*, v. *Sokal*, 61 Ark. 130, 32 S. W. 497, the court said, among other things: "Hence it is the obvious duty of courts, in the furtherance of the object of their creation, to prevent such assertions or appeals or, when made, to remove their evil effects, so far as they can." The court in that case continued: "While it is the duty of trial courts to confine counsel within the limits of legitimate debate, an omission to do this duty, while it may be a good reason for criticism, will not always entitle the appellant to a reversal of the judgment of the court below."

In the next case relied on by appellants, *St. Louis, Iron M. & S. Ry. Co.* v. *Waren*, 65 Ark. 619, 48 S. W. 222, defendant objected to the remarks made by plaintiff's counsel, but the court permitted him to proceed and make such remarks to the jury over the objection of defendants. At the close of the argument the court instructed the jury that the remarks were improper and they should pay no attention thereto.

In the case of *Sanger* v. *McDonald*, 82 Ark. 432, 102 S. W. 690, the court said, speaking of the trial court: "The court, by failing to stop counsel, to reprimand him for the argument and to take it from the jury when objection was made, virtually held that the remarks were proper." Certainly that case can have no application to the facts in the instant case.

In the case of *Williams* v. *Cantwell,* 114 Ark. 542, 170 S. W. 250, another case relied on by appellants, the court held that error was committed and said: "Information as to any juror's connection with any insurance company could have been obtained in a less dramatic manner by asking each of the jurors if he represented or was connected with any casualty company insuring employers against liability, or if he was connected with any insurance company, or any other proper question which might have tended to disclose whether any juror had any bias or prejudice likely to influence his verdict one way or the other; and had any juror answered that he was so connected with any such insurance company it would not have been improper to have permitted a more minute inquiry of such juror."

The next case to which attention is called and upon which appellants rely is *Childs* v. *Neal,* 138 Ark. 578, 211 S. W. 660. Appellants quote from the opinion in that case, that the court said that the remarks were highly improper. The remarks were as follows: ". . . 'defendant, a banker, within the draft age, who, while evading the military service of his country, was trying to cheat the plaintiff, who was offering his life in his country's cause,' and asked the jury which of the two they would believe." Yet the judgment in that case was affirmed, notwithstanding the remarks of the attorney.

Our attention is next called to the case of *St. Louis, Iron M. & S. Ry. Co.* v. *Hairston,* 125 Ark. 314, 188 S. W. 838. In that case the court said: "However, a wide range of discretion must be allowed the circuit judges in dealing with the subject, for they can best determine at the time the effect of unwarranted argument; but that discretion is not an arbitrary one, but that sound judicial discretion the exercise of which is a matter of review." Not only does the opinion state that circuit judges have wide discretion and that they can best determine at the time the effect of the unwarranted argument, but in that particular case Chief Justice McCullough wrote a dissenting opinion in which Justice Kirby concurred. In the dissenting opinion he stated: "A very

large degree of discretion must necessarily rest with the trial judge in such matters, and I assume that he has endeavored to fairly exercise it so as to preserve the integrity of the trial. . . . But unless it is manifest that prejudice resulted from an improper argument, and the trial judge has failed to do all he could to eliminate the possibility of prejudicial effect, we should not reverse the judgment, however much we may be disposed to condemn the argument. If we adopt the rule of reversing judgments merely because improper remarks have been made in the progress of the trials, we will increase very materially the number of reversals."

We should not overlook the fact that the trial judge is learned in the law, and as much interested in a fair and impartial trial as we are. As stated by this court repeatedly, they can best determine at the time the effect of unwarranted arguments. And we should not overlook the fact that the jurors are men of intelligence, sworn to try the case according to the law and evidence, and probably as free from bias or prejudice as we are.

In the case of *St. Louis, Iron M. & S. Ry. Co.* v. *Raines,* 90 Ark. 398, 119 S. W. 665, 17 Ann. Cas. 1, the attorney for the plaintiff made the following remark: "Bill Coyne was bound to tell it that way, and if he did not he would not hold his job fifteen minutes." Objection was made at the time and the court sustained the objection, just as he did in the instant case. The court said: "Under these circumstances we do not think that any prejudicial error occurred from these remarks. We have frequently referred to the duty of the trial court to control the argument of counsel and to keep them within the record and the legitimate scope of the privilege of counsel; but some reliance should be placed upon the sound judicial discretion of the trial judge."

Whether the counsel's conduct deserves reprimand or not is a matter for the sound discretion of the trial court. It is also a matter for the discretion of the trial court whether the reprimand was sufficient, if a reprimand is necessary at all in his judgment. It is the duty of the trial court, if improper remarks are made, to ad-

monish the jury, as he did in this case, to not consider them. While great latitude is allowed attorneys in the argument of cases, yet they should not go beyond the scope of legitimate argument and make any assertions that might result in prejudice. On the other hand, no one is perfect, and lawyers on each side are partisans, and in the heat of argument many times say things that they would not otherwise say. This, however, is always in the presence of the trial judge, and it is his duty to sustain objection to any improper argument and to instruct the jury not to consider it.

We think the trial court did all that his duty required him to do in this case. The appellants did not ask that the attorney be reprimanded or that anything be said to the jury. The only request they made was for the court to declare a mistrial.

The judgment of the circuit court is affirmed.

KEATON *v.* MURPHY.

4-5514 131 S. W. 2d 625

Opinion delivered June 26, 1939.

Boone T. Coulter, for appellant.

W. F. Denman, Syd Reagan, Mahony & Yocum and *Robert C. Knox,* for appellees.

GRIFFIN SMITH, C. J. In 1919 C. H. Murphy executed an oil and gas lease to Trinity Petroleum Corporation,

retaining a one-eighth royalty. Thereafter, the land covered by the lease, and other lands, were conveyed to the Murphy Land Company, a corporation, subject to the Trinity lease.

In December, 1921, R. A. Keaton and Samuel Sebersky, trustees, purchased a one-half interest in the one-eighth royalty held by the Murphy Land Company ". . . in and to all the oil and gas in, under and upon [40 acres of the land included in the Trinity lease]," and the question presented by this appeal is,—

Did Keaton and Sebersky acquire a one-sixteenth interest in all oil and gas that might be produced from the forty acres, or were they limited to gas and oil resulting from the Trinity operations?

Necessary parts of the Keaton-Sebersky deed are printed in the margin.[1]

Keaton's interest went to Sebersky, the conveyance having been evidenced by a quitclaim deed of 1922. Keaton's wife did not join in the deed, and now insists she has never relinquished dower.

In 1937 certain parties, representing themselves as owners of all of the stock in the Murphy Land Company at the time of its dissolution in 1933, filed their petition in Union Chancery Court, asking that the Keaton-Sebersky deed be construed.

It was alleged that Trinity, April 25, 1922, executed a release of its lease; that Sebersky was a non-resident,

[1] The deed recited that the grantor did ". . . grant, bargain, sell and convey unto the said R. A. Keaton and Samuel Sebersky, trustees, and unto their heirs and assigns, an undivided one-half interest of the one-eighth royalty held by the Murphy Land Company in and to all the oil and gas in, under and upon the [described] lands; . . . Subject, however, to a certain oil and gas lease executed by the Murphy Land Company on the 29th day of October, 1919, unto the Trinity Petroleum Corporation on said lands which lease is recorded . . . And for said consideration it does hereby grant and convey unto the said R. A. Keaton and Samuel Sebersky, trustees, and unto their heirs and assigns, the right to collect and receive under the aforesaid lease such undivided one-half of one-eighth interest of all oil royalty and gas rentals due us or that may become due us under the aforesaid lease."

and could not be located; that plaintiffs had executed (July, 1936) a lease on the forty acres in question in favor of Phillips Petroleum Company; that the Keaton-Sebersky deed constituted a cloud on title to the property, etc. There was a decree by default. However, Sebersky later appeared and asked that the cause be redocketed. The motion was granted, and Sebersky filed demurrer, answer, and cross-complaint. Settlement was made before trial and Sebersky withdrew his pleadings. Thereupon (April, 1938) appellant intervened. The intervention was dismissed for want of equity, and from this order an appeal was taken.

It is stated in appellees' brief (and there is evidence supporting the statement) that negotiations with respect to the original transaction were carried on by Keaton and Sebersky for themselves, and by C. H. Murphy, Joe K. Mahony, A. H. Stolz, and Aylmer Flenniken, representing the Murphy Land Company. Flenniken is dead, but all of the other named parties agree that Murphy, when the deed was executed, stated he would not convey any of the oil, gas and minerals *in place,* and it was finally agreed that the deed should cover a one-half interest in the one-eighth royalty. Both Keaton and Sebersky testified that such was the intent.

We think the deed of December 3, 1921, conveyed only a one-half interest in the one-eighth royalty, and that it did not, as appellant contends, convey a one-sixteenth interest "in and to all the oil and gas in, under and upon" the described property. The interest conveyed is an interest in the royalty, not in the minerals in place, independent of the royalty. The words "in and to" relate to the oil and gas interests identified by the Trinity lease—that is, the royalty held by the Murphy Land Company and retained by C. H. Murphy when he leased to Trinity.

This construction is made doubly certain by the provisions following, as shown in the footnote.

In the view we have taken it becomes unnecessary to discuss other questions.

The decree is affirmed.

SMITH *v.* TATUM.

4-5556 131 S. W. 2d 619

Opinion delivered July 3, 1939.

[redacted]

Williams & Williams, for appellant.

Evans & Evans, for appellee.

GRIFFIN SMITH, C. J. The defendants below were partners engaged in the mercantile business at Booneville as Tatum Hardware Company. It is alleged that in 1937 A. W. Tatum, a member of the partnership, sold certain seeds to the plaintiff; that such seeds were sold as certified ribbon cane seed; that they were so advertised and bore a trade label describing them as such; that the seeds were displayed in defendants' store "bearing placards and other written and printed matter describing them as certified ribbon cane seed; that A. W. Tatum stated definitely that they were certified ribbon cane seed, and that they were suitable for planting; that said A. W. Tatum warranted that they were as advertised; that they were suitable to plant to grow ribbon cane for making syrup; that plaintiffs relied upon said warranties as above set forth and purchased $2 worth; that the seeds were planted in soil adapted to and suitable for the cultivation of ribbon cane; that the plaintiffs worked and cultivated said crop in a prudent and careful manner; that when the crop was grown the seed did not produce ribbon cane, but grew johnson grass, broom corn, and many other kinds of noxious weeds and grass; . . . that plaintiffs harvested and hauled fifteen loads of the crop to the mill before they discovered it was worthless," and each plaintiff has been damaged in the sum of $400.

There was the following stipulation: "It is agreed for the purpose of making a test as to the law governing this case that the plaintiffs bought seed which bore the certificate of the State Plant Board to be ribbon cane seed, and that they bought them from the defendants for the purpose of planting. (2) That they did plant them to raise a crop of cane for syrup, and that the seed was not in truth pure ribbon cane seed and was not suitable for planting to raise ribbon cane for making syrup. (3) That the plaintiffs were damaged by reason of planting the seed, and that the damages were of a substantial nature."

Plaintiffs moved for a directed verdict on the proposition that the agreed statement showed substantial damages if the defendants were liable for breach of warranty, and that the cause be submitted to the jury for a determination of the amount of such damages. The defendants also moved for a directed verdict.

The court sustained the defendants' motion.

In *Kafauver* v. *Price,* 136 Ark. 342, 206 S. W. 664, a recovery by appellees was approved in circumstances somewhat similar to the instant case, dissimilarity being that in the Kafauver Case there was testimony in support of an express warranty, while in the case at bar (although such warranty is alleged in the complaint) the stipulation falls short of either an express or an implied warranty. In the Kafauver Case appellant was engaged in the grocery business at Rogers and sold seed as a part of his business. Appellees, farmers, purchased of appellant a quantity of sorghum seed for planting purposes. The seeds were sold as "orange sorghum seed," and were planted and cultivated, but "turned out to be a mixture of broom corn, kaffir corn, and milo maize seed, with perhaps a mixture of sorghum of some kind, and molasses could not be made out of the product."

One of the plaintiffs testified that he went to appellant's place of business and called for sorghum seed of the variety desired, and that appellant sold him the seed with the positive affirmation that they were orange sorghum seed; also, appellant said he would "stand behind

it." Appellant denied making any representations concerning variety of the seed, other than to sell them as sorghum seed.

In the opinion, written by Chief Justice McCulloch, it is said: "The rule of law seems to be very well settled by the authorities that a sale of seeds by description, where there is no opportunity for inspection, or where the identity is not distinguishable upon an ordinary examination, imports a warranty as to the particular kind of seeds, and that such a transaction falls within the general principle that a sale of chattels by description ordinarily imports warranty of the identity of kind. . . . There seems to be a contrariety of opinion as to whether or not a sale of seed imports a warranty of quality, but there is very little difference of opinion as to warranty as to the kind of the seed."

The rule approved by Chief Justice McCulloch was adopted by the court in 1918. In 1921 the so-called Pure Seed Law was enacted, with amendments in 1933 and in 1937. (§ 12370 of Pope's Digest, and succeeding sections.)

It is insisted by appellees that common law liability was superseded by the Pure Seed Act, which had for its purpose protection of buyers of seeds; therefore, it is urged, a cause of action does not accrue unless the seller makes representations additional to those which are necessarily implied from the fact of the sale of a commodity purchased in the open market by a retailer, without fault or negligence on his part, after such commodity has been inspected and certified by the state's agents and labeled in compliance with the law.

Although allegations of the complaint are that A. W. Tatum told one of the appellants the seeds were a certified ribbon variety, and that he warranted they were as advertised, the stipulation falls short of establishing either an express or an implied warranty. The language is: "The plaintiffs bought seeds which bore the certificate of the State Plant Board to be ribbon cane seed." There is no proof, other than this statement. In other words, there is no evidence that the containers in which the seeds were displayed did not bear the certifi-

cate in question. No express warranty having been proven, must we hold that the mere fact of a mistake on the part of the Plant Board, of which appellees had no knowledge, creates a liability for which appellees must compensate appellants? We think not.

Affirmed.

McMillan, Administrator, *v.* Palmer.

4-5550 131 S. W. 2nd 943

Opinion delivered July 3, 1939.

D. W. McMillan and *J. H. McMillan,* for appellant.

J. H. Lookadoo, for appellees.

BAKER, J. The appellee, T. B. Palmer, was indebted to Dougald McMillan, Sr., for borrowed money in the sum of $3,500. This was evidenced by a note bearing interest at 10 per cent. per annum and was secured by a mortgage on Palmer's home at Amity, Arkansas, a 91-acre farm about a half mile from the home, and 480 acres of land in Pike county. This original debt was created in 1922. In 1931 the debt amounted to $3,641.18. At that time it was renewed and a deed of trust was given conveying all the property covered in the original mortgage, and there was added 75 acres of land in Garland county, which was at that time the home place of Palmer. Dougald McMillan, Sr., died in 1933. This indebtedness had not been paid but had been increased by interest and advances for taxes. Dougald McMillan, Jr., was appointed administrator of his father's estate. On account of his efforts to make collection, Palmer made application to the HOLC offering a mortgage upon his property in the town of Amity, where he then resided, for a loan of $2,500. He proposed to give a first lien on the property as security for the debt. The administrator filed a "consent" agreement to accept $2,500 in bonds

from the HOLC. The property was appraised, and it was finally proposed that a loan of $2,200 would be made, provided approximately $300 was expended in repairs on the home and in payment of certain taxes and expenses, leaving $1,820.03 to be applied to the debt due the estate. In accordance with this proposition there was later delivered to the appellant $1,800 in bonds and $20.03 in cash, and at that time the administrator executed a release in order that the HOLC might take and have a first lien against the home property at Amity. It is not in dispute that, at the beginning of these negotiations, the administrator informed Palmer that he could not secure a loan from the HOLC for an amount sufficient to pay Palmer's debt to the estate, and we think it may be conceded that after the bonds from the HOLC were delivered and credited on the indebtedness owing by Palmer he executed new notes giving a second lien on the homestead property and a first lien on the 480 acres in Pike county, a 90-acre farm near Amity and 75 acres in Garland county. This balance represented by the new obligations was $3,015, and Palmer executed three notes for $1,005 each, the first due one year after date, the second two years after date and the third three years after date. On these three new notes interest was payable at 8 per cent. instead of 10 per cent., according to the original indebtedness. Palmer did not make payment upon this indebtedness and suit was filed to foreclose upon it, including additional money advanced to pay taxes. After this suit was filed parties entered into an oral agreement whereby Palmer was permitted to cut pine timber from the Pike county land and apply $4 per thousand feet upon the debt due the administrator. Not all the timber was cut before Palmer ceased his milling operations . There was an agreement made also whereby Palmer was permitted to enter into some mining operations on the Pike county lands. The Atlas Quicksilver Corporation was authorized to carry on these mining operations and for that reason it was finally made a party to this suit. When the suit to foreclose was pressed the defendants filed an amended an-

swer in which they pleaded that the plaintiff had signed an agreement with the HOLC to accept the $1,832.40 in bonds as a full and complete settlement of the debt; that the plaintiff then, in violation of the law and by threats of the foreclosure of the mortgage, forced Palmer to give him a new mortgage on all the property for the difference in the amount plaintiff claimed the defendant owed and the face value of the bonds received and asserted these matters as a complete bar to plaintiff's right to recover.

In addition, by way of cross-complaint, defendant, Palmer, pleaded that he had paid from the timber cut upon the lands $1,678, and that this was paid through threat and duress, and he asked for a recovery of this sum. The decree of the court was in accordance with the defendant's contention, and plaintiff was not permitted to recover for the balance due upon the three notes aggregating $3,015 and advancements made to pay taxes, but the court also held that the payments made by Palmer of the $1,678 were voluntary, and that he would not be permitted to recover. From that decree plaintiff duly appealed, and the appellees have prayed a cross-appeal asking a recovery of the amounts paid upon the $3,015 alleged indebtedness.

In a matter of this kind wherein our opinions are preserved, there is little merit in repetition. On that account we are announcing as a preliminary to whatever comment that we may offer that the case of *Sirman* v. *Sloss Realty Co., Inc., ante* p. 534, 129 S. W. 2d 602, is determinative of the principles involved upon this appeal. It remains for us to make application of our conclusions therein to the case at bar. What we have to say now in making such application may also be treated as supplemental to the case of *Sirman* v. *Sloss Realty Co., Inc., supra,* in overruling the petition therein filed for a rehearing. We find in this class of cases that counsel not only here, but in other cases that have been cited speak of and discuss propositions of secret agreements and fraud. If it is meant by the term "secret agreements," an implication that the parties have not dealt openly with each other, but with stealth and with hidden transac-

tions to the disadvantage of the HOLC, and that corporation has been injured thereby, it should make the complainant offer its proof thereof. It certainly does not lie in the mouth of Palmer to enter voluntarily into a contract with the administrator of the McMillan estate and then plead his own conduct as a form of secret agreement or as a species of fraud which impairs the contract entered into between Palmer and the HOLC and on that account invalidate the other contract made with the administrator of the McMillan estate. If it should be conceded that the release executed by the administrator of the McMillan estate was in itself sufficient to discharge the indebtedness Palmer owed, that fact alone would not be conclusive of the controversy presented on this appeal. That is true for the reason that the moral obligation to pay what one justly owes is a sufficient consideration to support a new note or other evidence of indebtedness executed in acknowledgment of the amount owing. Even an unwritten promise has been held sufficient to revive a pre-existing debt. *Apperson & Co.* v. *Stewart,* 27 Ark. 619; Gilbert's Collier on Bankruptcy, p. 384, § 574; *Fonville* v. *Wichita State Bank & Trust Co.,* 161 Ark. 93, 255 S. W. 561, 33 A. L. R. 125. This last cited case is also authority decisive of the question of duress.

There is perhaps no more effective release of one from the payment of his just obligations than proceedings and discharge in bankruptcy. But it has been seen that one who renews his old debt discharged in bankruptcy by a new obligation is bound thereby. Such concession above set out, however, was not made. It was pleaded, established by proof and not seriously disputed that after the bonds were delivered there was an unpaid balance of the original debt. In the case at bar, as in other cases of this kind, the creditor was under no obligation to discharge his debtor for a sum less than the full amount due, and, if he permitted him to take some of the property mortgaged and pledge it to another lender, this was a matter of agreement and contract, and we think that so long as the parties deal fairly with each other there is no cause or reason to hinder them in their

freedom to contract in regard to their own private business affairs. There is no sounder public policy. *Northwestern Mutual Fire Ass'n* v. *Pacific Wharf & Storage Co.,* 187 Cal. 38, 200 P. 934, 937.

Authority for the following statements may be found in 1 C. J. S., p. 468, § 3, and other standard texts. There was no dispute about the amount due or owing, hence no compromise or settlement for a sum less than the amount claimed. There can be very little merit in an argument or elaboration of the principles of accord and satisfaction for settlements that are controlled by such principles are matters of contract entered into by the parties. The parties made their own agreement. They executed new notes for $3,015, a second mortgage upon the Amity property and a first mortgage upon other property. Certainly the courts may not declare as a matter of law that the parties were not free to enter into and make their own contracts. Courts may not substitute for the parties agreements they did not intend and bar their rights of recovery that both acknowledged.

In addition to the authorities cited in the case of *Sirman* v. *Sloss Realty Co., Inc., supra,* we now call attention to *Glick* v. *Bank of America,* Civ. No. 3911 App. Dept. of Superior Court in and for Los Angeles County, case No. 470,595 Ct. 357, Certiorari denied January 3, 1939, 305 U. S. 657, 59 S. Ct. 357, 83 L. Ed. 426.

In the foregoing citation it appears that this matter was presented to the Supreme Court of the United States by writ of certiorari which was denied. It is perhaps apparent to every one that if the announcements in the Glick Case above were contrary to the public policy in the United States, the highest court of our country might well have said so, making use of the opportunity to do so. We cannot think that a more extensive elaboration of the principles involved in this controversy will be of any particular benefit in this or any similar case.

It follows that the trial court was in error in dismissing the plaintiff's complaint, and the decree must, therefore, be reversed. It is reversed with directions to

enter a decree of foreclosure and order a sale of the property giving such recognition to the mining company's rights as the contract provides, including in such sale also that in the second mortgage. In directing a sale of the mortgaged property, the court may order such sale in the order requested by mortgagor, if deemed desirable. The homestead property may not be sold unless the other or remaining property be insufficient to pay the indebtedness.

The appellee was not entitled to recover, and his cross-appeal is dismissed.

BAKER, J. (on rehearing). Since the opinion was handed down in this case the Supreme Court of California has reversed the appellate court in the matter of the case of *McAllister* v. *Drapeau,* 92 P. 2d 911. The appellee has filed a petition for rehearing, calling our attention to that fact and insisting upon error in our conclusions, for the reason in the case of *Sirman* v. *Sloss Realty Co., Inc., ante* p. 534, we gave approval to the announcement made in the above cited McAllister case, now reversed by the Supreme Court of California, which court cited our recent case of *Sirman* v. *Sloss* with approval. It is urged that we should now distinguish this case upon rehearing from the case of *Sirman* v. *Sloss, supra, upon* the sole ground that Sloss Realty Company gave notice when it filed the consent to take bonds that it intended to take a second mortgage from Sirman. We agree with appellee in his contention that there is this distinguishing characteristic. The opinion of the Supreme Court of California is far from convincing. It seems, however, that the sole ground for that distinction was that no notice was given that the mortgagor intended to give a second mortgage, and it was insisted that the rules of the HOLC precluded the execution and acceptance of a second mortgage at the time that the consent to accept bonds was filed, and the release was treated as absolute, notwithstanding the fact that the parties had agreed upon their own settlement. Otherwise stated, the

contracting parties clearly understood that the release would not pay or discharge the indebtedness, but that the intention was to enable the mortgagor to give the first lien to the HOLC. It is also stated, in the recent opinion under consideration that the second mortgage was executed under duress, that is to say, a threat to sue or foreclose unless the second was executed and that similarity with the case at bar may be noticed in passing.

These announcements of the California Supreme Court have been duly considered and with the utmost respect to that high tribunal, and, without intention to be critical, we are compelled to express our disapproval of its conclusions. We have heretofore called attention to the fact that accord and satisfaction arises out of contract.

It appears to us that if we should follow the conclusions of the California court it would be tantamount to a declaration that if one satisfies a first mortgage in order that he might take a second mortgage upon the same property, he will be met, upon an effort to foreclose this second mortgage, with a plea of satisfaction of the indebtedness by the release of the first mortgage, and, if he had at any time threatened to foreclose this first mortgage, he would then be confronted with the plea of duress in that the second mortgage was given to avoid foreclosure. The mere statement of these conditions and holdings is a refutation of the soundness of the announcement. It was not the intention of Palmer to settle his indebtedness when he executed the mortgage to the HOLC, nor did he mean at that time to insist that the bonds issued became a legal discharge of the amount of the indebtedness that he owed. He mortgaged the other property to secure the balance or remainder that he owed over and above the amount of bonds accepted by the creditor and the appellant now holds a first mortgage on all the properties except the home place and on that a "secret" second mortgage.

We summarize our conclusions as follows: In accord and satisfaction there are certain elements that must usually or ordinarily be considered. First, there

is a disputed amount involved. Second, there is a consent to accept less than the claimed amount in settlement of the whole. In this case there was no dispute. There was an actual agreement upon the amount that should be paid. 1 Am. Jur., Accord and Satisfaction, §§ 19 and 30. 1 C. J. S., Accord and Satisfaction, §§ 1, 2, and 3. 1 R. C. L., Accord and Satisfaction, § 3.

The only allegation of fraud is that there was a second mortgage, that it was entered into secretly and that it should not be enforced. There is no evidence of this alleged fact. The execution and delivery of a second mortgage does not violate any sound policy of the law. This fact was recognized by the very rules of the HOLC by which Palmer now seeks to shelter himself.

The following rule is copied from appellee's brief: "(1) If the home owners' income is so reduced that he is unable to meet full amortization, payments from the beginning on his obligations to the corporation, the second mortgage shall not require any principal payments prior to June 13, 1936, and payments thereafter shall be on a schedule which the home owner may reasonably be able to meet."

It is not alleged nor established by proof that Palmer comes within the protection of this rule. Certainly he does not, as his so-called "second mortgage" conveys several other pieces of property.

Both these matters as alleged and insisted upon by appellee are supported by the holding of the Supreme Court of California in reversing the McAllister case, *supra*. That court insists in the opinion that in the execution of a second mortgage the mortgagee is clearly at fault and the mortgagor perhaps a little to be blamed because he executed the second mortgage under duress. The same duress is established in the present case, that is, that the mortgagor not only threatened to sue, but did actually file a suit to foreclose the lien of the mortgage; that the mortgagee labored under the effects of this threat when he executed the second mortgage. We submit that in no other class of cases in American jurisprudence will a threat to foreclose to enforce acknowledged

rights, even when partially executed by the filing of a suit, be held to constitute duress. Our own courts have defined duress. The writer of this opinion gathered together some of our own decisions upon that point in a recent case. *Perkins Oil Co.* v. *Fitzgerald,* 197 Ark. 14, 121 S. W. 2d 877.

We think the unsoundness of the conclusions reached by the California court in the case of *McAllister* v. *Drapeau, supra,* is clearly demonstrated by pursuing that conclusion to an ultimate result. If we regard as sound the assertion that the purpose of the Congress in enacting the HOLC law was to provide a means of relief for distressed home owners, then we must regard that ultimate purpose as being beneficent, one that will not defeat itself in its enforcement. At the time this institution was formed and the corporation began lending money to home owners, all of them, of course, were in financial distress. If suits had not been actually instituted and foreclosures had not been consummated, there was, at least, no doubt, in many instances, the threat to foreclose. If that threat to foreclose constituted duress such as to make invalid a contract later entered into by the parties, then no creditor having knowledge that the law had been so declared would thereafter permit his debtor to enter into a new contract with him, to give sufficient time to meet his obligations, as all such new obligations made under such circumstances would be under the ban of judicial disapproval and subject to a decree of invalidity because executed under that kind of duress. Therefore, the creditor would necessarily force a foreclosure and sale of the property rather than accept the debtor's new promise, and grant him sufficient time within which to pay his debt and save his property from sale.

No such result was intended or contemplated by the law under which the HOLC was created.

With the utmost respect for the highest judicial tribunal of a sister state, we are forced to disagree with the conclusions.

The petition for rehearing is denied.

BAILEY *v.* HALL, SECRETARY OF STATE.

4-5629 131 S. W. 2d 635

Opinion delivered July 3, 1939.

Beloit Taylor, E. Chas. Eichenbaum, Fred Donham and *Miles & Amsler,* for plaintiff; petition denied.

Jack Holt, Attorney General; *Millard Alford,* Asst. Atty. General; *Woolsey & McKenzie, Arnett & Shaw* and *J. M. Smallwood,* for defendants.

HUMPHREYS, J. A Workmen's Compensation Act, numbered act 319, was enacted by the Fifty-second General Assembly of the State of Arkansas, and approved by the Governor of the State on March 15, 1939, and appears in the Acts of Arkansas, 1939, on pages 777-844, inclusive. The Act is very long, containing fifty sections. On account of the length of the Act we make reference to it rather than embody it in this opinion. See Act 319 of the Acts of the General Assembly of Arkansas, 1939, pages 777-844, inclusive. The Act as published contains no emergency clause and by reference to the indorsements on the original Act filed in the office of the Secretary of State which was approved and signed by the Governor of the State on March 15, 1939, and also by reference to the journals of the Senate of which we take judicial notice and knowledge, the emergency clause at-

tached to the Act in the House of Representatives was finally defeated in the Senate.

Within the time provided by law the required number of legal voters of the State of Arkansas filed their petition with C. G. Hall, Secretary of the State of Arkansas ordering that said Act be referred to the people of Arkansas to the end that the same may be approved or rejected by the vote of the legal voters of the State at the biennial regular general election to be held on the fifth day of November, 1940. In this petition they submitted to the State Board of Election Commissioners as the title to be placed upon the official ballot at the biennial regular general election to be held on the fifth day of November, 1940, the ballot title as set out in full in a footnote of this opinion.*

---

* Footnote

"Referendum On Act No. 319 of the Acts of the General Assembly of the State of Arkansas, approved March 15, 1939, same being the Workmen's Compensation Law," and being an Act to require employers carrying on any employment in this State in which five or more employees are regularly employed in the same business or establishment, except domestic service, agricultural farm labor, institutions maintained and operated as public charities, the State of Arkansas and each of the political subdivisions thereof, the selling, delivering or acting as sales agent or distributor as an independent contractor of or for any newspaper, magazine or periodical, to secure and pay, or provide for payment of, compensation for the disability or death of their employees from injury arising out of and in the course of their employment, without regard to fault as a cause for such injury except injuries occasioned solely by intoxication of the injured employee while on duty or by willful intention of the injured employee to bring about the injury or death of himself or another; and providing that said Act shall not conflict with any Act of Congress governing the liability of employers for injuries received by their employees engaged in interstate commerce, and providing that any person contracting to do building or building repair work shall be termed employment as defined therein if said contractor employs two or more employees in any one time; to define the terms used in said Act; to provide that the remedies therein granted an employee on account of such disabilities or death shall be exclusive as to his employer except where the employer fails to secure the payment of compensation as required by the Act; to give the right and provide the method of waiver of exclusion or exemption from the application of said Act; to require the employer to provide medical and hospital services and supplies for an injured employee to provide the method

When this petition for referendum of said Act was filed in the office of the Secretary of State, C. G. Hall as Secretary of State approved the ballot title submitted with the petition and certified the sufficiency of the number of qualified electors on said petition to refer said Act and declared said Act inoperative until after its approval by the qualified electors at the next biennial election.

This is a petition by the plaintiff, a tax payer and qualified elector of the state of Arkansas, for the benefit of himself and all others similarly situated in the state against the defendants in their respective capacities as Secretary of State and members of the State Election Board to enjoin them from referring the Act to the people for approval or rejection at the next general biennial election on November 5, 1940, on the ground that the ballot title submitted with the petitions is insufficient. The suit for injunction is an original proceeding in this court under one of the general provisions of Amendment No. 7 to the Constitution of 1874 known as the "Initiative and

---

of computing the amount of the average weekly wages earned by an employee at the time of his injury; to define degrees of disability and fix the amount of compensation to be paid the injured employee for the different degrees of disability and specific injuries on the basis of such average weekly wage, except as otherwise specifically provided, and to fix the maximum amount of such compensation; to define occupational diseases and to provide for payment of compensation therefor, the amount thereof, and by whom payable; to prescribe the amount of compensation for death of employees from such injuries, to whom payable and the manner of payment to create a Workmen's Compensation Commission of three members to administer the provisions of said Act, except as otherwise specifically provided, and to prescribe the qualifications of its members, their appointment, terms of office, salary, expense account, removal from office, and official bond and to prescribe its powers and duties; to provide for the practice and procedure before the Commission in the making, hearing, determination and award of claims for compensation under said Act; for review of the orders of the Commission by appeal to Circuit Court, and for the enforcement of the orders of the Commission and modification of its awards to authorize the appointment by the Commission of Referees and other personnel and to prescribe their powers and duties and provide for their compensation and traveling expenses; to create in the Department of Health an Industrial Hygiene Division and prescribe its duties and provide how its expenses are to be paid; to prohibit the waiver by employees of right

Referendum." We quote the following language from the Initiative and Referendum Amendment:

"At the time of filing petitions the exact title to be used on the ballot shall by the petitioner be submitted with the petition and on state-wide measures, shall be submitted to the State Board of Elections Commissioners, who shall certify such title to the Secretary of State to be placed upon the ballot; . . . the sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes."

The sufficiency of the petition is not challenged on the ground that the signatures thereto are insufficient in number, but on the ground that the ballot title is insufficient. The case recently before us relative to the sufficiency of a ballot title is the case of *Newton* v. *Hall, Secretary of State,* 196 Ark. 929, 120 S. W. 2d 324. In that case this court said: "The ballot title in the case of

---

to compensation or to contribute to the payment thereof; to provide that the right to compensation shall not be assignable or subject to legal process; and to fix or lien therefor to fix the maximum fees for services rendered in respect of a claim or award for compensation; to require every such employer to secure the payment of compensation by insuring and keeping insured the payment of such compensation with any stock company, mutual company or reciprocal exchange authorized to do business in this State, or by financial ability to pay such compensation and receiving an authorization from the Commission to pay such compensation directly as a self-insurer; to provide for the authorization and regulation of companies writing compensation insurance under this Act including the approval of rates, provisions of policies, assignments of rejected risks for such insurance among such companies and for the adjustment of rates upon such risks; to establish in the State Treasury an Administration Fund to be known as the Workmen's Compensation Fund, to the credit of which Fund shall be deposited certain assessments and premium tax to be paid by insurance carriers and self-insurers qualifying under this Act and to provide that said Act shall be retroactive as to such taxation commencing January 1, 1939; to provide penalties for failure to secure compensation and for other violations of the Act; to prescribe the effect of this Act on liability of third parties for injuries to or death of employees; to declare the effect of the partial unconstitutionality of said Act and to provide that its provisions are separable and for other purposes."

Westbrook v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, was held defective because the ballot title left the erroneous impression that a residence in the state for ninety days was a cause for divorce, instead of being a requirement as to the period of residence before obtaining a decree for divorce. In that case we announced the test of the sufficiency of a ballot title to be that it should be complete enough to carry an intelligent idea of the scope and import of the proposed law, and that it should be free from misleading tendency, whether of amplification or omission or of fallacy, and must contain no partisan coloring. This test has never been departed from in the subsequent cases, and we have attempted to determine the sufficiency of ballot titles in the cases presented by the application of this rule to the titles under review."

In the declaration just quoted from the Newton Case this court attempted to and did announce an absolute rule or test by which the sufficiency or insufficiency of a ballot title must be determined, with perhaps one exception and the exception is that all ballot titles must necessarily identify the measure sought to be initiated or referred. We have carefully read said Act 319 with a view to ascertain whether the proposed ballot title is free from misleading tendencies, whether of amplication or omission or a fallacy and whether it contains any partisan coloring. We find nothing in the ballot title which would mislead a voter either by amplification or omission or by fallacious statements and we find nothing in it showing that it is partisan in coloring. The only thing left then for us to determine in applying the test or rule is whether the ballot title is complete enough to carry an intelligent idea of the scope and import of the proposed law. The scope and import of the proposed law is to provide for the payment of compensation by employers for injuries to, or death of their employees; to prescribe the amount of compensation and to whom it may be paid; to secure the payment of compensation; to establish a Workmen's Compensation Commission to administer the Act and to provide funds for the administration of the

Act. The ballot title in question contains about nine hundred words and sets out the scope and import of the proposed Act in such a way as to be understood by anyone of ordinary intelligence. After a careful reading of the Act and the proposed ballot title we are convinced that the ballot title contains every essential necessary to meet the requirements or test of the rule governing the sufficiency or insufficiency of ballot titles announced by this court.

The petition for an injunction against the defendants is denied.

STATE, EX REL. ATTORNEY GENERAL, *v.* NEW YORK LIFE INSURANCE COMPANY.

4-5557 131 S. W. 2d 639

Opinion delivered July 10, 1939.

Jack Holt, Attorney General; *A. D. DuLaney* and *Lee Cazort,* for appellant.

Rose, Loughborough, Dobyns & House, for appellee.

SMITH, J. This case, a precursor of others of similar purpose, was filed July 5, 1938, under the authority and direction of § 7968, Pope's Digest, which provides that "If it should be found, upon investigation made by the Attorney General or the Arkansas Tax Commission, that any life, fire or accident insurance company doing business in this state has for any year or years failed, for any cause, to pay all the tax due by it, suit for such unpaid taxes shall at once be brought by the Attorney General against any such company owing such taxes. . . ."

The question here presented for our decision is stated to be: "Is the appellee (Life Insurance Company) liable for (back) taxes on premiums received for Annuity Insurance Policies under § 7965 of Pope's Digest, which requires that 'Every life . . . insurance company . . . doing business in this state, shall file with the Auditor or Insurance Commissioner at the same time it makes its annual statement, a sworn statement of its gross premium receipts in this state for the year ending the 31st day of December next preceding, and on such gross receipts each of said companies shall pay into the State Treasurer on or before the first day of March of each year, a tax of two and one-half per cent. . . .' "

It was alleged that appellee is a foreign life insurance corporation engaged in the business of writing life and health insurance, and issuing various kinds of annuity insurance policies, for which it collected premiums. The company was required to make and file with the Insurance Commissioner an annual sworn statement of its gross premium receipts on all business done in this state, and to pay to the treasurer of the state each year to and including 1930 a tax of two per cent., and from 1931, to pay a tax of two and one-half per cent. on such gross receipts for the privilege of doing business in this state.

Appellee has not reported, in its sworn annual tax statements to the Insurance Commissioner, the premiums received by it on annuity policies of insurance. The amount so collected for the Year 1925 and each subsequent year is stated.

An answer was filed, denying liability for the taxes on various grounds, only two of which will be considered.

The first is whether the Insurance Company is liable for the tax. Upon this question exhaustive research is manifested in the briefs of opposing counsel.

The earliest cases on the subject construing statutes similar to our own statute, above quoted, are *Commonwealth* v. *Metropolitan Life Ins. Co.,* 254 Pa. 510, 98 Atl. 1072, and *People, ex rel. Metropolitan Life Insurance Co.,* v. *Knapp,* 231 N. Y. 630, 132 N. E. 916, in each of which cases it was held that a tax against a foreign insurance company, on the consideration received for granting annuities, was not subject to the tax imposed upon insurance premiums. The first of these cases was decided July 1, 1916, the last by the Court of Appeals of New York, July 14, 1921.

It appears that, upon the authority of those two cases, the Insurance Commissioner of this, and of all the other states, assumed that premiums or sums paid for annuity insurance were not taxable as insurance premiums, and the insurance companies were not required by the Insurance Commissioners of the respective states, in which the various companies were authorized to do business, to report premiums collected for annuity insurance for purposes of computing the tax due on insurance premiums collected.

There are other cases to the same effect, which we shall not review. But the cases on the subject are not harmonious. Indeed, the New York case, above cited, which is treated as one of the leading cases on the subject, affirmed, in a per curiam opinion, from which two of the justices dissented, the opinion of the Supreme Court, Appellate Division, (193 App. Div. 413, 184 N. Y. Supp. 345) from which two of the justices had also dissented.

These two cases are reviewed at length by the Supreme Court of Iowa in the case of *Northwestern Mutual Life Ins. Co.* v. *Murphy, Commissioner,* 223 Ia. 233, 271 N. W. 899, 109 A. L. R. 1054, in which a statute similar to our own was construed. In an opinion, which was unanimous, the Supreme Court of Iowa declined to follow the New York and Pennsylvania Cases, and held (to quote a headnote): "1. The consideration received by an insurance company for its undertakings to pay annuities is properly included in the amount upon which the company is liable to a tax imposed by a statute requiring every foreign insurance company to pay annually into the state treasury as taxes a stated percentage 'of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year.'"

Numerous cases are cited in the briefs, and it is said—and may be true—that the weight of authority sustains the view of the Pennsylvania and New York courts. But the decisions of the Supreme Court of New Hampshire in the case of *New York Life Ins. Co.* v. *Sullivan,* 89 N. H. 21, 192 Atl. 297, and of the Supreme Court of Massachusetts in the case of *Mutual Benefit Life Ins. Co.* v. *Commonwealth,* 227 Mass. 63, 116 N. E. 469, accord with the view which we adopt. Expert witnesses called by the insurance companies differentiated annuity and other insurance, but the fact remains, in our opinion, that it is insurance, and that money paid for annuity insurance must be regarded as premiums paid for insurance.

We are much persuaded in reaching this conclusion by the extensive discussion of the subjejct by Professor Huebner, Professor of Insurance and Commerce in Wharton School of Finance and Commerce, University of Pennsylvania, and President of the American College of Life Underwriters, in his textbook on Life Insurance. He devotes an entire chapter to the subject of Annuities, and differentiates the various types of annuities. We accept the view of Professor Huebner, rather than that of judges, who, like ourselves, have only occasional con-

tacts with the subject. He says, at page 154 of the chapter on Annuities (3rd Ed.): "Many believe that the growth of the annuity business will be the outstanding feature in the life-insurance business during the next quarter of a century. . . The purpose of the annuity, it is seen, is to protect against a hazard—the outliving of one's income—which is just the opposite of that confronting a person who desires life insurance as protection against the loss of income through premature death. Technically, however, the two types of contracts are closely related to each other, since the cost of both is computed on the basis of similar data and principles. Sight should not be lost of the fact that annuities are simply another important means of insurance."

We conclude, therefore, that sums of money paid for annuity insurance, which all the witnesses refer to as premiums, are taxable under the statute hereinabove quoted.

It does not follow, however, that the state should recover in this action. It will be remembered that this is not a suit for current premiums. It is a back tax suit. The court below found there could be no recovery in this case, but the decree does not recite the ground upon which that relief was denied. In our opinion, there can be no recovery, because of the provisions of § 13899, Pope's Digest, which reads as follows: "After the assessment and full payment of any general property, privilege or excise tax, no proceedings shall hereafter be brought or maintained for the reassessment of the value on which such tax is based, except for actual fraud of the taxpayer, provided that failure to assess taxes as required by law shall be *prima facie* evidence of fraud."

It will be observed that the inhibitions of this statute are not directed against suits for the collection of the general or ad valorem taxes alone. It applies also to suits for the collection of privilege and excise taxes. In the case of *State, ex rel. Attorney General* v. *New York Life Ins. Co.,* 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099, it was held that premium taxes are excise and privilege taxes. See, also, *Hixon* v. *School District of Marion,* 187

Ark. 554, 60 S. W. 2d 1027; *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. 2d 182; *Thompson* v. *Wiseman,* 189 Ark. 852, 75 S. W. 2d 393.

It appears that, prior to 1927, there were no restrictions on the institution of suits to collect back taxes; but in that year the General Assembly passed Act 129, of which § 2038, Pope's Digest, is a part, requiring that the Tax Commission first Authorize such suits. This act was upheld in the case of *State, ex rel. Attorney General* v. *Standard Oil Co. of La.,* 179 Ark. 280, 16 S. W. 2d 581.

In 1929, the General Assembly passed Act 174, prescribing a limitation of five years on suits for back taxes on tangible property, and a limitation of seven years on suits for back taxes on intangible property.

This right to sue for back taxes was further restricted by Act 281 of the 1931 session of the General Assembly, of which § 13899, Pope's Digest, hereinabove quoted, is a part. This Act was upheld in the case of *State, ex rel. Attorney General* v. *Anderson-Tully Co.,* 186 Ark. 170, 53 S. W. 2d 17, 85 A. L. R. 100, in which case it was said that the whole proceedings for the reassessment of property and for the recovery of back taxes are purely statutory, and without such authority no such actions could be maintained. This opinion was unanimous, except that two members of the court were of opinion that the act did not apply to suits pending at the time of its passage.

This Act of 1931 was again upheld in the case of *State ex rel. Attorney General* v. *Chicago Mill & Lbr. Co.,* 187 Ark. 65, 58 S. W. 2d 951. In that case it was alleged that there was fraud in the assessment of the personal property of the corporation proceeded against, for the reason that its personal property had been grossly undervalued. After holding that the undervaluation did not constitute fraud, the suit was dismissed. It is the failure to assess taxes which, by the act, is made *prima facie* evidence of fraud.

Here, it is conceded that the Insurance Company made report of the premiums collected and paid the taxes due thereon. It did not report its annuity premiums; but there was no element of fraud in this. It made report

of all premiums upon which a report was required. The affirmative testimony is to the effect that over a period of many years the administrative officers of this state were of the opinion that annuity premiums were not taxable, and members of this court are even now of that opinion, as evidenced by the concurring opinion which has been filed in this case.

To permit, at this time, a back assessment, for a period of thirteen years, would impose a burden on a group of policyholders, many of whom had no connection with annuity contracts being taxed. There was not, it is true, any statement or assessment of the total premiums received, but a statement was filed of all premiums thought to be taxable. Appellee, Insurance Company, concealed nothing, but correctly disclosed all the information required. The blanks furnished by the state required the insurance company to disclose the premiums received from "Ordinary," "Group," and "Industrial" policies, and this was correctly done. The statute prohibits suits for back taxes "except for actual fraud of the taxpayer." Here, there is no element of fraud, and for that reason the suit was, in our opinion, properly dismissed.

The decree is affirmed. Justice HUMPHREYS is of opinion that the suit is not barred and dissents for that reason. Justices McHANEY and BAKER are of opinion that annuity premiums are not taxable, but concur in the judgment of the court holding the suit barred. Justice HOLT nonparticipating.

McHANEY, J. (concurring). I agree that the opinion of the majority holding that this action is barred by reason of the provisions of § 13899 of Pope's Digest is correct. But I do not agree with the conclusion of the majority that the amounts paid by purchasers of annuity contracts are taxable under existing legislation.

By act 220 of 1913, the legislature of this state for the first time imposed a tax on the "gross premium receipts" of life and other related insurance companies, and it was therein provided that: "The purpose of this

law is to impose a tax of one and one-half per cent. on the gross receipts of every insurance company coming within the description herein above given, whether such premium receipts be in cash or in the shape of notes or other evidences of credit." At that time insurance companies doing business in this state were not authorized to write annuity contracts and were not so authorized until 1921, although the tax rate had been increased in the meantime. In that year, the legislature enacted act 493 and in § 1 provided: "Corporations may be formed or enter this state to effect insurance for the following purposes: 3. Life Insurance—Upon the lives or health of persons and every assurance pertaining thereto, and to grant, purchase or dispose of annuities and endowments." This appears to me to be a very strong indication that the legislature did not consider annuity contracts as being life insurance, else why, after authorizing life and health insurance of all kinds, was it deemed necessary to add the words "and to grant, purchase and dispose of annuities and endowments." If the legislature had thought annuity payments or premiums were taxable as insurance premiums, it would have been a very simple thing to have added that they were taxable as such. It did not do so and the taxing statute was not amended at that or any succeeding session of the legislature to include them. The only amendments to the taxing statute that have ever been made since 1913 are to increase the rate. In 1935, the Commissioner of Insurance prepared and had introduced a bill which, among other provisions, contained one that would have specifically taxed annuity receipts, but it was defeated. In the 1938 special session, the legislature, among other amendments to the insurance laws, amended § 7965 of Pope's Digest, the section that levies a tax of 2½ per cent. on the "gross premium receipts" of life, health and accident insurance companies, but it did not in terms impose such tax on annuity receipts. No insurance commissioner of this state has ever demanded of appellee the payment of the tax demanded in this action, for the reason that no insurance commissioner ever considered that the present statute authorized him to do so, for the reason that an-

nuity receipts were not life insurance premiums within the meaning of the taxing statute. No doubt they so considered the matter because of two decisions, one by the Supreme Court of Pennsylvania in 1916 in the case of *Commonwealth* v. *Metropolitan Life Ins. Co.*, 254 Pa. 510, 98 Atl. 1072, and the other in 1920, in New York, in the case of *People ex rel. Metropolitan Life Ins. Co.* v. *Knapp,* 193 App. Div. 413, 184 N. Y. S. 345, affirmed 231 N. Y. 630, 132 N. E. 345. In the Pennsylvania case, the statute of that state imposed a tax on "the entire amount of premiums of every character and description," and in disposing of the case pointed out the difference between "the ordinary insurance contract and the granting of an annuity," and stated, in line with what I have pointed out above, that: "It is significant that neither the Legislature of Pennsylvania or New York appears to have supposed that the power to make every insurance appertaining to or connected with the lives of individuals, conferred authority also to grant or purchase annuities. This authority is expressly added in each state." In denying the right of the Commonwealth to collect the tax on annuity receipts, the court said: "For these reasons in our opinion the act of June 1, 1911 (P. L. 607), under which the commonwealth here claims, and which imposes tax only upon premiums received by every insurance company, does not impose the tax upon the consideration paid for the granting of annuities. We therefore have reached the following conclusions:

". . . The defendant company under the act of June 1, 1911 (P. L. 607), is not liable to tax upon the consideration money received by it for the granting of its annuities.

"The defendant company has fully paid the tax imposed by the act of June 1, 1911, upon the gross premiums received by it during the years 1911 and 1912, and is not now indebted to the commonwealth, in either of the cases stated in the caption hereto."

The New York court, in the case cited, reached the same conclusion. The New York statute imposed the tax on "the gross amount of premiums received during the

preceding calendar year." (193 App. Div. 413, 184 N. Y. S. 346). I can see no distinction between a tax on "the entire amount of premiums of every character and description," as in Pennsylvania, "the gross amount of premiums received," as in New York, and the "gross premium receipts," as in the Arkansas statute. All mean the same thing. Other and more recent cases to the same effect are *State of North Dakota* v. *Equitable Life Assurance Society of the U. S.*, 68 N. Dak. 641, 282 N. W. 411; *State ex rel. Equitable Life Assurance Society* v. *Hamm, Ins. Comm.*, 88 Pac. 2d (Wyo.) 484, decided March 21, 1939; *Daniel* v. *Life Ins. Co. of Virginia*, (Tex. Civ. App.) 102 S. W. 2d 256.

It is my further opinion that before a tax can be levied on annuity receipts, the statute would have to be amended so as to clearly express the intention of the legislature so to do. I have no doubt that it could do so, but my insistence is that it has not done so. In the recent so-called "use tax" case, *Mann* v. *McCarroll, Commissioner of Revenues, ante* p. 628, 130 S. W. 2d 721, we said: "The question raised here is whether a use tax has been levied or imposed upon the property. The law is, as we understand it, that the imposition or levying of a tax shall be direct and specific, and if there is any doubt about the fact of the levy, such doubt must be resolved in favor of the taxpayer." Citing cases. It must be conceded that the language of the statute is not "direct and specific." No Insurance Commissioner has ever so considered it or attempted to collect the tax during the eighteen years since insurance companies were authorized to issue annuity contracts. Although the legislature's attention has been called to the failure of the statute to impose such tax, it has failed to amend the statute as to enable the Commissioner to collect it, and until it does, I am unwilling for this court to legislate for it.

I, therefore, concur in the holding of the majority that this action is barred, but dissent from the holding that the present statute authorizes the Commissioner to collect the tax on annuity receipts in the future.

Mr. Justice BAKER concurs in this opinion.

MATTHEWS *v.* BAILEY, GOVERNOR.

4-5712 131 S. W. 2d 425

Opinion delivered August 16, 1939.

[redacted]

Milton McLees, O. H. Nixon and *E. Charles Eichenbaum*, for appellant.

Jack Holt, Attorney General, *Fred A. Donham, Beloit Taylor, Walter L. Pope* and *Rose, Loughborough, Dobyns & House*, for appellees.

Coleman & Riddick, U. A. Gentry, Shields M. Goodwin, John P. Vesey, Herman E. McKaskle and *Ben E. Carter, amici curiae.*

GRIFFIN SMITH, C. J. Act 130, approved February 24, 1937, authorized the refunding of Arkansas state highway bonds aggregating $140,537,253.20. There were amendatory and supplemental acts affecting the original purposes expressed in act 130, pertinent parts of which are referred to in *Roy Matthews* v. *Carl E. Bailey, Governor, et als., ante* p. 703, 130 S. W. 2d 1006.

In the opinion in the Matthews Case it was held that until the General Assembly should act, there was no power in the governor and the state board of finance (a) to issue non-callable bonds; (b) to give a pledge on highway revenues prior to highway and toll bridge maintenance; (c) to pay interest on $2,253,013.64 of "B" bonds which, under the provisions of act 11 of 1934, were interest free; (d) to pay overlapping interest during October, November, and December, 1939, on bonds not callable until January 1, 1940; and (e) to pledge revenues affecting turnback percentages.

Thereafter, acting under constitutional authority, the governor convened the General Assembly in extraordinary session, as a consequence of which act No. 4 was passed. The measure was approved August 5, 1939.

Act No. 4 authorizes issuance of general refunding bonds ". . . in an amount not exceeding in the aggregate the principal amount of obligations [of the state of Arkansas] issued and authorized to be issued under authority of act 11 of the Second Extraordinary Session

of the Forty-ninth General Assembly, approved February 12, 1934." It was further provided that the new bonds should be sold at not less than par and accrued interest, and should bear interest ". . . averaging over the life of such issue less than the average rates of interest borne by the obligations to be redeemed out of the proceeds of such sale over the life of those issues; provided, however, that such general refunding bonds shall include a principal amount of bonds, bearing interest at a rate not to exceed two per cent. per annum, and maturing not later than three years from their date, equal to the amount of outstanding obligations, to be redeemed out of the proceeds of such sale, which now bear no interest."

An additional provision is that the refunding bonds ". . . may be issued and delivered not more than three months prior to the date upon which the obligations to be redeemed out of the proceeds of the sale of such general obligation bonds, or any of them, shall be redeemable. Such general refunding bonds shall mature, with or without option of prior redemption, in annual installments, beginning not later than the year 1942 and ending not later than the year 1977."

It will be observed that express authority is granted for refunding, at 2 per cent. interest, redeemable within three years, the so-called "B" bonds identified in the opinion of July 10th, amounting to $2,253,013.64; that power is conferred to pay overlapping interest for three months, estimated to be $475,346.69,[1] and that the bonds may be issued "with or without option of prior redemption"—in other words, callable, or non-callable.

[1] The term "estimated" is used because experience has shown that interest coupons on bonds are not always presented for payment. They become lost, or are destroyed, or through indifference the holders do not act. Under Item III of appellant's brief (the brief signed by Milton McLees, O. H. Nixon, and E. Charles Eichenbaum), beginning at page 55, it is urged that the executive order is void for the reason that direction is given for issuing bonds aggregating $568,452.01 ". . . that have not been refunded under the provisions of act 11." Appellant seemingly overlooks the fact that act No. 4 authorizes not only the refunding of obligations funded by act 11, but it also authorizes the funding of obligations *authorized to be issued.*

Other provisions of the act will be commented on.

Machinery by which refunding operations may be carried out includes delegation to the governor of power to issue an executive order, to be filed with the secretary of state. In the order the governor must find that refunding would be to the best interest of the state. Certain definite pledges are authorized, language of the act being that the governor, with approval of the board of finance, ". . . is hereby authorized and empowered to make the following covenants and pledges in trust, which shall constitute an irrevocable contract between the state of Arkansas and the holders of such general refunding bonds."

First, the governor may pledge to set aside, in trust, for the payment of principal and interest of the bonds, the first $7,500,000 or lesser sum payable annually into the state highway fund on and after October 1, 1939, from the revenues arising from any motor vehicle license fees or taxes, and from a tax on gasoline or other motor vehicle fuel of 5¾ cents per gallon, ". . . sufficient to pay bond and interest requirements and to create such sinking fund reserve as may be agreed upon by the governor with approval of a majority of the members of the board of finance." The executive is further empowered to covenant, on behalf of the state, that while the bonds or interest are outstanding, neither motor vehicle license fees nor taxes shall ever be reduced below the rates prevailing as of the effective date of the act, ". . . nor shall the tax upon gasoline or other motor vehicle fuel, payable into the state highway fund, be reduced below 5¾ cents per gallon, except that whenever the revenues of the state highway fund shall exceed $15,000,000 per annum for three successive years, the General Assembly of the state of Arkansas may reduce the said motor vehicle license fees or taxes below the rate now prevailing, or may reduce the tax upon gasoline or other motor vehicle fuel, so long as such fees and taxes are estimated to certainly produce for the state highway fund not less than $15,000,000 per annum."

The power is delegated to covenant that if reductions should be made, in consequence of which revenues fell below $15,000,000, the General Assembly will restore the reduced tax or license fees, or both, so that the original revenues will be attained. The governor may also covenant that when the revenues exceed $15,000,000, fifty per cent. of the amount of such excess shall be paid as collected into a sinking fund. He may further covenant for the creation of a sinking fund into which shall be payable annually the difference between the amount of the principal and interest of the refunding bonds in any fiscal year, and the sum of $7,500,000, together with the amounts payable into the sinking fund reserve.

Section 5 of the act provides for the disposition of revenues not pledged for debt service, and certain appropriations are made from such contingent revenues. Other provisions of the act are not material to this opinion. Mention is made of the preceding pledges because they form the basis of controversial points.

Appellant alleges issuance of an executive order and its approval by the board of finance, then charges: (a) That the governor, the board of finance, and the state refunding board are without power to consummate the refunding plan because act No. 4 was not passed in compliance with §§ 21 and 22 of art. 5 of the Constitution of Arkansas, and therefore the appropriations contained therein are void because the bill was not considered by the Committee of the Whole of the House of Representatives. (b) That at the time the executive order was signed, act No. 4 was not in effect because, notwithstanding the purported enactment of an emergency clause, such emergency clause failed on account of constitutional prohibitions. (c) That Paul Gutensohn, whom the governor had undertaken to appoint as a senator from the Fourth District, was one of 24 in the Senate who voted for adoption of the emergency clause; that the constitutional membership of the Senate was and is 35; that two-thirds of the full membership was necessary to enactment of the emergency clause, and that, eliminating Gutensohn's vote, only 23 senators voted for such emer-

gency. (d) That the act is a special act, and therefore prohibited by the Constitution. (e) That the order is void because it attempts to fund obligations authorized by act No. 11 of 1934, but which have never been funded. (f) That the act, in authorizing interest to be paid at 2 per cent. on certain bonds not presently drawing interest, violates Amendment No. 20 to the Constitution; and also that the same provision of the Constitution is violated through payment of interim interest on $47,534,-668.72 of bonds.

A sufficient answer to the allegation contained in subdivision "a" is that the Constitution does not require appropriation measures to be voted on by a committee of the whole. Each branch of the General Assembly may make its own rules and adopt its own procedure, subject only to the requirements expressed in the Constitution.

Subdivisions "b" and "c" will be discussed separately.

The act is not special, as alleged in subdivision "d." The state may legislate with respect to its own affairs. Amendment No. 14 to the Constitution has no application here.

The objection urged in subdivision "e" is disposed of in the first footnote to this opinion.

Questions raised in subdivision "f" were determined adversely to appellant's contentions in the Matthews-Bailey Case, *supra.*

In an *amicus curiae* brief filed by John P. Vesey, and in other briefs, it is insisted that act No. 4 is void because it delegates legislative powers to the governor. Specifically, complaint is made that the General Assembly did not authorize issuance of callable, or non-callable, bonds. The provision relating to callability has been quoted, *supra.* While constitutional questions may be raised for the first time on appeal, it is our view that this phase of the controversy should be more exhaustively briefed, and we therefore decline to pass upon the issue at this time.

The remaining matters of controversy are: (1) Does act No. 4 create vested rights, and (2) was the Senate's vote on the emergency clause sufficient to enact it?

A provision of Amendment No. 7 to the Constitution is that ". . . an emergency shall not be declared on any franchise or special privilege or act creating any vested right, or interest, or alienating any property of the state."

It is urged by appellees that four things are set up in the constitutional amendment, affecting which an emergency clause would be invalid: A franchise, a special privilege, an act creating a vested right or interest, an act alienating any property of the state. Admittedly, act No. 4 does not create a franchise, a special privilege, or alienate any property of the state. If the measure falls within any of the classifications as to which an emergency cannot be declared, it must be the third division—an act creating a vested right or interest. Appellant says that if one has a vested right or interest, he has a fixed, settled, or absolute right; that "vested" is primarily interpreted as meaning "free from all contingencies." In *Steers* v. *Kinsey*, 68 Ark. 360, 58 S. W. 1050, it was said: "A vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title to the present or future enjoyment of the property in some way or another. Parties have no vested rights in remedies or matters of procedure." It is also well settled that no one has a vested right in a public law. *Robinson* v. *Robinson*, 193 Ark. 669, 101 S. W. 2d 961.

After citing the foregoing language, appellees say:

"In other words, before an act would come under the classification of granting a vested right or interest, it must be one that grants or transfers to an individual, person, or corporation, some right or interest which he or it is immediately entitled to use. . . It is true that various steps can be taken by the governor and by the board of finance which will ultimately result in the sale

of the bonds, which bonds will be secured by a pledge of revenues. The holders of these bonds will have vested rights, as was said in the case of *Hubble* v. *Leonard,* 6 F. Supp. 145, cited in appellant's brief, but they do not receive those vested rights upon the passage and approval of this act, because the act does not grant any vested rights. Any right that anyone may obtain under this act will be contingent upon action being taken by the governor and board of finance. A vested right is one that does not depend upon any contingencies; therefore, the act itself creates no vested rights or interests."

In another paragraph appellees say: "If the act created a vested right, then, unquestionably, the Legislature would have no authority to enact it as an emergency measure."

Appellees also insist that act No. 4 is not subject to referendum because Constitutional Amendment No. 7, which authorizes such procedure in proper cases, was repealed by Amendment No. 20 to the Constitution. Amendment No. 20 is:

"Except for the purpose of refunding the existing outstanding indebtedness of the state and for assuming and refunding valid outstanding road improvement district bonds, the state of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the state or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the state voting on the question at a general election or at a special election called for that purpose."

Appellees' comment is: "While Amendment No. 20 does not positively or affirmatively say that refunding bonds are not to be approved by a vote of the people, it absolutely negatives any requirement that they must receive such approval. The right to vote on a question can be taken away either by a positive statement to that effect or by a negation of the right. Before Amendment No. 20 was adopted, the people were given the right by Amendment No. 7, under certain conditions (filing nec-

essary petitions by a certain time) to vote on an act of the Legislature authorizing issuance of refunding bonds, but Amendment No. 20 takes this right away—not by a positive, but by a negative statement."

Our view is that the two amendments do not conflict in the slightest degree—suggestively, remotely, inferentially, or by any other method of construction. We do not think that when Amendment No. 20 was written, Amendment No. 7 was even thought of by authors of the new proposal; and certainly the people in adopting the last amendment did not visualize or meditate the refinement of language here urged. There is no implication that repeal was intended, or that there was a purpose to supersede the referendum.

At the time Amendment No. 20 was proposed, and when it was adopted, enormous public obligations were outstanding. It was recognized that (short of a miracle which was not expected and has not materialized) the state could not pay its highway obligations and provide for payment of road improvement district bonds according to the tenor of the numerous promises. Hence, funding and refunding were essential. Because the state's direct obligations were largely involved, and because property of citizens in half of the counties of Arkansas was pledged, it was felt that these liabilities should be recognized without the formality of referendum or referenda; but as to future pledges, the plan was to circumvent them unless there should be public approval. Hence, Amendment No. 20.

In preceding paragraphs we have copied from appellees' brief their argument in refutation of the contention that act No. 4 creates a vested interest. Appellees, however, concede correctness of appellant's position, but seek to avoid the consequences through interjection of Amendment No. 20. Before this amendment was adopted, appellees say, the people had a right to vote on legislative measures authorizing issuance of refunding bonds. Appellees further say that such right arose because of Amendment No. 7, and that the right was per-

fected when petition was filed "by a certain time." The right to refer and thereby to suspend operation of a legislative act extends only to measures to which the emergency clause is not attached. Measures carrying the emergency clause may be referred, but the law is in force until an adverse vote has been registered by the people in the manner provided by the amendment. But, as appellees have pointed out, under Amendment No. 7 the people were given the right to vote on an act authorizing the issuance of refunding bonds, and that right exists because an act creating vested interests is not subject to the emergency clause, and because refunding bonds which pledge revenues in trust, executed under the plan of act No. 4, are sustained by vested interests. If the bonds were not so secured there would be no purchasers, and an attempt to refund would be futile.

In seeming disregard of the foregoing declaration —a declaration which necessarily carries an admission that Amendment No. 7 provides for a vote by the people "on an act of the Legislature authorizing issuance of refunding bonds"—appellees urge that act No. 4 does not create vested interests because there must be an acceptance of the governor's offer to sell bonds before an investiture is completed; and before such acceptance is possible the period of 90 days within which petitions may be filed shall have expired. Therefore, by lapse of time which cannot be prevented, the right of the people to move in their own interest becomes barred, and the vested interest of bond purchasers arises through a process of construction wholly lacking in logic, and entirely devoid of that degree of common sense which mature minds ordinarily apply in dealing with serious matters.

To say that an act of the Legislature does not create a vested interest, but that such status occurs only when under terms of the act which delegates to an official plenary power to contract on behalf of the state, to pledge its full faith and credit and all of its resources, and particularly to set aside annually in trust millions of dollars arising from excise and other taxes—to say

that the act itself does not create a vested interest within the meaning of Amendment No. 7, but that acceptance of the official's offer is necessary before the relationship in question arises, is to argue that the greater does not include the lesser. It is to insist that intent may be warped at the call of interest, and it is to admit that words and phrases may be mutilated and deprived of their symmetry at the instance of convenience, and distorted if need be to create a breach in reason.

The next question is, Was Paul Gutensohn a member of the Senate, either *de jure* or *de facto?*

Fred Armstrong was elected senator in 1938 to represent the Fourth Senatorial District. He died December 10th of the same year. Paul Gutensohn was appointed by the governor to succeed Armstrong, and took the oath of office. The record does not disclose a finding by the Senate that he was a member of that body, although he served actively. He was not paid as members are ordinarily paid, but received compensation as the result of an act passed by more than two-thirds of both branches of the General Assembly, and signed by the governor. Act 81 of 1939.

Amendment No. 7 to the Constitution contains the following provision: "If it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay, such necessity shall be stated in one section, and if upon a yea and nay vote two-thirds of all the members elected to each house . . . shall vote upon a separate roll call in favor of the measure going into immediate operation, such emergency measure shall become effective without delay. It shall be necessary, however, to state the fact which constitutes such emergency."

After the bill which became act No. 4 had finally passed the Senate, a separate vote was had upon the emergency clause. Twenty-three senators and Mr. Gutensohn voted in favor of the emergency, and it was declared carried.

It is now insisted that 35 members were elected to the Senate; that two-thirds of that number is 24; that Gutensohn's vote was not the vote of a senator and should not be counted, and that without such vote the emergency failed.

It will be conceded that the governor has not the power to appoint members of the Legislature, and has never had. But the practice of making such appointments has persisted. As an express condemnation of the policy of appointing, Amendment No. 29 to the Constitution was adopted November 8, 1938, and became effective thirty days thereafter. By § 1 it provides: "Vacancies in the office of United States senator and in all elective state, district, circuit, county and township offices, except those of lieutenant governor, members of the General Assembly and representatives in the Congress of the United States, shall be filled by appointment by the governor." The attempt to appoint Gutensohn was made January 4, 1939.

Appellees contend that even though the power of appointment was wholly lacking, the appointment was in fact made, and that Gutensohn entered upon his duties, and thereby became a member of the Senate, *de facto*. If indeed his status was that of *de facto* officer, third parties affected by his activities are not to be penalized. By *quo warranto* proceedings his right to act should have been questioned. It has been held that the chancery court lacks jurisdiction to pass upon the qualification of a member of the General Assembly. *Davis* v. *Wilson,* 183 Ark. 271, 35 S. W. 2d 1020. There are other similar decisions, and the rule seems to be that if an official acts under color of office, even though he is not in fact an officer, proceedings in which he participates are not rendered invalid, even though the majority by which determination of a question was arrived at may have depended upon his vote. He may not, however, profit personally by his own misconduct.

Appellees direct attention to § 11 of art. V of the Constitution, which provides that "Each house shall ap-

point its own officers and shall be sole judge of the qualifications, returns and election of its own members." It is urged that inasmuch as Gutensohn was apparently accepted by the Senate, the effect was a determination by that body that he had a right to membership; therefore, in spite of the Constitution and the known fact of his status, the question of eligibility, it is argued, cannot be raised collaterally.

No court should be so technically hide-bound. The Constitution was made to be interpreted and enforced. When the judiciary was created there was no intent that it should side-step responsibility and hide behind precedent in an effort to promote a harmonious confluence of incompatible elements.

We find no case of our own holding that legislation enacted by the vote of a stranger to the Senate or the House is sacrosanct. There are no instances where it has been said that designation by appointment contrary to the Constitution shall have the force of election, or that the admitted right of the Senate and the House to judge of the qualifications, returns and election of members goes to the extent of nullifying the Constitution. Those elected to the General Assembly take an oath to support the Constitution, and there is no presumption that senators and representatives do not intend to adhere to the basic law, and they do attempt to obey it.

At page 589, § 307, of 22 Ruling Case Law, it is said:

"The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers. It was seen that it would be unreasonable on all occasions to require the public to inquire into the title of an officer, or compel him to show title, especially since the public has neither the time nor the opportunity to investigate the title of the encumbent."

At page 596, § 318, the same authority says:

"One of the important classes of *de facto* officers consists of those who enter into the possession of an office and exercise its functions by reason of an appointment which is informal or defective. As already seen, the defective appointment constitutes color of title or color of appointment. Therefore, the general rule is that when an official, person or body, has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer *de facto,* notwithstanding there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner."

In the instant case there was no *apparent* authority to appoint Gutensohn; and, although the latter served energetically and with a high degree of intelligence, the service was not that of a senator; nor could he have been a *de facto* officer in view of the want of apparent authority by the appointive agency.

In *Oliver* v. *Southern Trust Company,* 138 Ark. 381, 212 S. W. 77, it was held that a valid appropriation of money to pay the cost of an exhibit for Arkansas at the Panama-Pacific Exposition in 1915 required a vote of two-thirds of the members *elected* to each branch of the General Assembly. This case is authority for the holding that where, by the plain language of Amendment No. 7 two-thirds of the members elected to each branch of the General Assembly are necessary to enactment of the emergency clause, two-thirds of 35 elected members must vote in the Senate, else such emergency has failed. When Gutensohn's vote (which was not in fact a vote) is subtracted from the total of 24, it follows that the remaining 23 votes fell short of the required two-thirds. Cases from other jurisdictions sustain this holding, although there is some authority to the contrary.

The chancellor's decree in sustaining appellee's demurrer to the complaint is reversed, and the cause is

remanded with directions to proceed in a manner not inconsistent with this opinion.

SMITH, MCHANEY, JJ., and HOLLAND, Special J., dissent.

SMITH, J. (dissenting). In the former opinion, to which the majority refer, it appears that the attempt to refund the state's highway indebtedness had been made pursuant to acts 130, 151 and 278 of the Acts of 1937 and act 257 of the Acts of 1939, and it was held by the majority that these acts did not confer the authority which the governor had attempted to exercise; but of these acts the majority said: "We holds that acts 130, 151, 298 and 257, mentioned in the pleadings, were lawfully passed, and that no constitutional impediments void the measures."

The effect of that opinion is that there was no constitutional objections to the refunding plan, but that legislative authority for it was lacking. It became necessary, therefore, to repair to the General Assembly to acquire the authority which the majority said the acts referred to did not confer. A special session of the General Assembly was convened to confer this authority, and act No. 4 was passed at the special session of the General Assembly to confer that authority. The governor is now attempting to refund the state's highway indebtedness pursuant to the authority conferred by act No. 4 of the special session, but the majority opinion aborts this second attempt.

The majority reserve the question whether act No. 4 is inoperative, in that it confers legislative authority upon the governor, by permitting him to determine whether the new bonds shall be callable on demand or payable only on fixed maturity dates, and permits him to determine the rate of interest which the bonds shall bear. The former executive order for refunding was attacked with even more enthusiasm and eclat than is the present plan, and the objection just stated, which the majority reserve, was raised to the former order in a number of the briefs filed in that case.

The opinion in the former case enumerated these objections, concluding with the statement that "The governor may, at his option, authorize issuance of bonds containing a clause reserving to the state the right to call for redemption prior to maturity, on thirty days' notice.

"Assuming that act 130 conferred upon him all of the powers necessary to do those things set out in the executive order, one provision of the order is:

" 'Said bonds shall be dated October 1, 1939, and shall bear such rates of interest and shall mature at such time or times not exceeding forty years, as shall be hereafter fixed by executive order approved by the Board of Finance; provided, however, that the interest rates borne by the refunding bonds shall be so fixed that for the aggregate amount of outstanding obligations bearing any one rate of interest there shall be at least an equal amount of refunding bonds bearing a lower rate of interest, except that there may be an amount of refunding bonds equal to the amount of outstanding obligations, which bear interest at the rate of 3½ percentum per annum, which may bear interest at a rate not exceeding such rate, and an amount of refunding bonds equal to the amount of outstanding obligations, which bear interest at the rate of 3 percentum per annum, or no rate of interest, which may bear interest at a rate not exceeding 3 percentum per annum.'

"If authority for the procedure affirmed in the order has been expressly conferred by act 130; or if, by fair construction, it can be said that the things the governor contemplates doing were intended by the legislature, and if that intent can be gathered from the language used, then the lower court's action in denying injunctive relief should be sustained."

Having thus held in the former opinion that there was no delegation of legislative authority, we do not understand the necessity of reserving that question in the instant case.

Act No. 4 confers the power which act No. 130 was said not to contain, and if the former rule is adhered

to, "then the lower court's action in denying injunctive relief should be sustained."

Act No. 4 no more delegates legislative power than did act 130. The duties imposed upon the governor under both acts, and specifically under act No. 4, are to perform the functions under which the law becomes operative. The bonds are authorized by the act, and are to be issued pursuant to it. The bonds are not issued by the legislature, and could not be. It was essential that the legislature designate an agent to execute its will, and authorizing its agent to negotiate for the best terms obtainable was not a delegation of legislative authority.

The objection that the state had delegated legislative authority was made to the creation of the Revolving Loan Funds by act No. 119 of the Acts of 1927, under which the State Board of Education was authorized to borrow and lend money. In overruling that contention in the case of *Ruff* v. *Womack,* 174 Ark. 971, 298 S. W. 222, it was said: "7. Constitutional Law—Delegation of Legislative Power.—The Revolving Loan Fund Law providing for the sale of state bonds by the State Debt Board, for the purpose of borrowing money from permanent school fund, and for lending the money obtained to needy school districts by the State Board of Education, is not invalid as delegating legislative power to either of these boards, as the power conferred is merely that of enforcing the law after making investigations."

The emergency clause is held inoperative for two reasons, the first being that the act grants vested rights and is, therefore, not subject to have an emergency clause attached.

In our opinion, this holding is, not only unsound, but is very unfortunate, and, if followed, will lead to great confusion in future legislation.

The majority have misconceived the meaning of a vested right. The definition in Webster's New International Dictionary is: "Law. That has become a complete and consummated right; that has taken effect as an

immediate fixed right to present or future enjoyment, as *vested* interests, *vested* rights, a *vested* legacy, etc."

To whom has act No. 4 granted a vested right? Who has now a present right arising under this act? No one has, and no one may ever have. It is possible bonds may never be issued under act No. 4. If not, who has been deprived of some right conferred upon him by the act? Now, of course, vested rights may be acquired under this act, just as they may be acquired under nearly every act of the General Assembly. But they have not yet been, and until rights have been acquired they cannot be vested. The prior acts herein referred to authorized the refunding of the state's highway debt, and had the state's highway debt been refunded under those acts, vested rights would have been acquired; but it was not refunded under those acts. Can it be said that vested rights have been granted under these prior acts? Act No. 4 no more grants vested rights than did the former legislation on the same subject.

In the case of *Little Rock Railway & Electric Co.* v. *Dowell,* 101 Ark. 223, 142 S. W. 165, Ann Cas. 1913D, 1086, Chief Justice McCulloch said: "It is said by a learned author on constitutional law that 'the term "vested right" relates to property rights only, and does not apply to personal rights.' Black on Constitutional Law, p. 429." Judge McCulloch then further said: "Judge Riddick, speaking for this court and quoting in part from Mr. Black, said: 'Now, a vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property in some way or another.' *Steers* v. *Kinsey,* 68 Ark. 360, 58 S. W. 1050."

We ask again, who has acquired title, legal or equitable, to anything under act No. 4?

In the case of *Pearsall* v. *Great Northern Railway Co.,* 161 U. S. 646, 16 S. Ct. 705, 40 L. Ed. 838, it was said: "A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment;' and by Chancellor

Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent Com. 202. It is said by Mr. Justice COOLEY that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Principles of Const. Law, 332."

If the majority opinion should hereafter be followed, the value of the emergency clause has been destroyed, for the reason that under nearly every act of the Legislature vested rights may accrue, and many acts of every session of the General Assembly authorized things to be done, which, if done, will create vested rights; but this is quite a different thing from the act itself creating the right. We submit that act No. 4 does not create a vested right. It authorizes action which, if taken, will create a vested right; but that is true of most legislation.

The majority have much to say about the emergency clause attached to act No. 4. It is the opinion of the judges, who join in this dissent, that this discussion is beside the question, as, in our opinion, this act is not subject to the referendum, even though it had no emergency clause.

It is true that under the original I. & R. Amendment the practice of adding the emergency clause became so common as to be an abuse, which the second and our present I. & R. Amendment (No. 7) attempted to cure. This was by requiring the General Assembly to state the facts which constituted the emergency, and by requiring a separate vote upon the emergency clause. To adopt this clause, an affirmative vote of two-thirds of all the members elected to each House was essential, but the amendment authorized the people to order a referendum

notwithstanding the adoption of the emergency clause. However, it was required that the petition be signed for the referendum by not less than six per cent. of the legal voters, and so the law remains except in the matter of legislation authorizing the state to issue bonds. Amendment No. 20 effects a complete change in the referendum in this respect. This Amendment No. 20 was adopted in 1934, the very year in which the original refunding act was passed—act No. 11 of the 1934 Special Session. It was as well known, when Amendment No. 20 was adopted, as it is now, that our own highway debt could not be paid under act No. 11, and that future refunding legislation would be required. In the adoption of Amendment No. 20 the issuance of state bonds was prohibited "except by and with the consent of the majority of the qualified electors of the state voting on the question at a general election or at a special election called for that purpose." It was made unnecessary for the people to invoke the referendum by filing petitions and otherwise complying with the I. & R. Amendment No. 7. The referendum was automatic, and was a prerequisite to a bond issue by the state except for the purpose of refunding the existing indebtedness of the state. This did not involve the creation of a new or additional debt. The state's obligations in regard to the highway debt had been recently fixed by act No. 11 of the 1934 Special Session, and that this debt would at some time have to be refunded was a matter of common knowledge.

In the case of *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. 2d 71, the facts were that Pope county had issued bonds under the authority of Amendment No. 10, which the county was unable to pay as they matured. It became necessary to refund those bonds by extending maturity dates, and that action was taken under the authority of the order authorizing the original issuance of the bonds. Headnotes 1 and 2 in that case read as follows:

"1. Counties—Refunding Bonds.—The general rule is that the power conferred on counties to issue bonds in the first instance includes the power to refund them, pro-

vided that the refunding bonds do not increase the amount of the outstanding bonds or the rate of interest.

"2. Counties—Refunding Bonds—Notice.—Notice of an order of the county court refunding the county's bonds is not required by act 102 of 1935."

In the body of the opinion in that case it was said: "The power and authority conferred by said constitutional amendment on counties to issue interest-bearing bonds to pay their existing indebtedness necessarily implied that they might refund said bonds if it became necessary, provided they should not increase the amount of the outstanding bonds or the rate of interest. By doing this, no additional burden would or could be imposed upon the taxable property of the county. The general rule is that power conferred to issue bonds in the first instance includes the power, by necessary implication, to refund said bonds."

In the later case of *Arkansas Mortgage & Securities Co.* v. *Street Improvement District No. 419,* 191 Ark. 487, 86 S. W. 2d 917, we said that "refunding bonds are only a new acknowledgment of an old debt."

Amendment No. 20 fully covers the subject of the issuance of bonds by the state and suspends the provisions of Amendment No. 7 in that respect. It renders unnecessary any action on the part of the electors to have submitted to them the question whether the state shall issue additional bonds for any purpose except bonds to refund existing outstanding indebtedness of the state, which, as was said in the Arkansas Mortgage & Securities Company Case, *supra,* would only be a new acknowledgment of an old debt.

It is, therefore, in our opinion, unimportant whether act No. 4 has an emergency clause or not, and the fact that the General Assembly took the precaution to attach the emergency clause does not alter the law of the case.

However, we are of the opinion that the act contains a valid emergency clause. The facts recited in this clause as constituting an emergency are known to the entire citizenship of the state.

We are asked in the briefs of counsel for appellant to overrule the case of *Jumper* v. *McCollum,* 179 Ark. 837, 840, 18 S. W. 2d 359, but this the majority declined to do, and it has not been done. The rule there announced as to the sufficiency of the emergency clause must, therefore, be followed. It was there said: "Of course, an emergency clause which did not state the fact constituting the emergency would not suffice; nor would a recited fact which was so obviously and demonstrably inefficacious to constitute an emergency that all fair-minded and reasonably intelligent men would say to the contrary. But the converse of this proposition is equally true. If the fact which constitutes the emergency is recited, and if fair-minded and intelligent men might reasonably differ as to the sufficiency and truth of the fact assigned for placing the act in effect immediately upon its passage, the courts are concluded by the finding. See the many cases under the subhead, 'Encroachment on Legislature,' § 15 of the chapter on Constitutional Law, volumes 1 and 5, Crawford's Digest of the Decisions of the Supreme Court, and the same section and subhead of Crawford's Supplement."

In addition to the holding that the emergency clause was invalid, in that act No. 4 conferred vested rights, that clause is held invalid for the reason that its adoption was effected by the vote of Senator Gutensohn, who was not, in fact, a senator. The majority hold that Senator Gutensohn, appointed by the Governor to succeed Senator Armstrong, who was elected to the office, but who never qualified as such, because he died prior to the convening of the regular session in January, 1939, was not a senator, either *de facto* or *de jure,* and that his vote in favor of the adoption of the emergency clause cannot be counted, leaving only 23 votes in favor of adoption, whereas 24 votes are required.

We cannot agree. In our judgment this holding overrules all our previous decisions to the effect that each house of the General Assembly is "the sole judge of the qualifications, returns, and elections of its own members," including that of eligibility, from which there is no appeal, and that the courts are without power to un-

seat a member seated by either house or to hold invalid any law enacted by the necessary vote of such member. The opinion of the majority in this respect is, not only unprecedented in the decisions of this court, but is in direct conflict therewith as well as the decisions of courts of other states and the Supreme Court of the United States.

It is undisputed that Senator Gutensohn was appointed by the Governor; that he was seated as a Senator by the Senate; and that he participated in all the proceedings coming before the Senate as a member thereof. Let it be conceded that the Governor did not have the power to appoint Gutensohn, and that his act in doing so was in violation of § 6 of art. 5 of the Constitution, and § 1 of Amendment No. 29 thereof, and that by reason thereof he did not have the right to serve. Another provision of the Constitution is § 9 of art. 5, which provides that no person convicted of certain crimes shall be eligible to serve in the Legislature. These provisions are limitations on the Governor and the Legislature, but if they disregard these wholesome provisions, the courts are powerless to interfere. This is true, because another provision of the Constitution, § 1 of art. 5, provides: "Each house shall appoint its own officers, and shall be sole judge of the qualifications, returns, and elections of its own members. . . ." Substantially the same provision is in all the state constitutions, and the Constitution of the United States, in part, is as follows: "Each House shall be the judge of the election, returns, and qualifications of its own members. . . ." In ours it says "Each house shall be *sole* judge," whereas in the federal Constitution it leaves out the word "sole" and says: "Each house shall be judge," etc.

The reason for this wise provision of the Constitution was and is to make the legislative department independent of the judicial, and to make each house an independent court in respect to the election, qualification and eligibility of its own members. There is no provision to be found anywhere in the Constitution that authorizes the courts to upset a decision of either House in this re-

gard. Perhaps, one of the best statements of the reason and necessity for such a constitutional provision is that of Judge Brewer, of the Supreme Court of Kansas, later a Justice of the Supreme Court of the United States, in *State, ex rel. Martin,* v. *Gilmore,* 20 Kan. 551, where he said: "The constitution declares, article 2, section 8, that 'Each House shall be judge of the elections, returns, and qualifications of its own members.' This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide. Each House acts for itself and by itself; and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each House is empowered to pass upon the present qualifications of its own members. By Section 5 of the same article, acceptance of a federal office vacates a member's seat. He ceases to be qualified and of this the House is the judge. If it ousts a member on the claim that he has accepted a federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is in its very nature (and so as to any other disqualification) exclusive; and it is necessary to preserve the entire independence of the two houses."

Another splendid statement is the following from Judge Cooley's opinion in the case of *People ex rel. Drake,* v. *Mahoney,* 13 Mich. 481: "While the constitution has conferred the general judicial power of the State upon the courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers; and among them is the power to judge the qualifications, elections and returns of members of the Legislature. The terms employed clearly show that each House, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this, or any other court, to review their action. . . .

"It may happen, as suggested, in the argument, that with each House, not only deciding for itself questions of fact, but also construing for itself the law, we may sometimes witness the extraordinary spectacle of two bodies construing and enforcing the law differently, while a third construction is enforced by the courts upon the public at large. But with this possibility in view, the evils of allowing the courts a supervisory power over the decisions of the Houses upon the admission of members, are so great and so obvious that it is not surprising that the framers of the constitution refrained from conferring the power."

In our own recent case of *State, ex rel. Evans,* v. *Wheatley,* 197 Ark. 997, 125 S. W. 2d 101, a case written by one of the majority, in which Wheatley had, some years prior to his election, been convicted of a felony, and appellant was seeking to prevent him from serving under § 9, of art. 5, of the Constitution, the question for decision was stated as follows: "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." After quoting art. 5, § 11, of the Constitution, and after citing cases as to the proper construction of the language quoted, it was said: ". . . It is undisputed here that the Senate had 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.' "

This was the unanimous decision of the court, but the majority have departed from it and, in effect, have overruled it.

In *Young* v. *Boles,* 92 Ark. 242, 122 S. W. 496, we held (to quote a syllabus), "Where in an election contest for the office of State Senator, the circuit court directed a recount of the ballots, and pending an appeal from such order to the Supreme Court, the contestee was declared by the State Senate to be entitled to retain his seat, . . . the appeal, on motion of the appellee, should be dismissed."

See, also, *Parish* v. *Nelson,* 186 Ark. 786, 55 S. W. 2d 922; *Barry* v. *United States,* 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867; *Reif* v. *Barrett,* 355 Ill. 104, 188 N. E. 889; *State, ex rel. Boulware,* v. *Porter,* 55 Mont. 471, 178 Pac. 832; *Sherrill* v. *O'Brien,* 188 N. Y. 185, 81 N. E. 124; and note to 107 A. L. R. 205.

In the Montana case, *supra,* the court said: "The authority thus recognized as lodged in each House is indispensable to its independence and existence. It emanates directly from the people to each House as an independent entity, and cannot be delegated or granted away. Each House acts for itself, and from its decision there is no appeal. No individual, officer, court, or other tribunal can infringe upon its exclusive prerogative to determine for itself and in its own way, whether a person who presents himself for membership is entitled to a seat. . . . Either House may even act arbitrarily and in disregard

of fundamental rights. It may oust a member whose election is beyond controversy, and seat as a member a person who is disqualified for the office, but, if it should do so, there is still no recourse."

From these and many other cases that might be cited, it is perfectly clear that the qualification and eligibility of Senator Gutensohn were questions for the "sole" consideration of the Senate, and that its action in seating him is conclusive, and cannot be reviewed by this court.

In any event, Senator Gutensohn was a *de facto* officer, whose right to serve and vote cannot be attacked collaterally. *Forrest City Gro. Co.* v. *Catlin,* 193 Ark. 148, 97 S. W. 2d 910; *Hodges* v. *Keel,* 108 Ark. 184, 159 S. W. 21; *Davis* v. *Wilson,* 183 Ark. 271, 35 S. W. 2d 1020.

In *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. 2d 1018, 64 A. L. R. 1258, it was held that an ordinance creating an improvement district cannot be collaterally attacked as being improperly passed, because one of the aldermen whose vote was necessary to its passage, did not reside in the city, since he was at least a *de facto* officer, and his qualifications to serve could not be inquired into in that suit. Citing *McClendon* v. *State,* 129 Ark. 286, 195 S. W. 686, L. R. A. 1917F, 535.

If the decision of the majority is to stand, upsetting and holding void the action of the Senate in seating Senator Gutensohn, and in holding his vote on the emergency clause void and of no effect, an intolerable condition will arise with reference to every act passed by the 1939 session of the General Assembly. No one can certainly know, no lawyer, no judge, whether any act of that session has been lawfully enacted, without a search through the Senate Journal to determine how Gutensohn voted, and whether his vote was necessary to the passage or defeat of any measure. The published acts of the Legislature will no longer import verity. They stand stamped by the decision of the majority with uncertainty and doubt. No longer can the Acts of 1939 be cited without a showing from the Journal of the Senate that the vote of Gutensohn was not necessary for the passage of the act cited. And this most intolerable condition is a red

flag of warning of danger in repealing or making nugatory the constitutional mandate that "Each House shall . . . be sole judge of the qualifications, returns and elections of its own members." The framers of this provision knew what they were about. They knew that, if each House were not made the judge of the qualifications of its own members, and such matter be left to the courts, no one could tell whether a published law be valid or not, without an exhaustive search of the records to determine who were lawful members and who were not, and how they voted.

No importance is to be attached to the fact that the Legislature passed act 81, appropriating $1,000 "for the purpose of paying Paul Gutensohn for services rendered to the State of Arkansas," without reciting that it was for services rendered as a State Senator. The whole context of the act shows it was for such purpose, and § 3 recites "that without such services, the county of Sebastian would be deprived of representation in the Senate of the General Assembly," etc. The only service rendered was as a State Senator.

In our opinion, act No. 4 confers no vested right.

We are of the opinion, also, that, if the act is, in fact, subject to the referendum without an emergency clause, it has a valid clause of that character, which makes it immediately effective, and we, therefore, dissent from the holding of the majority, which overrules the opinion of the court below denying injunctive relief.

I am authorized to state that Justice McHaney and Special Justice Holland concur in the views here expressed.

Drainage District No. 18, Craighead County, *v.* Cornish.

4-5718 131 S. W. 2d 938

Opinion delivered October 2, 1939.

[redacted]

Horace Sloan, for appellant.

Arthur L. Adams, for appellee.

C. M. Buck and *Chas. D. Frierson, amici curiae.*

HOLT, J. Drainage District No. 18 of Craighead county is one of the numerous improvement districts organized to drain lands within the St. Francis and the Little River deltas, and to protect those lands from the flood waters of one or both of those rivers. The St. Francis River flows west of District No. 18 and the Right-Hand Chute of Little River flows in a southwesterly direction along the south and east end of the district.

When the plans of District No. 18 were prepared by the engineer, it was contemplated that a levee be constructed along the west boundary of the district, to protect the lands therein from the annual overflow of the St. Francis River; but this levee was not constructed, for

the reason that its cost was thought to be too great for the district to undertake. The ditches, however, were constructed, but it has been concluded that they were not dug to a proper slope and, for that reason, filled in, until their efficiency has now been greatly reduced. The absence of a levee along the St. Francis River on the west side of the district, and one along the Right-Hand Chute of Little River has conduced to that end.

Before District No. 18 in Craighead county was organized, Drainage District No. 17 of Mississippi county was organized. The boundary lines between Craighead and Mississippi counties form the boundaries between these improvement districts.

As a part of its improvement Drainage District No. 17 of Mississippi county dug a ditch for a distance of about two and one-half miles, along its west boundary line, to the southeast corner of section 36, township 13 north, range 7 east, which point is the southeast corner of Drainage District No. 18 of Craighead county. That ditch runs north and south, along the line between Craighead and Mississippi counties. At the southeast corner of Drainage District No. 18 the ditch turns west and runs along the boundary line between Craighead and Poinsett counties to the track of the Cotton Belt Railroad, where the ditch turns south, and, running through Poinsett county for a distance of about two miles, finds an outlet in the Right-Hand Chute of Little River.

As a part of its improvement Drainage District No. 17 constructed a levee along the right-hand bank of Right-Hand Chute of Little River, which at one point runs over and across a part of the southeast quarter of section 36, township 13 north, range 7 east. This levee follows the general course of Right-Hand Chute of Little River through Poinsett county to the ditch of District No. 17 emptying into Little River.

Drainage District No. 18 dug a ditch along its south boundary, which is the county line between Poinsett and Craighead counties, to the Cotton Belt Railroad, where the same outlet was found in the ditch of Drainage Dis-

trict No. 17 which empties into Little River, so that there were ditches both east and west of the Cotton Belt Railroad along the entire south boundary line of Drainage District No. 18.

It was planned to afford drainage to District No. 18 by digging ditches running north and south in that district, all of which emptied into the ditches along the south boundary line of District No. 18, which ditches, as has been said, emptied into the drainage ditch of District No. 17 which emptied into Little River, through an inverted siphon constructed by Drainage District No. 7 of Poinsett county.

For the privilege of using the outlet which District No. 7 of Poinsett county afforded through its inverted siphon, District No. 18 paid District No. 7 the sum of $100,000. It thus appears that Drainage District No. 18 finds an outlet for the water which its ditches collect through the facilities of District No. 17 of Mississippi county and District No. 7 of Poinsett county.

These and the other drainage districts lying in this delta south of the Missouri state line had a common problem, which consisted in carrying away the water which was poured into their territory by drainage ditches in the state of Missouri and in protecting their lands from the annual overflows of the St. Francis and Little rivers.

The problem was beyond the resources and revenues of these districts, and an appeal was made to the federal government, which has promised and is rendering aid under the provisions of the federal statute commonly referred to as the Overton Flood Control Bill, 33 U. S. C. A., § 701. It was found that levees were as important and more expensive than ditches to afford drainage. In other words, effective drainage could not be afforded by ditches unless protection was also afforded by levees from the overflows of the St. Francis and Little rivers.

In these circumstances the federal government proposes, at least so far as District No. 18 in Craighead county and District No. 17 in Mississippi county are con-

cerned, to construct essential levees to protect their drainage projects; but this offer is conditioned upon the acquisition by these drainage districts of all the necessary rights-of-way for the levees and the payment of incidental damages arising out of their construction.

Appellee, a landowner in District No. 18, filed this suit against the commissioners of that district, in which he alleged (1) That the district proposes to furnish, at its expense, to the United States, all lands and easements necessary to the execution of the works of building levees, and to hold the United States free from damages resulting from the construction of the works, and to take over and maintain the works after they shall have been completed, to-wit: (a) such portion of the project as relates to the west portion of the floodway on the Right-Hand Chute of Little River, affecting lands in sections 35 and 36, township 13 north, range 7 east, and (b) such portion of the project as relates to the construction of a levee on the east side of the St. Francis River in Craighead county and adjoining lands embraced in the Drainage District; (2) To clear and clean out the ditches of the district.

The complaint of the landowner further alleges that Drainage District No. 18 lies wholly within the eastern district of Craighead county, and recites the number of ditches which have been constructed therein, with their outlets as hereinabove stated, and the failure of the district to construct the levees on the east side of St. Francis River, being the west side of the district, as recommended in the final report of the engineer of the district on the organization thereof. There is alleged also the arrangement under which District No. 18 of Craighead county paid District No. 7 of Poinsett county the sum of $100,000, used in the construction of the inverted siphon hereinabove referred to, with the allegation that, through inattention to this siphon, it had become inadequate as an outlet. It was alleged that District No. 18 had issued bonds in the sum total of $350,000, and had pledged the assessment of betterments totaling nearly $800,000 to secure the payment thereof.

It was further alleged by the landowner that the federal plan for flood control contemplates the widening of the floodway for the Right-Hand Chute of Little River. This floodway consists of two parallel levees, at some distance back from each bank line of the said Right-Hand Chute, so as to form a passageway for Right-Hand Chute flood waters. This plan provides for the construction of a ditch on the land side and parallel to the proposed west floodway levee, so as not to destroy the ditch No. 4 of Drainage District No. 17 of Mississippi county, thereby preventing that ditch from having an outlet, as the moving back of the levee behind the present ditch No. 4 destroyed that part of the ditch which will then be embraced in the floodway. In other words, after the construction of the floodway ditch No. 4 of Drainage District No. 17, which now runs along the south line of Drainage District No. 18, will be closed for about a mile, and the new ditch will be constructed on the land side of the levee diagonally across section 36, township 13 north, range 7 east, and connecting with the original ditch No. 4 in section 35, township 13 north, range 7 east.

The federal government proposes to dig this new ditch, and to construct the levees, but has called upon District No. 18 to provide the right-of-way and the necessary easements, and to pay incidental damages.

The landowner alleged that this expense should be met and paid by District No. 17 of Mississippi county, and not by District No. 18 of Craighead county, although the right-of-way and the easements which the federal government asks District No. 18 to acquire lie within District No. 18. It is alleged that the commissioners of District No. 18 are without power to acquire and pay for this right-of-way and easements. It was also alleged that the commissioners proposed to acquire right-of-way and easements for the levee to be constructed on the east side of St. Francis River.

There are no conflicts as to the facts; indeed, the essential facts appear in a stipulation as to the facts filed by the parties. The questions raised relate to the powers of the district.

The district has no outstanding or unpaid obligations. On the contrary, it has anticipated and purchased $96,000 of its unmatured bonds, and it is not questioned that funds will be available to acquire the right-of-way and easements without consuming the betterments originally assessed; but the court below held that these betterments had been pledged to secure the bonds issued and sold by the district, and could not be used to provide right-of-way for the proposed levees. The court held, however, that such funds might be lawfully expended for cleaning out the ditches. It appears that the surplus of money which District No. 18 has on hand resulted largely from the fact that the district did not construct the levee on the east side of St. Francis River, which levee was a part of the original plan of the district, but in its final plans was postponed.

The correctness of the decree relating to the cleaning out work on the ditches is conceded; and we think cannot be questioned.

But it is very earnestly insisted that it is *ultra vires* the district to acquire the right-of-way in question. In support of this contention it is insisted that District No. 18 is taking over a part of District No. 17's improvement. It is true that when District No. 17 constructed its improvement, it built a levee in what is now a part of District No. 18; but that levee was abandoned. Another and a set-back levee has to be constructed, and it does not appear that District No. 18 has appropriated any part of District No. 17's improvement. The attorney for District No. 17 appeared at the oral argument in this case, and disclaimed any contention on the part of District No. 17 to the affect that its control over its own improvement is being interfered with.

The federal government has proceeded upon the assumption that each of the various drainage districts which it proposes to aid shall acquire such right-of-way as is required in the particular district. There is no controversy between Districts 18 and 17 over the control of their respective improvements and the set-back levee

and the property which will be damaged by its construction lies within the boundaries of District No. 18.

As to the levee along the St. Francis River, it may be said that the necessity for this levee to afford adequate drainage was recognized when District No. 18 was organized. It is now proposed to build a larger and longer levee without cost to the district except to provide the right-of-way.

Upon the question of the authority of the drainage district to build levees, it may be said that the district was organized under the provisions of act No. 279 of the Acts of 1909, as amended from time to time, known as the Alternative Drainage System. Section 32 of this act, which as amended by § 5 of the Acts of 1913, p. 738, appears as § 4489, Pope's Digest, reads as follows: "The word 'ditch,' as used in this act, shall be held to include branch or lateral ditches, tile drains, levees, sluice-ways, floodgates, and any other construction work found necessary for the reclamation of wet and overflowed land. And this act shall apply to the organization of districts, the main objects of which is the construction of levees."

It appears, therefore, that it is not *ultra vires* the drainage district to construct a levee if the levee is necessary to afford drainage, and in this connection the undisputed testimony is to the effect that the proposed levees are necessary to prevent the overflowing and filling up of the drainage ditches.

Now, while it is true that the proposed levee along the Right-Hand Chute of Little River lies entirely within District No. 18, it is also true that not all the proposed right-of-way for the levee along the St. Francis River lies within District No. 18. But it is not *ultra vires* the drainage district to build this levee or to acquire the right-of-way for its construction on that account.

The case of *Bayou Meto Drainage District* v. *Ingram,* 165 Ark. 318, 264 S. W. 947, involved the question of the powers conferred upon drainage districts under the provisions of act 279 of the Acts of 1909 and the acts amendatory thereof. An adequate outlet for the drain-

age did not exist within the boundaries of that district, and to secure this outlet it was necessary to continue the principal ditch several miles beyond the boundaries of the district. It was there said: "One of the sections of the statute (Crawford & Moses' Digest, § 3629) provides for the condemnation of a proper outlet for the drainage system, and that for that purpose a ditch or drain may be extended beyond the limits of the district; . . ."

Here, the levees are as essential to the efficiency of the project as was an outlet in the Ingram case, *supra.* The purpose of the levees is to prevent the overflow of the lands and the filling up of the ditches which always accompanies an overflow, and upon the authority of the Ingram case, *supra,* and the statutes to which it refers, we hold that the drainage act confers authority, not only to build the levee, but to build it beyond the boundaries of the district. If the district may build a levee, it may, of course, acquire the necessary right-of-way for another agency to build the levee for it.

The court below held that Drainage District No. 18 had the power to acquire the right-of-way for the levees, but decreed that the commissioners "are hereby enjoined and restrained from expending the district's funds, now on hand or that may be derived from the present tax levy or levies, for the purpose of acquiring any rights-of-way or flowage rights for the proposed federal levees and ditches in the district, and that, before proceeding with attempting to acquire any such rights-of-way of flowage rights, the district must petition the county court and secure from it an order authorizing the levy of an additional tax for that special purpose. That, in respect to all other issues raised by the complaint, the complaint is hereby dismissed for want of equity."

In the Ingram case, *supra,* it was discovered that lands which were, not only outside the boundary limits of the original district, but which were in adjoining counties, would be benefited by the proposed improvement, and the proceedings were transferred from the county to

the circuit court, where those lands were annexed and made a part of the district, and it was ordered that betterments be assessed against those lands. The plans of the district were altered and enlarged, and § 3625, Crawford & Moses' Digest (§ 4476, Pope's Digest) was quoted as conferring that authority. This section reads, in part, as follows: "The commissioners (of the district) may at any time alter the plans of the ditches and drains, but, before constructing the work according to the changed plans, the changed plans, with accompanying specifications, showing the dimensions of the work as changed, shall be filed with the county clerk, and notice of such filing shall be given by publication for one insertion in some newspaper issued and having a *bona fide* circulation in each of the counties in which there are lands belonging to the district. If by reason of such change of plans, either the board of commissioners or any property owners deem that the assessment on any property has become inequitable, they may petition the county court, which shall thereupon refer the petition to the commissioners hereinbefore provided for, who shall reassess the property mentioned in petition, increasing the assessment if greater benefits will be received, and allowing damages if less benefits will be received or if damages will be sustained."

Here, it is not contended that the construction of the levee will render the original assessment of betterments inequitable. On the contrary, it is shown by the undisputed testimony that the construction of the levee will protect the entire district, and that the benefits of their construction will inure to all the lands in the district equally and ratably. Nor has there been any change in the boundaries of the district. It is proposed only to make the original plans effective by building levees which have been found necessary for that purpose.

It is true that the construction of the levees will require the use of an increased per cent. of the original betterments; but it is not contended that the cost of the levees will exceed the assessed betterments. If this were

true, we would have a question not presented by this record.

In addition to § 3625, Crawford & Moses' Digest (§ 4476, Pope's Digest) the opinion in the Ingram case, *supra,* quotes §§ 3628 and 3630, Crawford & Moses' Digest (§§ 4479 and 4481, Pope's Digest), and it was held that those sections afforded authority for the enlargement of the district and for the alteration of its plans. In so holding the court there said: "It is the contention of counsel for the district that these three sections (§§ 3625, 3628 and 3630, Crawford & Moses' Digest) last quoted clearly authorize the further proceedings sought to be undertaken, and we are of the opinion that counsel is correct in this contention. On the other hand, it is the contention of counsel for appellees that, in the first place, the statute does not authorize a change of plans and an extension of boundaries of the district after the approval of the original plans and the assessment and confirmation of benefits; and second, that, in the present instance, the improvement as originally planned and executed, was substantially complete, and that the so-called additional improvement proposed by the changed plans is, in effect, a new and independent improvement. It is evident, from the broad and comprehensive language used by the lawmakers in framing this statute, and the numerous details set forth in the various sections, that it was intended to give every power necessary to complete drainage schemes. The statute clearly takes cognizance that a drainage scheme is ineffectual and incomplete unless the water is completely gathered up and an outlet provided for carrying it entirely away. In other words, the statute contemplates that a drainage ditch does not drain unless the water is taken care of and entirely carried away. So there is a clearly expressed purpose on the part of the lawmakers to authorize everything that is necessary to get the water off the land and into an outlet which will carry it somewhere into the open channel of a stream."

Section 4480, Pope's Digest, expressly authorizes drainage districts to condemn lands for an outlet lying

without the improvement districts; and we think there is the same authority to condemn lands for a right-of-way for a levee lying in part without the district.

The General Assembly of 1937 found that the opportunity was afforded for levee and drainage districts to secure federal aid, and two acts were passed authorizing them to do so. These are acts 67 and 212 of 1937. Act 83 of the 1939 session of the General Assembly confers upon drainage and levee districts the authority to acquire flowage and storage rights, and other servitudes, upon, over and across any lands in the construction, operation and maintenance of any floodway, reservoir, emergency reservoir, spillway or diversion, and confers the authority to acquire such rights by compromise, settlement, or other agreement with the owner or owners, or by condemnation proceedings. The affect of this legislation is to confer authority upon such districts to make contracts such as the one here involved. It cannot, therefore, be said that the contract between District No. 18 and the federal government is beyond the power of the drainage district to make, as authority has been expressly conferred by the acts just referred to.

The drainage district has appealed from so much of the decree of the court below as holds that the district does not have the right to use its surplus tax collections and revenues for the purchase of rights-of-way for the federal control projects without obtaining authority so to do from the county court. As we think the district has that power, that portion of the decree will be reversed.

The landowner, upon a cross-appeal, insists that "It is *ultra vires* the district to expend its revenues for the federal enlargement or reconstruction of the improvements of District No. 17 of Mississippi county, namely, the Right-Hand Chute floodway levee and ditch No. 4."

It appears, from what we have said, that District No. 18 is not taking over any part of the improvement constructed and under the jurisdiction of District No. 17,

and the decree holding that the district has the power to construct the Right-Hand Chute floodway levee will be affirmed.

BUDD *v.* STATE.

4134 131 S. W. 2d 933

Opinion delivered October 2, 1939.

Sullins & Sullins and *Mayes & Mayes,* for appellant.

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

McHANEY, J. Appellant was charged by information before a justice of the peace with the crime of misdemeanor, in that "on or about the 11th day of December, 1938, unlawfully did drive and operate a certain motor vehicle while in drunken and intoxicated condition, against the peace and dignity of the state of Arkansas." Trial to a jury before the justice of the peace resulted in a verdict of guilty and a fine of $200, on which judgment was entered. On appeal to the circuit court he

was again tried and convicted, and his punishment was fixed at $100 fine and ten days in jail. From this latter judgment comes this appeal.

For a reversal of the judgment against him, it is suggested, but not argued or relied on for a reversal, that the information failed to allege that appellant was on a public street, public place or public highway. If the appellant thought the information insufficient in this particular, he should have raised the question in some way, either by demurrer, motion in arrest of judgment or a motion for a bill of particulars as provided in initiated act No. 3 (Acts 1937, p. 1384). Moreover, the question is not raised in the motion for a new trial. For any or all of these reasons this suggestion of error is not well taken.

The only other assignment of error urged, indeed the only one raised in the motion for a new trial, is that the evidence was insufficient to sustain the judgment. In considering this assignment, our rule is that we must view the evidence in the light most favorable to the state, and if there is any substantial evidence to support the verdict, it will be sustained.

The car in which appellant was riding and which it is charged he was driving was being driven north on highway 71 toward Fayetteville. Aubrey Yates testified that on the 11th day of December, 1938, he was driving south from Fayetteville on the same highway; that close to Westfork or Woolsey, a short time before dark, he met a car which ran into him; that he saw the car two or three hundred yards away before it got to him, and that it was using both sides of the highway, going from one side of the road to the other; that he slowed his car down and pulled over on the right-hand side as far as he could, with both wheels off the pavement, and had almost stopped his car when the other car hit him. He pointed out appellant as the man who was driving the car, and further testified that, after the accident, appellant came toward him, his hat off, his face flushed and was excited. Appellant was arrested in Fayetteville by State police officers. Prior to making the arrest, they went to the scene of the accident, but appellant's car was

gone; that they came back to Fayetteville and found his car near the jail with marks on the fenders where it had hit the bridge; that appellant was in the car trying to start it and was so drunk that he couldn't walk by himself, had to be helped into the jail. His testimony was corroborated by other evidence. Appellant did not testify, but offered evidence to the effect that some one else was driving the car at the time of the accident. This made a disputed question of fact for the jury, and the evidence on behalf of the state was substantial that appellant was driving his car when the accident occurred, and that he was intoxicated at the time.

Under the well-settled rule announced above, the judgment must be affirmed.

JOHNSON *v.* STATE.

4130 131 S. W. 2d 934

Opinion delivered October 2, 1939.

Claude F. Cooper and *T. J. Crowder,* for appellant.

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

GRIFFIN SMITH, C. J. The defendant was convicted of arson and sentenced to ten years of penal servitude.

It was alleged that he feloniously set fire to cotton contained in an automobile trailer.

Two errors assigned are (1) that the *corpus delicti* was not established by evidence independent of a confession, and (2) that the confession was not voluntary, and therefore it was inadmissible.

Since the judgment must be reversed on the first ground, the second point will not be discussed.

The prosecuting witness Branch testified that the cotton in question was brought from one of his fields on the afternoon of October 24; that during the same day the defendant Johnson had been released from jail, where he had been held in connection with night-riding charges against other negroes;[1] that the cotton was absolutely dry; that the trailer was placed in the barn or under a shed about 90 feet long; that exhaust from the tractor connected with the trailer was directed upward through a four-foot pipe; that the fire was discovered about daylight the morning of October 25th; that physical facts indicated the cotton ignited at a point near the end of the trailer and "practically on top of the load"; that a levee is approximately fifty yards from the barn, with a road leading to it; that the destroyed cotton was worth $60, and the trailer was damaged to the extent of $10.

The defendant's wife and father were in jail at Osceola, held in connection with the night-riding charges heretofore referred to. Although the defendant in the instant case was kept in jail for some time, he was never formally accused of night-riding.

After the fire had been extinguished Branch went to Joiner. He had no information with respect to origin of the fire, other than suspicion.

A deputy sheriff, testifying for the state, said that he went to the Branch plantation the day of the fire "and checked up very carefully as to the time." He ascertained that the defendant had spent the previous night with his mother, and that he left for Joiner early

[1] *Johnson* v. *State*, 197 Ark. 1016, 126 S. W. 2d 289.

in the morning. Another witness saw appellant at Pecan Point between daylight and sun-up. At that time appellant was walking the gravel road rapidly, going in a direction away from the house—a direction which would lead past the Branch plantation and the load of cotton.

This was the principal testimony tending to show that the fire was of incendiary origin.

A special investigator, who had spent 18 years in the employ of the Frisco Railroad Company, took the defendant in an automobile and questioned him for several hours. A statement was made denying knowledge of the alleged crime. Later, in the sheriff's office, a confession was signed, and at the trial it was admitted in evidence.

Section 4018 of Pope's Digest is: "A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed."

Was there "other proof" that the offense was committed? We do not think so. It is possible—perhaps probable—that the defendant's confession was true. However, it is more important that the law's symmetry be preserved than it is that a criminal be punished in a particular case.

There is no presumption that an unexplained fire is of incendiary origin. On the contrary, the presumption is that such fire was caused by an accident, or, at least, that it was not of criminal design. In a prosecution for arson, as in other criminal cases, it is incumbent on the state to prove the *corpus delicti,* and it is now recognized as the universal rule in the law of arson that in order to establish the *corpus delicti* it is not only necessary that the state prove the burning of the building [or property] in question, but the evidence must also disclose that it was burned by the wilful act of some person criminally responsible for his acts, and not by natural or accidental causes.[2]

---

[2] 6 Corpus Juris Secundum, § 29, p. 746. See, also, 16 Corpus Juris, § 1514, pp. 735, 736, and 737.

In Alabama, California, Mississippi, Ohio, South Carolina, Tennessee, and some other states, the rule is that a predicate must be laid for the admission of a confession by introducing independent evidence of the *corpus delicti*. Our own cases do not seem to sharply draw this distinction. In *Harshaw* v. *State* [3] it was said that "It is not essential that the *corpus delicti* be established by evidence entirely independent of the confession before the confession can be admitted and given probative force. The confession may be considered with other evidence tending to establish the guilt of the defendant. But, if there is no other evidence of the *corpus delicti* than the confession of the accused, then he shall not be convicted alone on his confession."

In discussing an instruction in *Russell* v. *State* [4] we said: "The latter part of the instruction correctly tells the jury that the defendant's statement alone will not be sufficient to justify the finding that the appellant committed the crime charged against him, but that such statements could be considered by the jury along with other circumstances, if there are such circumstances, tending to show that the crime was, in fact, committed."

The "other evidence," and the "circumstances" mentioned in these cases, and the requirements of the statute, must be of that substantial character which, independent of a confession, and considered without reference to what the accused is alleged to have said or written, would suffice to overcome the legal presumption that the casualty was an accident, or that it resulted from natural events.

In the instant case the independent evidence was not of the character to meet the law's requirement. The judgment is therefore reversed, and the cause is remanded for a new trial.

---

[3] 94 Ark. 343, 127 S. W. 745.

[4] 112 Ark. 282, 166 S. W. 540.

4127 131 S. W. 2d 948

Opinion delivered October 2, 1939.

John D. Thweatt, J. J. Screeton and *Cooper Thweatt,* for appellant.

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

SMITH, J. Appellant was found guilty of involuntary manslaughter, and given a sentence of one year in the penitentiary, upon his trial, under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one W. A. Allen.

The partisanship of the witnesses who testified in the case is very apparent, and the testimony cannot be reconciled. It abundantly sustains the verdict; indeed, appellant insists that under the testimony he should either have been found guilty of murder or should have been acquitted, and he assigns as error the action of the court in submitting to the jury the question whether he was guilty of involuntary manslaughter, the crime for which he was convicted.

We think no error was committed in this respect, notwithstanding the fact that the testimony offered on appellant's behalf was to the effect that he had killed Allen while attempting to arrest him for a misdemeanor committed in his presence; that Allen resisted arrest and assaulted appellant with the blackjack, or policeman's club, which he took from appellant, who fired the fatal shot in his necessary self-defense.

The court gave at appellant's request an instruction, in which the jury were told that if appellant was making a lawful arrest, he might use such force as was necessary to overcome Allen's resistance, but modified it by adding the phrase, "acting without fault or carelessness on his part." An exception was saved to this modification.

The instruction was properly modified, and, as modified, conforms to the law as declared in the case of *Deatherage* v. *State,* 194 Ark. 513, 108 S. W. 2d 904, in which case, as in this, the accused was convicted of the crime of involuntary manslaughter, where the defense interposed was that the accused killed the deceased in attempting to arrest him. It was there said: "'Although,' as it has been said, 'officers of the law are clothed with sanctity' and 'represent its majesty,' their right in resisting an assault can rise no higher than that

of one in the exercise of the right of self-defense, a right which existed before the promulgation of any law, one inherent to man in the nature of things. Therefore, the same rule applies to officers in resisting an assault and in exercising a lawful act under the circumstances; that is to say, before taking human life, they must at least act with due care and circumspection."

Here, the testimony raises the issue whether appellant, even though he was attempting to effect a lawful arrest, acted with due caution and circumspection, or, as the modified instruction said, "without fault or carelessness on his part."

The testimony on the part of the state was to the effect that appellant was not attempting to arrest Allen; but the testimony offered by appellant is abundantly sufficient to present that issue. This testimony was to the effect that Allen was staggering drunk, as one witness testified, and wild and crazy drunk, according to the testimony of another witness. In this condition, Allen went to the White River Inn, a resort about a mile from DeValls Bluff, which was operated as a restaurant and a dance hall. Beer was sold there. Allen attempted to dance with some girls with whom he was not acquainted, and he cursed them vilely when they refused to dance with him. The proprietor of the place testified that Allen grabbed one of the ladies and attempted to dance with her; that Allen was too drunk to dance, and he attempted to take him off the dance floor, "when Allen came up with a knife in his hand." Appellant, who is the constable of the township, came to the proprietor's assistance, and Allen was placed in a truck and appellant started to DeValls Bluff to place Allen in jail. Allen protested that he would not be arrested. Witnesses Miles and Nicholson testified that appellant told Allen he was under arrest. This testimony was denied by witnesses for the state. Appellant testified that he told Allen that, if he would behave himself, he would be taken to his room at the hotel, and not to jail. Allen had obtained possession of appellant's blackjack, and when

the truck reached the hotel Allen announced that he was in his castle and would not be arrested. Allen attempted to go into the hotel, when appellant grabbed him. According to the testimony on appellant's behalf, Allen began beating appellant with the blackjack, when appellant fired the fatal shot.

Upon this conflicting testimony as to whether appellant was attempting to arrest Allen, the court gave an instruction numbered 27 reading as follows: "An arrest may be made by placing the person of the defendant in restraint. No unnecessary force or violence shall be used in making the arrest. The person making the arrest shall inform the person about to be arrested of the intent to arrest him, the offense charged against him for which he is to be arrested."

To this instruction the following specific objections were made: "That said instruction advised the jury that before the efforts of the defendant to arrest the deceased would have been lawful, it was necessary for the defendant to have informed the deceased of the intent to arrest him, when it would not have been necessary, under the law, to so inform the deceased if the deceased was in the act of committing a crime in the defendant's presence, or if the defendant was met with a demonstration of force at the hands of the deceased at the outset, or if the fact that the defendant was a peace officer was known to the deceased."

We think, under the issues thus joined, it was error to have given instruction No. 27. It is true the second paragraph thereof is practically copied from § 3725, Pope's Digest, which reads as follows: "The person making the arrest shall inform the person about to be arrested of the intention to arrest him, and the offense charged against him for which he is arrested, and, if acting under a warrant of arrest, shall give information thereof, and, if required, show the warrant." But this statute has no application when the offense is committed in the presence of the officer, and the offender knows that the officer has seen him commit the offense. The

statute is designed for the protection of the citizen, who may not be deprived of his liberty and taken into custody without being advised of the reason for that action. If an officer attempts to make an arrest, he must advise the person of his intention to arrest him, and the offense for which he is arrested, and, if acting under a warrant, he shall give information thereof, and, if required, shall show the warrant. But, if an officer saw a person committing a violation of the law, he is authorized by law to make the arrest without a warrant, even though the offense was only a misdemeanor. Section 3720, Pope's Digest.

The law of this subject is correctly stated in the chapter on Arrest in 6 C. J. S., p. 602, as follows: "It is, ordinarily, incumbent on an officer, seeking to make an arrest without a warrant, to inform the accused of his authority or official character, of his intention to arrest him, and of the offense for which he is being arrested, otherwise the person whose arrest is sought is under no duty to submit; although circumstances surrounding the arrest may, in a proper case, dispense with one or more of these requirements. In accordance with this exception to the rule, an officer need not inform a person who is committing an offense in his presence, or who is pursued immediately after the offense, of the cause of his arrest; and, where an officer is met with a demonstration of force at the outset, he need not go through the formality of informing the person of his intention to arrest him or of the cause of his arrest."

We conclude, therefore, that the giving of this instruction No. 27, in view of the specific objections made to it, was erroneous; and we are of the opinion also that this was error which cannot be said to be harmless. The turning point in this case was whether appellant was lawfully attempting to arrest Allen. If so, he was not the aggressor, and he had the right to use such force as was necessary to overcome Allen's resistance, using due caution and circumspection in that respect. But, if he did not have the right to arrest Allen, although an of-

fense had been committed in his presence, unless and until he had told Allen of his intent to arrest him, and the name of the offense for which the arrest was being made, as instruction No. 27 declared the law to be, and which appellant did not do, then appellant was the aggressor, and Allen was under no duty to submit to the arrest.

For the error indicated, the judgment is reversed, and the cause will be remanded for a new trial.

SANDERS *v.* STATE.

4132 131 S. W. 2d 936

Opinion delivered October 2, 1939.

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

MEHAFFY, J. The appellant was found guilty in the Izard circuit court of burglary and petit larceny, and his punishment was fixed at two years in the state penitentiary for burglary, and a fine of $10 for petit larceny. He filed the following motion for new trial:

"Comes now Woodrow Sanders, the defendant herein, and moves the court to set aside the verdict of the jury and the judgment of the court rendered in this cause, and that he be granted a new trial herein, because:

"1. The verdict is contrary to the law.

"2. The judgment is contrary to the law.

"3. The verdict is contrary to the evidence.

"4. The judgment is contrary to the evidence.

"5. The verdict and judgment is contrary to both the law and evidence.

"Wherefore, Woodrow Sanders, the defendant herein, prays that this court set aside the verdict of the jury and the judgment of the court rendered herein, and that he be granted a new trial."

Motion for new trial was overruled, and the case is here on appeal.

The information filed by the prosecuting attorney charged appellant in the first count with burglary by feloniously and burglariously breaking and entering a building belonging to one Ray Perryman, in the town of Calico Rock. The second count charged appellant with the crime of grand larceny.

The case was tried by jury, and the jury returned a verdict finding the appellant guilty of burglary and petit larceny. No objections were made to the court's instructions, and no objection was made to the introduction of evidence, and as will appear from appellant's motion for new trial, the only question is the sufficiency of the evidence to sustain the verdict.

Ray Perryman, the owner of the building, testified that he went to his place of business and found some motor oil, gasoline, and a five-gallon measuring can missing. He made an investigation and examined the tracks

very closely. The persons who entered the building had prized the door open. The door had been locked. He noticed one track in particular, and he next saw that track when he looked at one made by appellant. It was the same as the one inside the building. He then reported the matter to the officers. The five-gallon measuring can was worth from $5 to $8. There were 11 or 12 quarts of lubricant taken, which was worth 25 cents a quart; four quarts of another kind that sells for 35 cents a quart.

Homer Harris, a deputy sheriff, testified that he investigated the burglary and larceny and first arrested Kenneth Sanders, brother of appellant. Kenneth Sanders said that he got the oil from appellant. Appellant was then arrested and search was made of his house, and a quart can of 50 weight oil was found in an old stove. Appellant said he bought it in Calico Rock from the Perryman Chevrolet Company. Later he confessed and told witness and others that he and Earl Hicks wanted to go to Brockwell to church, and they broke into the station and stole the oil and gas. The confession was made voluntarily.

J. C. Badgett testified that he helped deputy sheriff Homer Harris investigate the case, and when they first questioned Kenneth Sanders, and he told them that he got the oil from his brother, then they arrested appellant. Appellant told them that he had gotten it in a garage at Calico Rock, and they checked his alibi, and he then confessed and said that he and Earl Hicks had broken into the garage and stolen the gas and oil.

Earl Hicks testified that he and appellant broke into the house and stole the gas and oil. They threw the five-gallon can out on top of the hill. They got eight gallons of gas and eleven quarts of oil.

The appellant did not testify.

The court fully instructed the jury, and as we have already said, no objections were made to the instructions.

The jury found the appellant guilty of burglary and of petit larceny. Of course, in order to convict for bur-

glary, the evidence would have to show that he entered with the intent to commit a felony; in this case, grand larceny.

Ray Perryman testified that the five-gallon measuring can was worth from $5 to $8. The evidence also shows that this can, which was stolen, was thrown out on top of the hill, and that in addition to the can appellant got eight gallons of gas and eleven quarts of oil. The evidence shows that there were 12 quarts of oil, worth 25 cents a quart, and four quarts of another kind worth 35 cents a quart. In addition to the oil, which was worth probably four or five dollars, eight gallons of gasoline were taken. Altogether, this would amount to something more than $10; the property actually stolen.

This court said in the case of *Monk* v. *State,* 105 Ark. 12, 150 S. W. 133: "The evidence is sufficient, we think, to sustain the finding of the jury. The proof adduced by the state tended to establish the value of the watch and fob in excess of the sum of $10, but the jury gave defendant the benefit of all doubts on that point and convicted him of petit larceny. The circumstances, however, warranted the inference that the house was entered by Davis with intent to commit grand larceny, and therefore warranted the conviction of burglary, even though it turned out that the property he took was of less than $10 in value."

We think the evidence was sufficient to justify the jury in finding that appellant entered the house with the intention of committing grand larceny.

The court gave the following instruction:

"In this case, if you should believe beyond a reasonable doubt, that the defendant entered the building and inclosure of the prosecuting witness, Ray Perryman, with the intent of stealing more than $10 worth of personal property, it would be your duty to convict him of the crime of burglary and fix his punishment at confinement in the Arkansas state penitentiary for sometime not less than two nor more than—I believe at the time of this alleged offense, the maximum was seven

years. It is immaterial, gentlemen, in this case whether or not the larceny was committed, but it is material that the defendant entered with the intention of committing grand larceny. If he entered the building with the intention of committing grand larceny, he would be guilty of burglary, even though he did not commit it."

The jury, therefore, must have found that the appellant entered with the intention to commit grand larceny.

This court said in another case: "When no property of any value is discovered by the accused after he has forcibly broken and entered the building with felonious intent, the better rule is that he is guilty of burglary, since the guilty purpose is the essence of the offense." 4 R. C. L. 436; *Davis and Thomas* v. *State,* 117 Ark. 296, 174 S. W. 567.

This court has decided in a number of cases that the offense of burglary is complete, even though the intention to commit a felony is not consummated. *Duren* v. *State,* 156 Ark. 252, 245 S. W. 823.

If one enters a building with the intent to steal generally whatever property there is, he would be guilty of burglary, although it turned out that the value of the property was less than $10. *Harvick* v. *State,* 49 Ark. 514, 6 S. W. 19.

The evidence was sufficient to submit to the jury the question of appellant's guilt or innocence, both as to burglary and larceny, and the jury's verdict on the facts is conclusive here. The rule is well established in this court that evidence admitted at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, it will be sustained. *Daniels* v. *State,* 182 Ark. 564, 32 S. W. 2d 300; *Walls and Mitchell* v. *State,* 194 Ark. 578, 109 S. W. 2d 143; *Humphreys* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492; *West* v. *State,* 196 Ark. 763, 120 S. W. 2d 26.

The appellant in this case did not offer any proof or contend that the value of the property was $10 or less.

No contention was made, and no contention is made here, that appellant entered the building with the intention of stealing property of the value of $10 or less. The jury would have been justified in finding that the actual property stolen by appellant exceeded $10 in value.

The judgment of the circuit court is affirmed.

EASON *v.* STATE.

4138 132 S. W. 2d 5

Opinion delivered October 2, 1939.

Botts & Botts, for appellant.

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

BAKER, J. Upon information charging grand larceny by stealing some pigs, the property of C. P. Chaney, the defendant, Harvey Eason, pleaded not guilty, was tried, convicted and sentenced to one year in the penitentiary. He filed a motion for a new trial, and that being overruled, he has appealed. Upon this appeal appellant relies upon five different matters for a reversal. In briefing the case, however, appellant has seen fit to reduce the first, second and third propositions to a single one and has argued thereupon that there is a variance as between the information charging the offense and the proof. The fourth matter is to the effect that the property alleged to have been stolen was never identified, and the fifth is the allegation that the state proved that the pigs were stolen on the night of February 12, at which time the defendant alleges and offers proof to establish the fact that he was at church.

C. P. Chaney, alleged in the information to have been the owner of the pigs the appellant is charged to have stolen, was the owner of a farm upon which Charlie Simmons was living. Chaney bought pigs, placed them upon this farm in charge of Simmons who cared for and looked after them. There was an agreement between Chaney and Simmons to the effect that when these pigs were sold the proceeds of the sale would be divided equally between the two of them. There is some question arising out of the evidence as to the exact interest that Simmons had in this property. It is argued by appellant that when the pigs were placed in the possession of Simmons that he took an undivided one-half interest in them, and that if they were thereafter stolen the allegation of ownership should have been that the property belonged to Chaney and Simmons.

The real question of variance arises out of the fact that these two traders, Chaney and Simmons, had no

very certain or definite agreement as to title or ownership of the property. Such definite agreement was not necessary. They both understood and performed their respective duties in regard to their relations to each other. Whether Chaney retained title to the property until it was sold made little difference. This question of title, or rights of the parties did not arise and was not specifically submitted to the jury in the course of the trial. When both were recalled in the final phases of the trial both agreed that Chaney was the owner of the property; that although Simmons had a right to sell that upon sale of the property the proceeds arising therefrom were to be divided.

The jury might well have found under the evidence, and we think it was justified in so finding, that because Chaney furnished the money for the buying of these pigs they remained his, and that Simmons had a working interest whereby he was paid for his services upon the sale of the property. The fact that he had a right to sell them did not change the title and ownership. In fact, as above stated, this was the effect of the final evidence of both these witnesses who were solely interested in the question of title. If the jury did so find, then there was no variance in the proof and charge.

But even if it should be granted that there was some question of ownership, and that Simmons may have taken an interest in the property when he took possession thereof, it does not necessarily follow that there was error. Section 3018, Crawford & Moses' Digest, which now appears as § 3840, Pope's Digest, was given effect in the recent case of *Tucker and Peacock* v. *State,* 194 Ark. 528, 108 S. W. 2d 890. That section provides: "Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, and erroneous allegation as to the person injured, or attempted to be injured, is not material."

In this case the hogs were somewhat specifically described by giving the number alleged to have been

stolen and the age thereof, with an allegation that they were the property of C. P. Chaney, who unquestionably had an interest therein. There can be little question that the information was sufficiently definite to describe the particular act of larceny charged. *Porter* v. *State,* 123 Ark. 519, 185 S. W. 1090.

The fourth contention appellant argues is that on the particular date alleged, February 12, he was attending church services and, therefore, could not have taken part in the theft of the pigs. It is true that the allegation of the information is to the effect that the theft occurred on the 12th day of February. The proof is not so definite as to time, and that date is merely stated as an approximate time of the occurrence of the larceny. It is unnecessary to discuss the material or essential importance of this date as alleged. This might have been a proper argument before a jury upon the trial of the case, but the jury has already determined the fact of guilt within the statutory period. Such determination is conclusive.

The fifth or last controversy presented is the fact that one of the witnesses, Gard Edwards, was interested in the result of the controversy, and that he had also made a mistake at sometime in identifying some other hogs which he had taken into his own possession. The jury heard this evidence and, no doubt, gave due consideration to all questions of interest or bias of witnesses.

We cannot say, as a matter of law, that the jury erred on either one of these propositions.

The judgment is affirmed.

FOREMAN AND DEAL *v.* STATE.

4136 132 S. W. 2d 13

Opinion delivered October 9, 1939.

C. T. Sims, for appellant.

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

GRIFFIN SMITH, C. J. Charles Foreman and Homer Deal have appealed from convictions based upon evidence that they stole a hog from Albert Taylor. Twenty-nine errors are assigned. Only the ninth will be discussed—that the court erred in allowing the prosecuting attorney, over objections of the defendants, to ask Sheriff W. C. Cruce if actions and conduct of the defendants did not lead the witness to believe they were guilty.

On cross-examination the officer was questioned by C. T. Sims, counsel for the defendants, relative to the conduct of the defendant Deal after Deal knew that he was suspected. The prosecuting witness (Albert Taylor) had testified that he found his hog in the defendant Foreman's barn. Foreman and Deal are brothers-in-law. Thereafter, Sheriff Cruce was told by Taylor that the hog was in Deal's barn.[1] Cruce went to the barn and was told by Foreman that a black boar then in the barn belonged to Deal, and that Deal got it from Claude Wolf. Deal testified he got the hog from Curtis Funderburg, in

[1] It was for the jury to determine, in the light of all the evidence, whether Taylor was mistaken in thinking the barn in which he saw the hog was that of Foreman.

Bradley county. Funderburg supported Deal's statement. Shortly after Taylor inspected the hog in the Foreman barn, it disappeared, and was not thereafter seen.

During the cross-examination of Sheriff Cruce it was brought out that the officer had asked Deal to come to his office for questioning. The interview was delayed on account of the illness and subsequent death of Deal's daughter. Cruce testified that after the child's condition became acute he did not expect Deal to come at once. The officer further testified that after the first conversation he had with Deal, the latter did not make any effort to avoid him.

Up to this point cross-examination of Cruce was directed in part to matters relating to the conduct of Deal. Counsel for appellants then asked the officer if he found Funderburg and Deal together in Warren, to which there was an affirmative reply. Cruce stated that he had no way of knowing what the two were talking about. Following are some of the questions and answers as shown by the trial transcript:

"Q. There wasn't anything of your own knowledge that would cause you to draw the conclusion that the discussion was on hogs, was there? A. Nothing—except under the circumstances.

"Q. A mere conjecture in your mind? A. A kind of conclusion arrived at from past experiences and facts.

"Q. What we call, under the rules of evidence, an improper conclusion of a witness? A. It might be."

On redirect examination, conducted by the prosecuting attorney, there is the following:

"Q. Mr. Sims [counsel for the defendants] just said, '. . . by your past experience.' What past experience have you had in investigating this kind of a case? A. I have investigated a number of them.

"Q. Did the defendants' [actions] and conduct lead you to believe that they were guilty? (Objections overruled and exceptions saved.) A. Yes."

It is urged by the state that the sheriff testified as an expert, and therefore the rule against opinion evidence does not apply. On behalf of the Attorney General it is said: "Certainly if a man can become an expert as to the operation of an automobile by working with it so as to be allowed to testify as an expert witness on the speed of it, a sheriff of a county, who makes many criminal investigations, would be an expert in matters of criminology, and should be allowed to testify as an expert."

While it is true that the modern conception of the admissibility of evidence is that it is more important to get the truth than to quibble over impractical distinctions between facts and conclusons,[2] and there are limitations to the rule which excludes opinion testimony, none of the exceptions goes to the extent of permitting an arresting officer to testify that the conduct of a defendant caused him to believe that the defendant was guilty.

Expert witnesses who have skill, learning, or experience in a particular science, art, or trade (and criminology is not to be excluded from the sciences), may give an opinion in a proper case upon a given state of facts relating thereto. It has also been found necessary to admit a class of evidence from nonexpert witnesses, which is usually spoken of as "opinion evidence," where the facts as they appear to the witness cannot clearly and adequately be reproduced, described, and detailed to the jury.[3]

The record in the instant case is sufficient to show that Sheriff Cruce is a most efficient and capable officer, with considerable experience in dealing with criminal matters; and, while his answer to the objectionable question is unquestionably his honest conclusion, it is, nevertheless, a conclusion, and it is predicated upon facts and circumstances which are not shown to stem from scientific investigation, the nature of which could not be adequately explained to the jury. For example, had the of-

[2] *First National Bank* v. *Robinson,* 93 Kan. 464, 144 P. 1019, Ann. Cas. 1916D, 286.

[3] American Jurisprudence, v. 20, p. 640, § 769.

ficer been called upon, in the light of his experience with firearms and his knowledge of chemistry, to testify whether, in his opinion, discolorations were caused by powder-burns or by blood-stains, there could have been no tenable objection, provided the proper foundation had been laid; and he might testify that in his opinion a certain wound was caused by a bullet, or a knife, or other instrumentality. But he would not be permitted to testify to the facts and state his conclusions, and then give an opinion as to the guilt or innocence of a defendant. That determination is for the jury.

At page 643 of 20 American Jurisprudence, § 771, there is an excellent text entitled "Conclusions Distinguished from Facts—Composite Facts." There it is said: "The general rule excluding opinions of witnesses is simple in its statement, but not so simple in application, for it is not always easy to distinguish in the testimony of a witness facts within his knowledge or observations from his opinion on facts. As a general rule a witness may testify to a composite fact, although in a sense his testimony may include his conclusion from other facts. In the multitudinous affairs of everyday life, it is extremely difficult to distinguish between 'opinion' on the one hand, and 'fact' or 'knowledge' on the other. Moreover, objections that proposed testimony states a conclusion are sometimes pushed to captious extremes.

"The true solution seems to be that such questions are left for the practical discretion of the trial court. Often the simplest and most satisfactory method is to permit a witness to state a fact as he knows it and leave the ground of his belief to be developed by cross-examination. In such cases it is within the administrative discretion of the court to require the witness's observations and particulars of examination to be more fully set forth or to allow his testimony to stand, leaving the parties to examine and cross-examine him with respect to the same."[4]

[4] The section of American Jurisprudence quoted from continues with the following: "What a person would do under a given state of facts which call upon him or her to perform a duty to some other

It is next insisted on behalf of the Attorney General that ". . . if the question was erroneous, which we do not concede, it was invited error, as the court can see by checking the concluding part of the cross-examination of the attorney for appellants on page 50 of the transcript."

It will be seen that in the first conversation referred to the sheriff was asked if he knew what Deal and Funderburg were talking about. In the second instance, the sheriff was required to say whether he thought Deal and Foreman were guilty.

For the error in admitting the opinion testimony of Sheriff Cruce, the judgments are reversed. The causes are remanded with directions to retry.

---

person has been held to be a fact to which such person can testify, and not merely a matter of opinion. A witness may be permitted to state whether he made a certain sale or agreement, whether he held a certain office, whether one is charged with certain duties, whether it was necessary for him to go in between an engine and a car in a particular case, or whether a certain man and woman lived together as man and wife, and that he held her out as his wife, although it has been held that whether the witness married a certain person involved a conclusion where only a common-law marriage was claimed. Similarly, it is held that a witness may testify directly as to whether he is wholly dependent on a certain person for support, but not as to whether a man furnished his family with a suitable place in which to live; whether a vehicle was being used in connection with his business; whether one did or did not sell a person goods at a certain time; whether he would have forwarded a message if it had been delivered to him; whether a homicide was committed without any cause; whether an automobile, when struck by one car, was headed right into another car; whether a certain object near the highway was likely to frighten horses; how a red flag is regarded by law-abiding citizens in the community; whether a photograph of a locomotive shows a pin lifter rod to be inclosed in a pipe; whether goods could not have been delivered without the witness seeing them; or what extent, by percentage, an elevator was used by passengers. It is a misuse of language, however, to call such testimony mere opinion testimony. It is more probably a conclusion drawn from alleged facts, which is admissible under what is sometimes called the 'collective facts rule.' If a witness was in a position to observe, he may be able to state that another person who was present saw stated conditions or occurrences which were visible and open to ordinary observation. His statement is one of a collective fact which the witness may well know with certainty and which is in accordance with common, every day experience."

HUDSON *v.* HUDSON.

4-5565 132 S. W. 2d 6

Opinion delivered October 9, 1939.

[redacted]

M. A. Hathcoat, for appellant.

BAKER, J. This appeal arises out of an order made by the chancery court of Newton county affecting certain lands therein, in which the appellant and appellee are alleged to own an undivided one-third interest each, and in settlement of their controversy a decree was entered on July 13, 1937, ordering a sale of the appellant's undivided one-third interest, in the event appellee failed to pay $350 for the appellant's interest in the land. A payment was to be made on or before the first day of September, 1937, of $100, and the balance in payments of $10 on the first day of each month thereafter. A lien was declared on the lands for the payment of this debt. In the event appellee should fail to pay it was provided that the lands might be sold in satisfaction of the claims as under execution. No appeal was taken from this decree.

Thereafter, on the 25th day of May, 1938, without any pleadings of any kind, the court made a further order, in vacation, without notice to the appellant, it

being stated therein that the appellee, defendant in that cause, was unable to perform the decrees of the court by reason of adversity, sickness and other casualties. The court ordered the sale of the land mentioned to be stayed until further orders of the court and until such time as the defendant might be able to secure funds with which to comply with the former orders of the court. The plaintiff, the appellant here, then filed a petition in said court praying that the order made, on the 25th day of May, directing the clerk to withhold the sale of the lands, such order being without notice to appellant, be canceled and set aside. The plaintiff further pleaded the fact that his necessities required relief, and that the defendant was able to borrow or secure funds with which to pay for the property, as well as settle other indebtedness against the property. This petition was duly verified. Attached to it was certificate of physician to the effect that the plaintiff was suffering from high blood pressure and was unable to perform manual labor. The chancellor indorsed upon this petition the following: "Taken under advisement for decree in vacation, March 29th and set for trial on said date in chambers at Harrison, 3-29-39." On that date, 29th day of March, an order was made, upon a submission of the case, upon plaintiff's petition, upon the former decree, and the order made in vacation on May 25th. There appears to have been no other proof. The court made this finding: "and the court finds that there is now due on said decree, entered at page 202 of chancery court record 'G,' ($130), and that said judgment should be reduced by the amount of $30, leaving a balance for the defendant to pay of only $100." If we may judge from the recitals in this decree, and from the further fact of the certificate of the clerk, to the effect that he has filed the entire record in this matter, and from the further allegation set forth in appellant's brief, which is undenied, we are at a loss to determine how the learned chancellor reduced the original judgment from $350 to $100, in the absence of payments or any pleading or contention showing that there was any fraud or mistake.

We are not unaware of the fact that the original decree set forth the fact that the appellee here had the privilege of buying this property for the sum of $350. The presumption from the remainder of the decree is that she accepted that privilege or offer, and the provision is made therein for a lien on the land, to be held as security or guaranty for the payment of the said sum of money. Our attention is called to the fact that after this decree was rendered there was a lapse of the term of the court at which it was made and entered. It seems that it necessarily follows that this decree might not have been changed or modified, or set aside except under the provisions of law, such as arise under unavoidable casualty. Section 8246, Pope's Digest. There is not even a contention that there has been any payment. Indeed, the record is without any kind of pleading justifying any modification of the original decree. Nor is there any evidence to supply a reason. Moreover, there is the affirmative showing that the record as presented is complete.

The order of May 25, 1938, was irregular and erroneous and should have been vacated in conformity with the prayer of the petition heard on March 29, 1939.

If payments have been made on original judgment and decree that fact should be ascertained and property be now sold under it for any balance due or owing.

This suit involves real estate in Newton county, and for that reason a reversal is ordered so that proper record may appear there. Further procedure will be in accordance with this opinion.

McCarroll, Commr. of Revenues, *v.* Clyde Collins Liquors, Inc.

4-5427 132 S. W. 2d 19

Opinion delivered October 9, 1939.

Frank Pace, Jr., and *Lester M. Ponder*, for appellant.

Ben D. Brickhouse and *L. L. Brickhouse*, for appellee.

MEHAFFY, J. The appellee filed in the Pulaski chancery court its complaint against Z. M. McCarroll, Commissioner of Revenues for the state of Arkansas. It alleged that it was legally engaged in manufacturing, bottling and selling spirituous and vinous liquors in the city of West Memphis, Arkansas, and as such is engaged in the sale of such products within the state of Arkansas, and exports for sale its products to other states in the United States of America; that it has at all times paid all taxes, both state and federal, enjoined upon it by law; that it has spent large sums of money in advertising and building up the trade name of its products in foreign states, and in its dealings in such matters, has created good will and business reputation which is very valuable in its interstate commerce trade; that its interstate business is confined exclusively to the shipment of spirituous and vinous liquors to dealers in other states where orders are procured, and all such orders for the purchase of such liquors are accepted or rejected by appellee at its home office in the city of West Memphis, Arkansas, and all such orders which are accepted by it are filled out of its stock so manufactured and bottled in the city of West Memphis, placed in cars or truck and forwarded in interstate commerce to the destination in such foreign states; that the General Assembly of the state of Arkansas at an Extraordinary Session of 1938, passed act No. 18; said act provides among other things that any manufacturer of spirituous or vinous liquors in this state intending to ship, sell or deliver such liquors to wholesale dealers of another state, may only do so by the payment of an inspection fee in the sum of 60 cents per case on spirituous liquors and 30 cents per case on vinous liquors; that the fee shall be evidenced by stamps purchased from the Department of State Revenues by such manufacturer, whose duty it is to place said stamps on each case in the amounts mentioned. It is alleged also that all revenues derived from the sale shall be deposited to the credit of the unappropriated fund for the purpose of providing funds for the tuberculosis sanatorium, and after deducting the costs of collection and costs of

inspection, shall be distributed 10 per cent. to the sanatorium building fund, 60 per cent. to the state welfare fund, and 30 per cent. to the fund created by act 236 of the Acts of 1937; that the commissioner of revenues is authorized to make and publish rules and regulations for the enforcement of the provisions of said act and a penalty is fixed for violation of the act and for any violation of rules and regulations so promulgated by the commissioner; that said act, insofar as it provides for the payment by the manufacturer of the alleged inspection fee, or the purchase of revenue stamps, is unconstitutional and void and in violation of appellee's rights guaranteed to it under the Commerce Laws, § 8, art. 1 of the Constitution of the United States; that the sole purpose and effect of the law is to levy a tax upon the sale and distribution of products manufactured by appellee and held for shipment in interstate commerce for the purpose of raising revenue for the use and benefit of the state of Arkansas and its charitable institutions; it alleges that insofar as the law applies to the sale and transportation of said products in interstate commerce and the act is intended as a revenue measure, that the manner in which it conducts its business constitutes interstate commerce, and appellee is not lawfully subject to the regulations or penalties prescribed by said law; that appellant's rulings and orders so made and promulgated under the provisions of said law constitute an unlawful burden on appellee's business in such interstate commerce; that the fee and amount required for revenue stamps is greatly in excess of the amount necessary to pay the necessary expense for the inspection; that the appellant is unlawfully and wrongfully seeking to deprive appellee of its lawful rights, and unlawfully and wrongfully seeking to prohibit and destroy the interstate commerce carried on by appellee; that appellant has caused to be printed stamps to be used by manufacturers and has, or is about to, promulgate rules and regulations governing shipments in interstate commerce, and will, unless enjoined, undertake to force appellee to purchase said stamps, and in the event of appellee's failure, appellant will un-

lawfully and wrongfully cause penalties to be placed upon it; that the imposition of the tax and the rules and regulations about to be promulgated deprive the appellee of its property without due process of law, and contrary to the Constitution of the United States, for the reason that said act is unconstitutional. It is further alleged that if the appellant is not enjoined, by reason of the loss of trade and destruction of its credit and good will, appellee will suffer irreparable loss and damage for which it has no adequate remedy at law. The prayer is for an injunction.

The complaint was verified, and a copy of act 18, above referred to, is filed with the complaint.

A temporary restraining order was issued and an acceptance and waiver of service by the appellant.

It was agreed by counsel that in lieu of an injunction bond, the appellee, on the first day of each month, would deposit with the clerk of the court 60 cents per case for spirituous liquors and 30 cents per case on vinous liquors. It was further agreed that upon final hearing, if the temporary order was made permanent, the fund deposited should be immediately refunded; but, if on the contrary it shall be finally determined that act No. 18, insofar as it pertains to appellee's business conducted in interstate commerce, shall be held to be constitutional and applicable to the appellee, then such deposit shall be paid over to the commissioner.

The appellant then filed answer specifically denying each and every allegation of the complaint. Thereafter an amendment to the complaint was filed alleging that act No. 18 is in violation of art. 6, § 19, of the Constitution of Arkansas.

The court entered a decree making the temporary restraining order permanent, and the case is here on appeal.

It is first contended by the appellee that the case should be dismissed for noncompliance with rule 9. However, a motion was filed by appellee, and on June 19, 1939, the motion was denied, and so far as the record

shows, no further steps were taken by appellee with reference to said motion, and the record does not show that the appellant appeared before the court and made any statement, as alleged by appellee. The motion to dismiss will, therefore, not be reconsidered.

It is next contended that the act is not within the purview of the Governor's proclamation. Section 19 of art. 6 of the Constitution provides for the convening of the Legislature in Extraordinary Session by the Governor, and provides that the Governor shall specify in his proclamation the purpose for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of. The purpose stated in the proclamation in this case, among other things, is to provide additional facilities for tubercular patients in this state, and to provide funds therefor.

Act No. 18 above mentioned is an act to create a building and maintenance fund for the Arkansas Tuberculosis Sanatorium, and § 5 of said act provides that all spirituous or vinous liquors intended or stored or held for shipment, distribution, sale or delivery outside of the state of Arkansas shall be subject to inspection by the commissioner of revenues, and said inspection shall be evidenced by a stamp or stamps to be provided by the commissioner of revenues, said stamp to be placed on each case of spirituous liquors at the rate of 60 cents per case, not exceeding three gallons, and on each case of vinous liquors, except native Arkansas vinous liquors, at the rate of 30 cents per case, not exceeding three gallons. It is further provided that this inspection fee shall be in lieu of all taxes imposed by law, and shall be in lieu of the taxes levied in sub-sections A and B of this act.

Appellee calls attention to the case of *Pope* v. *Oliver*, 196 Ark. 394, 117 S. W. 2d 1072, in which it is stated that the general rule was affirmed, and states the general rule as follows:

"The General Assembly may consider not only the legislation specifically mentioned and set forth in the

proclamation, but such other legislation as may necessarily or incidentally arise out of that call, such as any necessary detail in accomplishing the purpose designated by the call."

It is also stated in the above cited case that the intention of this constitutional provision is to prevent the enactment of laws having no connection or relation to the subjects embraced in the call. "The constitutional provision should be given a practical and liberal construction to carry out its evident purpose, and this is in the application of the maxim of construction that all doubts shall be resolved in favor of an act of the Legislature." *Pope* v. *Oliver, supra.*

The above was a statement in a dissenting opinion by the late Chief Justice HART, but quoted with approval in the case above cited.

The proclamation of the Governor is to be given a practical, common sense construction, and it would not be practicable for the Governor, in his proclamation, to go into details. As this court has repeatedly said, the Legislature may act freely within the call and legislate upon any and all of the subjects specifed, or upon any part of the subjects, and every presumption will be made in favor of the regularity of its action, and that the provisions of the Constitution in question merely require the Governor to confine legislation to particular subjects, and not to restrict the details springing out of the subjects enumerated in the call. *Jones* v. *State,* 154 Ark. 288, 242 S. W. 377; *Sims* v. *Weldon,* 165 Ark. 13, 263 S. W. 42.

Applying these rules of construction, we are of opinion that the act was within the Governor's proclamation. *Crawford County Levee District* v. *Cazort,* 190 Ark. 257, 78 S. W. 2d 378. Other cases might be cited in support of the rules above announced. This court has uniformly held that the call should be given a practical, common sense construction, and that it is not necessary for the proclamation to state the details of the act, but merely the general subject.

It is next contended by the appellee that the act violates § 21, of art. 5, of the state Constitution. The Constitution states that no bill shall be so altered or amended in its passage through either house, as to change its purpose.

This question does not seem to have been raised in the court below, and was not passed on by that court. However, the appellee does not state in what manner the bill was altered or amended in its passage, and there is nothing in the record to indicate that any amendment was adopted that altered or amended the bill in its passage through either house. Our conclusion is that it does not violate § 21, of art. 5, of the Constitution.

It is next contended by appellee that the act violates § 8, of art. 1, of the Constitution of the United States, in that it is a burden on interstate commerce.

The states cannot tax interstate commerce by levying a tax upon the business which constitutes such commerce, upon the privilege of engaging in it, upon the receipts as such, derived from it or upon persons or property in interstate commerce. A state cannot regulate interstate commerce or make a payment of tax or taking out of license a condition precedent to carrying on interstate commerce.

The manufacture, transportation and sale of intoxicating liquors is a privilege, and not a right. The state might prohibit altogether the transportation or sale of intoxicating liquors within its borders, and it might be said that this would be a burden on interstate commerce; but that the state can do that, no one doubts.

In the case of *State Board of Equalization* v. *Young's M. Co.*, 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38, Mr. Justice Brandeis, speaking for the court, said: "Can it be doubted that the state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy import, or channelize desired importations by confining them to a single consignee? . . . It might permit the manufacture and sale of beer, while

prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?"

If the state of Arkansas, under the 21st Amendment, can prohibit the sale and transportation and storage of liquors altogether, certainly it may fix a license fee which, if a burden at all, is a less burden than prohibiting the sale and transportation altogether.

The real complaint of appellee is that if it has to pay this tax, those manufacturers in other states who do not pay the tax will be able to undersell it, and it cannot compete with them. But if the storage of liquor, or if transportation and sale was prohibited altogether in Arkansas, he could not compete with them, and if every state other than Arkansas should pass a law prohibiting the transportation into their borders, this would of course put appellee out of business so far as transporting out of the state is concerned; and yet no one would contend that the passage of these laws was a burden on interstate commerce.

Our conclusion is that the law is valid, and is not a burden on interstate commerce.

The judgment of the chancery court is, therefore, reversed, and the cause remanded with directions to dismiss appellee's complaint.

MERGENTHALER LINOTYPE COMPANY *v.* COLLEGE OF THE OZARKS.

4-5520 132 S. W. 2d 8

Opinion delivered October 9, 1939.

E. B. Dillon and *S. S. Jefferies,* for appellant.

Paul McKennon, George O. Patterson and *E. H. Patterson,* for appellee.

McHaney, J. In August, 1923, appellant sold to Colin M. Threadgill and James L. Boyd, two linotype machines, one known as Model 5 and the other as Model 14, for a consideration largely on deferred monthly payments, for which they executed 68 notes for $65 each and one note for $1,734.30, the first of which became due and payable November 10, 1923, and one on the 10th of each month thereafter up to and including September 10, 1928. Threadgill and Boyd also executed and delivered to appellant at the same time a chattel mortgage on the two machines to secure the payment of the purchase money, which mortgage was duly recorded. The mortgage contained a provision requiring the written consent of the mortgagee (appellant) before there could be any valid sale of the machines by the mortgagors. It also provided that, if the mortgagors should "sell, assign, mortgage, or encumber said property or any part thereof, or any interest therein, or underlet or part with the possession of the same, either directly or indirectly" all unpaid notes should become due and payable and right of possession immediately to accrue.

Various trades and sales of the machines were thereafter made, but title thereto finally vested in Threadgill, subject to said mortgage.

In October, 1927, said Threadgill sold to appellee one of said machines, Model 5, and installed same in the print shop of the college, for a consideration of $1,900

of which $100 was paid in cash and six title retaining notes were taken by Threadgill from the college, dated November 1, 1927, to become due one each six months thereafter with interest at 6 per cent. These notes were thereafter paid by appellee to Threadgill, with the exception of a portion of the last note, $233.65, which was paid directly to appellant, at his request, sometime in 1931, after appellee had actual knowledge of the existence of said mortgage, which payment was credited by appellant on Threadgill's indebtedness on the other machine.

In January, 1932, appellant brought this action to foreclose its mortgage on both machines, making Threadgill, Boyd, and appellee defendants. Threadgill and Boyd made default and judgment was rendered against them for the balance due on their notes, and a foreclosure and sale were decreed as to machine, Model 14. Appellee defended on the ground that it had purchased Model 5 with the knowledge and tacit, if not actual, consent of appellant; that it had fully paid for same by payments to Threadgill, except the sum of $233.65 which was paid to appellant at its request; and that appellant was estopped to assert now the lien of its mortgage.

Machine, Model 14, was sold, appellant being the purchaser, for $1,800, which was credited on the balance due it by Threadgill and Boyd, and appellant sought the foreclosure and sale of Model 5 for the balance due after said credit. Trial resulted in a decree dismissing appellant's complaint as to Model 5 for want of equity, and in quieting and confirming title thereto in appellee. This appeal followed.

It is undisputed in this record that appellant knew of the sale of this Model 5 machine to appellee and the terms of sale, and implicitly, if not expressly, consented thereto. Under date of October 27, 1927, appellant's traveling representative, Elliott, wrote appellant, from Clarksville, Arkansas, a letter headed: "*Clarksville Ptg. Co.—C. M. Threadgill—Clarksville, Ark. College of the Ozarks—Clarksville, Ark.*" In this letter he said:

"Mr. Threadgill has sold Model 5 linotype No. 9353 R. to the College of the Ozarks, at Clarksville, and the machine will be used in connection with printing instructions given by the school, and to do the institution's own work.

"The contract between Mr. Threadgill and the College has not been signed, but the machine was moved to the school last week, and Mr. Threadgill says the insurance was transferred to cover the new location. He said his insurance agent is sending New York the rider to be attached to the policy covering this machine.

"The only contract to be used in connection with this transfer will be Arkansas title-retaining notes, and I suggested to Mr. Threadgill that when he obtains these notes, properly signed by officers of the college, he deposit them with New York.

" 'Mr. Threadgill sold the Model 5, with extra mold, motor, extra magazine and font of mats, delivered and erected for $1,900. Payments have not been agreed upon except that $600 per year is to be paid on the machine. Whether this will be paid monthly, quarterly or semi-annually is yet to be decided.' After imparting some information about the college and its president and requesting that literature be sent to Prof. Stitt, instructor in printing, that would be of assistance in teaching linotype, especially three or four copies of 'Big Scheme of Simple Operation,' the letter concludes in two paragraphs as follows: 'As you know the Model 5 sold to the college, and the Model 14 Mr. Threadgill is using are included in the same contract, and under the same mortgage. As stated above Mr. Threadgill will obtain title-retaining notes on the Model 5, and deposit them with us for presentation to the college. As these notes are paid the proceeds are to be applied on the contract covering the two machines.'

"Mr. Threadgill is behind on his note account and agreed today to take up the November note and said he would try to work out, in the near future, some definite plan as to the overdue items."

This letter is conclusive of appellant's knowledge of the sale and all the substantial terms thereof. It also shows that "Threadgill will obtain title-retaining notes on the Model 5, and deposit them with us for presentation to the college." These notes were delivered to Threadgill, but were not deposited by him with appellant for collection.

On November 17, 1927, appellant wrote Threadgill in part as follows: "Our Mr. Elliott has advised us regarding the recent sale of the Model 5 linotype by you to the College of the Ozarks, who in turn have removed the machine to their premises. The provisions of our contract on the machine expressly provide that no attempt shall be made to sell, assign, remove, transfer or in any way encumber the property without our prior written consent. It is to be regretted that a breach of our contract occurred not only in respect to the transfer of interest, but also the removal. Should you desire to make similar changes in the future, it is essential that the conditions of the contract be strictly adhered to so that we may be assured our mutual interests are properly protected.

"In order that we may be in a position to grant our formal approval to the present status of the Model 5 linotype, may we ask that you forward us either the original or a certified copy of the bill of sale or such similar papers as may have been prepared to support the transfer to the College of the Ozarks. In the event, the original documents are sent us we shall promptly return them to you by registered mail upon completion of our examination."

This letter constitutes at least an informal approval of the sale, and its request for the original or a certified copy of the bill of sale or similar papers supporting the transfer to appellee, was for the purpose of giving its formal approval. It does not request that the title-retaining notes, mentioned in the letter to it of October 27, be sent to it for collection. Had it done so and the notes been sent to it, appellee would have been advised of ap-

pellant's rights in Model 5. It does not appear that appellant ever asked Threadgill for the notes, but only the bill of sale or other papers evidencing a transfer. Instead of taking this matter up with appellee, it was content to take Threadgill's word that the sale had not been completed and no papers signed or executed. Its representative so wrote it under date of August 7, 1928, acting on information obtained from Threadgill. Now, it occurs to us, as it, no doubt, did to the trial court, that, with the machine in appellee's hands, being used by it, appellant should have made inquiry of appellee as to its claim on this machine. Appellant was advised of the sale and the terms thereof. It knew the machine was delivered to and was being used by appellee. It stood silently by for about four years without demanding the purchase money notes, permitted appellee to pay Threadgill all the purchase price, except a portion of the last note, without a word to appellee that payment to Threadgill would be made at its peril. This too in the face of the fact that Elliott had suggested that the purchase money notes be deposited with appellant for presentation to the college. Under the facts and circumstances, appellant had no right to rely on Threadgill's word that the sale had not been completed. A simple inquiry from appellee would have disclosed the facts, and Elliott was in Clarksville frequently during this period of time, or a letter to appellee advising it of the facts would have afforded it an opportunity to protect itself.

The following from Mr. Pomeroy is quoted in *Bone* v. *Sawrey,* 197 Ark. 472, 123 S. W. 2d 524: "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." See, also, *Edwards* v. *Jones,* 197 Ark. 229, 123 S. W. 2d 286, and cases cited in both cases.

We think appellant is estopped by its conduct from now asserting the lien of its mortgage against said machine, and that the decree should be and is affirmed.

PARSLEY *v.* USSERY.

4-5564 132 S. W. 2d 1

Opinion delivered October 9, 1939.

[redacted]

C. A. Cunningham, James G. Coston and *J. T. Coston,* for appellant.

Holland & Barham, Theodore F. Graupner and *A. P. Patton,* for appellee.

McHANEY, J. Appellants are the children of Mrs. Sallie May Parsley who is still living, and she is the stepdaughter of the late Dr. Benjamin A. Bugg, who died testate in 1910. One provision in Dr. Bugg's will gave his said stepdaughter a life estate in the 150 acres of land in controversy with remainder at her death in her children, grandchildren and their descendants. His will was probated May 31, 1911. On February 13, 1912,

less than one year as fixed by statute for appeals from the probate court to the circuit court, § 2885, Pope's Digest, Lillian Green and B. A. Bugg, Jr., executed an affidavit and prayer for appeal, and appellants contend that this affidavit was not filed with the probate clerk until June 17, 1912, which is the date the transcript of the record in the probate court was certified by the clerk to the circuit court. In other words, June 17, 1912, is the date the appeal was perfected to the circuit court. The circuit court treated the appeal as properly before it, no question being raised regarding it at that trial, and on October 28, 1913, entered the following judgment: "Comes the proponents, Grover C. Wadley, Sallie May Parsley, Fannie Wadley, Sallie A. Bugg, Thelma Parsley, Leda Parsley, Forrest Parsley, and Marie Parsley, by their attorneys, Virgil Green and John J. Leadbetter, and comes the remonstrators, B. A. Bugg, Jr., Lillie Green Thompson and Music Thompson, by their attorney, W. E. Beloate, and this case being submitted to the court upon the will and depositions of the *subscribing witnesses* and the *agreement of counsel of both parties,* and the court being fully and sufficiently advised in the premises, finds:

"That the will of B. A. Bugg, Sr., deceased, the same being the proposed will in said cause, was improperly executed, and that the said B. A. Bugg, Sr., deceased, at the time of making and executing said will, was of unsound mind and memory and not capable of making and executing a last will and testament, and that said will in all things should be declared null and void, and of no force and effect.

"It is, therefore, considered, ordered and adjudged by the court, that the proposed will of the said B. A. Bugg, Sr., deceased, was improperly executed and was written and executed by the said B. A. Bugg, Sr., at a time when the said B. A. Bugg, Sr., was of unsound mind and incapable of making a valid and binding will and testament, and that said will should be set aside and in all things declared null and void, and that the cost of this proceeding shall be paid equally by the parties hereto, that is one-fifth to be paid by each of the adult parties,

and that the certified copy of this finding and judgment be delivered to the probate court of the Chickasawba district of Mississippi county, and spread of record in said court, and upon the will record." There was no appeal from this judgment.

Acting after said judgment, the heirs of Dr. Bugg conveyed by deed to Sallie May Parsley the 150 acres of land in controversy. Thereafter she conveyed the same land to Arch Gray for a consideration of $15,200, and he, on July 12, 1926, mortgaged same to appellee, St. Louis Joint Stock Land Bank to secure a loan of $7,500. The title to said land thereafter passed to appellee, Mrs. M. O. Ussery, the present owner in possession, subject to said mortgage.

On October 28, 1936, appellants brought this action against Mrs. Ussery, alleging that they are the owners of the remainder interest in said lands, after the life estate of Sallie May Parsley, under the will of Dr. Bugg; that Mrs. Ussery had cut timber of the value of $3,000 from said land without right; and that the judgment of the circuit court of October 28, 1913, heretofore set out, is void for the reason that the affidavit for appeal from the probate court was not filed within one year from the date of probate of said will, and that no order granting an appeal by the probate court was made. Prayer was that they be decreed to be the owners of the remainder interest in said land and for judgment against Mrs. Ussery for $3,000. Mrs. Ussery answered denying all the material allegations of the complaint, alleging that the action was a collateral attack on said circuit court judgment of 1913, and pleading *res adjudicata* and limitations. S. L. Cantley, as receiver for St. Louis Joint Stock Land Bank, was permitted to intervene, setting up its rights in the premises. Trial resulted in a decree dismissing the complaint of appellants for want of equity, and they have appealed.

The first contention made by appellants for a reversal of this decree is that no appeal was granted by the probate court to the circuit court from the order ad-

mitting to probate the will of Dr. Bugg, and, therefore, the circuit court was without jurisdiction to render the judgment setting aside the will. It is also contended that the affidavit and prayer for appeal were not filed with the clerk of the probate court until more than one year after the order admitting the will to probate was made, and therefore, if an order granting the appeal was made, it was made more than a year after the order appealed from and was a nullity.

Other arguments are advanced for a reversal, but if those mentioned above are decided adversely to their contention, and we think they must be, it will be unnecessary to discuss them.

This suit constitutes a collateral attack on the judgment of the circuit court of October 28, 1913. In determining whether a domestic judgment on collateral attack is void for want of notice, this court has always held that it must be done from an inspection of the record only. *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704; *Union Investment Co.* v. *Hunt,* 187 Ark. 357, 59 S. W. 2d 1039, and case there cited where the reason for the rule is stated as follows: "The reason for the rule is that judgments and decrees ought to and do import verity and stability, and, as said in *Boyd* v. *Roane, supra*: 'It is generally thought to be better that the doctrine that the record importing absolute verity should work an occasional hardship than that public confidence should be shaken in the stability of judicial proceedings by suffering them to be lightly overturned; and for this reason the weight of authority in the case of a domestic judgment collaterally attacked is that the question of notice or no notice must be tried by the court upon an inspection of the record only.' "

The record of the judgment attacked shows on its fact that the judgment of the probate court, admitting said will to probate, was reversed, and it directed said "judgment be delivered to the probate court—and spread of record in said court, and upon the will record." In *Howell* v. *Miller,* 173 Ark. 527, 292 S. W. 1005, in a simi-

lar, if not the same, situation, this court said: "Counsel for appellant invoke the general rule laid down in *Walker* v. *Noll,* 92 Ark. 148, 122 S. W. 488, and other decisions of this court, to the effect that it is necessary, in order to invest the circuit court with jurisdiction, that it appear from the record that the affidavit and prayer for appeal were presented to the probate court, and that the appeal was granted. In the case of *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808, it was held that the granting of the appeal by the probate court is sufficient to confer jurisdiction upon the circuit court, and that the entering of the order granting the appeal upon the order of the probate court is merely evidence that the appeal has been granted. In the present case the record of the circuit court recites that the order and judgment of the probate court appealed from is vacated and held for naught. When the whole of that part of the judgment of the circuit court quoted above is considered, it is apparent that the circuit court found that the judgment of the county court sitting as the probate court in the probate of the will of Georgia A. Mitchell, deceased, should be vacated and held for naught. This constituted a finding on the part of the circuit court that an appeal had been taken from the order of the probate court in the manner provided by law. Otherwise, the circuit court would not have had any jurisdiction in the case. If the judgment of the circuit court had not contained an express finding that the judgment of the probate court appealed from should be set aside, counsel for appellant would have been right in contending that the judgment of the circuit court should be reversed for want of jurisdiction.

"It is well settled in this state that, where a judgment or decree contains a recital of the facts, this court can review the judgment for errors manifest upon the face of the record. *Strode* v. *Holland,* 150 Ark. 122, 233 S. W. 1033. The judgment of the circuit court, having contained a recital that the judgment of the probate court appealed from should be vacated, constitutes *prima facie* evidence that an appeal was taken in the manner pro-

vided by law, and must be taken as true, unless, by bill of exceptions or otherwise, the record contains evidence to contradict the recital of the judgment. *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575. This is in application of the well-known rule that every presumption must be indulged in favor of the court's finding which competent evidence would warrant."

So, here, the effect of the circuit court judgment that the judgment of the probate court "be vacated and held for naught," constituted a finding that the appeal had been taken in the manner provided by law. And this finding "must be taken as true, unless, by bill of exceptions or otherwise the record contains evidence to contradict the recital of the judgment." There is an abundance of evidence in the record to show that the appeal was properly taken according to law. The affidavit therefor was made in ample time. While it is not shown when it was filed, the presumption is, from the fact that the clerk made up the transcript, that it was filed in time, and that the order granting the appeal was made in time. The testimony of the then clerk and probate judge supports the finding.

The conclusion necessarily follows that the judgment attacked is valid and binding. The effect of this judgment is that Dr. Bugg died intestate, and the rights of appellants depend entirely upon a valid will.

The contention is also made that the attacked judgment shows on its face that it was a consent judgment, and that some of the appellants, being minors at the time (and others not *in esse*) and without a guardian, cannot be bound. The judgment shows that the parties named, both proponents, and remonstrants were represented by counsel, Sallie May Parsley and the other proponents by the same counsel. It shows that the case was submitted to the court, without intervention of a jury, "upon the will and depositions of the subscribing witnesses and the agreement of counsel of both parties." Just what the agreement of counsel was is not shown. It may have been an agreed statement of facts. Whatever it was, it is insufficient to show a consent judgment.

This suit was filed 23 years to the day after said circuit court judgment was rendered, during all of which time all the parties hereto, and the public generally have recognized said judgment as valid and binding. The general rule is, as stated in 34 C. J. 541, that, "Long lapses of time greatly strengthen the presumptions in favor of the validity of judgments."

The undisputed proof shows by appellants themselves that this property was all their mother had; that with it, she reared, supported and educated appellants, and that they have been the beneficiaries of this conveyance to their mother. To seek now, after this long lapse of time, and after innocent third parties have made large advances on the strength of it, to set aside said judgment where four of them were parties thereto, is without equity as the trial court properly held.

Affirmed.

PICKENS *v.* STATE.

4139 132 S. W. 2d 10

Opinion delivered October 9, 1939.

Dene H. Coleman, for appellant.

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

HUMPHREYS, J. The grand jury of Baxter county, Arkansas, indicted appellant, Albert Pickens, Nick Rand and Edwin McClellan for the crime of grand larceny in the county and state aforesaid by unlawfully and feloniously stealing, carrying and driving away, on or about the first day of July, 1938, four two-year-old red heifers, the property of Tom Hively, and two red heifers two years old, the property of Jim Southard, with the unlawful and felonious intent, there and then, of depriving the owners of their property.

Appellant pleaded not guilty and was tried separately from those jointly indicted with him. He was convicted and adjudged to serve one year in the state penitentiary as a punishment for the crime, from which verdict and judgment he has duly prosecuted an appeal to this court.

Appellant's first assignment of error for reversal of the verdict and judgment is that the evidence was insufficient to sustain a conviction because the testimony of Nick Rand and Edwin McClellan, which implicated appellant in the crime charged, was not corroborated by any other evidence tending to connect him with the crime.

Nick Rand and Edwin McClellan, according to their testimony, were accomplices in the crime, and appellant argues that under the law their testimony must have been corroborated by other evidence independent of the testimony of the accomplices in order to sustain the verdict and judgment and that since there is no corroborating evidence in the record connecting appellant with the crime except that of accomplices the judgment of conviction should be reversed.

As to the necessity for corroborating evidence of accomplices to warrant a conviction of a felony our attention is called to § 4017 of Pope's Digest which is as follows: "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; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Provided, in misdemeanor cases a conviction may be had upon the testimony of an accomplice."

We can not agree that there is no substantial evidence in the record tending to connect appellant with the crime independent of the testimony of the accomplices. The owners of the property described same particularly and about the time they disappeared from the range. Edwin McClellan testified that he was implicated with appellant and Rand in taking Tom Hively's and Jim Southard's cattle; that they loaded them in appellant's truck at one o'clock in the morning on the 11th day of June and that he and appellant took them to Batesville, arriving there about sun-up; that they went to the depot and unloaded the cattle and appellant went and parked the truck somewhere and while he was gone witness went around to the depot. Witness got the shipping contract and when he looked at the bill of lading it was in the name of Fred Snyder and showed that the six head of cattle were shipped to Stewart, Carson, White, Commission Company in Missouri; that they got back sometime in the morning around ten o'clock; that the following Tuesday the check was returned and that he and appellant went to Gainsville, Missouri, on highway No. 5 to cash the check and on the trip met Zion Small in his truck; that witness put Fred Snyder's name on the check and cashed it and went back where Albert Pickens was in his truck; that the money was divided between witness, Rand and appellant; that he and Rand got $35 each and appellant got the rest of the money.

C. G. Jones, the station agent at Batesville, testified that six head of cattle were shipped from the station at Batesville on June 11, 1938, and that the freight bill was made out in the name of Fred Snyder and that they were shipped to Stewart, Carson, White Commission Company.

Zion Small testified that on the 15th day of June, he went through Gainsville, Missouri; that he met appel-

lant with another man on highway 5 as he was going toward Missouri and also met him as he came back from that direction.

Fred Snyder testified that he never shipped any cattle to Stewart, Carson, White Commission Company.

The testimony of C. G. Jones corroborated that of McClellan to the effect that the six head of cattle in question were shipped by appellant in the name of Fred Snyder from Batesville to the commission company and that the testimony of McClellan to the effect that he and appellant went to Gainsville to cash the check was corroborated by that of Zion Small who met appellant twice the day the check was cashed together with another man on the highway. The sufficiency of the corroborating evidence was a question for the jury and that, together with the testimony of the accomplices, is clearly sufficient to support the verdict and judgment. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Mullins* v. *State,* 193 Ark. 648, 102 S. W. 2d 82; *Shaw* v. *State,* 194 Ark. 272, 108 S. W. 2d 497.

It is also assigned as error that it was not proved that the alleged crime was committed in Baxter county. Section 26 of Initiated Act No. 3 adopted by the people in 1936 (Acts of 1937, p. 1384) provides as follows: "It shall be presumed upon trial that the offense charged in the indictment was committed within the jurisdiction of the court, and the court may pronounce the proper judgment accordingly, unless evidence affirmatively shows otherwise."

There was no evidence showing otherwise. All the circumstances tended to show that the cattle were removed off the range in Baxter county in the night time and taken to Batesville and shipped by appellant and one of his accomplices and that the money received for the cattle was divided between them.

No error appearing, the judgment is affirmed.

Opinion delivered October 9, 1939.

Luther H. Cavaness, Virgil D. Willis and *W. F. Reeves,* for appellant.

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

SMITH, J. Appellant was tried upon a charge of murder in the first degree, alleged to have been committed by killing his father-in-law, John R. Stovall, by striking him with a skein from a wagon axle on the morn-

ing of March 16, 1939, and from the judgment sentencing appellant to a term of twenty years in the penitentiary is this appeal. Only one question is raised on the appeal, and that is whether error was committed in the admission of an alleged confession.

Appellant had only recently married Stovall's youngest daughter, and lived with Stovall as a member of his family. There was no evidence of any ill will between appellant and deceased. On the day of his death Stovall arose about 5 a. m., and went to his lot to feed his mules. A few minutes later appellant arose, and went to the barn to milk the cows, five in number. Stovall returned to the house, and, after staying there a few minutes, again left the house. Appellant testified that he had milked three of the cows, when his wife came out of the house to assist him with the milking, and she discovered an object lying near the yard gate. She ran to the horse lot gate and called appellant, who examined the object which his wife had seen, and discovered that it was the dead body of Mr. Stovall, who had evidently been killed by being struck with the skein. There had been no quarrel, and Mrs. Stovall testified that the only noise she had heard was that of the barking of the dog.

Appellant was naturally suspected, for the reason that apparently no other person had the opportunity to kill Mr. Stovall. Appellant realized that he would be suspected, and there was testimony to the effect that before he had been accused he expressed the hope that no one would think that he had killed "Pop," as he called Mr. Stovall. After discovering Mr. Stovall's body appellant went into the house and told Mrs. Stovall that her husband was dead. Appellant assisted in giving the alarm and in notifying the neighbors. The sheriff and coroner were sent for, and after a large number of persons had assembled some one suggested that bloodhounds be sent for, when appellant said he did not see of what service the dogs would be after so many people had been around the dead body. Stovall and appellant operated a dairy, and appellant had bought a truck used in delivering the milk. A witness testified that he had

heard appellant say a down payment would soon be due on the truck, and that he had only two dollars, and that "Something has to happen between now and then (the day the payment would be due) or I won't have the money to pay it." There was no other testimony tending to show any motive for the crime. Appellant was a high school graduate, and was 26 years old at the time of Stovall's death and a number of the neighbors testified that appellant's reputation was not only good, but was excellent.

Owen Fudge, a member of the State Police Department, was called upon to investigate the crime, and it is apparent from his testimony that he immediately concluded that appellant had killed Stovall, and his subsequent conduct was based upon that assumption. Appellant was arrested, but was not carried to Yellville, the county seat of Marion county, in which county the crime had been committed, but was taken to Harrison, the county seat of an adjoining county.

That night appellant was carried to the office of the prosecuting attorney, where Fudge began his investigation, in which he was assisted by the prosecuting attorney, the sheriff of the county, the chief of police of Harrison, and others. This investigation continued until about 3 or 4 o'clock the following morning. No one was allowed to see appellant except the investigators. His father was denied his request to see his son, and appellant's wife was not permitted to see him. She was, however, permitted to send appellant a note reading as follows: "Dear Harold: I still love you, and believe in you."

After the investigation had proceeded for some time without producing the proper result, the prosecuting attorney came into the office and gave the sheriff a pistol and remarked as he did, "Don't let anyone in," and the sheriff answered, "I have stopped one or two mobs, and I can stop another." This byplay was obviously intended to make appellant believe that he was about to be lynched. As a matter of fact, there was no show of

mob violence, but appellant was allowed to remain under the contrary impression.

Fudge explained his method of investigating as follows: "Q. Tell the court in your own way how you handled him? A. A crime of this nature is usually handled different to ordinary felony or grand larceny. My experience and observations of the smarter investigators than I am is that an investigation administered to a suspect of that nature would be to keep the crime constantly on his mind and hold it there with a moral conversation. That was the procedure taken with this crime. Q. Did you talk kindly or roughly? A. Kindly. When he would ask to change the subject, someone would throw the murder right back in his face, and the normal proceeding was taken in leading up to it."

Upon being asked what this normal proceeding was, the witness testified as follows: "A. For instance, I would tell him, 'Harold, you explain to us who else could have killed Mr. Stovall. Who could have? Who was out there?' He would say: 'It don't look like any one else could.' And I would ask him if Mr. Stovall had not been good to him and he would say that he had been a father to him. I would tell him that he knew he had made a mistake, and didn't he know that he would feel better if he would tell the truth. He would say, 'I am telling the truth.' Q. You necessarily had to accuse him in the line of questioning? A. Yes, sir, in the investigation. Q. That started immediately after you got up to Harrison? A. Yes, sir, I say immediately after dark that night. Q. Didn't you constantly accuse him and hold the accusation before him? A. We asked him to tell the truth throughout. Q. He said he was telling the truth? A. We suspected him. Of course we didn't know. Q. He said he was telling the truth? A. Yes, sir. Q. After he would tell you boys that he was telling the truth didn't it necessarily follow that you would tell him that he was telling a story about it? A. Naturally. Had to hold the crime before him and keep it constantly impressed upon his mind more or less, and accuse him of

it; started in soon after dark and continued until about 4 o'clock the next morning."

The night long investigation having proved ineffective to procure a confession, it was decided to take appellant to Little Rock, for the reason assigned that there were better facilities for investigation and better investigators in Little Rock, and after having had but little sleep appellant was brought to Little Rock the following day.

The investigation was resumed that night in a room within the walls of the Old Penitentiary Building, used by the State Police as headquarters.

We have not stated, and unless so indicated, will not state any of the testimony of appellant relating to the circumstances under which he finally made his confession, for the reason that the jury may have disregarded his testimony as untrue.

The investigation was resumed in a room filled with the trophies of many raids and arrests made by the police. There were also five death masks, which had been placed on wooden blocks on the wall of the room. These had been made by pouring plaster paris on the faces of criminals who had been executed. There were numerous guns and other weapons on display in glass cases. Appellant testified that he was shown pieces of rubber hose, with handles attached, which he was told were lie detectors; but this testimony was denied by the officers, one of whom testified in regard to the pieces of hose as follows: "Q. What are the rubber hose they have with those handles on them used for? A. What are they used for? The boys—it is hearsay where they get them. Q. What did they say? A. Said they got them in raiding negro honky tonks. Q. Do the negroes go armed with rubber hose with handles? A. I presume they do. Q. Mr. Fudge, do you know how come them to be in this room? A. That is where all the stuff like that is kept."

In this environment, the investigation was resumed on the second night after appellant's arrest. The same method of investigation used at Harrison was employed

in Little Rock, with the additional fact that appellant was told that his wife had been arrested for complicity in the crime, and it was repeatedly stated to him that no man, who was a man, would permit his wife to suffer for a crime which he had himself committed. It was not true that appellant's wife had been arrested, but appellant was allowed to remain under that impression. One of the officers, when asked whether appellant was told that his wife would suffer, answered, "Likely so. Of course, they told him how dirty the crime was, and that there would not be anything in a man to try to put it off on her." There was no testimony whatever to the effect that appellant had said anything to implicate his wife.

The investigation in Little Rock continued until after midnight, and appellant finally admitted that he had killed Mr. Stovall. He was asked to write a confession, and was given a pencil and paper for that purpose. He took the pencil, but declined to write or sign a confession, protesting that he was innocent.

The prosecuting attorney, who had been present during the investigation at Harrison and who accompanied the party to Little Rock, was sent for. He testified that appellant admitted having killed Mr. Stovall, but that appellant asked, "If I sign a confession, will you leave my wife out of this? If I sign a confession and plead insanity, what will be done with me? A. I cannot promise you anything; the only thing I can tell you is that it is best to tell the truth."

There can be no question as to what was meant by telling the truth. It could mean only that nothing but a confession of guilt would be accepted as the truth, as appellant had, during many hours, iterated and reiterated his innocence.

The prosecuting attorney was asked: "Q. You didn't offer him any leniency?" He answered: "A. I guess I did to this extent. Q. What extent? A. I told him it would be better to tell the truth, and I would feel more like making recommendations for a man that told the truth."

The investigation ended in this manner. An officer testified: "When we went back into the room, Mr. Jones (the prosecuting attorney) told me that the boy wanted to trade out; he wanted to plead insanity, and he says, 'I have no right to do that,' and he asked him not to prefer charges against his wife, and he says, 'I have no right to do that either,' and the boy backed out." In other words, when appellant was unable to secure immunity for his wife, which was not required, as his wife had not been arrested or accused, although he was unaware of that fact, appellant repudiated the confession.

The officer further testified: "After he (appellant) made this last denial, the assistant chief says, 'Let's take him to jail, I believe he is going crazy.' "

In the recital of the circumstances under which the confession was obtained, we have stated only the testimony offered by the state.

The trial court pursued the practice which we have many times approved in regard to the admission of the confession where there is a question as to whether it was free and voluntary. After hearing this testimony as a preliminary matter, he permitted its introduction before the jury. In other words, the judge submitted to the jury the question whether the confession had been freely and voluntarily made, and the jury was told that unless they so found, the confession should be disregarded and not considered for any purpose.

In many instances, where the accused is confronted with a confession which he cannot deny having made, he insists that it was not freely and voluntarily made. But that insistence does not render the confession inadmissible, where there is testimony to the effect that it was in fact, freely and voluntarily made. In such cases the practice approved by us, which was followed in the instant case, is for the court to hear the testimony in the absence of the jury as to the circumstances under which the confession was given, and if there is a substantial question as to whether it was freely and voluntarily made, to submit that question of fact to the jury, after admon-

ishing the jury to disregard the confession unless it was found to have been voluntarily made.

In this case the officers testified that the confession was, in fact, freely made; but such testimony, in view of the undisputed facts herein recited, proves only that they misapprehended what it takes to constitute duress. Under the circumstances here detailed, it was, in our opinion, error to have admitted the confession, as it does not appear to have been freely and voluntarily made.

In the case of *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376, it was said: "Of course, the officers had a right to interrogate the accused concerning his participation in the offense, but they had no right to coerce him into a confession by a continuous inquisition persisted in to the extent of exhausting him physically and mentally and overcoming his will. Of course, there was testimony in this case which tended to show that the confession was not voluntary, but we cannot say that there is an entire absence of testimony tending to show that the confession was voluntary and that the inquisition was not persisted in long enough to exhaust defendant mentally and physically and overcome his will."

In view of the conflict appearing in that case as to whether the confession had been voluntarily made, it was held proper for the court to have submitted that question to the jury. Here, it appears, from the testimony on the part of the state, ignoring that on behalf of the defendant, that the confession was not freely and voluntarily made, and it was error, therefore, to have admitted it to the jury.

The law on the subject was declared by Chief Justice McCulloch in this Spurgeon Case, *supra,* by quoting from the case of *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582, as follows: "'It has been said that no general rule can be formulated for determining when a confession is voluntary, because the character of the inducements held out to a person must depend very much upon the circumstances of each case. Where threats of harm, promises of favors or benefits, infliction of pain, a show

of violence or inquisitorial methods are used to extort a confession, then the confession is attributed to such influences. It may be said also that, in determining whether a confession is voluntary or not, the court should look to the whole situation and surrounding of the accused.' *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582."

Tested by the rule thus stated, we think the admission of the confession was error, and for that reason the judgment will be reversed and the cause remanded for a new trial.

CUNNINGHAM *v.* WALKER.

4-5624 132 S. W. 2d 24

Opinion delivered October 9, 1939.

Peter A. Deisch, for appellant.

Burke, Moore & Walker, for appellee.

GRIFFIN SMITH, C. J. Act No. 37, approved February 6, 1939, p. 69, by its terms directs that annually one member of the board of commissioners of certain levee and drainage improvement districts shall be elected on the first Monday in May.

The improvement district involved in this discussion was created under authority of Chapter XCVIII, Sandels & Hill's Digest, as amended by act No. 122 of 1911. The latter act was amendatory of act No. 9 of 1897. Provisions of the law prior to 1939 were that a board of three commissioners should be elected simultaneously on the first Monday of May of each year.

If act No. 37 of 1939 is valid, § 4 thereof repeals the section of the 1911 statute providing for annual election of three commissioners. Act 37 provides that commissioners of the district, as now constituted, shall hold office according to seniority. The oldest commissioner in point of service ". . . shall hold office for three years; the next commissioner in point of service shall hold office for two years, and the last elected or appointed commissioner shall serve for one year, or until their successors are elected and qualified; all of said terms beginning from the first Monday in May, 1939."

The election commissioners disregarded act No. 37 and called the usual district election. Appellant had been a commissioner for more than twenty years. At the time the election was held May 1, 1939, under provisions of the old acts, another commissioner had served two years, and a third had served one year. Cunningham did not qualify as a candidate, his contention being that act 37 was in effect and that it provided for the election each year of one commissioner—a commissioner to succeed the incumbent who had served the shortest period of time. Appellee Walker, who had not previously served on the commission, qualified as a candidate. The election commissioners declared his election. Appellant filed his complaint, praying that he be declared a continuing commissioner, and that appellee be ousted.

Appellee demurred, alleging unconstitutionality of act No. 37. One reason assigned was that it contravenes Amendment No. 14 to the state Constitution.[1] It was also alleged that the act does not state an emergency.

Since under any of the statutes time for holding an election in 1939 has passed, we do not determine whether the measure here in issue contravenes Amendment No. 14. Act No. 37 was not in effect on the first Monday in May; therefore, other questions involving validity of the act are unimportant to a determination of appellant's rights.

The rule laid down in *Gentry* v. *Harrison*[2] is decisive here. We reproduce, in parallel columns, the language held ineffective in that case, and the emergency clause in the instant controversy. The reported case appears in the first column:

"It is hereby found and declared that the regulation of the business of insurance is a function of the state government and necessary for the preservation of the public peace, health and safety, and that therefore an emergency exists."	"Because of the urgent need for experienced management of improvement district affairs, this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is hereby declared to exist."

By constitutional Amendment No. 7, the people reserved unto themselves the power to reject at the polls any measure enacted by the General Assembly. Conditions under which such rejection may be exercised are prescribed. One provision is that the effective date of an act is postponed until 90 days after adjournment of the law-making body unless the enactment shall be essential to preservation of the public peace, health and safety. In such circumstances the necessity for immediate operation of the law shall be stated in one section of the bill, ". . . and if upon a yea and nay vote, two-thirds of all members elected to each house . . . shall vote upon a separate roll call in favor of the measure going into immediate operation, such emergency

[1] "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

[2] 194 Ark. 916, 110 S. W. 2d 497.

measure shall become effective without delay. It shall be necessary, however, to state the fact which constitutes the emergency."

In *Jumper* v. *McCollum*[3] it was held that " . . . an emergency clause which did not state the fact constituting the emergency would not suffice; nor would a recited fact which was so obviously and demonstrably inefficacious to constitute an emergency that all fair-minded and reasonably intelligent men would say to the contrary. But the converse of this proposition is equally true. If the fact which constitutes the emergency is recited, and if fair-minded and intelligent men might reasonably differ as to the sufficiency and truth of the fact assigned for placing the act in effect immediately upon its passage, the courts are concluded by the finding."

It was said in *Hanson* v. *Hodges*:[4] "One purpose of Amendment No. 10 was to confer upon the Legislature the power to pass laws that were necessary for the immediate preservation of the public peace, health or safety, without reference to the people under the referendum."

Amendment No. 10 was superseded by Amendment No. 7. The latter amendment provided (but the former did not) that it should be necessary to state the fact constituting an emergency.

In the Hanson Case, decided in 1913, it was held that the existence or non-existence of an emergency was exclusively a question for legislative determination. Subsequent to this decision the people adopted Amendment No. 7 (1920), and by the terms of this amendment the General Assembly is required to state the fact constituting a recited emergency. The Jumper-McCollum decision was handed down in 1929. Its effect is to say that the General Assembly may not arbitrarily assert that an emergency exists, but in the exercise of sound judgment with respect to the subject of legislation and the effect thereof, it may do so. As was said in the opinion, if fair-minded and intelligent men might reasonably dif-

[3] 179 Ark. 837, 18 S. W. 2d 359.

[4] 109 Ark. 479, 160 S. W. 392.

fer as to the sufficiency and truth of the fact assigned, the courts will not interfere. Under this rule the courts determine whether the assigned fact is one with respect to which fair-minded and reasonable men would differ. The precedent is analogous to that applied in sustaining the verdict of a jury: if there is substantial evidence it will not be disturbed.

The question presented in the case at bar is, Does the act state facts constituting an emergency? Or, conversely, Does the legislative finding that "Because of the urgent need for experienced management of improvement district affairs" state a condition or fact which, if ignored, would imperil the public peace, health and safety?

We must bear in mind that by express language act No. 37 applies to all combination levee and drainage districts in Arkansas wherein the boundaries correspond to the designations of § 1. Act No. 122 of 1911 amends §§ 5, 6, and 29 of act 9 of 1897, the latter being a general act. The 1911 enactment is special, applying only to Phillips county, and in it the time and manner of elections are fixed.

The plan of act No. 37 was, by words relating to boundaries and areas, to avoid the consequences of Amendment No. 14. An existing special act may be repealed in whole or in part, but it may not be enlarged or extended.

We agree with the trial court that no fact creating an emergency was stated. An academic declaration of a known governmental requirement was expressed. An administrative truism was asserted. It might as well have been said that because rivers are deep and currents are treacherous, steamboats must be built substantially, the public peace, health and safety requiring it. All men will agree that, with respect to improvement districts, there is need for experienced management. This admission, however, and acceptation of the conceded principle, falls far short of a finding that the existing management

is without experience, that it is inefficient, or that an immediate change in management is necessary.

We must, therefore, affirm that part of the judgment which holds against the emergency. It is so ordered.

HOLLAND *v.* STATE.

4133 132 S. W. 2d 190

Opinion delivered October 9, 1939.

Harper & Harper, for appellants.

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

HOLT, J. The appellants, J. S. Holland, and his two sons, Joe, twenty-one years of age, and Grover, nineteen, were indicted in the Fort Smith district of Sebastian county, Arkansas, for the crime of grand larceny, alleged to have been committed on February 13, 1939. Joe Holland entered a plea of guilty, but J. S. Holland and Grover Holland pleaded not guilty; were tried, found guilty by the jury, and each sentenced to one year in the state penitentiary, with a recommendation by the jury, however, of suspended sentences.

The trial court accepted the jury's recommendation in the case of Grover Holland and suspended sentence,

but sentenced each of the remaining defendants, Joe Holland and J. S. Holland, to one year in the penitentiary.

Appellants, on this appeal, urge two errors. They, first, contend that the evidence is not sufficient to support the verdict; and, second, that the trial court erred in refusing to give their requested instruction No. 4.

The evidence, stated in its most favorable light to the state, as we are required to do, is to the following effect: Joe and Grover Holland live with their father on a small farm of about twelve acres a few miles east of Fort Smith, near highway No. 22. In addition to the four-room residence, there are two small barns and a chicken house on the property.

On behalf of appellants, Joe Holland who pleaded guilty testified that he stole the cow in question and tied her in one of the barns on his father's place at about eight o'clock on the night of February 12th, then went to bed. He got up the next morning about six o'clock, awakened his father, got him up, and after breakfast between six-thirty and seven o'clock, his father, one of his sisters, and Grover left for town; that after they left he went to the barn, butchered the cow between seven and eight o'clock, cut the carcass into four quarters and hung them in the barn. He further testified that his father, J. S. Holland, and Grover, his brother, knew nothing about his stealing and butchering this cow.

Mr. Kuykendall, one of the arresting officers, testified that he went in company with another officer, Prentice Mattox, with a search warrant to J. S. Holland's place on February 13, 1939, to search for a cow that had been taken the night before from Charlie Cartwell's pasture, and quoting his testimony: "and he said all right, and we went to a little shed or barn, and there was a block and tackle there and skinning knives, and a lot of blood; and I asked him how come that there, and he said that he butchered a calf there; and I looked around and went in the next barn by it in about fifteen or twenty feet, and there were four quarters of beef

hanging up there; and I said that is not a calf, that looks more like a cow; and he said he did not know anything about that. We looked around to find the hide if we could and whatever was taken out of the cow, and there was fresh entrails in the hog pen, where there was four or five hogs; and we searched around and Mattox and myself got in my car and started to town. I asked him about where the boys were and he said they were working and must be in town, and we started to town looking for them, and Joe and Grover Holland come by in an automobile and we caught them at the house; and asked them about the cow hanging in the barn; and Joe Holland said he had brought the cow up there and skinned it. I asked him what he did with the head and he said what did I care about that; and I said I would like to know where it went, and he said that he had sold it, it was a red hide, and sold it to the Midwest Hide & Fur Company; and we loaded them in the car and brought them to the Midwest Hide & Fur Company, and found the hide that they had sold, and it was a jersey hide, a match to the one Cartwell told us he had lost; and looked for the scar on the cow's hip and found the scar; and we went back to Cartwell's place, and got him and took him over there to identify the hide as his hide, and he identified the hide from the cow he lost the night before."

He further testified: "Q. How far is this barn from the house? A. The first barn is fifteen or twenty feet from the house, and the next one is on the same lot. Q. How far was this barn where you found the cow, or beef, from the house? A. It was in the last barn, I cannot tell you the exact feet, not over sixty or seventy feet." He further testified that the carcass was cut into four quarters and was warm at the time he examined it.

Prentice Mattox testified that they first went in the garage where there was a block and tackle hanging lined up against the wall, and they then laid it down and there was fresh blood on it; that he asked appellant, J. S. Holland, where the blood came from and he said that he and Joe had killed a yearling; that he went on into the red barn where the cow was hanging up and he said "that

is not a yearling there—that is a cow"; that appellant, Holland, told him that he would have to talk to the boys about it; that they picked up the boys about that time, and at first they denied knowing anything about the cow, but later, Joe Holland, told them that he had got the cow from his uncle at Ratcliff; that he would not tell them what he had done with the hide, but later told them that he had sold it to the Midwest Hide & Fur Company, and they went there and recovered the hide; that the hide had a scar on the right-hand side, that they had been told about the night before, and they also recovered the ear, which this witness identifies; that he examined the intestines in the hog pen and they and the beef were still warm; that appellant, J. S. Holland, claimed that he had been up town and just came in, and the boys claimed that they had been up town fooling around.

Charlie Cartwell testified that the cow he lost weighed around 800 or 820 pounds, and was a jersey cow with a scar on the right-hand side, and had a tag in her ear. He positively identified the hide as the hide of his cow. He also identified the number in the cow's ear and stated that he had checked it.

George Taylor testified that he was employed by the Midwest Hide & Fur Company in February of this year, and that the Holland boys brought the hide in and put it on the floor, and Joe went back to the stove, and appellant, Grover Holland, followed him to the office, and he paid him for the hide and they left; that he paid appellant, Grover Holland, for the hide; that that was the only hide they bought that day. On cross-examination he testified that he paid $1.84 for the hide.

We are of the view that this evidence, when viewed in the light most favorable to the state, is of a substantial nature and sufficient to warrant a conviction in this case.

This court in the recent case of *Jefferson* v. *State*, 196 Ark. 897, 120 S. W. 2d 327, restated the rule as follows: "It is contended by appellant that the evidence is not sufficient to sustain the verdict. The rule

as to the sufficiency of the evidence in such cases has been many times announced by this court as follows: 'The rule is well settled that the evidence adduced at a trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, it will be sustained.' Citing *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50; *Walls* v. *State,* 194 Ark. 578, 109 S. W. 2d 143."

We are also of the view that the verdict of the jury in this case must be sustained on another ground, and that is that proof of possession of recently stolen property, unexplained to the satisfaction of the jury, is sufficient to uphold a conviction.

In *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93, this court said: ". . . 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 cannot agree with appellants' contention that the court erred in refusing to give requested instruction No. 4. That instruction is as follows: "No. 4. You are instructed that in this case the state is relying upon circumstantial evidence, and if you find that the evidence is as consistent with innocence as it is with the hypothesis of guilt, you will acquit the defendants, in other words, gentlemen of the jury, a verdict of guilty on circumstantial evidence alone cannot be sustained which does not exclude every reasonable hypothesis but that of guilt."

The record in this case reflects that the state did not rely solely on circumstantial evidence for conviction of appellants. There was some substantial testimony of a direct and positive character. One of the officers testified on behalf of the state that they found fresh blood on the block and tackle, and that J. S. Holland said that he

and Joe had just butchered a yearling. The officers further testified that the four quarters of the cow hanging in the barn were still warm, although it was a cold day in February, freezing weather, according to one witness, and officer Mattox testified: "Q. Did you see the intestines of the cow? A. Yes, sir, they were in the hog pen. Q. Did you examine to see whether they were cold or warm? A. They were still warm and so was the beef." In addition, Grover Holland received the money, $1.84, for the hide taken from the cow in question.

In *Daniels* v. *State,* 186 Ark. 255, 53 S. W. 2d 231, this court stated the rule as follows: "Another instruction was refused which told the jury they could not convict unless the offense had been established to the exclusion of every other reasonable hypothesis of the defendant's innocence. The court gave at the request of the appellant correct instructions on the presumption of innocence and reasonable doubt, and, as the state did not rely entirely upon circumstantial evidence, it was not error to modify the instruction in the particular mentioned above or to refuse to grant the other. *Osburn* v. *State,* 181 Ark. 661, 27 S. W. 2d 783, and cases therein cited."

Finding no errors, the judgment is affirmed.

HOUCK *v.* MARSHALL.

4-5539 132 S. W. 2d 181

Opinion delivered October 9, 1939.

Daggett & Daggett, for appellants.

Hal B. Mixon, for appellee.

HOLT, J. At about eleven-thirty on the morning of June 5, 1938, appellant, C. N. Houck, while returning in his automobile to Marianna, Arkansas, westwardly on highway No. 79, at a point on a curve in said highway, collided with another automobile which was being driven by a negro, Harper Rouzie. The highway was made of gravel and about twenty feet wide.

As a result of this collision, plaintiff, Lester Marshall, suffered injuries, which were made the basis of a suit against appellants, and resulted in a substantal recovery in favor of appellee.

Appellants, on this appeal, earnestly insist, first, that there was no substantial evidence to support a recovery on behalf of appellee; and, second, that the trial court erred in giving plaintiff's instruction No. 5 over the specific objections of defendants. No complaint is made as to the amount of the recovery.

Appellee, plaintiff below, alleged in his complaint that defendants were negligent in driving on the wrong, or south side of the highway in question at a reckless and excessive speed and in failing to avoid the collision

and consequent injuries resulting by exercising ordinary care, after discovering the dangerous position of appellee.

There were four witnesses to the collision that resulted in the injuries to appellee: defendant, C. N. Houck, driving alone, and the three negroes, Harper Rouzie, driver of the other car which collided with Mr. Houck's car; the owner of the negro car, Matt Stanford, riding at the time on the front seat with Rouzie, and the plaintiff, Lester Marshall, who was riding on the rear seat of the negro car.

The testimony, as reflected by this record, is to the following effect:

Harper Rouzie testified: "We was going home when that fellow was coming in his car, Mr. Houck, and he was making sixty-five or seventy miles and I pulled up on the gravel and I couldn't get any further, I went on my high side (the south side) and he come on the high side around the curve. . . . A small curve, a slanting curve like. . . . Q. About how far in front of you was that automobile when you first saw it? A. It looked like it was fifty or sixty yards. . . . Q. How fast were you driving? A. About fifteen or twenty miles. . . . I didn't do nothing but pull on my side and the car was coming around the road and I said, 'He is not going to turn over at all.' He kept coming on and he turned on the far side and cut straight on to us. Q. Was that done suddenly or not? Where was the other car when you first saw it, what side of the road was it on? A. Just about the middle of the road, he was on the high side of the road too."

Matt Stanford testified: "When I got in the car I looked and seen the car we were in was driving fifteen or twenty miles an hour. There was a bank on the right-hand side and I seen a car coming and I said, 'Here comes a car,' it was driving pretty fast and he slightly come into us. . . . He come in by gravitation. Q. How far was the car away when you first saw it? A. About sixty-five or seventy yards. Q. Can you estimate the speed of that automobile then? A. I guess sixty or

seventy miles an hour, I don't know, it was running pretty fast. Q. How fast was your car going then? A. About fifteen or twenty." He further testified that the negro car was on the right-hand side of the road when they first saw the Houck car and that the Houck car was about the middle of the road coming around the curve toward them, and that the car was on the right-hand side of the road at the time of the collision.

Appellee, Lester Marshall, testified that he first discovered the Houck car at about a distance of seventy-five or eighty yards. There was a short curve where the collision occurred. We were on the right-hand side of the road at the time and traveling about fifteen or twenty miles per hour. The Houck car was coming in gradually to us. "Q. At the time the car ran into you, or at the time of the collision between the two automobiles, was your car still on the right-hand side of the road? A. Yes, sir. Q. Was it moving or stopped? A. He went to getting on the brakes when he seen the car coming and turning and making pretty fast speed, this boy was getting in on the brakes all the time."

Appellant, C. N. Houck, testified: "I was coming toward Marianna, that would be coming west on highway No. 79, near Poinsett Spur. The curve is a long curve, it is possibly a half mile around the curve, and just about the time I reached Poinsett Spur crossing I noticed the car approaching me, I would say that the car was about two hundred yards distance away. I was on my right-hand side of the road, which was the north side of the road and the inside of the curve. The car that was approaching me was also on the inside of the curve and the north side of the road, it was on my side of the road. . . . We were each on the same side of the road. . . . We were on the inside of the curve. . . . I immediately started to apply my brakes and I realized he was on the wrong side of the road as he approached me. My first thought, of course, was that he would immediately get over on the other side of the road. . . . Which would have been the south side. The car seemed

to have a weaving tendency to it, as we approached he came right back over to the north side of the road, at that time we were getting pretty close together and I realized we were going to have a collision and I got my car over to the right just as close as I could and not go in the bayou, Cow Bayou is on the right-hand side of the road coming toward Marianna, that is the inside of the road or the north side of the road. I couldn't get over any farther on account of the bayou. The bayou was almost full of water and the ditch was right at the edge of the gravel. The car that approached me, possibly, just before the impact came turned off a little bit to their right, so the collision when it came was not a perfect head-on, their car struck and it took off the lights and running board and it struck the corner of my car, the body of my car. . . . Q. As you approached this curve and noticed that car was either in the center or on the wrong side of the highway did you start applying your brakes? A. Yes, sir. Q. Did you materially reduce the speed of your car? A. Yes, sir, because I saw they were on my side of the road. . . . Q. At the time of the impact how fast was your car moving? A. I don't believe I was going over ten or fifteen miles an hour, I had almost come to a stand. When they struck me my car didn't move, my car was straight in the road, it didn't move forward or backward."

It is our view that the testimony, when considered in its most favorable light to the appellee, as presented by the record, is of a substantial nature and sufficient to take the case to the jury.

We have reached the conclusion, however, that the trial court erred in giving plaintiff's requested instruction No. 5, and that for this reason the judgment must be reversed and the cause remanded for a new trial.

The instruction complained of is as follows: "You are instructed that if you find from the evidence that the driver of defendant's automobile discovered the peril of the plaintiff and by the exercise of ordinary care and

caution, could have avoided a collision and failed to exercise such care and caution, then in that event, he would be guilty of negligence and the plaintiff is entitled to recover in this action, regardless of any contributory negligence on the part of the plaintiff, or the driver of the automobile in which plaintiff was riding."

Defendants objected specifically to this instruction on the grounds "that there is no evidence to present the doctrine of discovered peril and no evidence to show that the collision could have been avoided, in the exercise of reasonable care after the peril, if such existed or was discoverable, was actually discovered, and because the discovered peril doctrine does not preclude contributory negligence on the part of the plaintiff, and because it is in conflict with defendants' instructions No. 6 and No. 4."

Instruction No. 4 is as follows: "If you should find from the testimony that defendant, Houck, while driving westwardly on the north or right side of the highway, discovered the car in which plaintiff was riding approaching from the west or the north, or wrong side of the highway, and, anticipating that the driver of the approaching car would return to the south, or proper side of the highway, he (Houck) failed and refused to swerve his car to the south, or wrong side of the highway in an effort to avoid the collision, then you are instructed that defendants were not negligent because of Houck's failure to take his car to the south or wrong side of the highway."

Instruction No. 6 is: "In this particular case any act of negligence on the part of the plaintiff which caused or directly contributed to his injuries would be a complete bar to his right of recovery against the defendant herein, and you are so instructed."

Under the facts in the instant case we are of the view that the discovered peril, or the last clear chance doctrine, does not apply and that the court, therefore, erred in giving plaintiff's instruction No. 5. We think this is a case wherein the simple question of negligence and proximate cause should be applied.

Here we have the drivers of two automobiles approaching each other on a twenty-foot gravel roadway, one on the wrong side of the road, and each car continuing without stopping until a collision occurs. This case is not similar to one where one of the parties might have been parked, and at a standstill, on the wrong side of the road, nor does it present one where a pedestrian steps in front of a moving car. In the instant case the driver of each car had a right to assume that the other would try to avoid a collision.

In the well-considered case of *Mosso* v. *Stanton,* 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A, 943, relied upon by appellee, the court seems to have recognized wide disagreement as to the extent of the application of the last clear chance doctrine to the operation of trains, street cars, and the like on one hand, and automobiles on the other. The annotator who compiled the exhaustive annotations of more than one hundred pages in 92 A. L. R., finally, as to a situation similar to that in the instant case, concludes (page 140): "When, however, the *continuing negligence* of the injured person in failing to discover his own danger and move out of the danger zone stands over against the *continuing negligence* of defendant for failing to discover the situation and avert the accident, it is difficult to understand how the doctrine of last clear chance may be applied consistent with the proximate cause view."

Referring particularly to a situation where the doctrine may be made applicable to railroads, street railways and the like, he then further said:

"Even such considerations fail in the case, for example, of a collision between two automobiles of equal potentiality for harm. In such a case, as upon the present hypothesis, the parties are charged equally with the failure to discover the danger, and the negligence of the plaintiff in that regard continues at least as long as defendant's negligence, there seems to be no ground for applying the doctrine in favor of the plaintiff rather than the defendant, except that, as the event proved, it was the former rather than the latter who was injured."

We think this to be the correct view of the law in cases presenting facts similar to these in the instant case.

Instruction No. 5 appears clearly to be in direct conflict with instructions No. 4 and No. 6, which latter instructions were correct as applicable to the facts in this case.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

LASER *v.* STATE, EX REL. MCKINLEY, COMMR. OF LABOR.

4-5563 132 S. W. 2d 193

Opinion delivered October 9, 1939.

George O. Patterson and *E. H. Patterson,* for appellant.

G. B. Segraves, Jr., for appellee.

Linus A. Williams, for intervener.

MEHAFFY, J. The appellant was, and had been for a number of years, the owner of a coal mining plant consisting of tipple, motors and machinery ordinarily and customarily used in mining coal in what is known as the Spadra field, Johnson county, Arkansas. The mine is approximately two miles south of Clarksville, and has been known as the Sterling Coal Company. The appellant Laser, however, was the owner of same.

On July 1, 1937, Laser, by written lease, leased to J. E. Harding, Dick McAnally, Clint Huff, Walter Green, A. A. Deavers, and V. T. Collier for a period of three years, the entire mining plant which he owned, consisting of the equipment used in connection with the operation of the mine, in order to permit the lessees to engage in the operation of the coal mine. The lease provided for a royalty of 40 cents per ton on all coal mined, payable on the 15th day of each month for the coal mined the preceding month. On August 2, 1937, the lessees organized themselves into a corporation known as the Jamestown Mining Company, and on August 7th the mining plant and equipment was assigned by the original lessees to the corporation, Jamestown Mining Company. This assignment was by and with the consent of appellant with the understanding that the lessees individually would not be relieved from the payment of all royalties due on coal mined, as provided in the original lease. After obtaining this assignment, the Jamestown Mining Company engaged in the operation of the mine from August 7, 1937, until January 15, 1938, at which time it was unable to meet its payroll and closed down. On March 3, 1938, the appellees, Bill Sefik and 47 other persons, filed this suit in the Johnson chancery court in the name of the state of Arkansas, upon the relation of the Commissioner of Labor, and claimed a lien upon all of the mine and equipment used by them in performing the labor during the period for which they were unpaid. Affidavit for enforcement of the lien was filed. The complaint set out in detail the amounts due each, and also an itemized list of the machinery used by them in performing their labor.

The appellant, Laser, filed a demurrer to the complaint and affidavit, which was overruled, and Laser then filed an answer setting up that he was the owner of the property; had leased it to six individuals who had later leased it to the corporation, which was the employer of appellees, and he denied any connection whatever with the corporation or its conduct or operation of the mine.

John Cline, doing business as Clarksville Welding and Machine Works, filed an intervention claiming a lien on certain items of machinery because of repairs made to it under the contract with the corporation during the time it was engaged in the operation of mines.

The court entered a decree in favor of appellees, laborers, and in favor of intervenor Cline, giving them judgment against the Jamestown Mining Company for the amounts due, and also giving them a lien upon all the machinery used by them in the mine while performing their labor.

The appellant appealed from the decree awarding appellees a lien on the machinery and equipment. The case is here on appeal.

There is practically no dispute about the facts. The appellant, Laser, testified that he was the owner of the property and had been operating it since 1932; operated it under the name of the Sterling Coal Company, but he was the individual owner; he leased it to the individuals above named, and says he had no control over the operation of the mining company or the lessees that he leased it to originally; he identifies the machinery described as machinery belonging to him; that the mining company advised him, as owner, that they could not operate the mine any longer, and that if he wanted to protect his property he would have to take it over. The corporation surrendered the lease on January 31, 1938. He testified that he had been out approximately $450 in protecting the property; identified the assignment of the lease to the corporation, and the lease was introduced in evidence. He also testified that under the terms

of the lease he was to have the first opportunity to sell the coal for the corporation; that if he could not sell it they could sell it any place they desired; that his right to sell the coal was exclusive, but that the lessees could sell their coal anywhere if he could not sell it, and would give him only the royalties; that he purchased the coal outright from the mining company; that he was to receive a commission of 25 cents per ton on the coal he sold, in addition to his royalties. At the time he leased the property, he was engaged in the coal jobbing business, and had arranged to open his office in Minneapolis, Minnesota; that he not only handled coal for the Jamestown Mining Company, but other mines in the Spadra field and the whole southwestern field of the United States on a commission basis; that he had the exclusive right to sell the coal produced by the corporation and was to receive on all coal sold for it an additional sum as sales agent over and above the royalties due him under the lease; that the Jamestown Mining Company was a corporation, but he did not own any stock in it; that the Sterling Coal Company is a trade name which has been used by him; that he owns personally the Sterling Coal Company. He did not own the coal; it belonged to King and Clark Heirs and his mother; that he had a lease on the coal; that prior to the time he leased it, he operated the mine himself; the mine had been operated since 1904; neither Laser nor any of his family ever owned any stock in the Jamestown Mining Company.

J. E. Harding, one of the original lessees, testified corroborating the testimony of Tom Laser. Harding also testified that Laser was the exclusive sales agent; that Laser sometimes paid the power bills and deducted it from the amount the coal company had coming from coal he had sold.

The articles of incorporation were introduced, and also a copy of the lease, with the assignment.

The appellant was recalled and testified that he did not know where the office of the Jamestown Mining Com-

pany was located; that their books and payroll were kept at different times in an office that he maintained in Clarksville; that the corporation asked permission of him to use his office for their books because Miss Susie Cunningham, the bookkeeper of the corporation, was in that office; she did not work for him; the bookkeeper of the corporation made out the payroll in his office.

J. E. Nichols testified that he was employed by Tom Laser and the Southwest Coal Sales Organization of Minneapolis, owned by Laser. Miss Cunningham kept the company's books in his office at Clarksville; he had no control over her; the corporation asked the privilege of being permitted to keep the company's books in his office, which permission was granted. He testified that the payrolls and records were kept in the office space that he permitted Miss Cunningham to use.

The chancellor held that the laborers were entitled to a lien under § 9349 of Pope's Digest, which reads as follows: "Any person or persons working in any mines of the state of Arkansas, or in any quarries, either stone or marble, shall have a lien on the output of any such mines or quarries for the amount due for such work, and, in addition thereto, his lien shall attach to all the machinery, tools and implements used in such quarrying and mining, such liens to be enforced in the manner now provided or as may hereafter be provided for the enforcement of laborers' liens."

It is appellant's contention, first, that the appellees are not entitled to a lien under § 8905 of Pope's Digest. That section provides for liens on mines, gas and oil wells, buildings, supplies and equipment; but the court held that they were entitled to a lien under § 9349 of Pope's Digest.

The first case cited and relied on by appellant is *Reitz, Receiver,* v. *Nowlin,* 195 Ark. 16, 110 S. W. 2d 690. In the first place, the court in the case relied on did not construe the sections involved here; and the court stated: "The testimony as to the ownership of these two pieces of machinery is so conflicting that we are unable to say

the chancellor's finding that it belonged to the Queen Excelsior Company at the time the mine was closed down is contrary to a clear preponderance of the testimony."

Appellant then calls attention to the case of *Estep et al.* v. *Blue Ribbon Co.*, 177 Ark. 83, 9 S. W. 2d 331. That case holds that the act giving a lien to miners does not make such lien superior to the lien of a chattel mortgage.

We think, however, that none of these cases cited by appellants is controlling here, for the reason that the evidence showed that the mine was operated for the benefit of appellant Laser himself. The lease provides not only that he shall have 40 cents royalty on each ton, but that he shall have the exclusive right to sell all the coal mined. He, therefore, has control of the entire output, and the statute gives the laborers a lien on the output of the mine, and this entire output, under the lease, was under the control of the appellant. The corporation could not sell a ton of coal unless they were permitted to do so by appellant. If he had control of the entire output, and the evidence shows conclusively that he did, the mine was operated for his benefit as much as for the corporation. Certainly it would not be permissible for him to take the output of the mine, on which the laborers had a lien, and operate the mine in the manner in which this one was operated and prevent the laborers from having a lien to enable them to collect their wages. In addition to controlling the entire output, the evidence shows that the bookkeeper of the corporation occupied a room in Mr. Laser's office; the books were kept there, and we think the evidence clearly shows that the manner in which the mine was operated was for the benefit of the appellant; that is, he operated the mine in this way and never at any time, except by his own consent, did anyone else have a right to sell the output of the mine. The evidence shows that appellant was in the coal business, engaged in selling coal, and in the lease executed by him, he retained the exclusive right to sell all of the coal. It was provided in their contract that if Laser could not sell the coal, then the corporation might sell it; but even

then, the contract provides that Laser shall have his 25 cents per ton and his 40 cents per ton royalty. In other words, we think the arrangement just a method of operating the coal mine by appellant himself. If this could be done, then the owner could retain all the profit, all the income of the mine, and deprive the laborers of their lien under the statute. There seems to be no serious contention as to the lien of the intervener for repairing machinery.

Our conclusion is that the chancellor's decree is correct, and it is affirmed.

MALCO-ARKANSAS THEATRES, INC., ET AL *v.* COLE ET AL.

4-5578 132 S. W. 2d 174

Opinion delivered October 16, 1939.

Joseph R. Brown, for appellants.

Partain & Agee, for appellees.

HOLT, J. Appellees brought suit against appellants in the Crawford circuit court for damages which they

alleged were caused by appellants negligently permitting water from their premises to damage the property of appellees.

The acts of negligence complained of, as set out in appellees' complaint, are: "Defendants on or about March 5, 1938, and prior thereto, operated and controlled and had charge of the building adjacent to the building owned by the plaintiff, Ray Cole, and just north of his said building; that at that time and prior thereto the defendants carelessly and negligently maintained their said building and permitted same to be in a condition so that the water from off their building caused by rain falling thereon was permitted and caused to flow onto and against the rear wall of the building belonging to the plaintiff, Ray Cole; that the defendants carelessly and negligently maintained said building and the drainage from same in that there was no downspout or means of carrying off the water from defendants' building, but same was carelessly and negligently caused to collect in a gutter or drain, and since there was no downspout said water ran off and against and blew against the said rear wall of plaintiff's building so that finally by reason of such carelessness and negligence the mortar between the bricks of plaintiff Cole's building was washed out and came out, and the said rear wall was caused to fall to said plaintiff's damage as hereinafter complained of.

"That as above stated, the plaintiffs, Ray Cole and H. J. Sellers, owned and operated a bakery and place of business in the Cole building, and by reason of the said wall falling and the resultant coming in of wind and water, and its contact with their machinery, fixtures, wares, merchandise, ovens, and other property, their said property and business were damaged, as hereinafter complained of, by reason of the acts of negligence of the defendants, as hereinabove complained of."

The answer of appellants was a general denial of every material allegation in the complaint of appellees.

On a trial to a jury a verdict was returned in favor of appellee, Ray Cole, in the sum of $500 for damage to

the building in question, and for $500 as damages to the personal property of both appellees, or a total sum of $1,000. From this judgment comes this appeal.

The evidence in this case is to the following effect: The Malco Realty Company, Inc., purchased part of lots 11 and 12, block 26, in Van Buren, Arkansas, on May 7, 1937. The Rio Theatre in Van Buren is built on this property. On June 8, 1937, the Malco Realty Company, Inc., leased this property for a term of five years to appellant, Malco-Arkansas Theatres, Inc. Subsequently on September 3, 1938, the Malco-Arkansas Theatres, Inc., assigned their lease to Malco Theatres, Inc., and on the same day the Malco Theatres, Inc., leased the property to the Van Buren Enterprises, Inc. While the record reflects that some of these corporations have the same officers, yet they are separate and distinct corporations.

On March 5, 1938, during a heavy rain, a portion of the rear wall of the Rio Theatre building fell, and also a portion of the rear wall of the adjoining building owned by appellee, Ray Cole. There was no rear downspout on the Rio Theatre building next to appellee Ray Cole's building at the time of the alleged damage, nor was there any downspout on said theatre building at the time appellant, Malco-Arkansas Theatres, Inc., took over the building under the terms of its lease, nor at the time Van Buren Enterprises, Inc., took over the leased building from Malco Theatres, Inc.

The evidence shows that the condition of the downspout complained of was unchanged for sometime before the Malco-Arkansas Theatres, Inc., rented the building. Appellees' witness, Searcy Ireland, testified on this point: "A. Well, somewhere around between twelve and two o'clock, the building just fell in; part of the brick fell in the shop, but most of them fell out in the alley on the post office lot. Q. Did some of them fall inside? A. A few of them. Q. Before this happened, what had been the condition of the building north of your building (meaning the theatre building) as to a downspout? A. There wasn't any. Q. Can you tell the jury

what that caused when it rained? A. From time to time, I always came to work through the back door and I noticed from time to time when it rained, that the water would go on the building (the Cole building) and was gradually washing the mortar out from between the bricks. Q. The water was coming from where? A. The top of that building (theatre building). Q. Tell the jury if there was any water came from the Cole building where he had this downspout? A. No, sir. . . . Q. Do you know how long the building had been in that condition prior to this rain? A. No, sir, but I have noticed, I have been working up there over two years, I have noticed every once in a while, the water blowing onto the building and gradually washing the mortar away."

The evidence further discloses that at the time of the alleged damage complained of on March 5, 1938, appellant, Malco-Arkansas Theatres, Inc., occupied the theatre property in question as lessee and tenant of the Malco Realty Company, Inc., and was in charge and control of the building, but it was not the owner of the leased premises.

The testimony further reflects that appellant, Van Buren Enterprises, Inc., did not occupy the theatre building as a lessee and tenant, or in any other capacity, until September 3, 1938, almost six months after the alleged damage occurred.

Appellants earnestly contend (1) that the trial court erred in not directing a verdict in their favor for the reason that appellant, Malco-Arkansas Theatres, Inc., was at the time of the alleged injury and damage a tenant and lessee of the Malco Realty Company, Inc., and that appellant, Van Buren Enterprises, Inc., did not succeed to the occupancy and control of the theatre building until almost six months after the alleged damage; and (2) that the damages awarded are excessive.

Under the view that we take of this case it will not be necessary to consider appellants' second assignment.

As to appellant, Malco-Arkansas Theatres, Inc., we think the evidence fails to disclose any liability for the

reason that at the time of the alleged damage it was a lessee and tenant of the Malco Realty Company, Inc., was not the owner of the property, but was in charge and control only as a lessee and tenant.

We think the law is well established that in this situation this company as lessee could not be held liable for a defective condition in the leased premises, or for a nuisance, which caused injury and damage to the adjoining Cole property, when such defective condition, or nuisance, was present when it took over under the lease and in fact existed, according to the testimony, for sometime prior thereto. The rule applicable here appears to be well stated in 36 C. J. 249, § 969: "A tenant will be liable to an adjoining or neighboring landowner for injury to the latter's property resulting from a nuisance created by the tenant on the demised premises. He is, however, under no duty to change the condition of the premises when a nuisance existed at the time of the letting, and will not be liable for injuries arising from the existence of such a nuisance."

In the case of *Meyer* v. *Harris,* 61 N. J. L. 83, 38 Atl. 690, the Supreme Court of New Jersey, in considering the principle involved here, held "A tenant for years is not responsible in damages to a third person for maintaining and keeping in repair, upon the demised premises, a structure, erected thereon by his landlord prior to the commencement of his term, which operates to the nuisance of such third person. The remedy of the injured party is against the landlord alone."

Since the undisputed evidence in this case discloses that appellant, Van Buren Enterprises, Inc., did not occupy the theatre building in question as a lessee and tenant until September 3, 1938, almost six months after the alleged damage, we hold that no liability can attach to it.

The evidence in this case, as we view it on this record, fails to support appellees' contention that the Van Buren Enterprises, Inc., is but a reorganization and continuation of the Malco-Arkansas Theatres, Inc.

We conclude, therefore, that the trial court erred in refusing to hold as a matter of law that neither of the appellants was liable, and accordingly the judgment is reversed, and the cause dismissed.

MEHAFFY, J., dissents.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE, *v.* HOWELL.

4-5580 132 S. W. 2d 176

Opinion delivered October 16, 1939.

Thomas B. Pryor and *Daggett & Daggett,* for appellant.

Walter N. Killough, for appellee.

MEHAFFY, J. On October 21, 1938, the appellees, D. M. Howell and the American Insurance Company filed complaint against the appellants, Missouri Pacific Railroad Company and Guy A. Thompson, trustee, alleging

that on December 20, 1937, about 8:30 o'clock p. m., at a point between Cherry Valley and Vandale, Cross county, one of the railroad company's passenger trains ran into and destroyed a 1935 model Ford pick-up truck of the value of $425. It was alleged that the operators of the train failed to exercise proper and ordinary care in the operation of same, were operating it at an excessive rate of speed, failed to give warning of the approach of the train and failed to give the crossing signal as required by statute. In addition thereto, it was alleged that the grade crossing upon which the accident occurred was not properly kept and maintained, in that the rails were from four to five inches above the ground, which caused the truck to stall; that Howell was insured against damage to the truck in the amount of $250, which amount was paid to him by the insurance company, and that the insurance company was subrogated to the right of Howell to the extent of $250.

On November 17, 1938, answer was filed denying each and every allegation of the complaint.

The evidence showed that the crossing mentioned in appellees' complaint was a public road crossing used by the public generally.

Lonnie Smith testified that he had been using the crossing prior to the accident, hauling cotton over it for two years; it was a bumpy crossing, and the rails were up 3½ to 4 inches from the surface between the rails; some repairs had been recently made to the crossing; he hauled his crop across this crossing to the gin; the road was used a good deal by other people with wagons, trucks and automobiles. Witness had never seen any vehicles stalled upon it.

Leonard White testified that he lived a quarter of a mile from the crossing. The train stopped about his house after the accident; the rails were sticking up above the surface of the crossing at the time of the accident, probably as much as four inches. Witness used the crossing considerably and could get over it, and it did not bother him at all.

Mrs. Lonnie Smith testified that she heard the train coming before it reached the crossing; if it whistled she did not hear it; it whistled just before the crash; that was the only time she heard it; does not know how far the train went after the crash.

The appellee testified that he used this particular road probably twice or three times a month prior to the accident. On the night of the accident it was muddy and raining, and he was hunting the driest way to get home; it was cloudy and drizzling rain and fog; did not know the time the passenger train was due; the crossing is elevated some eight feet above the surface of the road; he was approaching the crossing from the west; there are some woods along the right-of-way about a quarter of a mile north of the crossing, and it would not have been possible for witness to have seen this train north of the crossing a mile or half mile away without coming up to the rails or upon the dump; the woods prevented his seeing the train half a mile or a mile away; the dump is 15 or 20 feet long on the west side of the crossing; he looked both north and south for a train as he approached, but did not see it; had not told the claim agent or anybody else that he saw the train a quarter or half mile away; he came up on the crossing and when his truck bumped over on the rail sticking up it stopped; the train was coming so he jumped out of the truck; when he got up to the track and saw the train he had just enough time to get out of the truck, that was all; he slowed up to get over the rails and killed his motor; the motor was in good condition, but it cut out crossing the rough tracks; just had time to get out of the car and run; when the truck was struck, he was not very far away, and he was still running; he did everything he could to see if a train was approaching; there was a heavy fog, and one could not see a light very far; when he first saw the train it was close to him, and he just barely had time to get out of his truck. There is a quarter of a mile of clear space between the crossing and the woods north of the crossing; it was this woods, a quarter of a mile away, that kept him from seeing the train; he looked for the train when

he was at the foot of the dump about 15 feet from the crossing; the train ran in excess of a quarter of a mile while he was traveling 15 feet.

A statement was introduced that witness said he did not read. It stated that he kept his car in second gear until it stalled on the crossing; that as he went over the rail he pushed in on the clutch, slowed up a little so his truck would not bounce so much, and when he pushed the clutch in the motor died; the front wheels of his truck stopped over the west rail; about the time the truck stopped he looked and saw the headlight of what he took to be a train; it appeared to be about a fourth of a mile north of the crossing; he jumped out and saw he could not move the truck, and then ran because he was afraid the train would knock the truck against him. He testified that that part of the statement, that he tried to push the truck back, was wrong, because he did not have time. It was correct about stating that he saw the train, but it was not a fourth of a mile away. Witness identifies the picture which is introduced in evidence. If his motor had not stalled, he would have gotten over the crossing before the train came.

Earl Dexter testified as to the value of the truck, but there is no contention made about the amount of the verdict.

The appellee was recalled and testified that he had owned cars and trucks since 1934; had been driving continuously, and had never had an accident before.

J. C. Ellison, a witness for appellants, testified that he had been roadmaster for the Missouri Pacific Railroad Company for 30 years and was familiar with the crossing; was riding on the train that was involved in the collision; heard the engineer blow the whistle for the crossing, and immediately after felt the emergency brake and knew something had happened; went back to the crossing after the train stopped; there was no injury to the road bed at the crossing, but the cattle guard south of the crossing was destroyed; crossing was made of composition asphalt and rock, and it was not necessary to make any repairs after the accident. Crossing was in good repair, not the

best, but in good repair. He has approximately 128 crossings in the 150 miles of track under his supervision; does not see all the crossings every week, but sees them at least once a month, traveling over them in a motor car; heavy rains can remove loose gravel from the rails and leave the rails sticking up; knows that the engineer whistled for the crossing; saw the crossing that night and next day, and it was in good condition for ordinary vehicular travel across it; the rails stuck up about a half an inch above the surface of the crossing.

J. O. Madison testified that he had been 26 years in the employ of the railroad company as fireman and engineer; was fireman on the train involved in the collision; was working a very powerful engine, about a 100-ton engine; they were going about 70 miles an hour as they approached the crossing; he first saw the truck when he was 800 to 1,000 feet away from it; the engineer applied the brakes in emergency, and the train ran about 2,300 feet from the time the brakes were applied until it stopped; there was nothing either he or the engineer could do to keep from hitting the truck; he saw the truck the first moment he could; he saw the truck about the time the engineer did and about the time he hallooed to the engineer the engineer applied the brakes; the headlight was in good condition.

J. E. Underwood testified that he had been in the service of the Missouri Pacific as engineer for 40 years; was driving the engine involved in the collision; was whistling for the crossing; after seeing the truck kept blowing as fast as he could to attract attention; was blowing when he first saw the truck.

The appellee, recalled in rebuttal, testified that sometime after the accident, he saw men working on the crossing; at the time of the accident the crossing was gravel, and it is now asphalt.

At the close of all the testimony the appellants requested the court to instruct the jury to return a verdict for appellants, which request was denied.

After the instructions had been given by the court, the jury rendered a verdict for appellee, D. M. Howell, in the sum of $155, and a verdict in favor of the insurance company in the sum of $245, and a judgment was entered upon the verdicts.

Motion for new trial was filed and overruled, and the case is here on appeal.

Appellants say that the appeal is predicated upon the following propositions:

"1. The testimony conclusively proves contributory negligence on the part of plaintiff, D. M. Howell, which should operate as a complete bar to the right of recovery of both plaintiffs.

"2. The testimony is insufficient to show failure on the part of defendant to exercise ordinary care to maintain the crossing in a reasonably safe condition for ordinary vehicular traffic.

"3. The testimony is conclusive that the crossing was, at the time of the collision, in a reasonably safe condition for ordinary vehicular traffic."

Appellants' first contention is that the evidence shows that appellee, Howell, was guilty of contributory negligence. We have set out the testimony above on the question of giving the statutory signals, and by reference to said testimony it will appear that the evidence was in conflict. It was, therefore, a question for the jury to determine, and they found against the appellants.

The court instructed the jury with reference to giving the statutory signals, and told them expressly that the operators of the train did not have to sound the bell and blow the whistle, but that the statute provides that one or the other shall be done. But it is earnestly contended by appellants that even if the jury should find that the statutory signals were not given, appellees could not recover, because plaintiff himself was guilty of contributory negligence.

Contributory negligence is negligence on the part of the plaintiff that contributes to the damage, and if the

negligence of plaintiff contributes in any degree to cause the damage, he cannot recover.

The appellee, Howell, testified that it was cloudy and drizzling rain; that the crossing is elevated eight feet above the surface of the road. He was approaching the crossing from the west, and that there are some woods along the right-of-way about a quarter of a mile north of the crossing; that it would not have been possible for him to have seen the train north of the crossing a half mile away without coming up close to the rails or up on the dump; that the woods prevented his seeing the train, although he looked both north and south; that he came up on the crossing and bumped over the rail sticking up; his engine stopped, and the train was close to him so he jumped out of his truck. When he got on the track and saw the train coming, he just barely had time to get out of the truck.

Mrs. Lonnie Smith testified that the train whistled immediately before the crash; that was the only whistle she heard.

Appellee did not know what time the train was due, and he had a right to assume that the railroad company would not be guilty of negligence in failing to give the signals required by statute. The question of contributory negligence was a question for the jury, and its verdict, if there is any substantial evidence to support it, will not be disturbed.

It is next contended that the testimony is insufficient to show failure on the part of appellants to exercise ordinary care to maintain the crossing in a reasonably safe condition for ordinary vehicular traffic.

Section 11057 of Pope's Digest makes it the duty of the railroad company to construct the crossings in such a way that the approaches to the roadbed on either side shall be made and kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by reason of the construction of said railroad.

In the case of *Payne* v. *Stockton,* 147 Ark. 598, 229 S. W. 44, this court said: "In construing this statute in *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 118 Ark. 72, 175 S. W. 415, the court held that it is the duty of every railroad company to properly construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road."

Appellants call attention to the case of *Missouri Pacific Railroad Co.* v. *Wright,* 197 Ark. 933, 126 S. W. 2d 609, and state that in that case the duty imposed upon the company was positively stated by the court as follows: "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."

Appellants cite the case of *Gable* v. *Kriege,* 221 Ia. 852, 267 N. W. 86, 105 A. L. R. 539, and state that the rule followed by this court is very clearly stated in that case. The court in that case said: "The defective equipment of the truck, and its overloading and excessive speed, were without question the proximate cause of the accident involved in this case. The driver of the truck, as plaintiff's witness, testified that there were no brakes thereon; that there was a load of six or seven tons of gravel, and that the overload was at least three or four tons; that he approached the crossing at 12 or 15 miles an hour with a truck thus equipped and thus overloaded. It is certain that the left front wheel of the truck could never have gotten into the hole or depression on the west or right-hand side of the highway, and the evidence clearly shows that the left front spring and shackle were broken, not from the condition existing at the crossing, but wholly on account of the defective equipment of the truck, the partially broken left spring, the overload of gravel, and the speed at which the truck was being driven. And this must be held to be the primary cause of the resulting accident."

The facts stated in the case cited are wholly different from the facts in the instant case. The railroad

owed the duty to exercise ordinary care to maintain the crossing in safe condition. As to whether this duty was performed or not, the evidence is in conflict. There is, however, substantial evidence tending to show that this duty of the railroad company was not performed; that the crossing was not maintained in good condition. The question was properly submitted to the jury, and it found against the appellant's contention.

On questions of fact, the finding of the jury is conclusive. The jury is the judge of the credibility of witnesses and the weight to be given to their testimony.

This court has many times held that in testing the legal sufficiency of the evidence, we must view the testimony in the light most favorable to appellee. This court said: "In testing the question of the legal sufficiency of the evidence we must, under rules well settled by the decisions of this court, view the testimony in the light most favorable to appellee, and give it such force as the jury might have given it." *St. Louis-S. F. Ry. Co.* v. *Whitfield,* 155 Ark. 560, 245 S. W. 323.

It is not contended that the jury was not properly instructed, and it is, therefore, a question of fact, and the evidence being in conflict, the jury's verdict must be sustained.

The judgment is affirmed.

ROBERTS *v.* BAUCUM DRAINAGE DISTRICT.

4-5577 132 S. W. 2d 184

Opinion delivered October 16, 1939.

Carmichael & Hendricks, for appellant.

John Sherrill and *Frank Wills,* for appellee.

HUMPHREYS, J. A petition of appellant and other landowners residing in certain territory in Pulaski county, Arkansas, was filed in the county court of said county on July 20, 1935, for the creation and establishment of Baucum Drainage District under authority of act 279 of the General Assembly for the year 1909 and act 221 for the year 1911 and other acts amendatory thereof. These acts are digested under chapter 52 of Pope's Digest. The lands in question were drained by the Faulkner Lake Drainage District and the petition requested that the landowners in the proposed district be allowed to construct or repair any levees or flood gates then existing, and in addition be permitted to construct new ditches, levees and flood gates when same might be deemed advisable to protect the proposed drainage system. Section 4489 of Pope's Digest provides that the word "ditch" includes levees and provides for the construction thereof under the same procedure as the building of drains. H. G. Martin, the engineer appointed by the court for making the preliminary survey made a report to the court that the land included

in the preliminary survey and described in the preliminary survey would be equally and ratably benefited by the proposed improvement of the Baucum Drainage District and that the same should be equally and ratably assessed for all benefits accruing from said improvement.

After the preliminary steps necessary for the creation of the district had been complied with the petition was heard by the county court and it was ordered and adjudged by the court that "a drainage district by the name and style of Baucum Drainage District of Pulaski county, Arkansas, be and the same is created and established" under the provisions of the aforesaid acts and amendments thereto.

Thereafter the commissioners of the district were duly appointed and each filed the required oath under the acts.

The Board of Commissioners then filed the plans and specifications and a statement of the cost of the improvement, said plans being accompanied by a map showing the location of all mains and lateral ditches, levees and other improvements fully described in the specifications attached.

After the establishment of the district the estimated cost for constructing a levee along the river front to protect the lands in said district from overflow was so great that the commissioners sought government aid to assist in building a levee instead of attempting to construct the improvements themselves and did secure such aid. The government, through its engineers and under authority of the 74th Congress, proposed to the commissioners of said district that it would construct the levee on the St. Louis-Southwestern Railroad right-of-way, to which there was no objection by the railroad company, at its own expense provided the district would pay $4,000 which would be the cost of four thousand feet of eight-inch perforated pipe to be placed under the railroad ballast for drainage purposes. This proposal came in the form of a letter to the commissioners of the district on April 15, 1938, as follows:

"We are addressing this letter to you for your information in arriving at the amount of money which your district will be required to raise in order to conform with the regulations of the United States engineer office. 1. The district will not be required to expend any money for borrow pit. 2. The district will not be required to expend any money for drainage structures. 3. Under your contract with the Cotton Belt Railroad you agree to assume the cost of installing a system of perforated pipe underneath the present railroad ballast in order to remove water from the ditch which will exist between the levee and the railroad bed after the levee is constructed.

"Under the railroad specifications there is to be installed an 8-inch pipe 24 feet in length, spaced every 200 feet. This amounts to 4,000 feet of perforated pipe which we estimate will cost to install $1 per foot, or, say, a total of $4,000.

"This amount, with the exception of administration expense, attorneys, engineers, etc., is in our judgment, all the money that it will be necessary for this district to raise."

The commissioners accepted the proposal to construct the improvement and the levee work was begun on the 15th day of June, 1938, and completed at a cost of about $75,000 at the expense of the government and for the purpose of raising the necessary fund to pay for four thousand feet of perforated pipe of $4,000 it assessed benefits against about ten thousand acres of land included in said district for the purpose of constructing the levee and drain provided for in the plans and specifications. The commissioners certified this assessment roll or benefit against each tract of land to the county court on October 3, 1938. The district through its commissioners requested the county court to review the assessment and to confirm, increase or diminish same as the court might find proper.

The appellant filed a petition denying legality of the district and attacked the correctness of the assess-

ments. He prayed that the district be dissolved and that the assessments be quashed. After hearing the evidence the court found that the district should be dissolved and refused to confirm, increase or diminish the assessments.

Baucum Drainage District appealed from the action of the court in dissolving the district and from its refusal to act upon the adjustment of benefits and in circuit court filed a motion to reverse the action of the county court in dissolving the district and filed a petition for a mandamus requiring the county court to exercise his jurisdiction upon the assessment of benefits and damages and the levying of the tax and other procedure necessary for the completion of the district.

Appellant filed an answer or response to the petition demanding that the circuit court hear the case *de novo* upon its merits as if the case had been originally brought in the circuit court. The circuit court sustained the motion of appellee to set aside the order of the county court dissolving the district and the application for a mandamus requiring the county court to exercise its jurisdiction with reference to the assessment of benefits and damages and remanded the case with directions to the county court to exercise its discretion with reference to the assessment of benefits and damages against the respective tracts of land and to levy a tax for the payment of the improvements made in the district.

Appellant contends that the court erred in reversing the judgment of the county court in dissolving the district without a trial *de novo* in the circuit court. We do not think so because a trial *de novo* on that proposition was unnecessary. This court decided in the case of *Wilson* v. *Mattix,* 149 Ark. 23, 231 S. W. 197, that the county court was without authority to dissolve a drainage district after it has been organized and sustained a motion to dismiss the cause on the ground that the county court had no jurisdiction to adjudicate the dissolution of the district. In so ruling this court said: "A search of the statute from end to end fails to dis-

close any provision which, either in express terms or by implication, can be construed to confer authority on the county court to dissolve the district after it has been organized. The county court, in the absence of a statute can not exercise that authority."

It is true that since this decision was rendered such authority was conferred upon county courts at the request of the Board of Commissioners when they should deem it inadvisable or impracticable and for the best interest of the property owners of the district, not to construct the improvements contemplated by the organization of the district under certain conditions. Such authority is conferred by § 3 of act 59 of the Acts of 1927 (Pope's Digest, § 4525). But this statute has no application in the instant case for the reason that the Board of Commissioners have made no such request of the county court. As far as applications by landowners in the district are concerned, the statute is just the same now as it was when the decision of *Wilson* v. *Mattix, supra,* was handed down by this court.

Appellant contends, however, that he was entitled to a trial *de novo* in the circuit court on the question of assessment of benefits to the respective tracts of land and damages thereto and a levy for a collection of the taxes and that the court erred in remanding the case to the county court for those purposes. Appellant would be correct in this contention had the county court determined those issues, but having refused to exercise its jurisdiction with reference to the assessment of benefits and damages and to act upon and levy a tax for the payment of the improvements made in the district, the circuit court was correct in issuing a writ of mandamus requiring the county court to exercise its discretion conferred upon it by § 4463 of Pope's Digest. Section 4463 of Pope's Digest provides that upon filing the complaint against the assessment of benefits or damages, "the county court shall consider the same and enter its findings thereon." The county court had exclusive original jurisdiction to pass upon the assessment of benefits and the damages and to levy the tax for the payment of the

improvements made in the district and where it refused to do so the remedy to compel it to exercise its jurisdiction was by mandamus.

The case of *Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712, Ann. Cas. 1913 C, 1317, relied upon by appellant is not applicable and does not rule the instant case because in that case no discretion was to be exercised by the county court such as passing upon assessments or the levying of taxes, while in the instant case such duty rested upon the county court in the first instance and no duty rested upon the circuit court to try the issue of assessments, damages and the levying of taxes until the county court had first exercised its jurisdiction in passing upon the assessments, damages, etc. The court, therefore, correctly granted the writ of mandamus to compel the county court to exercise its jurisdiction in these matters because it had failed or refused to do so. *Moyer* v. *Altheimer,* 168 Ark. 271, 270 S. W. 91; *Hudson* v. *Parker,* 156 U. S. 277, 15 S. Ct. 450, 39 L. Ed. 424.

No error appearing, the judgment of the circuit court is affirmed.

SOUTHWESTERN DISTILLED PRODUCTS, INC., *v.* TRIMBLE, JUDGE.

4-5627 132 S. W. 2d 173

Opinion delivered October 16, 1939.

Brickhouse & Brickhouse and *Vol T. Lindsey,* for petitioner.

John K. Butt, for respondent.

HUMPHREYS, J. On May 4, 1939, John K. Butt, prosecuting attorney of the Fourth Judicial Circuit of the state of Arkansas, which included Benton county, filed a complaint at law in the name of the state of Arkansas and himself as prosecuting attorney of the Fourth Judicial Circuit, against the Southwestern Distributing Corporation, George Dixon and James Cole alleging that they and each of them had in their possession approximately 8,877 cases of alcoholic liquor; that each case was unstamped with the revenue stamp required by law to be affixed to the container of such liquor and that no revenue stamps were affixed to any part of said liquor, or to any container thereof, that no Arkansas state tax

of any kind had been paid on any part of said liquor; that such possession of liquor occurred in Benton county, Arkansas, and that each and every case thereof was and is liable for a state tax to the state of Arkansas in the amount of $3.36; that the owners and possessors thereof are liable to the state of Arkansas for tax thereon in the amount of $3.36 for each and every case thereof, and the defendants are liable therefor; that the total amount of tax due to the state of Arkansas on said liquor is $29,826.72; that said tax is past due and unpaid; that the welfare of the state of Arkansas and of the citizens thereof is seriously menaced and jeopardized by reason of such tax delinquency in said sum; that there are no means or methods by which to collect said tax or to secure the payment thereof to the state of Arkansas, for the use, welfare or benefit of the citizens thereof other than by impounding and confiscation of said liquor. The prayer was for the sheriff of Benton county and the Arkansas state police be directed to seize and impound all of said liquor, and to hold same subject to the orders of the court and there was a further prayer that upon a hearing the plaintiff have a judgment against the defendants for the amount of tax found to be due, in the sum of $29,826.72 and for such penalty as is or may be due and for the cost thereof and for all other legal and equitable relief appropriate and that if such judgment as may be rendered is not paid within a time to be fixed by the court said liquor be ordered sold in such manner as may be directed by the court for the satisfaction and payment of said judgment.

The liquors were seized and impounded for the purpose of collecting the taxes due the state thereon.

On May 10, 1939, before any pleadings had been filed on behalf of the defendants, the plaintiff filed an amendment to the complaint alleging that the defendant, Southwestern Distilled Products, Inc., is a corporation and organized, doing business under the laws of the state of Arkansas and that the alcoholic and intoxicating liquor mentioned in the complaint was in the possession of it and the other defendants and each of

them for the purpose of the sale thereof in case lots or at wholesale and further alleged that the Commissioner of Revenues of the state of Arkansas had failed and neglected to take or institute appropriate legal or departmental action to collect or to secure the collection of the tax due the state of Arkansas on said liquor.

On May 9, 1939, a summons was issued on the complaint against the Southwestern Distributing Corporation, George Dickson and James Cole to answer the complaint and on said date the sheriff filed a return on the summons stating that on the 9th day of May, 1939, at 6:15 p. m. he served the writ by delivering a copy and stating the substance thereof to the Southwestern Distributing Corporation, George Dickson and James Cole in person.

On June 2, 1939, the Southwestern Distilled Products, Inc., a corporation organized and existing under and by virtue of the laws of the state of Arkansas, appeared specially and for that purpose only and filed a motion to quash the summons issued in the cause alleging that a complaint was filed in the circuit court of Benton county by J. K. Butt on and in the name of the state of Arkansas against the Southwestern Distributing Corporation, George Dickson and James Cole as defendants; that on the date of the filing of said complaint, an order of seizure was issued by the Hon. J. W. Trimble as judge of said court, ordering approximately 8,877 cases of alcoholic liquor allegedly belonging to the Southwestern Distributing Corporation to be seized; that after the service of said seizure order, a summons was issued in said cause directed to the Southwestern Distributing Corporation, George Dickson and James Cole and that a return was made on the same by the sheriff of Benton county; that, under said order of seizure, property consisting of alcoholic liquors belonging to the Southwestern Distilled Products, Inc., was impounded and that at no time since the filing of said alleged complaint, service of the order and issuance and service of the summons has been served upon the Southwestern Distilled Products, Inc., or that said corpora-

tion had ever been apprised or notified in the manner prescribed by law of any action or charge pending against it and that said seizure of its goods and merchandise was unlawful and was a violation of the laws of the state of Arkansas and in violation of the Constitution, taking the property without due process of law in violation of the corporation's rights as guaranteed by the Constitution of the United States and that the attempted service on the corporation and the return thereof was defective and void and all proceedings thereunto and pertaining was void with a prayer that the court quash the order of seizure entered in said cause and to quash the summons and return thereon issued and served thereon. A hearing was had on the motion and evidence was introduced to the effect that the liquor which was seized and impounded was the property of the Southwestern Distilled Products, Inc., and responsive to the other facts alleged and set out in the motion. After hearing the evidence, the court overruled the motion to which ruling of the court the Southwestern Distilled Products, Inc., excepted.

On the 3rd day of June, 1939, the Southwestern Distilled Products, Inc., appeared specially and for the purpose only of filing a demurrer to the complaint. It alleged that the complaint did not state facts sufficient to constitute a cause of action against it and the other defendants, and also alleged that under acts 108 and 109 of the Acts of the General Assembly of Arkansas of 1935 and amendments thereto the Commissioner of Revenues was the sole and exclusive officer of the state charged with enforcing tax liabilities upon persons, firms and corporations engaged in the handling of spirituous or vinous liquors in the state of Arkansas, and also that John K. Butt, as prosecuting attorney of the Fourth Judicial Circuit, had no legal right, power or authority to file suit against it or the other defendants or any other person engaged in the liquor business of Arkansas without proceeding under § 10 of act 109, as aforesaid wherein the state Auditor has been duly designated as the proper official of the state to cause proceedings

to be instituted for the collection of the taxes and licenses imposed in said act. On the 3rd day of June, 1939, John K. Butt, on behalf of the state of Arkansas, filed the following motion:

"Comes the plaintiff and moves the court to permit plaintiff to amend the complaint herein so as to show a defendant by its proper name, and for cause alleges:

"That the complaint herein named 'Southwestern Distributing Corporation' as a party defendant. That the proper and legal designation of said defendant is not as styled in said complaint, but is properly and correctly named herein, to-wit: 'Southwestern Distilled Products, Incorporated.' That such designation of said defendant in the complaint herein was due to misinformation of plaintiff, and that such designation constitutes a mistake in the name of said party defendant. That the defendant in interest herein is in truth and fact said Southwestern Distilled Products, Incorporated, by whatever name designated in said complaint.

"That said mistake in the designation and naming of said defendant is harmless error, in that the legal and equitable rights of defendant have not been and are not prejudiced thereby, and that no substantial right of said defendant will be affected by amendment of the complaint so as to show the proper and legal title and designation of defendant.

"Wherefore, plaintiff prays that it be permitted to amend the complaint herein so as to show defendant correctly by proper name, and to correct the mistake in the name of said defendant.

"John K. Butt."

The court allowed and granted the amendment to the complaint over the objection and exception of the Southwestern Distilled Products, Inc., and overruled the demurrer of the Southwestern Distilled Products, Inc., to which the Southwestern Distilled Products, Inc., objected and excepted.

On June 9, 1939, the Southwestern Distilled Products, Inc., filed a petition for a writ of prohibition in this

court against the circuit court of Benton county and J. W. Trimble, judge, seeking to prohibit the circuit court of said county and J. W. Trimble as judge thereof from proceeding further in the cause upon the alleged ground that it had no jurisdiction of the subject matter involved or the parties defendant in the suit brought in the name of the state of Arkansas and for the benefit of the state of Arkansas and its citizens by J. K. Butt, prosecuting attorney of the Fourth Judicial Circuit, against it and the other defendants setting out in the petition all the pleadings in the cause pending in the circuit court and the evidence introduced by the Southwestern Distilled Products, Inc., in support of its motion to quash the summons in the cause pending in the circuit court of Benton county. Proper notice was given and the state of Arkansas filed a response to the petition denying that the circuit court of Benton county was without jurisdiction to proceed in the cause. The petition for prohibition and the response thereto are quite lengthy and we deem it unnecessary to set out the petition and response thereto *in extenso* in this opinion. Suffice it to say that the issues joined present the questions of whether or not the state of Arkansas might amend the original complaint by substituting the correct name of the corporation claiming to be the owner of the liquors in question instead of the name of the Southwestern Distributing Corporation which appeared in the complaint by mistake; and whether or not J. K. Butt, as prosecuting attorney of the Fourth Judicial District had authority to bring the suit in the name of the state of Arkansas for the benefit of the citizens of the state.

(1) We think under authority of § 1463 of Pope's Digest the circuit court had a right to correct the name of the corporation in possession of the liquor when seized so as to state the true name of the corporation holding the liquor. We do not think by inserting the correct name of the corporation which was inserted in the complaint by mistake affected the substantial rights of the Southwestern Distilled Products, Inc. No denial is made in the motion to quash the summons that the liquor it

claims is subject to the tax or that it had paid the tax on the liquor. It does not deny receiving the summons, but interposes the technical objection that its correct name was Southwestern Distilled Products, Inc., instead of Southwestern Distributing Corporation which appeared in the complaint and summons. Section 1463 of Pope's Digest is as follows:

"The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Section 1466 is also authority for making the correction in the name of the corporation. Section 1466 of Pope's Digest is as follows: "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The effect of the amendment was to insert the correct name of the corporation in all the pleadings when the misnomer was corrected in the complaint. The correction in all the other proceedings follows as a necessary result of the correction of the misnomer of the corporate name of the Southwestern Distilled Products, Inc., in the complaint. This court ruled in the case of *Lowenstein* v. *Gaines,* 64 Ark. 499, 43 S. W. 762, that where a summons, commanding the defendant to answer on the first day of the next spring term unnecessarily added the words "which will be on March 25, 1895" when the term commenced on the first day of April, it was an abuse of discretion to refuse to allow the summons to be amended by striking out the unnecessary clause.

The real subject matter involved in this suit is the collection of the tax due the state out of the specific

property involved and is really a proceeding *in rem.* We think the court clearly had the right to seize the property and confiscate or sell it without respect to who was in possession of it or who was the owner of it. The property itself is responsible for the tax and subject to seizure and sale for the collection of the tax. The proceeding might well proceed to a conclusion without anyone being made a party. It is true that a judgment is asked against the parties who are in possession of the property and personal judgment could not be rendered against either of them without personal service, but that is only incidental to the main purpose of this suit which was to collect the tax due the state out of the liquor itself. The court had jurisdiction over the *rem* and undisputed service against two of the parties who had the liquor in possession and we think sufficient service upon the Southwestern Distilled Products, Inc., who now claims to be the owner thereof. The motion to quash the summons involved a question of fact for determination by the court. In the instant case, evidence was introduced in support of the motion to quash the summons and the court refused to quash the summons after hearing the evidence over the objection and exception of the Southwestern Distilled Products, Inc. This court said in the case of *Finley* v. *Moose,* 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 74, that: "If the existence or non-existence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into or determine, a prohibition will not be granted, although the superior court should be of opinion that the questions of fact have been wrongly determined by law, and, if rightly determined would have ousted the jurisdiction." And again said in the case of *Order of Railroad Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. 2d 448, that: "Where the court has jurisdiction over the subject-matter, and the question of the jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error and prohibition is not the proper remedy." See, also, the cases of *Robinson* v. *Means,* 192 Ark. 816,

95 S. W. 2d 98; *Safeway Cab and Storage Co.* v. *Kincannon, Judge,* 192 Ark. 1019, 96 S. W. 2d 7; *Metropolitan Life Ins. Co.* v. *Jones,* 192 Ark. 1145, 97 S. W. 2d 64.

(2) Petitioner also contends that prohibition is the proper remedy because acts 108 and 109 of the Acts of 1935 conferred full power and authority upon the Commissioner of Revenues of the state of Arkansas to regulate and enforce the liquor laws in Arkansas to the exclusion of all other officers. We find nothing in those acts specifically repealing § 10889 of Pope's Digest which is 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"; nor any specific repeal of § 11984 of Pope's Digest which is as follows: "All actions in favor of and in which the state is interested shall be brought in the name of the state in the circuit court of the county in which the defendant may reside or be found, and shall be prosecuted by the prosecuting attorney for the state prosecuting in such circuit."

It certainly was not the intention of the Legislature by the passage of acts 108 and 109 of the Acts of 1935 to take away from the prosecuting attorneys of the several districts the right to commence and prosecute actions, both civil and criminal, in which the state or any county of his circuit might be concerned. As stated, there is no express repeal of the statutes conferring such power upon prosecuting attorneys and no necessary implication that the Legislature intended to do so. As evidence that it had no such intention we find that § 10 of act 109 confers certain powers upon the state Auditor with reference to the administration of the liquor laws, and again we find as evidence that the Legislature had no such intention, subsequent to the passage of acts 108 and 109 of the Acts of 1935, and at the same session the Legislature passed act 132 of the Acts of 1935 which employed the following language in § 2 thereof: "The circuit judges of this state are hereby declared to be primarily

responsible for the enforcement of laws against the unlawful manufacture and sale of intoxicating liquors."

We think that these several acts conferred concurrent authority upon the prosecuting attorneys of the several districts of Arkansas along with the Auditor and the Commissioner of Revenues to enforce the liquor laws of this state, and that John K. Butt, prosecuting attorney of the 4th judicial circuit of the state of Arkansas was well within his authority when he proceeded by proper action to seize 8,877 cases of alcoholic and intoxicating liquors for the purpose of collecting the past due taxes thereon, which was unstamped with the revenue stamps required by law to be affixed to the containers of such liquor, and upon which no Arkansas state tax of any kind had ever been paid.

The temporary writ of prohibition heretofore granted is, therefore, dissolved, and the writ of prohibition is denied.

SMITH, J., concurring in the judgment. MCHANEY and BAKER, JJ., dissent.

ANGELS *v.* REDMON.

4-5576 132 S. W. 2d 170

Opinion delivered October 16, 1939.

J. B. Gillison and *J. R. Yerger,* for appellant.
J. T. Cheairs, for appellee.

SMITH, J. A decree was rendered in the chancery court of Chicot county on April 6, 1936, confirming title in the state to lands acquired through forfeitures to the state for the nonpayment of taxes for various years. The proceeding was had under the authority of act 119 of the Acts of 1935, page 318. Among other lands embraced in the decree was fractional east ½ section 3, township 16 south, range 1 west, which had been sold and certified to the state in 1933 for the nonpayment of the taxes due thereon for the year 1932. At the time of the rendition of this decree the title to the tract of land described was in the John Hancock Mutual Life Insurance Company, which company, on April 2, 1937, conveyed the land, by quitclaim deed, to Sylvia Epstein, who later married one Angels, and on April 5th Mrs. Angels filed an intervention, in which she alleged her acquisition of the title to the land above-described, and that her grantor, the Insurance Company, had no knowledge of the pendency of the suit before the rendition of the decree. No affidavit to that effect was made by any representative of her grantor. In this intervention, Mrs. Angels alleged that the sale was void for the following reasons: "That said tax sale to the state and confirmation under said decree is void for indefinite de-

scription of said land, failure of the proper levying of the three-mill road tax, improper advertisement of sale by the sheriff and failure of the clerk to properly certify the tax records to the sheriff and issuance of warrant and other reasons."

This intervention was filed pursuant to the provisions of § 9 of the act 119, which reads, in part, as follows: "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 intervention contained no tender of the amount of taxes, penalty and costs for which the land was forfeited to the state, nor of the amount which would have accrued as taxes thereon had the land remained on the tax books, as required by § 6 of act 119.

Later, on September 2, 1937, Mrs. Angels filed a complaint, under the same case number which the original confirmation proceeding had borne, in which appellee December Redmond was named as defendant, in which she renewed and elaborated upon the allegations contained in her intervention which she had filed on April 2, 1937. At the time this complaint was filed, there was also filed an affidavit showing tender of taxes, etc., which had been refused. It was not recited when this tender was made; but it is not contended that it was made at the time of or prior to the filing of the intervention on April 2, 1937.

An amendment to the complaint was filed on January 7, 1938, renewing the allegations as to the invalidity of the tax sale; but neither the intervention, the original complaint nor the amended complaint contained any allegation to the effect that the tract of land herein described was not included in the list of lands which the state land commissioner had certified as having forfeited to the state, as required by § 5 of act 119, *supra*.

It is not questioned that the land here in litigation had forfeited and had been certified to the state in 1933 for the nonpayment of the 1932 taxes.

The case was submitted to and was heard by the court below upon an agreed statement of facts from which we copy the following relevant recitals. The land here involved was delinquent for the 1932 taxes, was sold to the state therefor, and the forfeiture was certified by the county clerk, December 13, 1935.

The confirmation decree was rendered under the authority of act 119 of the Acts of 1935, and included the land above-described. The intervention was filed April 2, 1937; but no affidavit of tender nor any tender was made to the clerk. However, on November 12, 1938, intervener made an actual tender of $174.75 (a sum sufficient in amount if the right to redeem exists), which tender was refused as not having been made in apt time.

The agreed statement of facts repeats the allegations of the intervention as to the defects in the tax sale, but proceeds to say: "However, all of said pleas are waived except as to the invalidity of the warrant attached to the tax books, and Sylvia Epstein relies on no other grounds set out in her complaint or amendment to complaint; and it is agreed that the certified copy of the warrant made by the clerk may be read and exhibited in evidence."

The warrant made by the county clerk, to which the agreed statement of facts referred, was offered in evidence. This is the warrant which the county clerk is required to make by § 10016, C. & M. Digest (which section, as amended, appears as § 13763, Pope's Digest) when the clerk delivers the tax books to the collector. It is conceded that this warrant was not made, nor was it attached to the tax books within the time required by law, and the effect of this omission was to make the tax sale invalid. It was so held in the cases of *Wildman* v. *Enfield,* 174 Ark. 1005, 298 S. W. 196, and *Stade* v. *Berg,* 182 Ark. 118, 30 S. W. 2d 211. But the purpose of the confirmation decree was to cure such defects, and if there is a valid confirmation decree, such is its effect.

See *Fuller* v. *Wilkinson, ante* p. 102, 128 S. W. 2d 251, and cases there cited. This being the only defect in the sale relied upon, the decree—which appears to be regular in all respects—has cured it.

Now, this was a defect which would have entitled Mrs. Angels to redeem had there been a compliance with the provisions of act 119 in that behalf. Section 6 of that act permits a landowner to intervene before confirmation and to defend upon the ground that the sale to the state was void for any reason, but requires the owner to "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 . . ."

Section 9 of the act permits the owner to intervene within one year after the decree of confirmation has been rendered, provided the owner file "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."

One of these provisions, as appears from the portion of § 6 of the act above-quoted, is that a tender of taxes be made. This was not done, and the right to redeem was properly denied for that reason, and this appeal is from that decree. The latest of the numerous cases relating to the necessity of tender is that of *Chronister* v. *Skidmore, ante* p. 261, 129 S. W. 2d 608.

As to the affidavit required by § 9 as to the lack of knowledge of the pendency of the suit, it may be said that we construe this statute to mean that the affidavit should be made by the person owning the land at the time of the rendition of the decree. Mrs. Angels purchased the land only four days before the expiration of the year next ensuing after the rendition of the decree, and her

lack of knowledge of the pendency of the confirmation proceeding was unimportant and is unaffected by the statute. It is true she made affidavit that her grantor, the Insurance Company, was unaware of the pendency of the suit; but this, at best, was only hearsay. The affidavit should have been made by the one who owned the land at the time of the rendition of the decree.

In making up the transcript, the clerk included "List of lands in Chicot county subject to confirmation under act 119 of the Acts of 1935," and has attached a certificate to the effect that the land here involved was not included in that list. It appears, however, that the certificate of the land commissioner was not offered in evidence at the trial, and counsel for appellant has this to say about it in the brief: "It was decided by us that we would not take any proof in support of the various allegations in the attack of the tax title and would waive them and rely simply on the invalidity on account of the warrant and the whole idea of the stipulation was to save taking of proof and to introduce the record by this stipulation. The stipulation was filed in good faith, and we certainly never regarded it as a trap." Counsel is candid enough to admit that he was unaware that the land commissioner had not certified the tract of land here in litigation as being delinquent.

It would, however, be a trap, notwithstanding the entire good faith of the parties, to permit this question to be now raised. It was by stipulation expressly waived and the cause was submitted to the court below on the sole question of the effect of the failure of the county clerk to make and attach a warrant to the tax books when they were delivered to the collector. Had this question been raised, and not waived, it might have been shown that the commissioner had made a supplemental certificate. It is stipulated that the land was delinquent, and was properly certified to the state, and it was not questioned that it was described in the notice published for six consecutive weeks, as required by § 3 of act 119.

Section 5 of act 119 requires the land commissioner to furnish this list of delinquent lands under his certifi-

cate, and provides that "Such certificate shall be all the proof that shall be required to show *prima facie* title in the state." But it is only *prima facie* evidence of delinquency. Whether other proof of delinquency could be considered is, for the reason hereinabove stated, a question not presented by this record.

The decree is correct and is, therefore, affirmed.

DEFRIES *v.* BATESVILLE WHITE LIME COMPANY.

4-5567 132 S. W. 2d 169

Opinion delivered October 16, 1939.

Hugh U. Williamson, W. V. Thompson and *W. M. Thompson,* for appellant.

S. M. Casey and *Shields M. Goodwin,* for appellee.

McHANEY, J. Appellant brought this action against appellee to recover damages for personal injuries which he alleges he sustained in August, 1936, while working for appellee as a laborer. His amended complaint, as abstracted, alleged that he was "engaged in loading stone

upon a tram car, used by appellee in hauling stone from their quarry in Independence county, to their kiln, a distance of about two miles from said quarry; that the tram car had been placed for loading in such manner that the west end of the car was some six inches lower than the east end, and that, in order to keep the car in place, a cross-tie had been fastened to an angle iron or bar attached to the end of the car about four feet from the center of the track with the other end of the crosstie fastened to one of the crossties in the center of said track; that, due to improper fastening of said cross-tie, same was caused to slip from its position in such manner that the tram car jerked backward, throwing a large rock from the top of the tram car, striking appellant on top of the foot, breaking several bones, etc." The gist of the negligence laid and relied on is "in failing to securely fasten the said cross-tie so that same would not slip out of place." The defense was a general denial of the allegations of the complaint and a plea of contributory negligence, in bar of the action. On a trial, at the conclusion of appellant's evidence, the court, on motion of appellee, instructed a verdict for appellee, over appellant's objections and exceptions, and judgment was entered accordingly. The case is here on appeal.

Appellant, according to his own testimony, and he was the only witness to the accident, was working alone, loading rock on one of appellee's "V" shaped tram cars, to be hauled to its kiln about two miles away, over its narrow gauge line of railroad. We understand a "V" shaped car to be one with the point of the "V" at the bottom of the car. He had loaded the east end of the car and in doing so had piled the rock higher than the top of the car. While continuing to pile on rock, loading toward the west end, the car slipped backward about an inch, or, as he said, "an inch or two," when one of the rocks piled above the side of the car, or above the top edge of the "V", fell off and landed on top of his foot. Can the fact that the car slipped an inch or two be said to be negligence? If so, was it the proximate cause of the injury?

The trial court held, and, we think, properly so, that there was no negligence shown. Appellant says he observed the brace, or "scotch," placed on the car as alleged, for the purpose of preventing it from running down the decline in the track, immediately after the accident, and that it was properly in place. In other words, the car had been and was at the time properly "scotched." Just what caused the car to move, he did not know, and he assumed, because it moved about an inch, that it was improperly done. Moreover, it is difficult to see just how the rock could have fallen off the car from so slight a movement. Naturally, it would have fallen to the rear, if at all, when the car stopped, instead of laterally. He had loaded the front two-thirds of the car, but the back one-third had only a few rocks in the bottom. If the rock fell off the car, because the car moved, a fact he did not mention to the foreman shortly after the accident, it must have been, because he piled the rock too high above the edge of the car, for otherwise, it could not have fallen, and this would be his own negligence. He saw his foreman immediately after the accident, and simply told him that a rock had fallen on his foot. He made no mention that the car moved, or that it was improperly scotched.

Employers are not insurers of the safety of their employees, and negligence is never presumed, except in *res ipsa loquitur* cases, from the mere fact of injury. Judgments cannot be based on speculation or conjecture. *National Life & Accident Ins. Co.* v. *Hamilton,* 189 Ark. 377, 72 S. W. 2d 543; *Marathon Oil Co.* v. *Sowell,* 191 Ark. 865, 88 S. W. 2d 82; *Missouri Pac. R. R. Co.* v. *Baum,* 196 Ark. 237, 117 S. W. 2d 31.

Here all we have in the evidence is that an accident happened resulting in injury, and an assumption of negligence, because the car moved an inch or two. This is not sufficient, and the court correctly directed a verdict for appellee.

Affirmed.

4-5583 132 S. W. 2d 187

Opinion delivered October 16, 1939.

Carter & Taylor, for appellant.

J. E. Yates, J. D. Benson and *John E. Harris,* for appellee.

HOLT, J. Mrs. Frank Gosnell died intestate in June, 1926, leaving her husband, Frank I. Gosnell, and Henry Carter, George and Frank I. Gosnell, Jr., children, as her sole surviving heirs.

Her husband, Frank I. Gosnell, was first appointed administrator of her estate and served until sometime in 1932. Appellee, Lottie Garner, succeeded Frank Gosnell and served as administratrix of the estate until the early part of 1936 when she was in turn succeeded by W. J. Higgins. Appellee was the sister of the deceased.

On September 25, 1936, appellee, Lottie Garner, filed claim against the Gosnell estate in the Franklin probate court for $3,425, and on October 9, 1936, filed another claim for an additional sum of $1,145, or a total of $4,570.

The probate court allowed her a total sum of $3,970 on both claims.

An appeal was granted appellants to the circuit court, and the matter was by agreement submitted to the court sitting as a jury, and he entered judgment in favor of appellee, Lottie Garner, against the estate for the total sum of $3,895. From this judgment of the circuit court comes this appeal.

This record reflects that at the time of Mrs. Frank Gosnell's death early in 1926 there were two outstanding valid claims against her estate in the form of two promissory notes, one for $7,000 which Mrs. Gosnell and her husband had executed in favor of a Mr. Randolph, and another for $2,000 which she and her husband had executed in favor of the Bank of Mulberry. These two claims, totaling $9,000, were properly filed on November 9, 1926, duly approved and allowed by the probate court as claims against the estate in favor of Mr. Randolph and the Bank of Mulberry during the time that Frank Gosnell, the husband of the deceased, acted as administrator from the death of Mrs. Gosnell up to 1932. There is no contention here that these two claims were not valid claims against the estate.

Appellee, Lottie Garner, bases $3,000 of her claim against Mrs. Gosnell's estate for money which she claims to have borrowed on lands of her own, not the property of the estate, which said money she used for the benefit of the estate to help pay off the claim of $9,000 against said estate. The remainder of the total of her claim al-

lowed by the court below embodied certain advancements which she claims to have made to the children of the deceased and for moneys advanced by her for expenses of the administration.

It is first earnestly insisted by appellee that her entire claim should be allowed on the doctrine of subrogation. We cannot agree. We think it clear that the only possible part of appellee's claim which this doctrine of subrogation could effect would be the $3,000 which appellee claims was her own personal money used by her to pay off a part of the $9,000 in valid claims allowed against the estate as heretofore indicated.

We do not think that under the facts in this record she was in any manner subrogated to the rights of the Bank of Mulberry and Mr. Randolph, who were allowed claims totaling $9,000 against the estate by virtue of the two notes which they held at the time of Mrs. Gosnell's death.

The facts relating to this $3,000 item are to the following effect: On the 10th day of February, 1930, during the time that Frank I. Gosnell was acting as administrator, the probate court directed him to sell so much of the lands of the estate as were necessary to pay the then existing debts of the estate. Following this order Gosnell, as administrator, reported sale of certain lands of the estate to the court. The probate court made an order confirming the report of sale to pay debts and, among other things, said: "That the action of the said Frank I. Gosnell as such administrator in advertising and making such sale is in all things approved and confirmed by the court, and that he as such administrator is hereby authorized to accept said cash so offered by the said Ed Garner, and upon the receipt of the same, he is authorized and directed to execute and deliver to the said Ed Garner a deed to a sufficient number of acres of said lands so purchased to equal in value the sum of $9,000, that being the amount of debts due by said estate and for which said sale was made." The order further recited: "That Ed Garner the purchaser of said lands at

said sale is offering to waive the time of payment and to pay cash therefor."

Following this order, an administrator's deed was executed in favor of Ed Garner for a consideration of $9,000, and was for the purpose of securing funds with which to pay all the debts of the estate then outstanding. This deed conveyed approximately one hundred forty-five acres of land belonging to the estate, all lying in Franklin county, and was dated August 4, 1930. Shortly after Garner received this deed he conveyed by warranty deed this one hundred forty-five acre tract to his wife, Lottie Garner, appellee.

Upon the receipt of this deed Mr. Garner and his wife, the appellee, secured the $9,000 with which to pay the Gosnell estate for the lands, in the following manner as testified by Mr. Garner: "We didn't have any money to pay for this land so my wife went to the Arkansas Valley Trust Company in Fort Smith and borrowed $5,000, and $4,000 from L. T. Morgan at Altus, and we paid off this note to Mr. Randolph and the Bank of Mulberry. She didn't owe the Bank of Altus. The $9,000 borrowed was the $9,000 that Mrs. Garner put in the estate to keep the land in the estate. We paid the Arkansas Valley Trust Company some money and then sold eighty acres of land to Mr. Wilson and paid Mr. Morgan back the $4,000, and then we borrowed $3,000 from the Federal Land Bank and took up the indebtedness from the Arkansas Valley Trust Company because we could get a longer term and a small rate of interest. We got $6,000 for eighty acres we sold Mr. Wilson. The $4,000 indebtedness, we deducted from the $6,000 and that left $2,000 and we paid the Arkansas Valley Trust Company $1,000. At the time we executed the mortgage for $3,000 and borrowed the $3,000, we paid Mr. Morgan what we owed him and still owed the Arkansas Valley Trust Company $3,000. At the time, the Gosnell estate did not have money to pay the $3,000 to the Arkansas Valley Trust Company. My wife was not the administratrix of the estate at that time. While she was administratrix, she made application to the Federal Land Bank for a loan

on part of her land for the purpose of extending the loan on the boys' lands and it was refused because of minor heirs. At that time two of the boys were minors and maybe three. The Federal Land Bank turned us down. Then we tried the other method in order to finish paying the balance of $3,000 which the Gosnell estate owed. It is still not paid. Mrs. Garner put a mortgage on 245 acres of my land to the Federal Land Bank. We never received from the Mrs. Frank Gosnell estate the principal sum of $3,000."

We think it clear on this record that at the time this one hundred forty-five acre tract was sold to him on order of the probate court it was for the purpose of paying all the outstanding valid debts against the Gosnell estate at that time, which the court found to be $9,000; that appellee, Mrs. Garner, after her husband had deeded the property over to her, immediately borrowed $5,000 from the Arkansas Valley Trust Company in Fort Smith and $4,000 from L. T. Morgan at Altus, giving a part of the 145 acres in question as security for the loan from Morgan, and that she took this $9,000 and paid off all the outstanding claims against the estate, which amounted to $9,000. The evidence shows that she later sold eighty acres of this land for $6,000 and this money she used to repay Morgan the $4,000 which she owed him and the Arkansas Valley Trust Company at least $1,000 on what she owed it. This would leave in her possession approximately sixty-five acres of the land in question, to which she at the present time has title, and probably $4,000 of the money which she borrowed from the Arkansas Valley Trust Company. We think, therefore, that this alleged claim of $3,000 against the estate must fail. When appellee instead of paying the $9,000, the consideration for the one hundred forty-five acres of land purchased from the estate, into the hands of the administrator, paid off the two notes in question, the Randolph $7,000 note and the Bank of Mulberry $2,000 note, all debts of the estate were then paid in full and the estate owed her nothing on her $3,000 claim.

We can see no application here for the doctrine of subrogation. What appellee did was as a volunteer and

a stranger, and "a stranger and volunteer as these terms are used with reference to the subject of subrogation, is one who, in no event resulting from the existing state of affairs, can become liable for the debt, and whose property is not charged with the payment thereof and cannot be sold therefor. . . . Anyone being under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer." 25 R. C. L., par. 11, p. 1325.

In volume 60, C. J., par. 27, pp. 716-719, the text writer states: ". . . A mere volunteer or intermeddler who, having no interest to protect, without any legal or moral obligation to pay, and without an agreement for subrogation, or an assignment of the debt, pays the debt of another is not entitled to subrogation, the payment in his case absolutely extinguishing the debt. The payor must have acted on compulsion, and it is only in cases where the person paying the debt of another will be liable in the event of a default or is compelled to pay in order to protect his own interests, or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished. In order for a person who, having no interest to protect and without any legal or moral obligation to do so, pays the debt of another to be entitled to subrogation, he must have an agreement, express or implied, therefor, or a request from the debtor to pay, which is in effect an implied contract, or ratification of the payment, or an assignment of the debt."

We cannot agree to appellee's contention that her claim should be allowed as expenses of administration. An administrator may not expend the money of an estate for any purpose except to pay the debts of the decedent or expenses incurred in due course of administration of the estate to pay the debts personally due by the decedent. All of the debts of the Gosnell estate were paid in 1930 when one hundred forty-five acres of the land were sold to Ed Garner for $9,000 cash and by him deeded to appellee.

In *Stuckey* v. *Stephens,* 115 Ark. 572, 577, 171 S. W. 908, this court said: "It is not the policy of the law to encourage, or to permit, the administrator to expend the money of the estate for any purpose except to pay the debts of the decedent, or expenses incurred in the course of administering the estate to pay the debts personally due by the decedent. The administrator, as such, has nothing to do with the education of the children, nor the support of the widow, nor with the permanent improvement of the lands of the estate, further than is necessary to make these lands a source of income for the payment of the debts. Indeed, under the statute he has no control whatever over the lands except for the payment of debts, and no necessity for any such control existed in the present case."

And again in *Yarborough* v. *Ward,* 34 Ark. 204, this court laid down the rule as follows: "Harmonizing this opinion with the former expressions of this court, we have developed a plain, intelligible and rational system. Except for funeral expenses, no debts can be created against an estate after death. They must be then existent, or arise out of obligation incurred by the deceased whilst alive. Only such can be presented for allowance, classification and payment in statutory order, out of the assets found in the hands of the representative after settlement.

"Save with regard to funeral expenses, no provision is made for the classification and settlement of demands arising in the course of administration. Those who render services, or furnish material useful to the estate, stand upon the common law regulating contracts, and may sue the person with whom the contract is made; and must sue him, if at all, in his individual capacity."

In the more recent case of *Miller* v. *Oil City Iron Works,* 184 Ark. 900, 45 S. W. 2d 36, this court said: "The circuit court properly refused to allow the administratrix the amount claimed to have been expended by her for the support and education of the minor children of the intestate. The reason is that the administratrix had nothing to do with the support and education

of such minor children. *Alcorn* v. *Alcorn,* 183 Ark. 342, 35 S. W. 2d 1027."

It is our view that none of the items making up appellee's claims was ever authorized by the probate court and that they were not authorized by law.

On the whole case we conclude that the trial court erred in allowing and sustaining appellee's claims, and the judgment is, therefore, reversed with instructions to enter a judgment disallowing and dismissing said clams.

SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* BIANCHI, ADMX.

4-5572 132 S. W. 2d 375

Opinion delivered October 16, 1939.

Miles, Armstrong & Young and *Arnold & Arnold,* for appellant.

George W. Johnson and *Harper & Harper,* for appellee.

SMITH, J. Mrs. Alice Bianchi, as administratrix of the estate of her deceased husband, Dan R. Bianchi, recovered judgment against appellant company for $9,000 in a suit in which it was alleged that his death was caused by appellant's negligence.

The undisputed testimony in regard to the circumstances of Bianchi's death are as follows. On and prior to June 9, 1937, appellant furnished electric power in the town of Greenwood. As a part of its distribution system it maintained poles and electric wires on the streets of Greenwood, one of these poles being at the intersection of Sycamore and Front streets, and on this pole a number of wires were suspended about thirty feet above the ground. The Three States Telephone Company supplied telephone service in Greenwood, and maintained a pole near that of appellant's pole from which one of the lead-in lines of the telephone company ran under the wires of appellant into the residence of one of the telephone company's subscribers.

About five o'clock in the morning of the date above stated, a windstorm blew a limb from a tree down upon one of appellant's wires, causing a short circuit. About 5:20 a. m. a nearby resident notified appellant of what had happened, and that it appeared likely that the wire would burn in two and fall to the ground. Appellant's agent to whom the notice was given replied that he would come by that morning and see about it. About 7 a. m. the power wire burned in two and fell across the telephone wire, and the end of this power wire which had fallen across the telephone wire barely reached the ground. Several persons passed by the wire, and about 7:20 a. m., Bianchi, who was employed as a lineman by the telephone company, arrived at the scene, apparently for the purpose of taking some action in regard to the wire, although there was no testimony to that effect.

The undisputed testimony was to the effect that the power wire was shooting out fire into the ground, and that the strength of the current was sufficient to burn a small hole in the ground, and that there was a buzzing noise. Bianchi climbed the telephone pole, on top of which he grasped the wire upon which the power wire had fallen in an effort to dislodge the power wire. While Bianchi was so engaged a spectator said to him, "Dan, don't you think that it might arc back on you?", and Bianchi replied, "It might, at that." Another spectator

remarked to Bianchi, "That's a pretty hot wire, ain't it?", and Bianchi replied, "Yes, it is." Bianchi desisted from the attempt to dislodge the power wire and climbed down the pole and went to his truck from which he took a piece of copper wire covered with the same insulation which was on the power wire, and with this piece of copper wire he fashioned a hook, with which he attempted to remove the power wire from the telephone wire. When the wire which Bianchi was using as a hook came in contact with the power wire he received an electric shock, from the effects of which he died within a few minutes. Some four or five minutes after Bianchi received the shock the repair crew of the appellant light company reached the scene, and disconnected the current and made an unsuccessful attempt to revive Bianchi.

There were six or eight wires suspended from appellant's pole, some of which carried as low as 110 volts, while the wire which shocked Bianchi carried 6,900 volts. The wires presented the same general appearance, and Bianchi did not know which wires carried the low nor which carried the high voltage.

Assuming that this testimony is sufficient to support the finding that appellant light company was negligent, we think it shows with even more certainty that Bianchi was guilty of contributory negligence. He had taken a course of something more than four months in an electrical school in Chicago, and was employed by the telephone company as a lineman. He may not have known which of the wires of the light company were the high tension wires, but he did know that the wire which had been burned in two was "very hot." The ground where Bianchi stood, while not muddy, was damp, and all the testimony was to the effect that the trees and the suspended power wires were wet. Bianchi wore a pair of plain canvas gloves with leather palms, which, according to the undisputed evidence, were damp. There was no testimony to the effect that Bianchi's gloves were intended or supposed to furnish insulation except as against light voltage; but he must have known that the

dampened condition of the gloves reduced their insulation value.

It was said in the case of *Oklahoma Gas & Electric Co.* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550, that "It is a scientifically established fact that a person whose body is wet, and who is in contact with wet ground, will, because of the concurrence of these conditions, receive a greater charge of electricity from a given point of contact than he would if his hands and body and the ground were dry. Water is a highly efficient conductor."

It is insisted, however, upon the authority of the case of *Arkansas Light & Power Co.* v. *Cullen,* 167 Ark. 379, 268 S. W. 12, that a question was made for the jury as to whether Bianchi was guilty of contributory negligence. The facts in that case were that Cullen, the person killed, discovered a wire which had broken and fallen to the ground. Cullen remarked that it was a house wire, and that he would remove it before anyone was injured by it. The undisputed testimony revealed that the house wires in that system carried only 210 volts of electricity, which would shock but would not kill one if touched where it was insulated. The wire in question was insulated, but, instead of being a house wire carrying only 210 volts of electricity, it was a primary wire carrying 2,300 volts of electricity. Cullen reached up and took hold of the wire where it was insulated, but on account of the strong current which it carried his muscles contracted and prevented him from releasing the wire, and he was killed. In holding that the question of Cullen's contributory negligence was a question for the jury, it was there said: "It cannot be said that, under the undisputed evidence, appellee's intestate voluntarily put himself in contact with the live wire, knowing it to be charged with a deadly current, for there was some evidence tending to show that he thought, and had reason to believe, that it was a house wire, carrying only a small voltage of electricity."

It is here argued that inasmuch as Bianchi received no shock when he tried to shake the power wire off the telephone wire he had the right to assume that no great

voltage was carried on the wire which had fallen on the telephone wire.

Now, it may be true, and the jury may have found, that Bianchi did not know the respective voltage carried by the different wires, but he must have known—for he, himself, stated—that the power wire was "Very hot," and he must also have known that, if he placed a copper wire, which he held in his hands, in contact with this power wire, he would receive whatever shock the voltage of that wire would produce. He took an unnecessary chance which no emergency required. He knew that some of the appellant's wires carried a high voltage, and the sputtering noise which all persons present heard and the flashes of light which all of them saw should have warned him, or any person of ordinary care and prudence, that the wire here in question was not one of the low voltage wires which could be safely touched with the copper wire which he was using as a hook.

Our own cases on the subject and cases from other jurisdictions were reviewed in the case of *Arkansas Power & Light Co.* v. *Hubbard,* 181 Ark. 886, 28 S. W. 2d 710. In that case, we reversed and dismissed a judgment for the benefit of the estate of an intestate, on the ground that intestate was guilty of contributory negligence, nowithstanding the contention that deceased did not realize the dangerous condition of a wire charged with electricity with which he came in contact. Upon the authority of the case of *Danville Street Car Co.* v. *Watkins,* 97 Va. 713, 34 S. E. 884, we held that the properties of electricity are commonly known, and persons of ordinary intelligence are presumed to know of its dangerous qualities. The late Justice BUTLER, speaking for this court, there said (181 Ark. 886, 28 S. W. 2d 711): "Three decades since the opinion in *Danville* v. *Watkins,* the use of electricity has become so general and widespread as to be a public necessity, and its properties are so universally known and recognized as to be a part of the common knowledge of the people, and it seems to be the general rule, where such is the case, all persons of ordinary intelligence and experience will be presumed to

know of its dangerous qualities. (Citing cases.)" See, also, the cases of *Oklahoma Gas & Electric Co.* v. *Frisbie, supra,* and *Hines* v. *Consumers Ice & Light Co.,* 173 Ark. 1100, 294 S. W. 409, and *Mississippi Valley Power Co.* v. *Hubbard,* 181 Ark. 487, 26 S. W. 2d 118.

The undisputed testimony establishes the fact that Bianchi, acting in no emergency, voluntarily took a chance which he must have known was attended with the possibility of great danger and harm, and for this reason there can be no recovery for his death, which was caused by his own contributory negligence.

The judgment will, therefore, be reversed, and as the case appears to have been fully developed, it must be dismissed. It is so ordered.

HUMPHREYS, MEHAFFY and HOLT, JJ., dissent.

HOLT, J., (dissenting). I cannot agree with the majority in this case. It is my opinion that the evidence justified the trial court in submitting the question of deceased's negligence to the jury, and that this was done under proper instructions.

The evidence, as reflected by this record, is practically undisputed and to the following effect: At about 5:20 a. m. on the date of the alleged injury that resulted in the death of deceased, appellant was notified that a limb was in contact with one of its wires and that it appeared likely the wire would burn in two and fall. Subsequently, about seven o'clock, the wire did burn in two and fell across the lead-in telephone wire to the McConnell home, leaving the electric wire suspended into Front street near its middle, barely contacting the ground eight or ten feet north of Sycamore street. This wire was charged with an unknown quantity of electricity. After several people had passed by this wire in this condition, and at about 7:20 a. m., the deceased, Bianchi, a young man about thirty years of age, employed as a lineman by the Three States Telephone Company, arrived on the scene. Bianchi, upon observing that the light wire was in contact with a telephone wire that led into the McConnell home, climbed the telephone company's pole, grasped the lead-in wire which was in contact with appellant's

fallen wire and tried to dislodge it from the telephone wire, but without success. He then descended the pole, went to his car a few feet north and procured a piece of dry copper wire above five feet in length covered with the same kind of covering, or insulation, which covered all of appellant's wires. He fashioned a hook on the end of this dry wire and attempted to remove the fallen electric wire from the telephone wire over which it was hanging.

The evidence further shows that he was at this time wearing a pair of canvas gloves, the palms of which were covered with leather. This short wire, which deceased used in an effort to dislodge the electric wire was covered with weather-proofed insulation in which there were no breaks and if dry (and the testimony shows that it was) would protect from a shock or leakage of voltage up to 1,000 volts.

It is undisputed that there were seven or eight light wires on appellant's pole, all apparently of the same size, covered with the same kind of insulation, and that some of them carried a voltage of as low as 110 volts and others 6,900 volts, that carried by the wire which the deceased attempted to remove.

It seems to me that under these facts reasonable men in the exercise of fair judgment might differ on the question of the contributory negligence of the deceased.

In the instant case the deceased, a lineman for the telephone company, whose duty it was to look after his employer's property, when he came upon this scene, observed the dangerous position of the electric wire not only to people who were passing by, but to those in the McConnell residence, after taking what seemed to him the necessary precautions for his own safety and acting in what, I think, may be termed an emergency, attempted to remove this wire and unfortunately was killed in the attempt.

The law presumes against suicide, and there is no claim here that deceased intended to kill himself.

I am of the view that the instant case is controlled by *Arkansas Light & Power Company* v. *Cullen,* 167 Ark.

379, 268 S. W. 12, where this court held that where the deceased might have thought he was coming in contact with a house wire of low voltage rather than one carrying 2,300 volts he could not be guilty of contributory negligence as a matter of law. In that case, this court said: "The undisputed evidence reveals that house wires in the system carry only 210 volts of electricity, and will shock, but not kill, one if touched where insulated. The wire in question was insulated. Instead of being a house wire, carrying 210 volts of electricity, the wire in question was a primary wire, carrying 2,300 volts of electricity. Appellee's intestate reached up high and took hold of the wire where it was insulated, but, on account of the strong current, his muscles convulsed, thereby preventing him from releasing the wire. Before his companion could knock the wire out of his hands with a stick he was dead, and, when released from the wire, fell to the ground. It cannot be said that, under the undisputed evidence, appellee's intestate voluntarily put himself in contact with the live wire, knowing it to be charged with a deadly current, for there was some evidence tending to show that he thought, and had reason to believe, that it was a house wire, carrying only a small voltage of electricity. In view of the disputed evidence in this regard, it was proper to submit the issue of contributory negligence to the jury."

I think, under the facts in this case, the jury would have been justified in finding that deceased must have thought he was handling a wire of low voltage.

In *Interstate Power Company* v. *Thomas,* 51 F. 2d 964, 84 A. L. R. 681, the court held that whether plaintiff acted as a reasonable person would have acted was a question for the jury, and said: "The question of contributory negligence, like every question of negligence, is ordinarily for the jury; and it is only when there is no substantial conflict in the evidence which conditions it, and when, from the undisputed facts, all reasonable men, in the exercise of fair judgment, would be compelled to reach the same conclusion, that the court may lawfully withdraw it from them." On this record, I cannot bring myself to say that the minds of reasonable men would

be compelled to reach the conclusion that the deceased was guilty of contributory negligence.

In this connection, this case is very similar to that of *Southwestern Gas & Electric Company* v. *Murdock,* 183 Ark. 565, 37 S. W. 2d 100, in which this court said: "If the appellee did what a man of ordinary prudence would have done under the circumstances, he was not guilty of negligence. Extraordinary care is not required nor is the utmost possible caution. The duty imposed on appellee was to exercise ordinary care, but there was no duty to possess knowledge or skill so as to know there was danger because the lights burned out or because the machinery ran faster. Even if the injured party's act contributed to the injury, this would not bar recovery unless his act was negligent. It is not the contributory act that bars recovery, but contributory negligence."

For the above reasons I think the cause was properly submitted to the jury, and that the judgment of the court below should be affirmed.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY request that they be noted as concurring in this dissenting opinion.

BREED *v.* STATE.

4145 132 S. W. 2d 386

Opinion delivered October 23, 1939.

W. S. Atkins, for appellant.

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

BAKER, J. Two questions are raised by this appeal from the conviction for arson. The first of these is that the court erred in refusing to give instruction No. 7 as requested by defendant. That instruction reads as follows: "You are instructed that although you may believe the testimony of the witnesses, E. R. Jarvis, Chas. Crosnoe and Chris Wheaton, you could not convict the defendant on their testimony unless you find that their testimony is corroborated by other evidence that connects the defendant with the crime; and you are further instructed that such other evidence is not sufficient unless it shows affirmatively that the defendant was connected with the commission of the crime, and all of the evidence in the case taken together must be sufficient to convince you of the defendant's guilt beyond a reasonable doubt before you can convict the defendant."

The court modified the instruction by striking from it the name of Chas. Crosnoe, who was charged by appellant with being an accomplice. The court gave the instruction as asked after amending by striking from it the name of this witness. The court also gave instruction No. 6 as asked for by appellant after amending it to tell the jury that the defendant could not be convicted unless the testimony of an accomplice was corroborated, and the jury was satisfied of the guilt of the appellant beyond a reasonable doubt on the whole case. The court instructed the jury by an addition to No. 6 as follows: "And if you find from the evidence that the witness Chas. Crosnoe was an accomplice, then you are told that you cannot convict the defendant unless his testimony is corroborated by other testimony in the case, which convinces you of his guilt beyond a reasonable doubt."

Appellant insists that the court erred in not telling the jury as a matter of law that Crosnoe was an accom-

plice, instead of submitting to the jury the evidence in that regard, under the above instructions.

Without attempting to set forth all the evidence in this case with any degree of detail, it may be said that E. R. Jarvis, who operated a restaurant at Hope, Chris Wheaton, a negro, who lived at Hope and sometimes worked for Jarvis, Chas. Crosnoe and appellant, Breed, all were alleged to have gone from Hope, Arkansas, at night to Ashdown to burn a hotel building at that place. Jarvis had contracted for and paid some money in the purchase of this hotel, had increased the insurance from $10,000 to $20,000, according to plan to burn the building and collect the insurance. Jarvis and Wheaton had entered pleas of guilty just prior to the time of trial, and they testified with considerable detail as to the part taken in the plans to burn the hotel by appellant, Breed. Crosnoe, who is also a confessed incendiary artist, testified that he had been approached by Jarvis and Breed prior to the time of this fire, and that he reported to the chief of police at Hope the information he had received from Jarvis, and was advised to enter into the arrangement with Jarvis and keep him, the chief of police, advised as to their actions. Crosnoe testified to this fact and says he advised the chief of police of the progress of the plan. He is corroborated by the chief of police, who informed Mr. Sanderson, sheriff of Little River county.

We are prepared to believe this statement and think it not unreasonable that the jury might have done so as the undisputed evidence discloses that there were minute details arranged in gathering together and moving to the hotel building to be destroyed gasoline in wooden barrels for containers where it was handled by Wheaton, who was the only man in the house at the time the gasoline was distributed so as to be most effective in the fire. Some of these matters were known by the sheriff, and when Wheaton set fire to the gasoline and ran from the building, he was caught and arrested while gasoline was still burning on his clothing. Crosnoe says that Breed came for him that night and took him to Ashdown. Breed's statement is that Crosnoe came for him and took

him to Ashdown on that occasion. Jarvis had furnished the car in which these two men went to Ashdown, and according to his statement he delivered possession of it to Breed. He says Crosnoe was to return in it to pick up Wheaton. Wheaton says Breed was to do this.

Crosnoe stated that they met Jarvis, who asked about Wheaton and another negro who were to deliver the gasoline on a truck. They had not met these negroes as it was understood they would. In a short time they left ostensibly, at least, to locate them. They were several miles away when he, Crosnoe, saw the flash when the building was set on fire. He 'phoned the chief of police at Hope, telling him the fire had been set.

There are many important and material facts substantial in effect not mentioned, some of which tend strongly to show appellant's connection and guilty participation in the crime, or at least the jury might have well so found therefrom. To set all these out would unnecessarily extend this opinion.

It is earnestly insisted by appellant that the trial court should have told the jury as a matter of law that the undisputed evidence showed that Crosnoe was an accomplice, and that, therefore, instruction No. 7 should have been given without modifying it. It told the jury that Jarvis, Crosnoe and Wheaton were accomplices, and that Breed could not be convicted upon their uncorroborated testimony.

We most heartily agree with this contention on the part of the appellant as to the law, that is to say that defendant might not be convicted on the uncorroborated testimony of an accomplice, but we do not agree with appellant's contention as to the facts. It is true that without explanation Crosnoe would appear to be as deeply involved in the criminal conspiracy as Breed or Wheaton, but we have the explanation given that he was acting under the instructions and advice of the chief of police of Hope, Arkansas; that he was reporting to the chief of police the details, progress and development of the conspiracy to burn this piece of property; that he knew

these reports were being used to entrap those with whom he was daily associated. His conduct, at least, makes a question of fact for the jury to determine.

It may be possible, and perhaps is highly probable that Crosnoe was not motivated by any high ideals in regard to law enforcement or public welfare. In fact, his designs may have been extremely selfish and sinister. He may have intended to profit, at least, by the good will of the officers at the expense of the capture of his boon companions, in addition to that gained from the crime, but notwithstanding such surmises, unless he actually participated in a crime he was not an accomplice. In other words, we think it may be asserted, that his deception of his friends, his betrayal of their confidence, his going with them to lend color to his pretended mental attitude are not in themselves criminal in their nature, and this is particularly true providing the jury did not find that he had actually intended to participate in the arson. The test is not whether a jury should have convicted him, had he been on trial; but the court submitted properly the question in this case of his actual participation, for the determination of the jury; that is to say if Crosnoe was found to be an accomplice, they could not have convicted the defendant upon his uncorroborated evidence.

The rule is that, after conviction by a jury, the evidence will be given that consideration most favorable to the state. This has so frequently been stated no authority need be cited now.

Therefore, it may be said that the jury elected to take the view that Crosnoe was not a participant in the crime, but was acting under the direction and instruction of a peace officer of the state.

The appellant, also, argues that the evidence in this case is not sufficient to corroborate the testimony of the accomplices, and does not warrant a conviction. The force of this argument must be regarded as spent or lost unless Crosnoe be regarded as an accomplice. We think the jury found that he was not one. The state is entitled to that consideration.

On the other hand, if this testimony be considered from appellee's viewpoint there is sufficient testimony of a substantial nature to support the finding of the jury. The rule is that the evidence independent of that of the accomplice, must tend to connect the defendant with the commission of the crime.

It need not be such as considered wholly apart from the testimony of the accomplice, to warrant a conviction. The rule in this regard was rather clearly announced in a somewhat recent case. *Shaw* v. *State,* 194 Ark. 272, 108 S. W. 2d 497. It was there announced: "It is sufficient to say that this was purely a question for the jury. They believed the testimony of Scott, and there is nothing in the evidence to show that it was physically impossible for the witness to have recognized the appellants as he said he did. The testimony of Scott, independent of that of the accomplices, tended to connect the appellants with the commission of the crime, although it might not have been sufficient of itself to convict them. This satisfied the rule. The sufficiency of the corroborating evidence was a question for the jury and, together with the testimony of the accomplice, it is clearly sufficient to support the verdict."

Jarvis, who had contracted to purchase this hotel, and who had paid down part of the purchase money, had procured $20,000 insurance instead of $10,000 upon it prior to that time, testified that he took appellant and Chris Wheaton to the hotel in order that they might inspect it and examine it to see if it could be burned. Of course, they wanted a fire that would result in a total destruction of the building. Jarvis also says that while he was in discussion with Mr. Oliver, the agent of the owner of the building, that Breed and Wheaton were free to go about the building and make this investigation. Mr. Oliver corroborated Jarvis in this respect. He says that Wheaton and Breed were there, and that they did not remain with Jarvis and Oliver, who were discussing some detail of the trade or possession of the property. The appellant denies that he was there for the purpose of determining if the building could be

burned, although he admits his presence there on that particular occasion and explains that he was there looking the building over making estimates to paint or calcimine the place for Jarvis, the new owner. He says that he had made sufficient estimate to know that about 70 buckets of paint would be required to do this work. If he went into any detail in regard to paint or calcimine it was a matter of so little importance that it was not further developed in explanation of his presence there or conduct on that occasion.

The appellant also admits that he was present in Ashdown the night the house burned and met Jarvis at the hotel, and admits that he was told by Crosnoe that Jarvis was going to burn the hotel that night, admits that he returned to Hope prior to the time of the fire, and somewhere near midnight met the chief of police. He describes this meeting with the chief of police by saying he asked the chief of police what he was doing up so late. In answer to his inquiry the chief of police asked him what he was doing up so late. He admits that he said he wanted the chief of police to remember he had seen him that night if anything happened. He also admits that he denied that he had been to Ashdown the night of the fire when questioned by the sheriff. Upon trial he stated that he had on previous occasions aided in the burning of some houses.

There is, no doubt, that the evidence is sufficient to show that the fire was of incendiary origin. We have this appellant admitting he was present in the night time in a car furnished by Jarvis, at least, a few hours prior to the time the fire broke out; that he was associating with and accompanying Crosnoe and Wheaton, both of whom had formerly lent expert services and practices in similar arts as those under consideration. We have a man making a defense and establishing an alibi by the chief of police just before the crime was committed. All of this furnishes grounds for more than mere suspicion pointing to him as a participant. Both Wheaton and Crosnoe have pleaded guilty and explained their own sinister purposes and designs on these same occasions.

We examined the several authorities submitted to support the contention of the appellant and find no fault with them. In all that class of cases wherein the courts have said that the trial court should have told the jury as a matter of law that certain witnesses were accomplices, the facts were undisputed, or such authorities cited made clear that the particular witness was an acknowledged or confessed participant, or the facts were such that his participation in the offense was not questioned; therefore, the testimony given was that of an accomplice, and that fact was not a matter in issue. Not so in the case at bar. One of the typical cases cited was *Bass* v. *State,* 124 Tex. Cr. Rep., 62 S. W. 2d 127. In that case one of the witnesses, who had participated in the theft, and was an accomplice of the appellant, had testified and the court submitted to the jury for determination the matter whether the witness was an accomplice. This was held to be an error, because the facts were undisputed. The trial court held as a matter of law that Jarvis and Wheaton were accomplices. If there was a question whether a witness was an accomplice, that matter was a proper one to submit to the jury. It was so held in *Simms* v. *State,* 105 Ark. 16, 150 S. W. 113.

In the above cited case the trial court was importuned to do just what appellant argues should have been done in the case under consideration. The court refused the request and, as was held in the opinion, properly so ruled. Our court has stated the rule as follows: "The only ground for reversal urged by defendant's counsel is that the court erred in refusing to give an instruction telling the jury that the defendant could not be convicted on the uncorroborated testimony of the witness Alice Walls. The effect of this instruction was to declare as an undisputed fact that Alice Walls was an accomplice; and if there is any dispute in the testimony on that point, it necessarily follows that the instruction was not correct, and that the court properly refused it . . ."

The rule has perhaps been several times approved by our court. One of the last cases was *Yates* v. *State,* 182 Ark. 179, 31 S. W. 2d 295.

The appellant also argues as a second ground for reversal that the evidence is not sufficient to support a conviction, particularly when considered apart from the testimony of accomplices. The argument made upon this proposition is based entirely upon the theory that Crosnoe was an accomplice, and his evidence on that account would have to be corroborated under the same rule that required corroboration of evidence given by Wheaton and Jarvis.

Since we have adopted and followed the rule that the evidence must be given that consideration which will support a verdict in favor of appellee, we think it would unnecessarily encumber this record to set forth with a reasonable degree of detail all of the evidence for the purpose. It will have to suffice in this case to say we have reached the conclusions, after a full and careful consideration of the evidence, that the evidence is of a substantial nature and warranted a conviction of the appellant, and, since there was no error in the submission of the case, the judgment should be affirmed. It is so ordered.

FORT SMITH SEED COMPANY *v.* JONES, SHERIFF.

4-5596 132 S. W. 2d 364

Opinion delivered October 23, 1939.

J. F. Quillin, for appellant.

HUMPHREYS, J. On April 19, 1932, appellant, a corporation, obtained a judgment against Albert Robertson and Maye Robertson for $294.40 in the circuit court of Polk county, on appeal from a magistrate's court in said county.

On September 23, 1938, an execution was issued upon the judgment and levied upon lands belonging to Albert Robertson and Maye Robertson described as follows, to-wit:

Lot 27 in Hornbeck Place Addition, and lots 1, 2, 3 and 4 of Reeves' Subdivision of lot 28 of said Hornbeck Place Addition to the city of Mena, Arkansas.

On October 15, 1938, said lands were sold under the execution pursuant to law by W. E. Jones, sheriff of the county, and purchased by J. B. Wallace, Sr., the highest bidder, for $326, which amount was insufficient to pay the judgment and accrued interest and costs. The lands were sold on a credit of three months and on January 16, 1939, the purchaser paid the total amount of his bid to the sheriff, whereupon, appellant requested the sheriff to pay said sum to it less costs, which he refused to do without an order of the court.

Thereupon appellant filed a petition in said court for a writ of mandamus to compel the sheriff to pay the proceeds of the sale of the lands to it to apply on its judgment. Summons was issued on the petition and W. E. Jones, sheriff, accepted service of same. The petition set out all the proceedings had and done in

the case from the time suit was filed by appellant against Albert Robertson and Maye Robertson in the magistrate's court.

On the 18th day of January, 1938, appellant by its attorney appeared in court and W. E. Jones, sheriff, appeared in person and both sides announced ready for trial. The cause was submitted to the court upon the record with the result that the court denied the petition for a writ of mandamus, to which appellant excepted and prayed an appeal to the Supreme Court, which was granted.

The necessary steps to perfect its appeal having been taken the cause is before us for determination, the sole question being whether at an execution sale of real estate, when a stranger to the suit becomes the purchaser, is the sheriff required to deliver the purchase money to the execution creditor when the same is received, or is he permitted to wait until the time for redemption of the judgment debtor has expired? By § 5341 of Pope's Digest it is provided that: "When any real estate, or interest therein, is sold under execution, the same may be redeemed by the debtor from the purchaser, or his vendees, or the personal representatives of either, within twelve months thereafter."

In § 5342 of Pope's Digest it is provided that: "The debtor may, at any time within twelve months, pay to the clerk of the court where the execution issued the purchase money, with fifteen per cent., per annum, and all lawful charges, and take his receipt therefor. Such money shall be held by the clerk for the use of the purchaser, and he shall be responsible upon his official bond therefor. Such clerk shall indorse upon the execution book that such redemption has been made."

It will be observed by reference to § 5341 of Pope's Digest that the redemption by the debtor is from the purchaser at the sale and not from the sheriff.

It will be observed by reference to § 5342 of Pope's Digest that the method by which the redemption is to be effected is for the debtor to pay the clerk of the court from which the execution was issued the purchase

money, with fifteen per cent., per annum and all lawful charges and take his receipt therefor and that the money shall be held by the clerk for the use of the purchaser and that the clerk shall be responsible upon his official bond for the money.

There is no provision in the statute for the owner of the property sold under execution to redeem the land from the sheriff. The money received by the sheriff from the purchaser was for the purpose of paying the amount to the judgment creditor and upon his failure to do so a penalty is imposed upon him by § 5374 of Pope's Digest.

The court erred in denying the writ and the cause is reversed and remanded with directions to the circuit court to grant the writ.

GRASBY *v.* FINDLEY.

4-5584 132 S. W. 2d 379

Opinion delivered October 23, 1939.

John W. Atkinson and *E. R. Parham,* for appellants.

William W. Shepherd, for appellees.

GRIFFIN SMITH, C. J. Mrs. Flora Richard Martin had, for a number of years, owned property in Requa's Suburban Park Addition to the city of Little Rock, including Lots 2 and 3, which are involved in this suit.

Mrs. Martin's home was near the north end of Lot 2. The south ends of the lots abut the northern extrem-

ity of the right-of-way of the Little Rock-Hot Springs highway, each lot being 262.8 feet in width on the south end. The west boundary line of Lot 3 is 732½ feet, while the east line of Lot 2 is 717½ feet in length—a difference of 15 feet. This is due to the gradual widening of the addition until the west line of Lot 4 is reached, at which point the north boundary, in continuing west, takes a slight southwesterly course.

During the time Mrs. Martin occupied Lot 2 as her home she erected a fence, along which climbing roses were planted. The point of beginning, with respect to the fence, is 61.2 feet west of the southwest corner of Lot 2. The fence runs in a northeasterly direction until it intersects with the west line of Lot 2, near which point an east-west hedge is planted. This hedge is referred to in appellants' brief as being "parallel with the south property line."

Mrs. Martin had mortgaged Lots 2 and 3 to Union Trust Company of Little Rock. Thereafter, on August 19, 1932, the bank quitclaimed to W. W. Findley all of Lot 2 and a part of Lot 3,[1] the description being by metes and bounds. The property identified included a strip off the east side of Lot 3, in width 36 feet at the north end and 37.2 feet at the south. The description is copied in the margin.[2] In the same instrument Mrs. Martin and her husband joined in warranting the title to Findley.

April 3, 1935, the mortgage of Union Trust Company was foreclosed, the commissioner in chancery

---

[1] In the conveyance the lots are referred to as blocks.

[2] "Beginning at a point of intersection of the boundary line between said blocks, said point being on the north side of the Hot Springs highway, running thence north a distance of 725 feet along the said boundary line to the point of intersection with the north boundary line of said blocks 2 and 3, thence west along the north boundary line of said block 3 a distance of 36 feet, thence south to a point of intersection of said line with the south boundary line of said block 3, said point being on the north side of the Hot Springs highway a distance of 37.2 feet from the point of beginning, thence east 37.2 feet to point of beginning."

thereafter conveying to Marion Wasson, state bank commissioner. This description, also, is shown in the margin.[3]

April 8, 1936, Wasson conveyed to Mrs. Martin the following lands: "Beginning at a point of intersection of the boundary line between said blocks, said point being on the north side of the Hot Springs highway, running thence north a distance of 725 feet along the said boundary line to the point of intersection with the north boundary line of said blocks 2 and 3, thence west along the north boundary line of said block 3 a distance of 36 feet, thence south to a point of intersection of said line with the south boundary line of said block 3, said point being on the north side of Hot Springs highway a distance of 37.2 feet to a point of beginning."

It will be observed that the excepted part of what was formerly Lot 3 was that portion described by metes and bounds in the commissioner's deed of April 3, 1935, being the strip 36 feet wide on the north end and 37.2 feet wide at the southern extremity.

March 18, 1938, Leonard S. Goodman, trustee (to whom the title had passed) conveyed Lot 3 (except the 36-37.2-ft. strip) to appellants.

May 4, 1938, Findley filed his complaint, alleging that he was owner of Block 2 and that part of Block 3 lying east of what was termed an established fence, and also east of an established water line, electric light poles, a hedge, and rose bushes. Contention was that he was entitled to a fractional strip carved out of Block 3, measuring 66.2 feet in width on the front or south end, and 36 feet wide at the north end; that the defendants threat-

[3] "All of block 2 and that part of block 3 more particularly described as follows: Beginning at a point of intersection of the boundary line between said blocks, said point being on the north side of the Hot Springs highway, running thence north a distance of 725 feet along the said boundary line to the point of intersection with the north boundary line of said blocks 2 and 3, thence west along the north boundary line of said block 3 a distance of 36 feet, thence south to a point of intersection of said line with the south boundary line of said block 3, said point being on the north side of the Hot Springs highway a distance of 37.2 feet from the point of beginning, thence east 37.2 feet to point of beginning."

ened to take possession of this strip and were preparing to remove the so-called division fence, pipe line, light poles, rose bushes, etc.

It was further alleged that defendants were constructing a tourist camp and filling station on the western part of Block 3, in violation of restrictions running with the land which confined its use to residential purposes. There was an allegation that the tourist camp would constitute a nuisance.

In their answer the Grasbys deraigned their title, claiming all of Lot 3 except the 36-37.2-ft. strip. They alleged that Mrs. W. W. Findley was a necessary party; denied that erection of a tourist camp would constitute a nuisance; alleged that construction operations on Block 3 were terminated in consequence of a restraining order procured at the instance of W. W. Findley, and that by reason of delays, etc., they were damaged $720, for which judgment was asked.

The Martins intervened, and with W. W. Findley they alleged that Union Trust Company had no substantial interest in the controversy; that Flora R. Martin was the real owner at the time of the sale to Findley, having been represented in the negotiations by her husband; that at the time of the sale no survey of the property was made; that the fence, light poles and rose bushes along the boundary line [beginning at a point 61.2 feet west of the southwest corner of Lot 2] constituted the boundary line on the west [of Lot 2] and that the location had been so identified for many years before the sale to Findley; that they intended to sell Findley all of the property embraced within their home place and represented to him that the fence, electric light poles, rose bushes, etc., were on the division line; that the intent was that Findley should purchase the ground to the fence and rose bushes; that the line was stepped off as best they could and measurements were given to the scrivener who prepared the deed, and that they believed the measurements embraced all of the front yard and the incidental property then being used as the Martin home place.

It was further set out that within two weeks following Grasby's claim, they caused the land to be surveyed and discovered the error in measurements; that the deed fell short by 29 feet (on the south end) of embracing all the property to the rose bushes, and that the deed should be reformed to correctly describe the land intended to be conveyed. The prayer was that the deed of Union Trust Company be permitted to stand as written, but that the conveyance by warranty executed by the Martins be reformed in accordance with the intentions of the parties.

The chancellor decreed reformation except as to 4½ feet, effect of which was to exclude from the conveyance to Findley the western boundary fence, rose bushes, light poles, wires, and water line; and as to this strip of ground appellees have cross-appealed. Judgment was also given in Grasby's favor for $114.20 as damages on account of wrongful issuance of the restraining order.

It is insisted by appellees that Mrs. Martin sold, and that appellees bought, "all of the land in the front yard between the two division fences, and [that] the decree should be affirmed with respect to the reformation order."

It appears from the record that Mrs. Martin's sale to Grasby was consummated approximately six years after she had sold to Findley. The latter went into possession and assumed that his south boundary line extended farther west than it did. He was under the impression, and no doubt honestly so, that the western extremity of his property was not 300 feet west of the southeast corner of Lot 2, as the deed exemplified, but that it was 329 feet from such point. Effect of appellees' contention, if sustained, would permit them to retain a wedge-shaped strip of land 29 feet in width fronting the highway, but gradually diminishing to non-existence at a point north of the center of the boundary line between Lot 3 and the 36-37.2-ft. strip added to Lot 2 in order that the Martin home place should be 300 feet wide on both the north and south ends.

Do the facts and circumstances justify reformation?

When appellants purchased Lot 3, appellees were in possession under a recorded deed which showed the exact property appellees were supposed to have bought. There was nothing on the face of the transaction to indicate that the wedge-shaped strip of land within the Findley curtilage was a part of the grant to Findley. Conversely, appellants purchased under specific descriptions covering all of Lot 3, except the strip added to Lot 2 for the purpose of making the latter 300 feet in width.

Martin, after stating that he represented his wife in making the sale, testified that the question was raised (and presumably Findley raised this question) as to where the line would run; that he (Martin) stepped off the distance by walking on the Nineteenth Street Pike "because it was boggy and soggy on the property;" that he stepped off the number of feet they wanted to sell Findley, and a question arose regarding the rose bushes. Continuing, Martin said:

"I stopped on the east side about three or four feet and put down the number of feet I had stepped so as to retain the rose bushes. So far as the 29-foot strip was concerned, I had no intention of deeding it to Mr. Findley or anyone else. I took the figures on a piece of paper to the bank for the drafting of the deed. I showed the fence to Mr. Findley and did not tell him that the line, measured by the steps, was to include the rose bushes. We had intended to change the plat and have the line made according to the fence if we had kept the property. I stepped off and sold to Mr. Findley according to so many steps and so many feet. It was not surveyed."

It may be urged that when the Grasbys purchased fractional Lot 3, they did so with notice of defined lines on the east side, and are therefore bound to accept such monuments as designating the eastern extremity of their property, in spite of the fact that their deed called for the very land in controversy. There is no evidence, however, that at the time of purchase, or before, the Findley claims were brought to appellants' attention. In this circumstance they had a right to expect, and they may demand, property conformable to the descriptions

contained in their deed. The result of this determination gives to each party the land described in the conveyance.

Appellees do not question the judgment for $114.20, and it is affirmed. That part of the decree reforming the Findley deed is reversed. The cause is remanded with directions to quiet title in appellants as to all of Lot 3 except the 36-37.2-ft. tract herein identified, but reserving to appellees an easement across the eastern portion of that part of Lot 3 as agreed to by the parties under a recitation in the decree.

HARDY *v.* HARDY.

4-5434 132 S. W. 2d 365

Opinion delivered October 23, 1939.

James H. Nobles, Jr., Graham Moore, C. T. Sims and *J. R. Wilson,* for appellant.

Lamar Williamson, Adrian Williamson and *Gaston Williamson,* for appellee.

SMITH, J. R. L. and B. A. Hardy were brothers and associates in a business which had prospered. In 1903 B. A. Hardy married Miss Gertrude Cotham, and to that union two children were born, a daughter named Louise, who married a Mr. Graham, and his son named Benjamin A. R. L. Hardy became involved in a feud with McVey brothers who assaulted and beat him. B. A. Hardy entered the feud and shot one of the McVeys, and was later killed by them in September, 1907. R. L. Hardy stated to B. A. on his death bed that he (B. A.) had lost his life in his brother's behalf, and that he would always look after Mrs. B. A. Hardy and her two infant children. The son was then six weeks old and the daughter was then three years old.

Thereafter the closest relations and the most unlimited confidence existed between R. L. Hardy and the widow and children of his deceased brother. R. L. Hardy

became the administrator of his brother's estate and guardian of the minor children after the death of his brother's widow. He also took charge of and managed the business affairs of Mrs. B. A. Hardy.

In December, 1893, R. L. Hardy married Miss Ida Harris, who inherited an estate worth, in round numbers, $60,000 upon the death of her father in 1894.

In addition to the control of the property of Mrs. B. A. Hardy and her minor children, R. L. Hardy also had control of and managed the estate of his wife, Mrs. Ida Hardy. He had a single bank account, kept in his own name, to the credit of which account he deposited all moneys coming into his hands, whether belonging to his wife or to Mrs. B. A. Hardy and her children. He kept books, however, showing receipts and disbursements of the funds of each of these parties.

R. L. Hardy kept an account of the assets of Mrs. B. A. Hardy coming into his hands from 1907, the date of the death of her husband, until January 19, 1929, the date of her own death, at which time the books of R. L. Hardy showed assets belonging to Mrs. B. A. Hardy amounting to $9,919.74. Upon the death of Mrs. B. A. Hardy, R. L. Hardy credited one-half of this amount to the account of the daughter and the other half to the credit of the son of B. A. Hardy.

In 1922 and in 1927 R. L. Hardy filed final accounts current of his guardianship of the son and daughter of B. A. Hardy respectively, and was discharged as their guardian. He received his discharge upon exhibition to the court of receipts from his wards showing payment of the sums due them respectively. No money was paid, but R. L. Hardy charged himself upon his ledger with the sums of money reported in his settlement as due his wards. He was thereafter indebted to them as their trustee, and not as their guardian.

During the guardianship Hardy had used the money of his wards in his business operations without obtaining any authority from the probate court to lend this money; but he charged himself with the interest thereon. He continued the practice of using this money after he

ceased to be guardian, but continued also to charge himself with the interest thereon. From time to time he advanced various sums of money to both B. A. and Louise.

It appears—and we find the fact to be—that Hardy kept accurate accounts, so far as the amounts thereof were concerned, both as guardian and as trustee, and it appears certain also that both B. A. and Louise reposed unlimited faith in their uncle's integrity. However, in 1933, Louise wrote her uncle, R. L. Hardy, a letter of inquiry about her property, and received from him a reply containing the following assurances:

"I have on hand lands that are good timber lands and more improved farms that I consider well worth at a low valuation $112,965 and about $100,000 in notes and accounts. The notes and accounts are worth about 50c on the dollar.

"I am paying you 6 per cent. on amount I am due you. Don't say anything to anyone about our business. This is the time to be on guard, but say nothing. I predict that in less than two years' time we will be on top of the world. Don't let anything discourage you and you will sure win."

Mrs. Ida Hardy, wife of R. L. Hardy, died testate in 1934, and was survived by her husband and an only child, a son named Eric. Under this will she devised all her property to her son, subject to a life estate in her lands which she devised to her husband. R. L. Hardy and Union Bank & Trust Company were named executors of the will, and their inventories showed assets totaling about $105,000, consisting largely of bonds of many kinds.

About this time B. A. and Louise discovered that R. L., their uncle, had executed a mortgage on a number of different tracts of land owned by him, to secure various creditors, but they were not included in that number. This appears to have been their first intimation that all was not well with their property held by R. L. Hardy, and they called upon him for a settlement. Some differences arising they employed an attorney to aid them

in this settlement, and an agreement was reached to the effect that R. L. Hardy was then indebted to B. A. in the sum of $28,535.56, and to Louise in the sum of $22,259.19.

An "agreement collateral to mortgage" which R. L. Hardy had executed for the benefit of other creditors, was then made under date of August 23, 1934, which recited the indebtedness of R. L. Hardy to B. A. and Louise and to the original mortgagees, in which it was agreed by the original mortgagees and all other parties in interest that the security of the mortgage inured to the benefit of all these creditors equally and ratably. This was the first settlement which Hardy had made as trustee. He did not question his indebtedness to B. A. and Louise, and with a few relatively unimportant exceptions his ledgers reflected the amount thereof. R. L. Hardy freely admitted this indebtedness, but stated that he had lost the money in his business and was unable to pay it except insofar as it was secured by the mortgage.

B. A. Hardy asked and was given permission to examine the books of R. L. Hardy. This examination disclosed that, while R. L. Hardy had lost the money belonging to his nephew and niece, the estate of his wife had steadily augmented and then totaled about $105,000.

R. L. Hardy appears to have exercised the same control over the estate of his wife as he had exercised over that of his nephew and niece, except that from time to time and at fixed intervals he rendered to his wife statements of her account with him. For some years after his marriage R. L. Hardy made real estate loans of his wife's money, and she executed a power of attorney to him, which recited that she had authorized him to "loan moneys for her, to receive payments therefor, receipt and release mortgages," and to satisfy them of record. Later his wife disapproved making of real estate loans, and at her direction Mr. Hardy began buying bonds of all kinds for her account, but using his own discretion as to the bonds to buy. When bought the bonds were placed in a safety vault in a local bank, of which Mr. Hardy and his son Eric carried the key. Later

the bonds were sent to a bank in New York, to be kept for Mrs. Hardy's account.

During the progress of the investigation of R. L. Hardy's books by B. A. Hardy, his nephew, ill-will developed, and B. A. Hardy became convinced that he had not been fairly dealt with, and that assets belonging to himself and to his sister had been converted into bonds which R. L. Hardy had purchased for the account of his wife.

R. L. Hardy was adjudged a bankrupt, and suit was brought to foreclose the mortgage to which reference has been herein made.

There had never been any transactions of any kind between B. A. Hardy and his sister with Mrs. R. L. Hardy, but on June 11, 1935, B. A. Hardy and his sister filed this suit against R. L. Hardy and Union Bank & Trust Company as executors of Mrs. Hardy's estate. This complaint alleged many of the facts herein recited, and the practice of R. L. Hardy to mingle all the funds which he controlled in a common account kept in his own name.

The complaint made the following allegations, among others:

"Plaintiffs state that out of the common fund carried by the defendant, R. L. Hardy, as guardian and agent of these plaintiffs, and as agent of Mrs. Ida Hardy, the defendant, R. L. Hardy, made purchases of real estate and of stocks and bonds in the name of Mrs. Ida Hardy, which is shown by an inventory of the assets of the estate of Mrs. Ida Hardy, deceased, and paid for same in part with the funds that belonged to these plaintiffs. That a list of the real estate and a list of the personal property comprising the assets of her estate are attached hereto as Exhibit 'B' and 'C,' and made a part of this complaint.

"Plaintiffs state that their funds, which were mixed and mingled by the defendant, R. L. Hardy, as their guardian and agent, and as the agent and attorney in fact for Mrs. Ida Hardy, his wife, were wrongfully converted

by the defendant, R. L. Hardy, and used by him for the purchase of real estate and the personal property as hereto attached and that a part of the real estate and part of the personal property of her estate is the product and fruits of their funds, and that they and each of them have a lien upon said real estate and personal property.

"That the defendant, R. L. Hardy, and the defendant, Union Bank & Trust Company, are the qualified and acting executors of the estate under the last will and testament of Mrs. Ida Hardy, deceased, and have in their possession and custody as such executors all of said property, both real and personal."

Upon these allegations, plaintiffs prayed: "That the defendants, R. L. Hardy, and the Union Bank & Trust Company, as executors, be enjoined from distributing the assets of the estate of Mrs. Ida Hardy, either to the defendant, R. L. Hardy, or the defendant, Eric Hardy, until so ordered by an appropriate order of this court. "That the defendant, R. L. Hardy, be required to make full, complete, and itemized statement showing the amount of money received and handled by him as agent of Mrs. Ida Hardy, and the amount of money received and handled by him as guardian and agent of these plaintiffs, how said moneys were invested or expended from 1907 to August 23, 1934, and that the plaintiffs have a lien upon the property of the estate of Mrs. Ida Hardy for the payment of such sum as this court on final hearing may find that their funds were invested in said property."

It will be observed, from the allegations of the complaint, copied above, that the suit to foreclose the mortgage had not then proceeded to a decree. The decree finally rendered gave judgment against R. L. Hardy in favor of B. A. and his sister in a sum the amount of which is not disputed.

No answer was filed by R. L. Hardy, who had but recently received his discharge in bankruptcy; but an answer was filed by the bank as executor, in which all the material allegations of the complaint were denied.

There was a plea also of the statute of limitations and of laches.

Upon the issues thus joined an enormous amount of testimony was taken. Each side employed an expert accountant to audit Hardy's ledgers, and each accountant made an elaborate report. The attempt on the part of the plaintiffs was to show that assets in R. L. Hardy's hands belonging to B. A. Hardy and to Mrs. Louise Hardy Graham were used by R. L. Hardy in buying bonds included in the executor's inventory.

Before plaintiffs began taking this testimony, they filed "petition for production of books and record," in which they alleged that it was essential that plaintiffs have access to all the books of R. L. Hardy, and that access to some of the books had been denied. Upon these allegations plaintiffs prayed "That upon his failure to do so (produce the books) they ask that this court take the allegations of this complaint as true and enter judgment against the executors in the sum of $15,000 for plaintiff, Benjamin A. Hardy, and for $15,000 for plaintiff, Louise Hardy Graham, and for all other relief consistent with the statutes in such cases made and provided."

This amended complaint and the prayer thereof may be disposed of by saying that relief was prayed to which plaintiffs were not entitled; but we do not think that the prayer thereof operated to change the nature and character of the suit.

On June 13, 1938, another amendment to the complaint was filed, in which it was prayed that Hardy be required to furnish an itemized statement of plaintiffs' assets, and that a finding be made as to assets inventoried as the property belonging to Mrs. Hardy's estate which had been purchased with funds belonging to plaintiffs. This amended complaint does not appear to have changed the nature of the original suit.

After the taking of the testimony had been completed and the case was ready for submission the executors, on June 13, 1938, filed a motion to dismiss the com-

plaint upon the ground "That the suit constituted an action to enforce a demand against the estate of Mrs. R. L. Hardy for debt, and is such an action as is required by the provisions of § 105 of Pope's Digest to be supported by an affidavit verifying said claim or demand in form and substance as required by § 101 of Pope's Digest."

A response to this motion was filed, denying that the suit constituted an action to enforce a demand against Mrs. Hardy's estate, or was such an action as is required by the provisions of § 105, Pope's Digest, to be supported by an affidavit verifying said claim in form and substance as required by § 101, Pope's Digest.

It is insisted also that the motion to dismiss was not filed in apt time.

It is conceded there was no verifying affidavit conforming to the provisions of §§ 105 and 101 of Pope's Digest. The insistence is that the character of the suit is such that this is not required.

The motion to dismiss was sustained, and this appeal is from that decree.

Numerous cases have held that compliance with these statutes is mandatory in the enforcement of demands against estates, and that a nonsuit will be ordered where the statute had not been complied with. *Purcelly* v. *Carter,* 45 Ark. 299; *Ross* v. *Hine,* 48 Ark. 304, 3 S. W. 190; *Wilkerson* v. *Eads,* 97 Ark. 296, 133 S. W. 1039; *Davenport* v. *Davenport,* 110 Ark. 222, 161 S. W. 189.

It was held in the case of *Hayden* v. *Hayden,* 105 Ark. 95, 150 S. W. 415, that in suits against estates, either by ordinary action or before the probate court, it is necessary to produce at the trial an affidavit of the justness of the claim and of its non-payment made before commencement of the action in substantial compliance with § 114, Kirby's Digest, now appearing as § 101, Pope's Digest, or the suit will be nonsuited.

It was held, however, in the case of *Carl-Lee* v. *Griffith,* 153 Ark. 74, 240 S. W. 15, that a complaint

against an executor which fails to allege the making of an affidavit of the justness of the demand is not fatally defective; the statute merely requiring the production of the affidavit at the trial.

The motion to dismiss was, therefore, made in apt time. It would not have been ground for dismissal that the complaint failed to allege the making of the affidavit, as it was sufficient to produce the affidavit at the trial, and the motion to dismiss was, therefore, aptly filed at the trial when it appeared that the statutory affidavit had not been made.

We are of the opinion, however, that this action is not a demand against the estate of Mrs. R. L. Hardy within the meaning of §§ 105 and 101, Pope's Digest. There had never been any transactions between B. A. Hardy and his sister with Mrs. R. L. Hardy. The suit was in the nature of a discovery, to ascertain what assets had been acquired for the benefit of Mrs. Hardy with money belonging to B. A. Hardy and his sister. They were not advised as to the amount thereof, and it was necessary that this fact be first ascertained. It was prayed that when this fact had been ascertained, a trust be impressed upon so much of the assets inventoried as the property of Mrs. R. L. Hardy which had been acquired with the funds of B. A. Hardy and his sister.

Under the title, "What Are Debts and Claims," § 210 of the chapter on Executors and Administrators in 11 R. C. L., page 191, declares the law to be that "a claim for a trust fund included in the assets of a decedent's estate, as to which the relation of debtor and creditor never existed between the parties, was not a 'debt' or 'demand,' within the meaning of the statutes relating to the order of payment of demands against such an estate."

Sections 105 and 101, Pope's Digest, relate to the enforcement of debts and demands which are to be classed and paid in accordance with the administration laws. The cause of action here sued on is not a debt or demand of that character. Had this been a suit

against the estate of R. L. Hardy after his death, either in the chancery court or in the probate court, we would have an entirely different case, one in which it might well be argued that this was an attempt to enforce a demand against an estate.

In the case of *Orr* v. *St. Louis Union Trust Co.*, 291 Mo. 383, 236 S. W. 642, it was held by the Supreme Court of Missouri (to quote a headnote in that case) that:

"8. A widow's claim against her deceased's husband's estate for money turned over to decedent for investment on her account is not barred by her failure to exhibit it in the probate court during the administration proceedings, as required by Rev. St. 1909, c. 2, art. 7; such claim involving the establishment of a trust and an accounting, which, being matters of an equitable nature, are not cognizable before the probate court."

The case of *Holloway* v. *Eagle,* 135 Ark. 206, 205 S. W. 113, supports the view that §§ 105 and 101, Pope's Digest, do not apply to this case. There W. H. Eagle & Son had acquired title to land, upon which the court found a trust should be declared for the benefit of the heirs of E. H. Holloway, deceased, and that demand was enforced against the estate of W. H. Eagle, although, as stated in that opinion, "No claim was filed against his (W. H. Eagle's) estate by the heirs of E. H. Holloway."

We are of the opinion also that this suit is not barred by limitations or by laches. R. L. Hardy was admittedly a trustee for both B. A. Hardy and his sister. Unlimited confidence was reposed in him as such until 1934, when the inventory of the estate of Mrs. R. L. Hardy was filed, and the cases appear to be unanimous to the effect that a cause of action for the enforcement of a constructive trust does not arise until the discovery of the fraud of the trustee where there was no laches in its discovery. Here, the parties acted promptly after the discovery of what they allege to be fraud of their trustee, and they have since prosecuted the action with the utmost diligence.

It was the view of the court below that §§ 105 and 101, Pope's Digest, had not been complied with, and that non-compliance therewith required the dismissal of the suit, and it was dismissed without any consideration or finding as to whether R. L. Hardy had purchased property for the benefit of his wife with the funds of his nephew and niece and, if so, to what extent. It is our opinion that this question should be passed upon by the court below as it is one which would require the consideration of innumerable records. Upon the remand of the cause the court may be advised that the assistance of a master is necessary, or it may be desired to take additional testimony; but, even so, we think this question of fact should be determined by the court below in the first instance, and the decree will be reversed and the cause remanded for that purpose.

JONESBORO COCA-COLA BOTTLING COMPANY *v.* YOUNG.

4-5597 132 S. W. 2d 382

Opinion delivered October 23, 1939.

Kirsch & Cathey and *Arthur L. Adams,* for appellant.

MEHAFFY, J. On September 9, 1938, the appellee, C. H. Young, filed complaint in the Greene circuit court against the Jonesboro Coca-Cola Bottling Company and others. The Jonesboro Coca-Cola Bottling Company operates a Coca-Cola bottling plant at Jonesboro, Arkansas. The individuals joined as defendants were the persons who operated the stand and sold the Coca-Cola.

The appellee alleged that on April 13, 1938, he purchased at a drink stand in Paragould, operated by the ladies joined as defendants, a bottle of Coca-Cola; that this bottle contained some foreign substance, the exact nature of which was unknown to him, but which was a deadly poison; that he drank part of the contents of the bottle, ceasing because he noted an unnatural taste; that as a result he became violently and dangerously ill, suffered intensely for a considerable period of time, and was unable to work; that the Coca-Cola was manufactured by the Jonesboro Coca-Cola Bottling Company. He asked damages in the sum of $2,000 on account of his sickness and suffering, and $500 for loss of time.

The appellant and others filed answers, specifically denying each and every material allegation of the complaint.

The appellee, C. H. Young, testified in substance that he lived at Paragould and had worked all the morning of April 13, 1938; he came in about noon and after eating dinner went to the sale barn at Paragould, where auction sales of livestock were held; there he met Mr. Houghton of Missouri; he knew Houghton, who invited him to have a cold drink with him; they went to the stand operated by the ladies joined as defendants;

Houghton ordered sandwiches, but witness did not eat any sandwiches, as he had already had dinner. He drank two swallows from his bottle of Coca-Cola when he noticed an unnatural taste and set it back; Houghton told him he would buy him another if that did not suit him. He then took another sup to satisfy himself, and pushed the bottle back and left it. He had previously drunk a great number of Coca-Colas. From the drink stand, he and Houghton went back to the sale barn and were together while Houghton sold his stock. After a little time passed Houghton remarked that appellee looked "peculiar." He was not feeling well, and, as he began to feel worse, he left and walked four or five blocks home. He had fever when he got home; his eyes, face, lips, tongue and chest began to swell and his fever soon went up to 104 degrees. He first called Dr. Ellington, and afterwards called Dr. Haley. He was in bed ten days and sick for two months. He lost his job, a logging contract. Thinks his earnings would run around $10 a day. His suffering became less in 24 hours and most of it had left in 48 hours; he still had a sore mouth and could hardly see; his eyes still trouble him. Dr. Ellington made five or six trips to see him, and Dr. Haley made two. Witness was 43 years of age. It was probably close to 1:30 o'clock when he got back to the sale barn that day; he did not go to the sale barn to buy or sell stock, but just went with Mr. Houghton. When the Coca-Cola was purchased, witness saw the lady who served them uncap the bottles and set them on the counter. Houghton drank all of his bottle of Coca-Cola. Witness drank some of his. He could not see anything in it, and did not save the contents of the bottle. He made no remark at the time to the ladies running the stand, but did mention it to Houghton. Thinks he was with Houghton until 2:30, and then went home and called the doctor about 3:30. In the forenoon, witness had been down on the St. Francis River "cogging" logs; was not in the vines and bushes, but was working in an open ditch; went to work about 7:00 in the morning and remained until he came home at noon; the work was about eight

miles from Paragould. Witness then testified about his work and what he was earning, and then said that the pains he was speaking of were in his head and eyes and stomach. On that day he had eaten for dinner: beans, potatoes and cornbread, and had drunk water.

Appellee's testimony was corroborated by Hovey Houghton, and he said that Young drank a little of the "coke" and set it back, saying that something was wrong with it. They went back to the barn and he noticed that appellee looked a little pale and peculiar; that he mentioned this fact to appellee. Young had made "a second try" at the Coca-Cola and pushed it back and said something was wrong with it. Young left about 2:30, and when he left he looked pale, whereas he usually was red-faced. Witness did not see him anymore for three or four weeks, and then appellee had little scales on his face.

Other witnesses testified as to appellee's injury and suffering.

Dr. R. J. Haley testified that he was called in consultation with Dr. Ellington, and appellee was found to be quite ill; his temperature was 104 degrees; his chest was blue and he was suffering from a dermatitis. He testified at length about his condition and said he was very uncomfortable, but that it was never determined what was likely to have caused the condition. Young had given a history of his actions, and when Dr. Haley was asked by the court whether the Coca-Cola could have caused Young's condition, he said it was impossible to answer; that the answer would have to be made saying that there are several or many things which might cause or give rise to such a condition; the exact cause they never did determine.

Dr. Ellington testified to practically the same facts that were testified to by Dr. Haley, and he said that he could not tell what had caused appellee's condition. When asked if the things appellee had eaten at noon—beans, potatoes and cornbread—might cause a disease like that, he answered that they might.

Dr. H. A. Stroud testified that he did not know of any substance taken internally that would cause that condition at that time, and in his experience he had found none. He also said there were some 250 or 300 well-known causes of this ailment. If it is the result of an internal cause, there would generally be other symptoms such as vomiting, cramping, etc. This witness also testified that he did not think the condition could have been caused by the drinking of a bottle of Coca-Cola.

Dr. J. A. Dillman also testified that he did not think appellee's condition was caused by any poisonous substance taken at 2 o'clock internally, and gave his reasons.

Photographs and other evidence were introduced by the appellant, but as we view the case, it is unnecessary to call attention to any other evidence.

The court instructed the jury rather fully, but was requested by the appellant to give the following instruction: "If you should find from the testimony that the illness or injury to the plaintiff, if any, might equally as well have resulted from some cause other than drinking the Coca-Cola, you will find for the defendant."

The court refused to give this instruction. In view of the evidence in this case, we think the court erred in its refusal to give this instruction. One seeking to recover damages for the wrongful conduct of another, must not only show that the other is guilty of negligence or wrongful conduct, but the burden is upon him also to show that the wrongful conduct caused the injury.

"The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence, no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause, or where it is impossible

to say what, if any, portion of the damages resulted from the fault of the defendant, and what portion from the fault of the plaintiff himself." 15 Am. Jur. 413.

From the evidence in this case, it appears to be uncertain whether or not the damages suffered resulted from the negligence of the appellant. That appellee drank the Coca-Cola and shortly thereafter became seriously ill is not disputed. But the evidence fails to show that the injury suffered by appellee was caused by the negligence of the defendant; that is, by selling a poisoned bottle of Coca-Cola.

Mr. Justice HUMPHREYS and the writer are of opinion that the judgment should be reversed, for the error noted, and the cause remanded for a new trial. The majority, however, are of opinion that the evidence as to the cause of the injury is speculative, and as the cause has been fully developed, the judgment should be reversed and the cause dismissed.

Since a majority is of that opinion, the judgment is reversed and the cause dismissed.

BALLENTINE *v.* STATE.

4140 132 S. W. 2d 384

Opinion delivered October 23, 1939.

H. C. Rains, for appellant.

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

McHaney, J. Appellant was indicted for the crime of murder in the first degree for the killing on the 25th day of May, 1939, of Albert Honea. On a trial he was convicted of murder in the second degree, and punishment fixed at twenty-one years in the state penitentiary, on which judgment was entered, from which is this appeal.

The only contention made for a reversal of the judgment is that the court erred in giving an instruction on murder in the second degree for the reason, as contended by him, that the evidence clearly shows that he was guilty of no greater offense than voluntary manslaughter. For this reason he asks that the judgment be reversed and the punishment reduced to the maximum amount fixed by law for manslaughter. His contention is that the record fails to disclose any malice on his part or any intention to kill Honea.

Murder in the first degree is defined by statute, § 2969, Pope's Digest, as "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 shall be committed in the perpetration of or in the attempt to perpetrate," certain crimes named. The statute then says, § 2970, Pope's Digest:

"All other murder shall be deemed murder in the second degree." We have many times held that actual intent to take life is not a necessary element of the crime of murder in the second degree. *Brassfield* v. *State,* 55 Ark. 556, 18 S. W. 1040; *Byrd* v. *State,* 76 Ark. 286, 88 S. W. 974. Malice, however, is a necessary element of murder, either in the first or second degree, and it must be either express or implied. Section 2967 provides: "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition."

Albert Honea was an old man and operated some kind of a "joint" near the foot of the Frisco bridge across the Arkansas River in Fort Smith. Appellant and others had gathered at his place and had engaged in a penny ante poker game and in shooting dice, and the evidence tends to show that they had all become more or less intoxicated from drinking bay rum. One of the witnesses testified that appellant got mad over the crap game and "seemed to take his spite out" on deceased who was not in the crap game and had taken no part in the gambling. The evidence shows that appellant attacked Honea with his fists, knocked him down, picked him up, knocked him down again, kicked and stamped him. The old man was taken to the hospital where he died, and Dr. Foltz testified that he had lacerations and bruises over his entire body, had cranial fractures of the skull, fractures of both the right and left upper and lower jaws, a broken vertebra, a broken neck, and ribs on the right side were fractured to such an extent that fragments pierced his lung which produced a hemorrhage. The evidence supports the finding that appellant inflicted these injuries. The extent of his intoxication is in dispute. The officers who arrested him some hours later testified that he was not intoxicated. They examined his shoes and found grey hairs around the protruding tacks in the soles thereof. Appellant says he was drunk, but not so drunk that he did not know what he was doing. Drunkenness is no excuse for the killing. *High* v. *State,* 197 Ark. 681, 120 S. W. 2d 24. In *Byrd*

v. *State, supra,* the court used this language: "In this case the fact that defendant was intoxicated at the time he assaulted Burnsides may have raised in the minds of the jury a reasonable doubt as to whether there was a specific intent to kill, and led them to reduce the crime to murder in the second degree. 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 commits murder the same as if he were sober, 1 Bishop, New Crim. Law, § 401."

In this case the evidence was sufficient to have sustained a verdict and judgment for murder in the first degree. The court, therefore, did not commit any error in submitting the lesser degree of homicide.

Affirmed.

MORRIS AND FRANCE *v.* STATE.

4129 132 S. W. 2d 785

Opinion delivered October 2, 1939.

Partain & Agee and *Batchelor & Batchelor,* for appellants.

Jack Holt, Attorney General, and *John P. Streepey,* Asst. Atty. General, for appellee.

HUMPHREYS, J. Informations were filed in the circuit court of Crawford county, Arkansas, by the prosecuting attorney of that district charging appellants jointly in one information with the crime of larceny on the 21st day of September, 1938, with unlawfully, willfully and feloniously stealing, taking and carrying away one brindle heifer with horns, and one jersey heifer with horns, each weighing about four hundred pounds and branded with "M" on hip, the property of Dr. May, and one bull calf mixed with jersey weighing about three hundred pounds, the property of Fred Smith, with the unlawful and felonious intent then and there of depriving the said owners of their said property; and charging appellants jointly in the other information with the crime of larceny on the first day of October, 1938, with unlawfully, willfully and feloniously stealing, taking and carrying away one roan heifer calf weighing about four hundred pounds, and one white faced heifer calf weighing about four hundred pounds, and one motley-faced bull calf weighing about three hundred and fifty pounds, the property of W. F. Wright with the unlawful and felonious intent then and there of depriving said owner of his said property.

The first information was docketed as case number 3415, and the second as case number 3416.

When the cases were called for trial each defendant, appellants herein, through their respective attorneys, moved for a severance of their cases in order that they might be tried separately, which motions were overruled by the court over the objection and exception of each defendant.

The cases were then consolidated for the purposes of trial by the court without objection or exception by either defendant.

The consolidated cases then proceeded to trial before a jury duly impaneled with the result that the defendants, appellants herein, were convicted under both informations, and penalties imposed against each defendant on information docketed as case number 3415 of one year in the state penitentiary and two years imposed against each defendant on information in case number 3416.

From these verdicts and judgments each defendant has duly prosecuted separate appeals to this court.

They each assign as reversible error the failure of the court to sever their cases. The motion to sever the cases assigned no reason why they should be severed.

The defendants were not indicted for capital offenses and, hence, they were not entitled as a matter of law to separate trials. They were indicted for felonies less than capital and might be tried either jointly or separately, in the discretion of the trial court. Section 3976 of Pope's Digest provides 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."

At the time the motions were made to sever, nothing was before the court except the information and we cannot say the court abused his discretion in overruling the motions. We ruled in the recent case of *Graham and*

Seaman v. *State,* 197 Ark. 50, 121 S. W. 2d 892, that when two persons were charged with a felony not capital, the denial of the motion for a severance was within the discretion of the trial court, and was reversible only when that discretion had been abused.

The court did not err in overruling the motions for a severance.

According to the record, the cattle described in the two informations had been running, prior to their disappearance, with other cattle belonging to the same parties, on both sides of highway No. 71 a few miles from Mountainburg near Lake Ft. Smith and a part of the time in the Lake Ft. Smith property. A short time after the cattle disappeared the owners, with the aid of George Collins, the constable of the township, and the sheriff of the county, instituted a search for the cattle. It was suspected that they had been stolen so they went to the Ft. Smith market, the Springfield, Missouri, market and the Joplin, Missouri, market, in an effort to find whether they had been sold and by whom. The search through the community and these markets for the cattle caused much comment among the people, and finally Claude Morris was arrested for stealing them. Shortly before his arrest as well as after his arrest he made a statement to the officers and others that on September 22, in the night time, he hauled the brindle heifer with horns and the jersey heifer with horns, branded with "M" on the hip and a bull calf mixed with jersey for his co-defendant, Charley France, to the Joplin, Missouri, market; that his co-defendant, Charley France, told him that the two heifers belonged to him, and that the bull calf belonged to his brother, Logan; that Charley France accompanied him to Joplin and assisted in the sale of them; that Charley France sold them in the name of Claude Morris, and that he, Morris, received a check for them, cashed same and, after taking out his pay for hauling them, amounting to $12.50, he paid the balance of the money to Charley France, and, on the way back, France bought some apples about five miles from Springdale. He also told the investigators and other parties that on

October 1, 1938, he hauled the roan heifer, the white-faced heifer and the motley faced red bull in the night time for his co-defendant, Charley France, to the Joplin, Missouri, market where they were sold by France who received a check for them, and that out of the proceeds of the check France paid him $12.50 for hauling them up there; that he thought they belonged to Charley France. On the trial of the causes, he testified confirming the statements he had made to the officers and others. After Claude Morris made these statements, Charley France was arrested, and he stated that Claude Morris was employed by him on or about September 22 to haul two heifers of his own to the Joplin, Missouri, market and to sell them for him; that there was no bull calf loaded in the truck; that he went as far as Springdale with Morris and got out there for the purpose of buying some apples and waited until Morris returned from Joplin; that he returned in the afternoon and paid him $60 out of the amount he had received after deducting $12.50 from the amount they brought for his services in hauling them; that this was the only load of cattle that Morris ever hauled for him; that if the bull calf mixed with jersey was in the load he was stolen elsewhere after he, France, got out of the truck at Springdale. He stated that he knew nothing about the cattle belonging to W. F. Wright which Morris stated he had loaded at his house, and that he never employed him to sell that load of cattle and did not accompany him to Joplin and assist him in the sale of same and did not receive any part of the proceeds from the sale of the Wright cattle. Relative to the brindle heifer and jersey heifer, which he employed Morris to haul to Joplin to sell, he stated that they were his individual property; that he and Dr. May had been raising cattle for six or seven years; that May would buy them and send them up to him, and that he would furnish the feed and raise them, and that when he sold them he would give Dr. May half the money; that about a year before the disappearance of two of the cattle in which he and May were interested, they had divided the cattle they had raised up to that time, and that May had taken his

part to Fort Smith and sold them, and that he had sold six or seven of his part to his brother, Logan; that his brother had later turned two of them back to him to assist him in paying a note that he owed the bank, and that the two heifers he employed Morris to haul to Joplin were these two. On the trial of the cause he testified in substance confirming the statements he had made to the officers and others.

Dr. May testified in the course of the trial that he was jointly interested with appellant, Charley France, in raising cattle; that he bought them and sent them up to France to raise, and that France had a right to sell the cattle at any time he chose under their agreement.

Several witnesses were brought from Joplin, Missouri, connected with the stockyards and sales market who testified, in substance, that appellants brought both loads of cattle to Joplin about the times set out in the respective informations, and that they were sold to Owens Brothers Commission Co., who issued checks in payment of same. A witness by the name of Friend, who was connected with the Owens Brothers Commission Co., testified over the objection of appellant, Charley France, that the check issued for the first load of cattle was made payable to France when he admitted that he himself had only drawn the check in blank and had not inserted the name of the payee.

At the conclusion of the state's evidence, and at the conclusion of all the evidence appellants filed a motion to dismiss the charges against them for stealing the Dr. May's heifers on the ground that the undisputed evidence showed that they were the individual property of Charley France, and for the further reason that, if they were owned jointly by Dr. May and Charley France, he, France, had the right to sell the heifers without the consent of Dr. May. The court overruled the motions, and appellant, Charley France, as well as Morris, asked instructions to the effect that if the cattle were the property of Charley France individually or if they found that they were joint owners of the property, but further found

that Charley France had a right to sell them without the consent or permission of Dr. May the jury should acquit both appellants of the charge against them for stealing the two heifers known as the May heifers. The court refused to give these instructions over the objection and exception of appellants. The appellants assign as reversible error the refusal of the trial court to instruct a verdict of not guilty as far as the cattle were concerned which were alleged in the informations to be the property of Dr. May and of the refusal of the trial court to give the instructions requested by appellants to that effect.

A person cannot, of course, be convicted of selling his own property or for employing any other person to sell same, nor can one be convicted for stealing the property of another by selling same when the other person jointly interested has given him permission to sell the property.

Dr. May admitted that, even if he were jointly interested in the cattle with France, under their agreement, he had given him permission to sell them, and that he had a right to sell them without his (Dr. May's) permission. The court in refusing to acquit the defendants did commit error in refusing to instruct a verdict of not guilty in favor of appellants and in failing to give an instruction to that effect, but it was not reversible error for the reason that it did not result in any prejudice to appellants. The information charging them with stealing the May cattle also charged them with stealing one bull calf mixed with jersey which was the property of Fred Smith. If they were guilty of stealing the Smith bull calf they would be guilty of the crime of larceny subject to a penalty of not less than one year in the penitentiary. This was the extent of the penalty imposed under the information that charged them with larceny on or about the 22nd of September, 1938. Of course, if a greater penalty had been imposed upon them than the minimum fixed by law some prejudice might have resulted against them, but since they received the minimum punishment only we are unable to see how they were

prejudiced, provided, of course, that the evidence was sufficient to sustain a conviction of the charge for stealing the Fred Smith bull calf.

Appellants assign as error the insufficiency of the evidence to sustain the verdicts against them. The verdicts against Charley France were amply sustained by the testimony of Claude Morris to the effect that he got the Smith calf as well as the Wright calves at Charley France's barn or home, in the night time, and hauled them to the Joplin, Missouri, market and assisted him (Charley France) in selling them if his testimony is sufficiently corroborated by other evidence than his own. We think it is. There is substantial evidence in the record showing that Charley France was present when the cattle were sold at Joplin, and that he assisted in making the sales of the cattle. He denied that he was in Joplin when the Smith bull and the Wright cattle were sold, but the evidence reflects that he was present, participated in the sale and received checks for the proceeds thereof from the sale of the cattle. This was ample evidence to corroborate the testimony of Claude Morris.

It is argued in behalf of Claude Morris that there is no evidence whatever tending to show that he stole the Smith bull or the Wright cattle. He testified that he got them both at Charley France's home or barn, and hauled them to the Joplin market for $12.50 a load, and that he had no knowledge that they were stolen and did not assist in selling them. Charley France testified that he did not get them at his barn or home. Charley France testified that the only two cattle he employed him to haul were the two heifers, and that neither the Smith bull nor the Wright cattle were ever in his possession. We are unable to say just what part of his testimony the jury accepted as true and what part it discarded as untrue. There is no question under this record, but that the Smith bull and the Wright cattle were stolen. The testimony of the disinterested witnesses from Joplin show that both appellants were in possession of the recently stolen cattle and sold them to Owen Brothers Commission Company, and that the money was collected by

either or both of them. Their explanation may not have been satisfactory to the jury. Unless their explanations were satisfactory to the jury the presumption arises from the fact that they were in the possession of recently stolen property, that it was stolen by them. Their explanation of their possession of the cattle was in conflict, and the jury may well have concluded from the whole record that these appellants stole them off the range in Crawford county and hauled them into the Joplin, Missouri, market and sold them. *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833; *Bowser* v. *State,* 194 Ark. 182, 106 S. W. 2d 176.

The fact that these cattle were hauled out of Crawford county in the night time and were sold by these appellants in the Joplin, Missouri, market is a strong circumstance against them. It is argued in behalf of Claude Morris that he gave the information which led to the discovery that the cattle had been sold in the Joplin, Missouri, market, but he did not give this information until a considerable length of time after he hauled them to Joplin, Missouri, and helped sell them when he well knew all the time that the officers and owners of the cattle were searching for them. He even went off to Texas without giving the information and gives that fact as an excuse why he did not sooner inform the officers and owners of the cattle that he had hauled them to Joplin for Charley France.

It is argued that the court erred in permitting witness, Friend, to testify that the check for the first load of cattle was made payable to France when he himself had not written the payee's name nor the amount in the check, but had simply issued the check in blank. If the admission of the check was error, it was not prejudicial error for prior to this time in the course of the trial Fred Manning had testified without objection that the check for the first load of cattle was made out to appellant, France, and that the amount of the check was about $60. This court said in the case of *Martin* v. *State,* 177 Ark. 379, 6 S. W. 2d 293, relative to objections of this character to evidence that: "Even though it might be said

that the testimony was inadmissible, still it would not be prejudicial, as the witness Copeland testified to substantially the same thing without objection from appellant."

Appellants contend that the instruction given by the court on its own motion attempting to cover the whole case was erroneous. The instruction contained a number of paragraphs, and no specific objection was made to it. A general objection was saved to the instruction. It is not now contended that the instruction was inherently wrong as a whole. Reading it in its entirety we think it fairly presented the issues in the case except as to that portion thereof relative to the Dr. May's cattle, and, as heretofore stated, there was no prejudicial error resulting to appellants on account of the court's refusal to dismiss the case against appellants as to the charge in the information relative to May's cattle. This court ruled in the case of *Bruder* v. *State,* 110 Ark. 402, 161 S. W. 1067, that: Where an instruction given by the court consists of two or more paragraphs, one of which has properly declared the law, a general objection to the instruction is insufficient.

The judgments are, therefore, affirmed.

HILL *v.* HOPKINS.

4-5569 133 S. W. 2d 634

Opinion delivered October 16, 1939.

W. H. McClellan, for appellant.

Ernest Briner, for appellee.

BAKER, J. The same subject-matter of this controversy was before this court upon appeal, and was then decided in favor of the appellee. *Hill* v. *Hopkins,* 195 Ark. 594, 113 S. W. 2d 482. In this first case Mrs. Hill, the wife of the present appellant, was a party and for that reason the rules of *res adjudicata* are not strictly applicable. Hill filed this suit alleging that he was the owner of this land although the legal title was held in the name of his wife, Mrs. L. G. C. Hill; that he had bought and paid for the land and took title in his wife's name, not intending that she should take actual or real title, but that she should hold only as trustee, and that this arrangement was so understood by both of them. He further alleged that his wife had traded the land to Hopkins for an automobile worth $50 and he offered to repay to Hopkins the $50, alleged value of the property, with interest, and sought a rescision, alleging that Hopkins had fraudulently represented the automobile and its value, stating that it was a 1931 model, when it was in fact a 1929 model and of much less value than it would have been had it been the model of the year as represented.

All the allegations constituting the alleged fraud were denied by the defendant, the appellee here. Upon trial of the case the court dismissed the complaint, and it is from that decree that this appeal is prosecuted.

The main facts are not substantially in dispute. The effect of these facts, or the value of this testimony is considered from widely divergent angles by the parties. There is no controversy about the fact that the appellant here purchased this land, paid for it with his own money; that is to say he borrowed some money and used that at the time of the purchase and in perfecting his title. He perhaps used money that he had received as a pensioner. His first effort toward procuring title to this land was made in buying whatever interest was held by some improvement district. He learned then that it would cost less to redeem the land from a tax forfeiture to the state than it would to buy the original title from the record owner and redeem from the tax forfeiture. To do this he borrowed some money and went with his lender and redeemed the land. All these proceedings were done in the name of his wife, Mrs. L. G. C. Hill.

It is alleged, and some proof was offered tending to show that Hill, by reason of some mental defect, had had a guardian appointed many years ago and finally his last guardian, and who was then still acting, had been appointed by the probate court of Grant county. Several lay witnesses testified that they did not think that Hill was sound mentally, giving such reasons as they had observed. One of the witnesses was a young woman who had lived in the home of Hill and who testified that he was easy to anger and that he acted peculiar. Two witnesses, who had served as nurses or attendants and having some years of experience with those who are mentally afflicted, expressed their opinions that he, Hill, was not mentally capable of transacting business. One other witness, the man who had gone with Hill to help him in redeeming the land, and who advised him to take the title in his wife's name, was the same one who at that time loaned him money to buy, or redeem this property from

the state. There is some evidence, indeed, and appellant's admissions are abundant, as argued in his brief, to the effect that he acted much as other men do, clearing up land, contracting with people to do labor, buying property and trading, though there is no evidence that he ever took title to any tract of real estate in his own name. This appears also from evidence offered from former trial. In truth, it appears that he, and those who advised him at the time, were under the impression that because he was living under a guardianship he was incapable of holding title to real property. Practically the only evidence of the alleged fraud in this case is an admission on the part of Hopkins that at the time he bought the automobile that he had traded for the land, he had paid $30 for it. He testified, however, that it was worth $300. There is evidence that the land in question was worth from $300 to $500. Hopkins testified that when he traded the automobile for the land he traded with both Mr. and Mrs. Hill. Both of them signed and acknowledged the deed. Hill does not deny that fact, but relies upon the proposition that at that particular time his guardian had not been discharged and therefore, because of the guardianship pending in the probate court of Grant county, the conveyance made by him was illegal and void.

Hopkins pleads that he was an innocent purchaser of this property and did not know of the alleged incompetency of Hill; that the title was in Mrs. L. G. C. Hill, and that he had no knowledge of the alleged fact that she was a trustee. These facts seem to be established by the record in this case. Even though Hopkins had had notice that the land was purchased with Hill's money that would not be notice that a trust was created. The duty of the husband to make suitable provisions for the support and maintenance of his wife raises a legal presumption that the conveyance was a gift, and that she takes as a donee, rather than a trustee. *Keith* v. *Wheeler,* 105 Ark. 318, 151 S. W. 284; *Wood* v. *Wood,* 116 Ark. 142, 172 S. W. 860; *Doyle* v. *Davis,* 127 Ark. 302, 192 S. W. 229; *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 876. Numerous other citations are available.

But even if the deed should have shown merely that she took "as trustee," she still would have had capacity to have conveyed the title. Section 1813, Pope's Digest.

The appellee offered in evidence the testimony given by both Mr. and Mrs. Hill in the trial of the former case, and this evidence was received and heard over the objection of the appellant, who now urges that it was not competent, except for the purposes of contradiction, and since it could not have been used for that purpose for the reason that they did not testify upon this trial, its presentation was error. We do not think so. One of the matters pleaded by the appellee is to the effect that if this conveyance was procured by Hill to be made to his wife, Hill ratified and confirmed this conveyance as giving her the actual or absolute title to this property.

The effect of the testimony taken in the former case, and it was offered upon this trial, was that Mrs. Hill was the owner of this land and that she refused to trade with Hopkins, but directed him to trade with her husband, the appellant here. Hill, in that case, swore that his wife was the owner of the land and that he acted, in making this trade, solely as her agent, so we find him at that time asserting that his wife was the owner of the land. He seeks to avoid the effect of this by declaring that he was still laboring under the disability of mental incapacity and that she was merely a trustee The effect of such insistence is contradictory. In fact, the situation is rather an incongruous one. If we take Mr. Hill's statement as being absolutely true, that he was mentally incapable of making the deed and that was the reason why title was taken in his wife's name, and that she was merely a trustee during all this period of time in which he and his wife were in possession of the land, we are driven to these conclusions: first, that if the wife was a trustee, she was one from the date of the purchase of the land until she had conveyed it; second, that Hopkins had no notice of this trust in regard to the property; third, that when Mrs. Hill transferred the property she was still acting as trustee and she conveyed whatever title she held, even as a trustee. If Hill were

capable of creating a trust by this transaction he was capable of conveying.

As above stated, Mr. Hill seeks to avoid the effect of his declaration that his wife was the owner by alleging the continuance of his mental incapacity, until later on when he procured his guardian to be discharged, and after the discharge of his guardian he was then free to assert the invalidity of his acts, and seek to establish a trust and recover the land. The error of this conclusion on his part arises out of the well known fact that the mere appointment of a guardian or continuance of the guardianship is not conclusive evidence of such mental incapacity as would make void all acts of the ward. The unreasonableness of this situation appears in this very case wherein Hill sought out, while he still had a guardian acting for him, this particular tract of land. He exercised the ordinary trader's perspicacity in finding the most advantageous method of purchasing. He borrowed money from one who was later his witness, who was willing to testify to the mental incapacity of his favored friend. He hired men to work, paying them for their labors. He himself did a considerable amount of work in clearing up and otherwise improving the property. He was the same trader who had bought this land, that was traded for the car and used it until he had practically worn it out. He had shown little consideration or care for this car after he had it in possession, as the testimony in the former case shows that he had destroyed much of the upholstering in it by hauling wild hogs in it. He had lived much as other men do without any real or apparent evidence of mental incapacity. True, he may have been easy to anger and may have frequently shown his angry moods. He may have been peculiar, but we submit that there is no evidence in this entire record indicating mental incapacity, except the probate record showing the appointment of a guardian and this is not conclusive. It is *prima facie* evidence. It had been frequently so held. 14 R. C. L. 621, § 73.

It has also been held, and seems to be the weight of authority, that the testimony of lay witnesses in regard

to mental incapacity, is of no value, unless the witness details the facts upon which his opinion is formed. Of course, then, the opinions take their values from the facts proven, rather than from the declaration of them. *Pulaski Co.* v. *Hill,* 97 Ark. 450, 134 S. W. 973; *Beller* v. *Jones,* 22 Ark. 92; *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695; *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539; *Seeman* v. *Hilderbrand,* 195 Ark. 677, 113 S. W. 2d 724.

It may be true that there was fraud. It will not be presumed. It was not proven. No error appears. Affirmed.

BLACKWOOD *v.* DAVIDSON.

4-5571 132 S. W. 2d 799

Opinion delivered October 16, 1939.

Jesse Taylor and *W. Leon Smith,* for appellant.

Frank C. Douglas, for appellee.

MEHAFFY, J. In 1930, W. S. Davidson was the owner of 160 acres of land in Mississippi county, Arkansas. J. R. Crowe was the owner of 320 acres of land in Arkansas county, Arkansas, subject to an indebtedness of $7,000. Davidson and Crowe entered into a contract to exchange lands. Davidson agreed to assume the indebtedness due on the Crowe lands, and Crowe to remain in possession of said lands for three years, but to execute a note for the rental thereof for the third year in the sum of $3,600. The contract was not recorded and no reference was made to it in the deeds between Crowe and Davidson.

On June 19, 1930, Davidson executed and delivered to Crowe his warranty deed conveying the lands in Mississippi county to Crowe, the consideration mentioned in the deed being the sum of $1 paid and exchange of land between Davidson and Crowe. This deed was recorded at the recorder's office in Blytheville on June 23, 1930.

On May 8, 1931, J. R. Crowe, being indebted to Dwight H. Blackwood in the sum of $4,000, evidenced by his promissory note, executed and delivered to Blackwood a deed of trust in the execution of which his wife joined, conveying to Blackwood the real property located in Mississippi county which he had acquired by warranty deed from Davidson.

Blackwood had no knowledge, either actual or constructive, at the time he loaned the money to Crowe and took the deed of trust from him, of any claim which Davidson might have against said land by the unrecorded contract.

Crowe failed to execute the rental note and on October 15, 1932, Davidson filed suit in the chancery court of Chickasawba district of Mississippi county, Arkansas, against Crowe in which he sought to have a vendor's lien declared on the Mississippi county property to enforce the payment of the $3,600 due Crowe and filed *lis pendens* notice. Blackwood had no knowledge of the claim of Davidson, and was not made a party to the suit by Davidson to enforce the lien.

Blackwood's mortgage was filed for record January 3, 1933. Davidson knew of the mortgage before it was filed and knew of it when he began suit against Crowe. After Blackwood's mortgage was filed and recorded, Davidson was given a decree against Crowe and a lien declared on the land. Davidson purchased the land at the commissioner's sale.

Payments had been made to Blackwood by Crowe from time to time, and on August 5, 1938, Blackwood brought this suit against Crowe and Davidson to secure judgment for the balance due him and to enforce his mortgage lien. He filed and there was recorded, a *lis pendens* notice.

In April, 1938, Davidson entered into a contract with one H. H. Hardesty to sell the lands in Mississippi county, and received payment of $500.

After Blackwood had filed suit, Davidson filed answer setting up the suit which he had brought against

Crowe, the decree, sale, and purchase of said land under said decree, and further pleaded the statute of limitations. The chancellor rendered a decree against Crowe in favor of Blackwood for the amount due, principal and interest, and dismissed the complaint as to Davidson. The case was tried on the following evidence, which was agreed to by the parties as evidence:

"1. That the land involved in this cause of action is the northeast quarter (NE¼) of section thirty-four (34), township sixteen (16) north, range twelve (12) east of Mississippi county, Arkansas.

"2. That in 1930 this land was owned by the defendant, W. S. Davidson, and in May, 1930, Davidson entered into a contract with J. R. Crowe to exchange this land to said Crowe for some other lands in Prairie county, Arkansas, and as a part of the consideration for the exchange and transfer, Crowe agreed to pay Davidson, $3,600, which was to be represented by a note to be executed by said Crowe, and said amount was also to cover the rental on the Prairie county land for one year. Crowe failed to execute his note or make his payment as per his contract. On June 19, 1930, Davidson (without his wife's joining) conveyed the above described lands to Crowe for a recited consideration of '$1 to me paid and the exchange of lands between myself and J. R. Crowe,' said deed now being of record in the recorder's office in Blytheville, Arkansas, where the same now appears of record in Deed Record 59, page 399, having been filed for record on the 23rd day of June, 1930.

"3. On May 8, 1931, the defendant, J. R. Crowe, was indebted to the plaintiff, Dwight H. Blackwood, in the sum of four thousand dollars ($4,000) as evidenced by a promissory note of said date due six months after date and bearing interest from maturity at the rate of ten per cent. per annum until paid; that to secure said indebtedness the defendant, J. R. Crowe and his wife, Hazel Crowe, executed on the 8th day of May, 1931, a mortgage conveying the above described property to the said Dwight H. Blackwood which said mortgage was filed for record on the 3rd day of February, 1933, where

the same now appears of record in trust deed record W-1 at page 310 in the recorder's office in Blytheville, Arkansas.

"4. That Crowe failed to execute the note for three thousand six hundred dollars ($3,600) to Davidson and failed to pay the said amount, and that on October 15, 1932, Davidson filed suit in the chancery court for the Chickasawba district of Mississippi county, Arkansas, in which he sought to obtain judgment against Crowe in said sum and to have a vendor's lien declared on the property, and at the same time filed *lis pendens* notice which appears in *Lis Pendens* Record No. 2, at page 138, in the recorder's office in Blytheville, Arkansas. At the time this suit was filed, Blackwood had not filed his deed of trust from J. R. Crowe and his wife, Hazel Crowe, but did file the same on the 3rd day of February, 1933.

"5. At the time of the execution of the deed from Davidson to Crowe, the above described property was unencumbered, and at the time of the execution and delivery of the deed of trust from Crowe and wife to Blackwood said property was unencumbered except whatever right Davidson may have had to enforce his claim against Crowe for the three thousand six hundred dollars ($3,600).

"6. On the note given by J. R. Crowe to the plaintiff, Dwight H. Blackwood, the following payments have been made:

September 8, 1935	$200.00
January 8, 1936	650.00
February 8, 1936	250.00
March 8, 1936	350.00
July 8, 1938	500.00

None of these payments have been noted upon the margin of the record of the deed of trust securing this indebtedness as said deed of trust appears in Trust Deed Record W-1, at page 310.

"7. That on the 5th day of August, 1938, the plaintiff, Dwight H. Blackwood, filed this suit to foreclose his mortgage, and at the same time filed *lis pendens*

notice which appears in *Lis Pendens* Record 2, at page 375, in the recorder's office in Blytheville, Arkansas.

"8. That Crowe contested the suit filed by Davidson, and a receiver was appointed to take charge of and rent land; that decree was rendered in favor of Davidson in said suit on September 25, 1933, and on appeal to the Supreme Court, by Crowe, the case was affirmed and the opinion of the court now appears in 189 Ark. 414, 72 S. W. 2d 763. Thereafter the land was duly advertised by the commissioner appointed by the court, and at the sale, conducted by the commissioner, on the 26th day of February, 1934, Davidson became the purchaser at said sale for a consideration of three thousand seven hundred fifty dollars ($3,750) which sale was by this court confirmed and the commissioner's deed executed and approved by the court.

"9. That on the same day that Davidson conveyed the above described property to Crowe, Crowe executed and delivered to Davidson a warranty deed conveying the property in Prairie county, Arkansas, to Davidson according to the terms of the contract.

"10. That the contract to exchange lands between Davidson and Crowe was not filed for record, and that, Blackwood had no knowledge, actual or constructive, of the existence of said contract at the time of the execution and delivery to him of the trust deed by Crowe and his wife conveying said property; that at about the time Blackwood filed his mortgage for record in the Chickasawba district of Mississippi county, Arkansas, he knew of the suit pending by Davidson against Crowe, but he did not make himself a party thereto, and that, at said time the note from Crowe to Blackwood was past due and no payments had been made thereon; that at the same time Davidson had actual knowledge of the existence of the indebtedness from Crowe to Blackwood and of the mortgage given by Crowe to Blackwood to secure the same, but that Blackwood was never made a party to the suit by Davidson against Crowe. That Blackwood and counsel for Davidson discussed the sale of

said land, and that Blackwood knew of the sale of the land under the Davidson decree against Crowe, and that Blackwood also knew that Davidson's wife had not relinquished dower and homestead in the deed from Davidson to Crowe; that Blackwood further knew that Davidson took possession of the land after he purchased at the commissioner's sale, and that Davidson is now in possession of said land.

"11. That either party herein may submit any record or documentary evidence in reference to this case, and that copies of the same may be filed and treated in evidence the same as though the original records thereof are introduced.

"12. That on April 30, 1938, the defendant, W. S. Davidson, entered into a contract with H. H. Hardesty to sell the said land to the said H. H. Hardesty, and the said H. H. Hardesty paid the sum of five hundred dollars ($500) to the said W. S. Davidson. That said contract has never been placed of record. That the value of said lands is fifteen thousand dollars ($15,000). That the balance due Blackwood, principal and interest, on the note executed by Crowe to Blackwood at the time of the filing of the suit the sum of four thousand seven hundred forty-nine dollars and ninety-eight cents ($4,749.98)."

Paragraph 10 of the agreed statement of facts recites that the contract to exchange lands between Davidson and Crowe was not filed for record, and that Blackwood had no knowledge, actual or constructive, of the existence of said contract at the time of the execution and delivery to him of the trust deed by Crowe and his wife conveying said property.

J. R. Crowe and Hazel Crowe, his wife, filed separate answers admitting the execution of the note and the mortgage securing same.

Paragraph 11 of the agreed statement of facts provides that either party herein may submit any record or documentary evidence in reference to this case, and copies of the same may be filed and treated in evidence the same as though the original records thereof are in-

troduced. The record, however, does not show that either party introduced any other record or documentary evidence except that to which attention is called herein.

Appellee calls attention to the case of *Green* v. *Maddox,* 97 Ark. 397, 134 S. W. 931, and the case of *Webb* v. *Alexander,* 195 Ark. 727, 113 S. W. 2d 1095. In these cases it was stated: "No rule is better settled than this, that one is bound by whatever, affecting his title, is contained in any instrument through which he must trace title, even though it be not recorded, and he have no actual notice of its provisions."

In this connection it may be stated that Blackwood had no knowledge of the contract executed by Crowe and Davidson, and that the deed from Davidson to Crowe not only does not retain a lien for the purchase money, but on the contrary, indicates the entire purchase price has been paid. But Davidson did have actual knowledge of the mortgage from Crowe to Blackwood and Crowe had made the payments above set out in the agreed statement of facts.

The chancellor entered a judgment in favor of Blackwood against Crowe for the amount due on the note and mortgage, but held that Blackwood's complaint should be dismissed as against Davidson, and the title to the property involved be quieted in Davidson, and that Davidson recover his costs against Blackwood.

Davidson executed a deed, which indicated that the purchase money had been paid, and, at the same time, had a secret written agreement of which Blackwood knew nothing for $3,600. He knew that Blackwood took a note and mortgage, and yet never intimated to Blackwood at any time that he had any claim or lien on the land or that the purchase price was not paid.

Appellee says that, if Blackwood did not have actual knowledge of the terms and conditions when he took his mortgage from Crowe, these records certainly should have put him on notice to make inquiry. No record that Blackwood knew anything about would put him on inquiry, because the deed which was recorded indicated the

payment of the purchase price. It is true that Davidson's wife refused to sign the deed, but the only thing that this would be notice of to Blackwood, was that she had not relinquished her dower rights, and certainly it was no notice to make inquiry of a secret agreement of which he had never heard.

It is true, the record recites, that Crowe was indebted to plaintiff; that is, the mortgage recites this; and he certainly was, because he had just executed and delivered to Blackwood his promissory note, and the purpose in executing the mortgage was to secure the payment of this note. There is no intimation in the record anywhere that the indebtedness existed before he executed the note.

Appellee argues that it is shown that it was an existing indebtedness by the transcript and record in the case of *Davidson* v. *Crowe,* 189 Ark. 414, 72 S. W. 2d 763; but Blackwood was not a party to this suit, and was not bound by anything decided there. Blackwood knew that Davidson had sued Crowe, but he was not made a party, and is, therefore, not bound.

It is also argued that the land was of little value at that time, but increased in value until it is now worth $15,000. We fail to find any evidence indicating that it was of little value, or that it has greatly increased in value. This may be true, but there is no evidence of it.

There was no lien retained in the deed from Davidson to Crowe, and Davidson had not acquired any lien when Blackwood's mortgage was recorded. It is true that, when Davidson filed his suit against Crowe, he filed a *lis pendens* notice. This court has held that the *lis pendens* notice will not have the effect to deprive the purchaser of his title or give the persons filing such notice superior right or title, and he cannot acquire any greater right in the property than the defendant had at the time the *lis pendens* notice was given. *Oil Fields Corp.* v. *Dashko,* 173 Ark. 533, 294 S. W. 12.

In other words, by filing the *lis pendens* notice, Davidson acquired no greater right in the property than Crowe had at that time.

While it is true that equity aids the vigilant, yet in this case Davidson knew all about Blackwood's mortgage and kept secret from Blackwood the contract that he had made for the $3,600.

Appellee calls attention to the cases of *Connelly* v. *Hoffman,* 184 Ark. 497, 42 S. W. 2d 985, and *Buckner State Bank* v. *Stager,* 195 Ark. 1072, 115 S. W. 2d 1076. In each of those cases, the court held that the second mortgagee was a third party, and there were no payments made and indorsed on the margin of the record before the bar of the statute attached. The statute requiring indorsement of payments or memorandum of same on the margin of the record, has no application in this case.

In this case, Davidson was a purchaser at his own sale in the foreclosure of a vendor's lien, which lien was not retained in the deed.

"A *bona fide* purchaser at a judicial sale is affected, to the same extent as the person whose title he buys, by an estoppel *in pais* which prevented the latter from asserting title." 16 R. C. L. 138.

In *Robb* v. *Hoffman,* 178 Ark. 1172, 14 S. W. 2d 222, we said: "In other words, the purchaser at a mortgage foreclosure sale steps into the shoes of the mortgagee in the mortgage foreclosed, and is entitled to all the rights such mortgagee had under the mortgage."

In the case of *Citizens Bank & Trust Co.* v. *Garrott,* 192 Ark. 599, 93 S. W. 2d 319, this court said: "Perhaps there is no better known principle than the application of the rule of *caveat emptor* and particularly to a creditor purchasing at his own execution sale."

It is contended, however, that because of Blackwood's silence he is estopped now to assert his claim. There was nothing that Blackwood could have told Davidson that Davidson did not already know. He could have told Davidson that he had a mortgage to secure a debt, but this Davidson already knew.

The evidence in this case shows that Davidson knew everything about the mortgage to Blackwood, and that Blackwood knew nothing of the secret contract under

which Davidson claims a vendor's lien. There is no claim made by Davidson that Blackwood's acts or his silence induced him to change his conduct or to make his contract with Hardesty.

Since Davidson knew of Blackwood's note and mortgage, and since his deed indicated payment of the purchase price, he cannot now assert a claim under a contract that was not of record, and about which Blackwood knew nothing.

We gather from the opinion of the lower court that the court held that Blackwood's claim was barred by the statute of limitations, because no entries of payments were made on the record. But Davidson was not a third party, and the statute has no application. It is agreed that the payments above set out were made, and the claim was not barred. Moreover, it appears that the property is worth $15,000. It is agreed that it is worth that amount. Therefore, after paying Blackwood's claim, there will be more than enough to pay Davidson's claim.

It is contended by the appellee that on April 28, 1938, he made a contract with one H. H. Hardesty to sell the property involved in this suit and agreed to borrow $8,000, Davidson to get this $8,000 and Hardesty to assume this as a part of the consideration. He paid $500 cash.

But that contract provided: "If the title is approved by the loan company, it shall be considered as being satisfactory and acceptable by second party; if the title is not approved and the loan made, then first parties agree to refund the $500 earnest money paid by second party."

There was no defect in the title except that Davidson evidently thought that Blackwood's lien might be prior to his, and this is the reason for inserting this clause in the contract. But this did not put him in any worse position, and nothing that Blackwood did or failed to do could possibly have influenced him in making this contract.

If his condition is changed at all, it is changed by reason of the value of the property, the fact that he could pay Blackwood's claim and still have more than enough to satisfy his own claim.

There is no estoppel because of this contract. This in no way affected Davidson; he knew what Blackwood's mortgage was, the amount of it, and knew that if Blackwood's claim was superior to his he could still carry out the contract with Hardesty, satisfy Blackwood's claim, and give a good title to the land.

The decree of the chancery court is, therefore, reversed, and the cause is remanded with directions to enter a decree foreclosing Blackwood's mortgage, and holding that his lien is prior to the lien of Davidson.

SMITH, J., dissents.

SMITH, J. (dissenting). The facts in this case are not intricate and all appear from the stipulation as to the facts signed by the parties.

They are to this effect. On June 19, 1930, to effect an exchange of lands, Davidson conveyed to Crowe the tract of land he was exchanging, which tract of land so conveyed is situated in Mississippi county. Crowe did not pay the sum of $3,600 which was a part of the consideration, and suit was brought to declare and foreclose a vendor's lien. This suit was brought in Mississippi county, in which county the land is located on which it was sought to enforce a lien. Crowe, who was a resident of Arkansas county, sought prohibition against the Mississippi chancery court, on the ground that he had not been sued in the county of his residence. This writ was denied. *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. 2d 1030.

Thereafter, the foreclosure suit proceeded to decree, and it was adjudged that a lien existed in Davidson's favor for the unpaid purchase money, and the decree directing the foreclosure of this lien was affirmed upon the appeal to this court. *Crowe* v. *Davidson,* 189 Ark. 414, 72 S. W. 2d 763. It would appear, therefore, not to be open to question that Davidson did have a lien when he filed the suit to foreclose it.

Davidson filed this suit to foreclose his lien on October 15, 1932, and it is stipulated that notice *lis pendens* was properly given. On May 8, 1931, Crowe executed a mortgage to Blackwood, but Blackwood did not file his mortgage for record until January 3, 1933, at which time Davidson's foreclosure suit was pending and his lien protected by the *lis pendens* notice.

The statement in the majority opinion that Davidson kept secret from Blackwood the fact that $3,600 of the purchase money had not been paid, is based solely upon the tenth paragraph of the agreed statement of facts that "Blackwood had no knowledge, actual or constructive, of the existence of said contract at the time of the execution and delivery to him of the trust deed by Crowe and his wife conveying said property." It is not intimated, either in the transcript or in the briefs of counsel, that Davidson concealed any fact from Blackwood. It is stipulated only that Blackwood was unaware of Davidson's lien when he took the mortgage.

Blackwood had no lien on this land until he filed his mortgage for record. Section 9435, Pope's Digest, reads as follows: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Blackwood's mortgage did not, therefore, constitute a lien as against Davidson, a third party, until it was filed for record. *Thornton* v. *Findley*, 97 Ark. 432, 134 S. W. 627, 33 L. R. A., N. S., 491.

It has been frequently held that, while a mortgage is good between the parties, though not acknowledged and recorded, it constitutes no lien upon the mortgaged property as against strangers unless it is acknowledged and filed for record, even though they may have actual notice of its existence. *Main* v. *Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Jacoway* v. *Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Ringo* v. *Wing*, 49 Ark. 457, 5 S. W. 787; *Leonhard* v. *Flood*, 68 Ark. 162, 56 S. W. 781; *Smead* v. *Chandler*, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353; *Rhea* v. *Planters'*

Mutual Ins. Assn., 77 Ark. 57, 90 S. W. 850; *Morgan* v. *Kendrick*, 91 Ark. 394, 121 S. W. 278; *Western Tie & Timber Co.* v. *Campbell*, 113 Ark. 570, 169 S. W. 253, 134 Am. St. Rep. 78. There are later cases to the same effect.

Blackwood's mortgage did not, therefore, become a lien as against Davidson until January 3, 1933, the date on which it was filed for record. It was then as much a lien, but not more so, than if it had been executed, acknowledged and recorded on January 3, 1933. But on that date Davidson's foreclosure suit was pending, and was protected by the *lis pendens* notice.

The case of *Oil Fields Corporation* v. *Dashko*, 173 Ark. 533, 294 S. W. 25, discussed the purpose and effect of the *lis pendens* notice. It was there said: "The effect of filing for record of the *lis pendens* notice, under the statute, is to protect the rights of the plaintiff in the action against those who may acquire title to or liens on the property from the defendant after the *lis pendens* notice has been filed for record. The filing for record of the *lis pendens* notice cannot have the effect to deprive *bona fide* purchasers of the property purchased before notice of *lis pendens* was filed for record. If one in good faith purchases real estate from a defendant in an action before the filing for record of the *lis pendens* notice, a failure to record the evidence of his title thus acquired until after the *lis pendens* notice has been filed for record will not have the effect to deprive him of his title or give the plaintiff in the action superior right or title. The plaintiff in the action, by recording the *lis pendens* notice, cannot acquire any greater right in the property than the defendant had therein at the time the *lis pendens* notice was filed. In other words, a *lis pendens* notice operates prospectively to preserve all the rights of the plaintiff as against the defendant in the litigation from the time the *lis pendens* notice is filed for record. But it cannot operate retroactively to divest the title of one to whom the defendant had conveyed the property prior to the filing of the *lis pendens* notice for record, even though such person has not recorded his muniment of title until after the filing for record of the *lis pendens* notice."

Now, of course, as the *lis pendens* notice operates prospectively only, recording that notice could not operate to deprive Blackwood of any lien which he then had; but at that time he had no lien, as he had not recorded his mortgage. The equities of the case are with Davidson. He had a vendor's lien before Blackwood took his mortgage. That Davidson did have a lien is the point expressly decided in the case of *Crowe* v. *Davidson,* hereinabove cited, and suit to enforce this lien had been filed with proper *lis pendens* notice long before Blackwood filed his mortgage for record.

The effect of the majority opinion is to hold this unrecorded mortgage superior to this vendor's lien, notwithstanding suit to enforce the vendor's lien was pending, with proper *lis pendens* notice of record before the mortgage was filed for record which, I think, should not be done, and I, therefore, respectfully dissent.

BELL *v.* MCILROY, TRUSTEE.

4-5573 132 S. W. 2d 815

Opinion delivered October 16, 1939.

Suzanne Chalfant Lighton and Karl Greenhaw, for appellants.

Bernal Seamster, for appellee.

McHaney, J. Appellant, Carl K. Bell, is the son and one of the heirs-at-law of C. H. Bell, who died intestate in 1923. Prior to his death C. H. Bell became incompetent, and in 1922 the probate court of Washington county appointed appellant, Carl K. Bell, and appellee, J. H. McIlroy as his guardians. After his death the guardians continued to act for his estate as trustees, without administration on the estate, until May 11, 1931, when appellee resigned, and was succeeded by C. F. Armistead.

The senior Mr. Bell had acquired a considerable estate, consisting largely of real estate in several Western Arkansas counties. On May 11, 1931, said trustees, McIlroy and Bell, together with the widow and other heirs-at-law of C. H. Bell, petitioned the probate court for an order authorizing and directing them to borrow on the security of the property of said estate a sum of money sufficient to discharge the obligations of said estate, which petition was granted, and the order made, and on the same date a note for the sum of $25,000, secured by a mortgage on the property of the estate, was executed, delivered to McIlroy Bank & Trust Co., hereinafter called the bank, $20,000 immediately advanced by it, and $5,000 to be advanced as needed. Said note and mortgage were signed by Armistead and Bell, as trustees, and by the other heirs.

On April 20, 1931, appellants, Carl K. Bell and wife, Margaret Bell, executed and delivered to the bank the note sued on for $3,000, secured by mortgage on their home in Fayetteville, for an indebtedness due by them, said note to become due and payable six months after date, with interest from date at 8 per cent. to maturity, and thereafter at 10 per cent. per annum. Thereafter, and before maturity, the bank, sold, transferred and as-

signed said note and mortgage to appellee, J. H. McIlroy, trustee, " to be held by him for such further disposition as he may decide or until such time as the affairs of the Bell estate are settled satisfactorily to the McIlroy Bank & Trust Company and all obligations discharged that exist at this time or may hereafter be created by the estate or any heir of said estate, or trustee for same." Carl K. Bell deeded the property covered by this mortgage to his wife on August 31, 1931, subject to said mortgage, which he agreed to pay.

This action was brought by appellee against appellants to foreclose said mortgage, and it was alleged that the note of the Bell estate to the bank is past due and unpaid, and that the note and mortgage of appellants are held by him as security for said debt, and that they are past due and unpaid. Prayer was for judgment for a total sum of principal, interest, taxes and insurance paid by him, less two interest payments made by Carl K. Bell, and less rents collected, of $5,415.77. Appellants defended on a number of grounds. The principal ones were, (1) that a certain transaction of September 14, 1935, involving $10,060 constituted payment of the note of appellants; (2) that the note was barred by limitations; and (3) that the indebtedness of the Bell estate to the bank was paid May 7, 1936, by conveyances by the Bell heirs to the Industrial Finance Company. Trial resulted in a decree for appellee, from which is this appeal. Substantially the same grounds are urged here for a reversal of the judgment.

1. As to the contention by appellants that their mortgage indebtedness was paid September 14, 1935, the facts are that the Bell estate owned 120 shares of stock of the bank which had been pledged to the bank by the trustees and heirs to secure said indebtedness. On May 20, 1931, said shares of stock were assigned and transferred to appellee as trustee for the bank to be "held by him until such time as it is necessary to dispose of same with the approval of the trustees, and the proceeds arising from such sale to be by said trustee (McIlroy) applied as a credit on any notes now due or to become due

hereafter to the McIlroy Bank & Trust Company executed by said trustees and said widow and heirs.'' Now, the finding of the trial court on this proposition is so well stated that we adopt it as follows: ''That thereafter, by agreement of the trustees of the C. H. Bell estate, and in accordance with the assignment heretofore set out, the bank stock certificates pledged to J. H. McIlroy, trustee, as hereinbefore set out, were sold for a total of $9,060; that at the time of said sale, the McIlroy Bank & Trust Company issued J. H. McIlroy, trustee, a certificate of deposit, to be held by him for the use and benefit of said McIlroy Bank & Trust Company; that during the time the said J. H. McIlroy, trustee, held said certificate of deposit, the bank accounted for interest thereon at the same rate as then charged upon the indebtedness of the Bell estate, and that until the application of said sum of money, represented by the certificate of deposit, on the 14th day of September, 1935, interest was allowed on said certificate of deposit at the rate obligations of the C. H. Bell estate bore, and said interest was deducted from the aggregate interest then due from said C. H. Bell heirs; that on said 14th day of September, 1935, J. H. McIlroy, trustee, received an assignment of said note and mortgage executed by the said Carl K. Bell and Margaret Bell, together with an additional note and mortgage of Ella Bell, 'to be held by him for such further disposition as he may decide, or until such a time as the affairs of the Bell estate are settled satisfactorily to the McIlroy Bank & Trust Company and all obligations discharged that exist at this time or may hereafter be created by the estate or any heir of said estate or trustee for the same;' that said assignment by the McIlroy Bank & Trust Company to J. H. McIlroy, trustee, upon the terms set out, was approved by C. F. Armistead and Carl K. Bell as trustees for the C. H. Bell heirs, and the approval evidenced in writing on said instrument of assignment. To have the bank records conform to the assignment of notes and mortgages to J. H. McIlroy, trustee, and to substitute for the note and mortgage of Carl K. Bell and Margaret Bell and the Ella Bell note

and mortgage in the assets of said McIlroy Bank & Trust Company, the said $9,060, evidenced by certificate of deposit to J. H. McIlroy, trustee, and an additional sum of $1,000 advanced by said bank under the contract and agreement in connection with the notes and mortgages executed by the C. H. Bell heirs, May 11, 1931, was received and retained by the McIlroy Bank & Trust Company; that the total of said $1,000 additional loan to the C. H. Bell heirs and the $9,060 received from J. H. McIlroy, trustee, was the total of amounts due on Carl and Margaret Bell's note and Ella Bell's note, together with accrued interest on said notes; that said transaction was in effect and in essence a purchase of the note of Carl K. Bell and wife by the trustees of the C. H. Bell estate out of the funds belonging to the said estate and held by J. H. McIlroy, trustee, in the sum of $9,060, the proceeds of the sale of bank stock belonging to said C. H. Bell estate, with the addition thereto of funds borrowed for the C. H. Bell estate, widow and heirs, in the sum of $1,000, so that said funds of the C. H. Bell estate were by the consent of said trustees converted into a new form by taking over and placing in the hands of J. H. McIlroy, trustee, the note and mortgage executed by defendants, Carl K. Bell and Margaret Bell, and the note and mortgage executed by Ella Bell to secure debt of $5,000, together with the accrued interest on both of said notes; that said transaction did not constitute a payment of the notes involved and did not increase or diminish the obligation of defendants, Carl K. Bell and Margaret Bell, on their $3,000 note and mortgage; that the debt evidenced by said note and secured by said mortgage remained the same debt and enforceable according to the terms of said note and mortgage in all respects as when originally made; that the written instrument executed by the trustees of the C. H. Bell estate at the time said notes and mortgages were by the bank assigned to J. H. McIlroy, trustee, taken in connection with oral negotiations had at the time, was effective to show the consent of the trustees to the investment in said notes and mortgages of funds belonging to the estate, widow

and heirs of C. H. Bell, deceased; and that said securities were to be held by J. H. McIlroy, trustee, in place of the funds so invested, and did not constitute a repledging of said mortgage made by defendants after payment, but merely a transfer of ownership."

This finding of the court is sustained by the testimony of J. H. McIlroy, and is substantiated by the written assignment of the Carl K. Bell note and mortgage to J. H. McIlroy, trustee, as above set out, which assignment was approved by Carl K. Bell and C. F. Armistead, trustees for C. H. Bell, and is further substantiated by the written assignment, above set out, of the 120 shares of stock to J. H. McIlroy, trustee, which was approved by the trustees of said estate and all the heirs in writing. Said latter assignment reads as follows: "We, the trustees of the estate of C. H. Bell, deceased, and the widow and sole heirs of said estate, hereby assign, pledge and transfer certificates Nos. 23 and 32, dated 2/20/1903 and 6/5/1913, for one hundred twenty shares of the capital stock of the McIlroy Bank & Trust Company, to J. H. McIlroy, trustee, to be held by him until such time as it is necessary to dispose of same with the approval of the trustees, and the proceeds arising from such sale to be by said trustee applied as credit on any notes now due or to become due hereafter to the McIlroy Bank & Trust Company executed by said trustees and said widow and heirs."

We think the court's finding is amply sustained by the evidence. At least, we cannot say it is against the preponderance of the evidence. There was no agreement, either written or oral that appellant's mortgage should be satisfied by said sale of bank stock.

2. As to the plea of the statute of limitations, the note and the marginal entry on the record of the mortgage showed two payments of interest, $10 on September 18, 1935, and $178.05 on September 18, 1937. These payments are in dispute. However, it is undisputed that taxes for 1933-4-5 and other expenses as itemized in the complaint, including payment of insurance pre-

miums, were made within the period of limitations, under the authority contained in the mortgage which prevented the bar of the statute. *Dunnington* v. *Taylor, ante,* p. 770, 131 S. W. 2d 627.

3. In May, 1936, the Bell heirs conveyed all the Bell estate to the Industrial Finance Company, a corporation largely owned and controlled by J. H. McIlroy, and it is contended by appellants that this discharged the Bell estate indebtedness, and, therefore, discharged their note and mortgage held as collateral to said indebtedness. We cannot agree that this necessarily follows. The deeds themselves do not state they are given in satisfaction of the indebtedness of the Bell estate or of the widow or any of the heirs. If, in fact, they were executed for such a consideration, either in whole or in part, it would seem most probable that appellants would have inserted such a provision in the deeds. Moreover, the notes have not been surrendered and canceled, nor have the mortgages been satisfied—a cogent circumstance that such was not the agreement. Their own testimony is that no mention was made by any of the parties at the time that these notes would be returned and the mortgages satisfied. The positive testimony of J. H. McIlroy is that there was no understanding that these deeds to the Industrial Finance Company should be received in satisfaction of these obligations. Both McIlroy and Carl Bell agree that, because the bank was going to be required to foreclose all of the mortgages, and, in order to save trouble and expense of foreclosure, in an action to which there was no defense, these deeds were made, executed and delivered to Industrial Finance Company. These instruments speak for themselves, and no such provision is found in them.

Appellants plead payment, but the burden of proving it is on them. *Hume* v. *Indiana Nat. L. Ins. Co.,* 155 Ark. 466, 245 S. W. 19.

Another circumstance, refuting the plea of payment, is that not all the property securing the indebtedness of the Bell estate was conveyed to the Industrial Finance

Company. The Carl Bell home was not deeded to it, and neither were the note and mortgage thereon given by appellants assigned to it. It was held by J. H. McIlroy as trustee for the bank and not assigned, sold or otherwise conveyed. In view of all these facts and circumstances, we cannot say the trial court erred in refusing the plea of payment, nor can we say the plea was established by a preponderance of the evidence. On the contrary, we are of the opinion that appellants failed to meet the burden of proof to establish the plea.

We find no error, and the decree is affirmed.

TEMPLE COTTON OIL COMPANY *v.* BROWN.

4-5570 132 S. W. 2d 791

Opinion delivered October 23, 1939.

Steve Carrigan, for appellant.

J. H. Lookadoo, for appellee.

McHaney, J. Appellee brought this action in December, 1938, against appellant in the Clark circuit court to recover damages for personal injuries which he alleges he sustained in October, 1937, the exact date on which he was injured not being stated, while employed as ginner by appellant in its cotton gin at Fulton in Hempstead county.

Sometime in October, 1937, a drive shaft on the engine broke, necessitating a shut down of the gin. It became necessary to remove this drive shaft, to which was attached a large pulley, and send it to a machine shop in Hope, Arkansas, to be repaired. When a breakdown occurred all the employees were used to assist in making repairs. When the drive shaft broke as above stated, appellee and the other employees were used in taking it down and in loading it in a truck for shipment to Hope. It was repaired and brought back from Hope by the machine shop there on the late afternoon or evening of the next day, and appellee and others assisted in unloading and installing the drive shaft and pulley in place. It was about 8 o'clock at night when they unloaded and carried or rolled it around the engine to lift it up and put it in place. His amended complaint states: "That as the plaintiff and these other employees of the defendant started carrying this heavy pulley around the end of the large engine, which was the only way possible for them to take it to the place where it belonged, to be installed and just as they were going around the end of the large engine the plaintiff stepped on some oil and slipped and injured himself; that it was dark in this engine room where the plaintiff was walking, carrying part of this heavy load referred to above, for the reason that there was only one light in the room, and it was on the other side of the engine and the shadow of the engine and drive wheel made it dark so that the plaintiff could not

see what he was stepping on or into; that he stepped on some oil that had carelessly and negligently been left on the floor by the defendant, and that this oil had been there for several hours, and plaintiff's stepping on this oil and slipping caused him to be injured as alleged in his complaint, and also as will be set out further on in this amendment to plaintiff's complaint."

The leaving of the oil on the engine room floor is the negligence relied on for a recovery in this action. As a result of his stepping in the oil and slipping, he alleged that he suffered many injuries, which he sets out in detail, and which resulted in his being totally and permanently disabled, to his damage in the sum of $50,000. The answer was a general denial of all allegations, a specific denial that he was injured or that he suffered any damages therefrom, and a plea of assumption of risk and contributory negligence.

Trial resulted in a verdict and judgment against appellant for $10,000, hence this appeal.

We think the court erred in refusing to direct a verdict for appellant at its request for any one of two or three reasons: (1) That no actionable negligence is shown; and (2) that if so, appellee assumed the risk as a matter of law; and (3) that he suffered no substantial injury.

1-2. Let it be assumed that there was some oil on the floor of the engine room of the cotton gin, and that the foreman had given general instructions to keep the floor clear of oil. It is not unusual, indeed it may be said to be the usual thing to find more or less oil or grease on the floor of the engine rooms of all cotton gins. The engine operated by appellant was a well-known make of open crank case engines, and such engines do throw out some oil. But this fact must have been well known to appellee, as he was frequently in and about the engine room, had worked at this gin one or two seasons before the 1937 season, and assisted in removing the drive shaft the day before. So, it is difficult to see that appellant was negligent, because its employee in the engine room

had not mopped up the oil which appellee says he stepped in, even in violation of instructions so to do. But, assuming that this was negligence, or that the jury was justified in so finding, we think appellee must be held to have assumed the risk of injury caused by slipping in the oil. If it was there, it must have been there the day before, because the engine had not been operated since the breakdown. Appellee assisted in removing the drive shaft the day before in broad open daylight. He assisted in putting it back in place about eight or nine o'clock at night, but the undisputed proof shows that the engine room was electrically lighted—whether one or two lights is in dispute. If oil was on the floor, it was perfectly open and obvious. He says himself that he did not look, but if he had he could have seen it, if it was there, and he must have seen it the day before, if he had looked. The drive shaft was brought back by him and the others over the same route through the engine room over which it was removed the day before. It was testified to by the machinist, and not denied by anyone, that he brought a double light socket and an extension cord back with him, and that he plugged in the extension line in the double socket to give an extra light on the side the men were working on, which made three lights.

Under this state of facts we think this case is ruled adversely to appellee by such cases as *Missouri Pac. Rd. Co.* v. *Lane,* 186 Ark. 807, 56 S. W. 2d 175; *St. Louis-S. F. Ry. Co.* v. *Burns,* 186 Ark. 921, 56 S. W. 2d 1027; *Missouri Pac. Rd. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. 2d 1047; *St. Louis-S. F. Ry. Co.* v. *Ward,* 197 Ark. 520, 124 S. W. 2d 975; and *Missouri Pac. Rd. Co.* v. *Vinson,* 196 Ark. 500, 118 S. W. 2d 672. It is not shown just how much oil was on the floor, whether much or little, but whatever it was it was open and obvious. In *Missouri Pac. Rd. Co.* v. *Lane, supra,* we quoted from *Mississippi Power Co.* v. *Hubbard,* 181 Ark. 487, 26 S. W. 2d 118, and, after stating the rule that employees do not assume risks created by the negligent act of the master, and that he has the right to require the master to provide a safe place to work, the opinion in that case said [186 Ark. 807, 56 S.

W. 2d 1027]: "But it is equally true that, where the danger arising from the negligent conduct of the master is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee, by voluntarily undertaking to perform his work in such a situation, assumes the hazards which exempts the employer from liability on account of injury to the employee. *Wisconsin & Arkansas Lumber Co.* v. *McCloud,* 168 Ark. 352, 270 S. W. 599; *Chicago, R. I. & P. Ry. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197; *Ward Furniture Mfg. Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002. Other recent cases on the subject are *Howell* v. *Harvill,* 185 Ark. 977, 50 S. W. 2d 597, and *Koss Construction Co.* v. *Vanderberg,* 185 Ark. 316, 47 S. W. 2d 41.

"No one knew how the oil happened to be on the top of the tank, whether it had sloshed out of the tank car through the dome, or whether it had been spilt there by the oil company, from whom it was purchased, in loading it, but this can make no difference. The undisputed proof shows that it was quite the usual thing for oil to be on top of such cars, to the knowledge of appellee, and he could not blindly step therein under the circumstances of this case without assuming the risk of so doing."

So, here, appellee must be held to have assumed the risk of the oil being on the floor, even assuming that appellant was negligent in so leaving it.

(3) Appellee has recovered a large judgment, $10,000, and it is difficult to understand how the jury could have so found under the evidence, or how the trial court permitted it to stand.

After his alleged injury, he continued to work during the remainder of that ginning season, or until about Christmas without losing a day on account of any injury. He made no claim for an injury. He did not consult a physician. After the ginning season was over, he did other work, performed his duties as a peace officer in Fulton, and when the ginning season opened in the fall of 1938, he again worked for appellee as cotton baler until he received two other injuries on the same day, which hurt his back "over again." Regarding the first

accident in 1938, he said: "There was a big bale of cotton in the press and I started to unbuckle it, and when there is a big bale in the press, it kicks, and when it kicked it gave me a twist and hurt my back over again." As to the second injury on the same day he said, in explaining how it happened: "I was lifting a bale of cotton and stepped in a crack." He makes no claim for these two injuries. It would appear to the ordinary person that, if he received the injuries to his back of which he complains, such as to render him totally and permanently disabled, he would have known about it at once and would not have been able to continue to do the work he did do thereafter and until his third injury in 1938. The necessary inference is that he was not so disabled.

For the error in refusing to direct a verdict for appellant, the judgment will be reversed, and, as the case appears to have been fully developed, it will be dismissed."

HUMPHREYS, MEHAFFY and BAKER, JJ., dissent.

MEHAFFY, J., (dissenting). The opinion of the majority states. "We think the court erred in refusing to direct a verdict for appellant at its request for any one of two or three reasons: (1) That no actionable negligence is shown; and (2) that if so, appellee assumed the risk as a matter of law; and (3) that he suffered no substantial injury."

I cannot agree with the majority on any one of these propositions, and I shall endeavor to give my reasons for disagreeing.

It is first stated that there is no actionable negligence shown, and if this were true, the decision of the court would be correct. But we have many times held that in determining the sufficiency of evidence to support a verdict, the Supreme Court must view the evidence with all reasonable inferences arising therefrom in the light most favorable to the appellee, and when thus viewed, if there is any substantial evidence to support the verdict, it cannot be disturbed by this court. A few of the cases so holding are the following: *Producers Gravel*

& Sand Co. v. *Jones,* 197 Ark. 767, 126 S. W. 2d 99; *Southwestern Trans. Co.* v. *Chambliss,* 197 Ark. 865, 125 S. W. 2d 123; *Ry. Express Agency* v. *Gee,* 197 Ark. 925, 125 S. W. 2d 802; *St. Louis-S. F. Ry. Co.* v. *Herndon, ante,* p. 465, 129 S. W. 2d 954; *Loyd* v. *James, ante,* p. 255, 128 S. W. 2d 1019; *St. L., S. W. Ry. Co.* v. *Braswell, ante,* p. 143, 127 S. W. 2d 637; *Kansas City So. Ry. Co.* v. *Holder, ante,* p. 127, 127 S. W. 2d 807; *Hot Springs Ry. Co.* v. *Hill, ante,* p. 319, 128 S. W. 2d 369; *Mo. Pac. Rd. Co.* v. *Harris, ante,* p. 619, 129 S. W. 2d 944; *Mo. Pac. Rd. Co.* v. *Davis,* 197 Ark. 830, 125 S. W. 2d 785; *Houston* v. *Hanby,* 149 Ark. 486, 232 S. W. 930; *Inter. Harvester Co.* v. *Layton,* 148 Ark. 156, 229 S. W. 22; *N. Y. Hotel Co.* v. *Palmer,* 158 Ark. 598, 251 S. W. 34; *Pritchett* v. *Rd. Imp. Dist. No. 2,* 155 Ark. 514, 245 S. W. 313; *Chi. R. I. & P. Ry. Co.* v. *Comer,* 157 Ark. 409, 248 S. W. 268; *Roach* v. *Scott,* 157 Ark. 152, 247 S. W. 1037; *Black* v. *Handley,* 158 Ark. 640, 240 S. W. 411; *Amer. Ry. Exp. Co.* v. *Mackley,* 148 Ark. 227, 230 S. W. 598; *K. C. S. Ry. Co.* v. *Sparks,* 144 Ark. 227, 222 S. W. 724; *Hines* v. *Rice,* 142 Ark. 159, 218 S. W. 851; *K. C. S. Ry. Co.* v. *Akin,* 138 Ark. 10, 210 S. W. 350; *Bennett* v. *Snyder,* 147 Ark. 206, 227 S. W. 402; *McCarty* v. *Nelson,* 129 Ark. 280, 195 S. W. 689; *Dickinson* v. *Brummett,* 133 Ark. 30, 201 S. W. 812; *Ft. Smith Light & Traction Co.* v. *Phillips,* 136 Ark. 310, 206 S. W. 453; *Tri-State Transit Co.* v. *Miller,* 188 Ark. 149, 65 S. W. 2d 9, 90 A. L. R. 1389; *Mo. Pac. Rd. Co.* v. *Harding,* 188 Ark. 221, 65 S. W. 2d 20; *Jamison* v. *Henderson,* 189 Ark. 204, 71 S. W. 2d 696; *Roach* v. *Haynes,* 189 Ark. 399, 77 S. W. 2d 532; *S. W. Gas & Electric Co.* v. *May,* 190 Ark. 279, 78 S. W. 2d 387; *Shrigley* v. *Pierson,* 191 Ark. 224, 85 S. W. 2d 727; *Doss* v. *Gephart,* 191 Ark. 863, 88 S. W. 2d 62.

There are many other cases to the same effect, and we know of none to the contrary. One reason for this rule is that the trial judge and jurors see the witnesses, hear them testify, have an opportunity to observe their conduct and manner on the witness stand, and have much better opportunity to determine what the truth is than the Supreme Court can possibly have, when it simply

takes the printed record; it knows nothing about the witnesses or their manner of testifying. It does not see the appellee, the injured party, and, of course, is not able to judge the extent of the injury, pain and suffering, and its effort to do so would be mere speculation.

On this first proposition then, the question is: Was there any substantial evidence to support the verdict: The majority opinion says that it is not unusual, and, indeed it may be said to be the usual thing, to find more or less oil or grease on the floor of the engine rooms of all cotton gins. The statement of the court that such engines as this one do throw out some oil, I think is mere speculation and is not supported by the evidence.

E. B. Yarbrough testified that in the fall of 1937 and 1938 he had charge of the engine room during the day time, and that Mr. Arch Seamore had charge of it at night, and this witness also testified that there was some oil on the floor, and that it was caused by some defective condition of the engine. This court says that it is usual to have oil on the floor, but the undisputed evidence shows that the oil on the floor was caused by a defective engine. This witness also said that the engine had always "slung" oil. He testified that the appellee slipped in the oil while he and a negro were lifting the pulley. The floor in the engine room was concrete. The appellee's work was upstairs. After this happened they let him run the gin stands, which was a lighter job. This witness testified that it was impossible to have an engine of this type without it throwing some oil, but the engine in this case was defective, and this witness said that was what caused it to throw oil. He testified that Jack Brown, the appellee, worked upstairs, and that the only time the employees of the Temple Cotton Oil Company that did not work in the engine room would have occasion to go in there was, when they were repairing machinery.

There was not only a defective engine, and oil on the floor, as shown by the evidence, but it was dark. While the majority opinion says that appellant got a machinist there to fix the lights, and that he came with additional

fixtures, yet the undisputed evidence in this case shows that the injury occurred about the 8th or 9th of October, and this machinist testifies that he fixed the lights in November.

The apppellee testified that he was working for the Temple Cotton Oil Company, drawing three dollars a day, at the time of his injury. Previous to that time he had worked for the Missouri Pacific Railroad Company. His work was that of a ginner, for the Temple Cotton Oil Company. He did not work in the engine room, but worked upstairs in the linter room; that he stepped in the oil and slipped when he went down to help with the machinery; that he did not know the oil was there; that it was the duty of the employees of the appellant company to keep the engine room cleaned up; he did not know there was any oil on the floor of the engine room; he had never seen any oil on the floor there; that he never went down in the engine room unless something broke down; the light was on the right-hand side of the engine at the head of the engine; one reason the light was not shining on the oil was that the fly wheel was between it and the light; the other reason is the bed of the bearings; there was a shadow from the light down where the oil was; when he slipped in the oil, and hurt his back he went to the office and laid down. He further testified that he did not know the engine threw out oil and does not know whether he could have seen it, if he had looked.

This evidence as to the light, is really not disputed. It, therefore, appears that the evidence, without contradiction, showed that the engine was defective; that it threw oil and the oil was on the floor; that the appellee worked upstairs and knew nothing of the oil, and did not know that the engine threw oil; had never seen oil on the floor; that there was but one light there, and that the wheel was between that and the oil. If this evidence is viewed as this court has time and again held that it must be, in the light most favorable to the appellee, can it be said there was no evidence of negligence: I do not think so.

There was substantial evidence to submit to the jury the question of whether appellant was guilty of negligence causing the injury; and that being true, this court cannot hold that it was not guilty of negligenie as a matter of law.

Under the established rules of this court when the evidence introduced by appellee, viewed in the light most favorable to appellee, is sufficient to submit the case to the jury, the jury's verdict will not be disturbed by this court although other evidence is in conflict with that of appellee, and although this court may believe that the preponderance of the evidence is against the verdict.

The majority opinion further says that it is difficult to see that appellant was negligent; but assuming that it was negligent, or that the jury was justified in so finding, they think the appellee must be held to have assumed the risk of injury caused by slipping in the oil.

"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." 39 C. J. 689.

This statement of the law was quoted with approval in the case of *Burden* v. *Hughes,* 186 Ark. 707, 55 S. W. 2d 502, and the court in that case said: "It is the duty of the master to make inspection for all latent or concealed defects beyond the knowledge of the employee. It is the duty of the master to make proper tests and inspections to discover dangers, and the employee has a right to assume that this duty has been performed by the master, and whether in any particular case the employer has discharged his duty with respect to making proper test and inspections is ordinarily a question for the jury."

In the case of *Mary Rocco* v. *Lehigh Valley Rd. Co.,* 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed., 743, the Supreme Court of the United States, discussing the question of assumed risk and the authorities relied on by the railroad company, stated: "Under the authorities cited the

decedent assumed the risks ordinarily incident to his employment as a track inspector, but in the circumstances shown we do not think they included a failure on the part of the motorman to keep a lookout and to give warning in places where the view of one who might be expected to be on the track or approaching in the opposite direction was shut off and the probability of accident was therefore much greater than where the track is straight and the view unobstructed. The issues of negligence of the motorman and contributory negligence of the decedent were for the jury."

"The doctrine of assumption of risk, whether assumed to be founded in the fiction of an implied contract with pay commensurate with the danger, or whether it be referred to the maxim, '*Volenti non fit injuria*' (3 Labatt's Master & Servant, 2d ed., § 1285), is artifical and harsh at best. It should not be extended beyond its reasonable limits. It must be remembered that the plan of the establishment and the co-ordination of work is that of the master deliberately adopted without consulting the servant. In adopting the plan the master must be assumed to have considered it with a maturity and deliberation not possible to the servant absorbed in the details of his daily duties. Whenever, therefore, there is room for reasonable difference of opinion as to whether the servant so appreciated the danger as to make it reckless to proceed, the question is one for the jury, especially where the servant is proceeding under an order of any kind, however communicated." *Hull* v. *Davenport,* 93 Wash. 16, 159 Pac. 1072.

This court said, in the case of *St. L. I. Mt. & So. Ry. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, in discussing assumed risk: "The servant is not presumed to know of risks and dangers caused by the negligence of the master, after he enters the service, which change the conditions of the service. If he is injured by such negligence, he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger."

The evidence on the part of appellee shows conclusively that he had no knowledge of danger from oil being on the floor. It shows he knew absolutely nothing about it.

The majority opinion states that appellee assisted in removing the drive shaft in broad daylight, while one of the witnesses for appellee testifies that it was eight or nine o'clock at night when they removed it. It is also said in the majority opinion that the engine room was electrically lighted, and if there was oil on the floor it was perfectly open and obvious. This statement of the court is squarely opposed to the evidence of appellee. The court says that if oil was there, appellee must have seen it the day before, if he had looked. What about the rule requiring the evidence on this proposition to be considered in the light most favorable to appellee? Appellee says he did not see it and did not know it was there, and that the room was dark.

It is next stated in the opinion that it was testified to by the machinist, and not denied by anyone, that he brought a double light socket and an extension cord back with him, and that he plugged in the extension line in the double socket to give an extra light on the side the men were working on, which made three lights. The court evidently overlooks the fact that the injury occurred on the 8th or 9th of October and the machinist says he did this work in the following November. There would have been three lights if he had put in two.

I do not think that under the facts this case is ruled adversely to appellee by the authorities cited by the court, or any one of them; but they are cited by the court, and the court again says that whatever oil was there was open and obvious. These statements absolutely ignore the evidence on the part of appellee. The opinion quotes decisions holding that where the danger arising from the negligent conduct of the master is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee who voluntarily undertakes to perform his work in such a

situation assumes the hazard, which exempts the employer from liability. That is true, if it was so open and obvious, but as I have said before it not only ignores the rule that we are to consider the evidence in a light most favorable to appellee, but it absolutely assumes that the appellee knew about it, when his testimony shows that he did not know anything about it.

In the case of *Mo. Pac. Rd. Co.* v. *Harville,* 185 Ark. 47, 46 S. W. 2d 17, an opinion written by the same judge who wrote the majority opinion in this case, among other things says: "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, when viewed in this light, it must be sustained."

Many, many decisions of this court might be cited to the same effect.

It is finally stated by the court in the majority opinion that the court cannot understand how the jury could have so found under the evidence, or how the trial court permitted it to stand. This statement of the court, I think, ignores the evidence of appellee.

I have already called attention to the evidence of E. B. Yarbrough, who had charge of the engine room in the daytime, and Arch Seamore testified that he was on the night shift; that Jack Brown did not work in the engine room, and as well as he remembers the pulley was torn up around nine or ten o'clock at night, and they brought it back the next night. When they put it up the next night, Jack Brown was helping to lift it, and he testified that appellee slipped and hurt himself; slipped on some oil on the floor that came out of the motor. They all had orders to keep the oil cleaned up. He testified that after Brown was hurt he went in the office and laid down on the table for about an hour. In about thirty minutes witness went in and asked him how he was feeling. He testified that Brown mentioned to him several times that his back hurt; that they all worked in the engine room, or elsewhere, when anything broke down;

that he saw Brown slip and hurt his back; when he slipped he turned loose of the pulley. He also testified that Jack Brown stepped in the oil; that the oil was at the north end of the motor and the light at the south end; that there were two light sockets there, but only one bulb.

Lex Morton testified that in the engine room there were two drops, but only one bulb. Witness does not remember what time it was that he was down at the Temple Cotton Oil Company's Gin and looked at the lights, but thinks it was in November sometime.

Dr. R. L. Bryant testified that Jack Brown came to his office on November 15, for an examination; he made a physical examination and made X-ray pictures; they were able to find considerable muscular rigidity over the back, and found that he was unable to stoop normally; his back was stiff, and he was not able to stoop and pick up things; X-rayed the lower part of appellee's back; X-ray picture showed that part between shoulders; shows the spine to be curved to the right side, and a separation of the second, third and fourth vertebrae; that the cause of the curvature of the spine was, in his opinion, caused by the injury he received; that there would be considerable pain, and it would have a tendency to cause stiffness. He identified the picture handed to him as the one taken by him. The curvature is in the same part of the spine where witness found the separation. He then exhibited a picture which showed the lower region of the spine. It showed that the fourth and fifth vertebrae were apparently flattened. On the left side he could see a fracture line. The left side is the one most markedly increased over normal. Witness is of the opinion that the condition of both the upper and lower parts of the spine could have been produced by the injury. He does not believe that appellee's condition could ever return to normal and appellee will always have a weak back; will never be able to do any stooping or lifting of heavy bodies.

Dr. J. M. Pate testified that he and Dr. Bryant gave appellee a thorough examination and that from this ex-

amination he found a curvature of the spine and also a widening of the discs; the patient was tender over the muscular region of the back; the lumbar region was very rigid; he cannot stand, or bend in either direction; he seemed to be in very much pain.

Jack Brown, the appellee, testified at length about his injuries, and while he continued to do light work, he said he had to work.

I think the court did not view the evidence in the light most favorable to appellee when it said: "The necessary inference is that he was not so disabled." But that is not the evidence. The evidence shows he was disabled, and if the verdict is for a greater amount than should be paid for the injury suffered, this would be no reason for dismissing the case.

I think the case should be affirmed. Mr. Justice HUMPHREYS and Mr. Justice BAKER agree with me in the conclusions herein stated.

CENTRAL SUPPLY COMPANY *v.* WREN.

4-5586 133 S. W. 2d 632

Opinion delivered October 23, 1939.

Barber & Henry and *John B. Thurman,* for appellant.

Ward Martin, for appellee.

SMITH, J. Appellant, Central Supply Company, brought suit to enforce a materialman's lien against a lot in the city of El Dorado on which is located the Ritz Theater. The complaint alleges that the materials were furnished to Frank Woodruff and Ray S. Woodruff, doing business as Woodruff & Son Plumbing Company, and were used in the construction of the building and improvements on the described lot.

The complaint alleges that "Comes the plaintiff, Central Supply Company, and for its cause of action against the defendants, O. G. Wren, doing business as the Ritz Theater, and the Ritz Theater, Frank Woodruff and Ray S. Woodruff, doing business as Woodruff & Son Plumbing Company, and Mrs. E. C. Bryant, states:", and thereafter alleges that the materials were furnished and used as above stated.

The summons directed the sheriff to summon "O. G. Wren, doing business as the Ritz Theater, the Ritz Theater, Frank Woodruff and Ray S. Woodruff, doing business as Woodruff & Son Plumbing Company."

The sheriff's return thereon showed service "by delivering a copy of the summons, and stating the substance thereof to the within named O. G. Wren doing business as the Ritz Theater in person in said county, and also by delivering a true copy to Frank Woodruff and Ray S. Woodruff doing business as Woodruff & Son Plumbing Company each in person in said county; and on the 1st day of November, 1938, by delivering a true copy thereof to the Ritz Theater, by delivering a true copy thereof to Ward Martin, the agent designated for service in said county as I am hereby commanded."

Ritz Theater, Inc., filed a motion to dismiss as to it for the following reasons: "That said purported summons and service thereof has no application, neither is

it binding, upon Ritz Theater, Inc., for said corporation is not a party to this suit and, therefore, any service had upon Ritz Theater, Inc., is void, illegal and of no effect; and that said summons was not issued or served as required by law." The motion to dismiss was sustained, and this appeal is from that decree.

O. G. Wren was sued as doing business as the Ritz Theater; but the Ritz Theater was also sued. Its corporate name was not correctly alleged, in that the abbreviation "Inc." was omitted. This abbreviation is ordinarily used to indicate that the party using it is incorporated and is, therefore, a corporation. The complaint did not, in this manner or otherwise, indicate that Ritz Theater was a corporation; but this omission was not fatally defective. It is certain that Ritz Theater was sued, and was named as a defendant. Had it been desired to know in what capacity it had been sued, a motion to require that allegation might have been made. That Ritz Theater was being sued is shown, not only by the allegations of the complaint, but by the recitals of the writ of summons, which named Ritz Theater as a defendant after naming O. G. Wren as a defendant; and, that it was sued as a corporation, is shown by the return of service of the summons. This recites service "by delivering a true copy thereof to the Ritz Theater by delivering a true copy thereof to Ward Martin, the agent designated for service in said county as I am hereby commanded." Service upon O. G. Wren had been previously recited, as appears from the return hereinabove quoted. Other defendants besides Wren were sued and served, one of these defendants was the Ritz Theater, and service was had in the manner provided by law for service upon corporations.

Now, the corporate character of the Ritz Theater was not alleged; but it is not questioned that Ward Martin was the agent designated by it upon whom service of process against it should be had.

In *Odd Fellows Building Assn.* v. *Hogan*, 28 Ark. 261, suit to enforce a mechanic's lien was brought against Odd Fellows Building Association without al-

legation as to its corporate capacity. It was contended in that case, as it is in this, that the defendant "being a corporation, created under the general incorporation law of the state, it is necessary to aver their corporate existence, and must be described as a corporation in the pleadings."

In holding against that contention, it was there said: "It was not necessary for the plaintiff to allege, in his complaint, the incorporation of the Odd Fellows Building Association, further than was done by the statement of its name and of the making of the agreement or the creating of the lien between the association and the plaintiff. No more certainty was required in the complaint as to the corporate character of the company, than if the company had brought the action; and in that case it would be clear, upon authority, that at common law no specific allegation of incorporation would be important. The name of the company implies its corporate existence. It is impliedly averred by the name, that the company was a corporation. Under a general issue, the plaintiff would be bound to prove the incorporation of the Odd Fellows Building Association."

Equally so under our liberal statutes concerning the sufficiency of pleadings, in the construction of which all inferences reasonably deducible therefrom are considered. Here, the contract out of which the lien arose is alleged, but the corporate existence of a party thereto was not alleged. This was a defect which may be easily cured.

Section 1458, Pope's Digest, reads as follows: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just."

In *Beavers* v. *Baucum*, 33 Ark. 722, suit was brought in the name of Rebecca McRae, whose correct name at the time was Rebecca Baucum. In treating this as an unimportant defect, not affecting the merits of the case, the court said: "Such defect can now be reached only by motion to correct the mistake, or such correction may be made by the court on its own motion, as was very properly done in this case. Newm. Plead. and Prac., 287."

Here, there can be, and is no question, as to the intention to sue Ritz Theater, whose correct name is Ritz Theater, Inc. Service upon its agent designated for that purpose is conclusive evidence of that fact, and it was, in our opinion, error to dismiss the complaint.

The decree will, therefore, be reversed and the cause remanded, with directions to overrule the motion to dismiss and for further proceedings not inconsistent with this opinion.

McNeill *v.* Rowland.

4-5598 132 S. W. 2d 370

Opinion delivered October 23, 1939.

W. B. Scott, for appellant.

W. A. Percy, Thomas M. Keesee and *Alvin E. Fink,* for appellee.

HOLT, J. On July 19, 1938, appellee, T. J. Rowland, filed two suits in the Crittenden chancery court on two promissory notes. These two notes were secured by deed of trust on real property, and a foreclosure was sought.

By stipulation of counsel, the two causes were consolidated for trial.

Appellants first filed a motion to dismiss plaintiff's (appellee's) complaint on the ground that he was not

the owner of the notes in question, but had previously assigned them to his daughter, Mrs. Dorothy Rowland Bleakney, and had no cause of action for the collection of the indebtedness due on said notes.

The court overruled this motion to dismiss, and thereupon appellants answered denying "that plaintiff has been the owner and holder of said promissory notes and mortgage ever since their execution, and denies that he is now the owner and holder of said promissory notes and mortgage," and "specifically pleads as a bar to this cause of action the statute of limitations against the payment of said notes and indebtedness."

The chancellor found that the statute of limitations had run against one of the defendants below, but that as to Earl H. McNeill, appellant, the statute of limitations had been tolled by the payment of certain sums amounting to $455, and rendered judgment against him, less these credits, in the sum of $1,484.63, and decreed foreclosure of the mortgaged property in satisfaction thereof. From this decree of the trial court, Earl H. McNeill brings this appeal.

There are only two questions to be decided by this court. 1. Did the trial court commit error in refusing to sustain the motion of defendants below to dismiss plaintiff's (appellee's) complaint? 2. Were the two notes in question barred by the five-year statute of limitations? (Pope's Digest, § 8933.)

The evidence, as reflected by this record, is to the following effect: Appellee, T. J. Rowland, is the stepfather of appellant, Earl H. McNeill, and of S. P. McNeill, another defendant in the original cause of action against whom no judgment was rendered. On January 29, 1927, appellant, Earl H. McNeill, and his brother, S. P. McNeill, borrowed $1,221 from T. J. Rowland, appellee, evidencing the loan by two promissory notes of that date, one in the sum of $600 and the other $621, both due and payable January 29, 1928, drawing interest at five per cent., and secured by a deed of trust on certain lands.

It is undisputed that the only indorsements of any kind appearing on each of the notes in question is the following: "Pay to the order of Mrs. Dorothy Rowland Bleakney. T. J. Roland. T. J. Rowland."

No principal or interest payments appear on either of the notes. It is in evidence, however, that appellant, Earl H. McNeill, made nine different payments to appellee, T. J. Rowland, totaling $455, as follows: "10-1-33, $25; 10-20-34, $150; 5-14-34, $20; 6-20-34, $45; 7-1-34, $50; 8-15-34, $25; 11-27-35, $100; 10-15-36, $15; 12-26-36, $25."

Appellant attempted to explain these payments on the ground that they were gifts or donations to appellee, his step-father, and were not intended as payments, and in further explanation stated: "The $25 on 10-1-23 was given to my mother to give to Mr. Rowland. I will have to look up my memorandum to know what he wanted that for. Now the next item 10-20-34, now that was for a model A '29 Ford, amount $150; and this one 5-13-34, $20, I don't recall about that. This next one 6-20-34, that was for $45, and that $45 was for that house car or trailer, one of those little trailers you know. Now, this next item dated 7-1-34, $50, I don't recall what that was for. This one dated 8-15-34, $25, I don't recall what that was for. Then this check dated 11-27-35, was the $100—I remember about this check, I gave that to my mother to give Mr. Rowland for him to do something in connection with his picture show business, and this one 10-15-36, $15, that was the money I paid him in West Memphis, Arkansas, to enable him to pay his rent for a little concession he had over there"; that he gave them to his mother and Rowland from time to time, and made the checks payable to Rowland because he did not want to put his mother to the trouble of going down town to get them cashed.

Appellee Rowland testified that these payments were made by appellant to him as payments on the notes in question, and further: "Q. Do you own these notes? A. I do. Q. Who, if anyone else, has an interest in these notes? A. Nobody in the world. Q. Is your

daughter claiming an interest in these notes? A. None whatever."

The record further discloses that sometime prior to the filing of the foreclosure suit appellee Rowland indorsed the notes as heretofore indicated and forwarded them to his daughter for collection. There is no evidence that she had any interest in the notes or that she paid anything for them. After retaining the notes for two or three months she returned them to her father who sometime thereafter brought suit to enforce their collection. The only evidence relative to the indorsement and sending of the notes to Dorothy Rowland Bleakney is the testimony of appellee and a letter which he wrote to his daughter. As to the facts in connection with the indorsement and the mailing of the notes by Rowland to his daughter, appellant, McNeill, testified as follows: "Q. You heard Mr. Rowland testify about mailing those notes to his daughter for collection and about her mailing them back to him? A. I heard that. Q. You have no reason to question that statement have you? A. No, I don't even know if that's the truth. Q. You don't know if it's untrue do you? A. No, I don't know if it's untrue, I don't know anything about it. Q. Then as far as you know of your own knowledge he might have had those notes all the time? A. He could have had them all the time as far as I know of my own knowledge."

That portion of the letter written by appellee to his daughter which is material is as follows:

"Well, Dorothy, I am going to have you git a first-class lawyer in Portland, one that will look after those notes and have them renew. I just cannot get an understanding from the boys. I believe they are trying to beat me out of that money. All I got out of them is about a hundred dollars & an old car in all. Explain to your lawyer. You want these notes renew if they refuse, then bring suit. The farm is one of the best cotton land in Arkansas and they are making, but are putting it over me. If it breaks Ada and myself up, I will be satisfied as then I know what their game is. Don't neglect this for my sake. I ask you as it has caused lots of worries.

Now understand, we have had no hard feelings whatever, but I just can't get an understand unless it comes through a lawyer it is pure and simple matter of business and it must be attended to before it is too late, if it is not already. There is something wrong in Denmark. I will send you the records of the notes that are recorded in Marion, Crittenden County, Ark., tomorrow. Monday have lawyer take it up with Mr. Earl McNeill, Turrell, Ark."

We consider first the question whether appellant's motion to dismiss in the trial court based on the fact the notes in question were indorsed by appellee, as set out *supra,* should have been sustained and the suit dismissed. We are of the view that the chancellor was correct in denying this motion of appellant.

While it is true that the indorsement on the notes in question, "Pay to the order of Mrs. Dorothy Rowland Bleakney. T. J. Roland, T. J. Rowland," appears to be absolute and contains nothing showing that it was made by appellee for the purpose of collection only; this court has repeatedly held that, even though an indorsement is absolute in form and does not appear to be for collection only, the fact that the purpose of the indorsement was for collection only may be shown by parol testimony.

In *Johnston* v. *Schnabaum,* 86 Ark. 82, 85, 109 S. W. 1163, 17 L. R. A., N. S., 838, 15 Ann. Cas. 876, this court said: "The other part of the indorsement was unrestricted, and unless explained, would render the indorser liable. But it is shown by undisputed evidence that the note was sent to the Bank of Randolph County for collection, and that the indorsement was made only for that purpose.

"The question arises, then, whether parol evidence is admissible to explain or qualify an unrestricted indorsement. The authorities seem to uniformly sustain the view that under such circumstances parol testimony may be admissible for that purpose. Mr. Daniel, in discussing the various circumstances under which parol testimony is admissible for such purpose says: 'Secondly,

it might be shown that the indorsement was upon trust for special purpose, as from a principal to an agent, to enable him to use the instrument or the money in a particular way, or for collection.' 2 Daniel, Negotiable Instruments, § 720."

And again in *First National Bank of Fort Smith* v. *Brunk,* 170 Ark. 583, 280 S. W. 372, this court said: "Appellant asks for a reversal of the judgment because the trial court permitted appellee to explain or qualify his indorsement of the draft in blank by parol evidence. The rule is practically universal that unrestricted indorsements of commercial paper may be explained or qualified by parol evidence."

We think it clear, therefore, that the court did not commit error in allowing appellee Rowland to explain that his unrestricted indorsement on the notes was for collection only, and we think the evidence justified the chancellor in holding that title to the notes in question never passed out of the hands of appellee Rowland; at least, we cannot say that his findings were against a preponderance of the evidence.

The law is also well settled, as we view this record, that when the notes in question were returned to appellee by his daughter he had the right to strike out his indorsement or leave it on the notes and simply disregard it and bring suit in his own name.

Section 10206 of Pope's Digest is as follows: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby released from liability on the instrument."

In 10 C. J. S., § 215, p. 706, the author says: "Where an indorser of negotiable paper becomes the holder by retransfer, he may strike out his own indorsement, and all indorsements subsequent to his own, whether special or not. Also, if the holder has indorsed the note for collection he may in like manner strike out his own indorsement when the paper returns to his possession, or he may strike out his own indorsement as collateral. However, an indorser on retransfer may hold the paper

without striking out his own indorsement." See, also, *Dickinson* v. *Burr,* 15 Ark. 372 and *Smith* v. *Childress,* 27 Ark. 328.

We now come to the second question presented by appellant wherein he contends that the notes sued on are barred by the five year statute of limitations. We cannot agree to this contention of appellant.

The following facts appear to be undisputed: The notes and deed of trust were executed by appellant and the money received by him has not been repaid. Rowland repeatedly requested appellant McNeill to make payments on the notes, and, in response to these demands, appellant did make the nine payments heretofore indicated, and at the time of making these payments McNeill did not tell Rowland that they were not intended as payments on the notes in question, but were intended as gifts.

The evidence further reflects that some of these payments made to Rowland by McNeill were made within five years of the institution of the suit on the notes.

While it is true that these payments were made by appellant after the bar of the statute of limitations had attached, the rule seems to be well settled that, as between the parties, such a payment on a debt removes the bar and revives the debt. In the instant case the rights of third parties are not involved.

In *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899, this court held that a payment made after a note was barred revived the indebtedness and a new period of five years began to run from the date of payment and said, quoting Wood on Limitations, (4th ed.), vol. 1, p. 601: "A part payment of a debt, though made after the bar of limitations has attached, removes the bar and revives the debt, but the revival cannot affect the rights of third persons attaching after the bar was complete and before the revival. Part payment on a debt operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of limitations, of any such lapse of time as may have occurred previous to the payment being

made. A partial payment made on account of an existing debt takes the case out of the statute of limitations. A partial payment of a note takes the entire debt out of the running of the statute, and time is computed from the date of such payment."

Again this court in applying this rule to notes secured by mortgages, in *Tyson* v. *Mayweather,* 170 Ark. 660, 663, 281 S. W. 1, said: "It is argued that these credits on the margin of the record were not signed or attested in the manner provided by § 7408 of Crawford & Moses' Digest. The section of the statute referred to was enacted for the purpose of giving notice to third parties of payments made on the mortgage indebtedness. As between mortgagor and mortgagee, it is not necessary that payments be indorsed on the margin of the record to fix a new date for the statute of limitations to run. The widow and heirs of the mortgagor are not third parties. Their rights are derivative, and they stand in the place of the mortgagor. The payment itself, as between the parties, fixes a new date for the statute of limitations to begin to run."

While it is true, as appellant contends, that the payments by him were not in fact indorsed as credits on the back of the notes in question, the rule is well established that such indorsement is not necessary to arrest the running of the statute of limitations. It is the fact of payment that tolls the statute and not the indorsement of a payment on the notes in question.

In *McAbee* v. *Wiley,* 92 Ark. 245, 122 S. W. 623, this court said: "The proof of a payment on indebtedness and of the indorsement of same upon the written evidence of that indebtedness may be made in the same manner as the proof of any other fact. It may be made directly, or by circumstances, or by the admissions of the defendant. It is actually the fact of the payment that tolls the statute, and not the indorsement; the indorsement is only a memorandum, or at most an evidence, of such payment . . ."

We agree with appellant that the burden was on appellee to show that the payments were made on the

notes as contended by him, since he relied upon such payments to remove the bar of the statute of limitations. It is our view, however, that appellee has met this burden by a preponderance of the testimony.

We think it equally true that the burden was on appellant McNeill to prove that these payments which he made to Rowland were intended as gifts and not as payments on the notes. Where it has been established that sums of money were paid by a debtor to a creditor, the presumption is that the money so paid was intended as payment on the debt and not as gifts or donations.

In 28 C. J. 669, the rule is announced as follows: "Ordinarily an unexplained payment of money will be presumed to have been made in payment of a debt, or as a loan, rather than as a gift." The text-writer then cites the case of *Miller* v. *Miller,* 169 Mo. App. 432, 155 S. W. 76, wherein the court held: "Where one sends money to another, the law presumes that it was in payment of a debt, and not a gift alone. . . . It is the partial payment on a note which tolls the statute of limitations or removes the bar after it has become complete, and not the formal crediting of the payment thereon. . . . Where defendant's intestate, who owed plaintiff several notes, completely barred by limitations, made a general payment, plaintiff may apply it to the largest note or to whichever note will best subserve his interest."

The learned chancellor in his written opinion in this case, among other things, said: "There was no evidence tending to show that, at the time the payments were so made, plaintiff was informed or had any reason to believe that they were donations or gifts. Defendants did not say anything at the time of making the payments which would cause plaintiff to believe that the payments were intended as gifts."

We think a clear preponderance of the testimony sustains this finding of the trial court.

On the whole case, we conclude, therefore, that the decree of the trial court is correct, and accordingly we affirm.

ZAMBIE *v.* NAMOUR.

4-5592 132 S. W. 2d 390

Opinion delivered October 23, 1939.

[redacted]

J. M. Jackson and *Brewer & Cracraft,* for appellant.

W. G. Dinning, for appellee.

SMITH, J. This appeal is from a judgment upholding the will of Habib Etoch, which was unsuccessfully contested upon the ground that Etoch lacked the testamentary capacity required to make a valid will.

Non-expert witnesses were called, who, after stating the facts upon which their opinions were based, offered to state the opinion that Etoch lacked this capacity. The court declined to permit these witnesses to express this opinion, and this appeal questions the correctness of that ruling, which was based, and is defended, upon the ground that the facts recited by the witnesses were not of sufficient probative value to permit them to express their opinions.

The law of the subject has been frequently declared by this court. The case of *Griffin* v. *Union Trust Com-*

pany, 166 Ark. 347, 266 S. W. 289, cites a number of these cases, and in this Griffin Case Chief Justice McCulloch said: "The decisions of this court on the subject are harmonious, and each is to the effect that a non-expert witness may testify as to his opinion after stating the facts upon which the opinion is based, so that the jury may determine what weight to give to the testimony."

Among other cases there cited is that of *Shaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679, from which Judge McCulloch quoted as follows: "'When a person's mental condition or capacity is in question, the opinions of witnesses who are not experts as to such capacity are only admissible in evidence when taken in connection with the facts upon which such opinions are based. Before such evidence can be admissible, "the specific facts upon which the opinions are based must first be stated by the witnesses, or their testimony must show that such intimate and close relations have existed between the party alleged to be insane and themselves as fairly to lead to the conclusion that their opinions will be justified by their opportunities for observing the party." In other words, the opinion of such a witness is not admissible in evidence until it be first shown by his own testimony that he has information upon which it can reasonably be based. Whether the information is sufficient for that purpose is a question for the court to decide before it can be admitted. After its admission, the weight to be given it is determined by the jury.'"

The question presented for decision is whether, in the application of this test, the trial court erred in refusing to permit the non-expert witnesses to express their opinions that Etoch lacked testamentary capacity.

Mrs. M. W. Miller, who, with her husband, lived in Etoch's home, and who had, for seven years and four months prior to his death, been his housekeeper, and who had known Etoch for a longer period of time, testified as follows: Etoch's conduct was quite a bit different for the last few months before he died. He did

not talk as he had talked before that time and would lead one to believe that he did not know what he was saying. "He would just call and I would go to see what he wanted, and I would find out what he wanted, and he would say he didn't call me, and I would ask him what he wanted, and he would say, not anything, and he would tell me to get out of there, and I wouldn't much more than get out until he would call me again, and I would go and ask him what he wanted, and he would say, not anything." When asked, "How long did he carry on and act that way?", the witness answered: "Better than three weeks before he died." In this connection, it may be said that the will was made April 15, 1938, and Etoch died May 10, 1938, being 26 days thereafter.

This witness further testified that she had asked Etoch to have her room papered, and he answered, "It's yours. It's yours, and you know it is not mine." Etoch would say that he had arranged to have the work done when he had not. Finally, he sent five men on one day to do the work, which caused great confusion as to who would do the work. He said that the paper had been paid for when it had not, and then he would ask witness to pay for it, saying that he didn't have the money. He would not remember what he was saying. He would not remember from one day to the other what he was doing, and I talked to him every day of his life. It was in February that I first noticed him not having his right mind, and that condition continued up until the time of his death."

This witness' husband who lived with her in Etoch's home, testified that Etoch was not out of his house from the 9th of April until the day of his death. That was the day Etoch fell out of his rolling-chair on his way home. He had been for some time previously crippled. Other testimony on the part of this witness corroborated that of his wife as to Etoch's rambling and disconnected conversations.

Etoch's brother-in-law owned the Cleburne Hotel in Helena, and Etoch spent much of his time there. Von-

dereau, who operates the cigar stand in the hotel, testified that Etoch would sit around the hotel near the newsstand, and would ask questions and, disregarding the answers, would soon repeat the question. He would give the bellboy an order, and when the boy started to obey it Etoch would call the boy back and repeat the order. Etoch's condition appeared to grow worse towards the end.

J. M. Sage had known Etoch for many years. Persons well known to Etoch would come into the hotel, and Etoch would ask who they were. One of the persons inquired about was a Mr. Moore whom Etoch had known for 40 or 50 years. After Etoch had fallen from his chair, witness visited him at his home. There was never any connected conversation. Etoch appeared to be suffering a great deal.

Zollie Brush had known Etoch 40 or 50 years, and saw him every day, usually at the hotel. Etoch's memory was not very good. He would telephone from the hotel for a kind of dope he used, and would sometimes repeat the order three or four times. He attempted to sit in the lap of a lady in the hotel. The lady thanked witness for keeping Etoch off of her. Witness called on Etoch at his home, but stayed only two or three minutes, as Etoch acted so funny. Etoch would play the punch board in the lobby of the hotel, but didn't know when he had won. Witness called on Etoch about ten days before Etoch died, sat on the side of the bed, but Etoch did not greet him.

Nick Straub lived in Helena all of his life, and knew Etoch well; saw him on an average of about three times a week; noticed Etoch doing peculiar things for two or three weeks prior to his death. One afternoon, right after lunch, Etoch told his negro body servant to get his hat, that he wanted to go home and eat supper, and the negro told him that it was not time for supper, and that he had just eaten lunch. Etoch got vexed with the negro. They had to keep the telephone in the hotel concealed from Etoch, as he used it so frequently; saw

Etoch attempt to sit in a strange lady's lap in the hotel, and saw him give another strange lady a rose.

Albert Newman, another witness who had known Etoch for 50 years or more, gave similar testimony. Etoch would use the telephone, and forget he had used it, and it became necessary to hide the phone from him. Etoch would go to a cafe for his meals, and would forget that he had eaten. This conduct extended over a period of several weeks before Etoch's last illness. Still other witnesses gave similar testimony.

Mrs. George Zambie, an heir-at-law and one of the contestants, testified that Etoch, her brother, attempted to sit in the lap of a lady, who left the hotel on that account. "Another lady came in and he did the same thing, then he went home and he fell down." Witness went to the home of her brother, who was unable to walk. He begged her to take him home, and when witness told him that he was at home and in his own bed, he would repeat the request that he be taken home. This was two or three weeks before Etoch died.

The daughter of Mrs. Zambie who was employed at the hotel, gave testimony to the same effect. Etoch used the telephone so frequently that customers complained about it. Etoch would annoy the guests, and when she would speak to him about it, he would deny having done so. Etoch would try on strangers' hats. "Did everything you could think of." Etoch would eat lunch at about 11 a. m., and when the witness ate at about 12:15 p. m., he would ask her to take him to lunch. He gave his negro servant conflicting orders about waiting on him. Witness saw Etoch at his home nearly every day he was confined to his bed. He would talk, and he did not know what he was telling. She would ask him about familiar things, and he didn't know what she was talking about.

It is true these two witnesses last named were much interested in the litigation; but this interest goes only to their credibility and does not render them incompetent. Other witnesses appear to have had no interest in the litigation.

It appears to us that this testimony shows much more than personal peculiarities or mere idiosyncrasies, especially the testimony relating to Etoch's conduct during the few weeks immediately preceding his death.

There was much testimony to the effect that Etoch was perfectly competent to attend to his business and to make a will, but the question presented for our consideration is whether the court erred in the exclusion of testimony to the contrary. The testimony is very clear to the effect that these witnesses had ample opportunities for observing the mental condition of Etoch, and the only question is whether the facts about which they testified were of sufficient significance to reasonably support the opinions that Etoch did not have testamentary capacity; and we have concluded that it was sufficient to require the submission of this issue to the jury.

In the case of *Raprich* v. *State,* 192 Ark. 1130, 97 S. W. 2d 429, after citing with approval the case of *Griffin* v. *Union Trust Co., supra,* we quoted from Smoot on Insanity, § 597, as follows: " 'Just what amount of knowledge and acquaintance is necessary to qualify such a witness is largely governed by the facts of each case, and within the sound discretion of the trial judge, who may declare the witness incompetent where the preliminary examination shows the facts are insufficient to qualify the witness to express an opinion. But where such witness shows any reasonable opportunity to acquire knowledge of the subject's sanity through observation and association, and is able to state any facts upon which to predicate an opinion, the meagerness of such facts goes rather to the weight to be given the opinion than to its admissibility; and the opinion formed at the time, with the facts upon which it is based, should go to the jury for what it is worth. The weight to be given to such testimony is exclusively within the province of the jury, if the facts upon which the opinion is founded themselves tend to show sanity or insanity.' "

We do not think the testimony here briefly summarized was too unimportant and insignificant to form the basis of an intelligent and reasonable opinion as to

Etoch's mental capacity, and the judgment must, therefore, be reversed for the error committed in excluding the opinions of these non-expert witnesses.

Judgment reversed and cause remanded for a new trial.

[redacted]

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* GEORGE.

4-5581 133 S. W. 2d 37

Opinion delivered October 23, 1939.

[redacted]

D. H. Crawford, Huie & Huie, House, Moses & Holmes, T. J. Gentry, Jr., and *Eugene R. Warren,* for appellant.

G. W. Lookadoo and *J. H. Lookadoo,* for appellee.

BAKER, J. George, who will be referred to by name or as plaintiff or appellee, sued Missouri Pacific Transportation Company, hereinafter called appellant, defendant or company, to recover damages for injuries alleged to have been suffered by him at Gurdon in Clark county in the early morning of August 22, 1938.

Upon a trial there was a verdict and judgment for $15,000 from which comes the appeal.

Appellant argues that the trial court erred in three particulars: (1) The court erred in refusing to direct a verdict for the defendant; (2) there was no evidence that the defendant was guilty of negligence; (3) that the verdict is excessive.

In the discussion of the matters that have arisen upon this appeal the appellant company has presented its contentions under the three heads stated, including incidental subjects such as contributory negligence and other matters pertinent to its defensive position. We shall follow this general trend in our discussion, but the first and second of the divisions will be regarded as consolidated because identical.

We shall state some facts about locations and conditions concerning which there seems to be no controversy. The bus was driven into Gurdon shortly after midnight. It had come from Little Rock, was going south 'till it reached Main street in the city when it turned east on the street which is a part of highway No. 53. After proceeding a short distance along Main street, it turned north across a sidewalk, on the north side of Main street and stopped or parked ten or twelve feet north of this side walk. It was then headed, just as it was driven in, toward the north. Whether this street where the bus stopped was a blind or closed street north of the bus does not appear from the record as abstracted.

The record does show that this was the usual parking place for the bus on such occasions except that there is a contention that at this time it had gone north a short distance more than usual. We fail to see the importance attached to this contention, but state it merely in an effort at achieving accuracy. While the bus was parked the driver went to the office to make his report; returning after these duties had been performed, he made ready to leave. If George had not witnessed the arrival of the bus he had observed its presence and knew from years of observation that, in a short time, it would back out from the place where it had been parked, turn west to highway 67 to continue its journey to the south. He saw the driver as he went around the bus testing the tires with a hammer and realized this was done preparatory to leaving. The driver of the bus, as he drove to the parking place, or very shortly thereafter, observed George standing on or near the sidewalk, but east of the point of crossing used by him on that occasion. He was still at this same place leaning against a pole "when the driver returned to the bus." It is not clear whether the driver meant to indicate by this statement the time at which he came back from the office or when he had gone around the bus testing the tires. He had just said the bus was 35 or 40 feet long. The materiality of this matter may become important when time to make this inspection is considered. In doing this he went within ten or twelve feet of George where he was standing at the post.

When the bus backed out George was hit or at least fell back away from the bus toward the east. He cried out at the time "What do you mean?" This cry was heard by the driver of the bus and was the first he knew of the alleged accident.

We think the foregoing is a statement of the material, undisputed facts showing the setting, a few minutes, perhaps, a few seconds before alleged accident occurred.

We shall now state the relative contentions of the parties and our conclusions thereon.

George was a deputy sheriff, constable and night watchman. He had been such watchman for a long time. That was the reason he met the night bus. George's statement is to the effect that, as he looked toward the west from where he stood at the pole near the rear of the bus, he saw the freight depot lighted up where men worked every night moving and transferring freight. His attention was attracted to some matters he thought he should investigate. He started west along the regular walk-way when he was struck by the bus backing rapidly from its parking place about 250 feet south of the depot. He says no horn was sounded or other alarm given by the driver. When he had looked before proceeding along the walk to the rear of the bus a moment before, it was still standing. In regard to the noise made by the motor when starting up, he said he did not notice it, and believed it had not been stopped during the parking interval. Wilkerson, the driver, was positive he had stopped the motor before going to the station 250 feet away, and says he was instructed to shut off the motor when it was necessary to stop as long or longer than two minutes, that the motor roared when starting up, because he always raced it momentarily. The driver says he backed out slowly. He did not know that George had moved from the position near or at the pole 'till he heard the cry "what do you mean?" While there is other testimony tending to support or contradict evidence adduced as above set out, we shall content ourselves with these declarations of the two principal actors.

Since we may not determine facts, as will be set out later, the principles of law involved and application thereof may be determined as accurately from the factual statements above as if the whole record or bill of exceptions were dumped into our laps.

May we hold as a matter of law that George was guilty of contributory negligence? It is urged most forcefully that he walked behind this moving bus. Such is not the evidence when considered in the light most favorable to support the verdict of the jury. Before he started to cross he had looked, and the bus was standing.

True, he had no right to block the way by standing therein, but the relative and reciprocal duties of pedestrians and vehicles are equal, and each should look out for the other and their conduct in the use of streets under the prevailing conditions determines negligence or the lack of it. Since it may not reasonably be denied that George had a right to be upon the sidewalk under the conditions stated by him, the question of his negligence was properly one to be determined by the jury, and not to be declared dogmatically by us as a matter of law.

Appellants cite an authority defining the duty of a pedestrian standing in a place of safety to remain in such place 'till he shall, by some movement, clearly demonstrate his intention to depart therefrom.. *Schulze Baking Co.* v. *Daniel's, Admr.*, 271 Ky. 717, 112 S. W. 2d 1011.

We think the declaration most probably is sound in principle when applied to the particular case, but cannot see how it may be applied here. Appellants say: "The rights of pedestrians and vehicles are reciprocal, and each must anticipate the movements of the other." Learned counsel's statement need not be fortified by citations of authorities.

May not the jury have reasonably determined that George's statement as to how he was injured was substantially true? Wilkerson, the driver of the truck, did not see him. That is the reason for the citation of the above case from the jurisdiction of Kentucky. The presumption invoked was to supply Wilkerson's failure to look or observe just where he was driving when he backed the 35 or 40 foot bus into Main street, over a walkway used by pedestrians.

We do not suggest that the driver should not have backed out or across the walk. He may have been on a blind or closed street, but even if the street were open he might properly have backed using and employing care commensurate with the risk at the time and place. May not the jury have found that according to his own evidence he assumed the way was clear without looking to see, and backed out hurriedly?

Then there is the question whether he gave any signal? The evidence is in sharp conflict. The jury decided this matter. The law is well settled and recognized. *Texas Motor Co.* v. *Buffington,* 134 Ark. 320, 203 S. W. 1013.

In the cited case there is a well stated, clearly announced declaration of law by the late Chief Justice McCulloch. It not only sets out the duty of the driver backing a car into a street, but, in addition, it is authority for the conclusiveness of the jury's verdict in settling the question therein of plaintiff's contributory negligence. Numerous authorities are cited to support the text. These are all decisions from our own court. For that reason we think it unnecessary, if not pedantic, to resort to decisions of foreign jurisdictions.

In support of the verdict we have already discussed the facts as they could or might have been found by the jury. With some degree of reluctance, we again approach "a vexed and vexing" proposition, the conclusive effect of a verdict.

The late Mr. Justice Butler whose scholarly attainments and industry might well be emulated, gathered a list of the well-considered cases and set them forth in the opinion prepared by him for the court deciding *Missouri Pac. Trans. Co.* v. *Sharp,* 194 Ark. 405, 105 S. W. 2d 579. Just a little later his conclusions were again approved in *Missouri Pac. R. R. Co.* v. *Henderson,* 194 Ark. 884, 110 S. W. 2d 516. I have decided not to copy anything from either of these opinions, lest some one interested in the subject might deem my selected part as the vital portion and for that reason fail to read these opinions in their entirety. It is remarkable with what frequency learned counsel, zealous in their advocacy, present this matter in some new phase, although there has been practical uniformity in all decisions. Indeed, it has come to us from our earliest recorded decisions. *Hynson* v. *Terry,* 1 Ark. 83.

It was alleged as error in this last cited case that the trial judge "charged the jury on matters of fact which is

expressly forbidden by the constitution." This provision of the constitution of that date is present in our Constitution of 1874, and, under well-recognized principles as announced by a long line of decisions, we must be deemed to have adopted the earlier decisions interpreting that provision of the constitution when we put the same language in the Constitution of 1874.

Avoiding a further superfluity of words which would bring no corresponding benefit, we must content ourselves with the announcement that from that earliest date to the present time this provision of our organic law has remained intact and unimpaired. So now when we are confronted with substantial evidence found to be true by verdict of the jury, the effect of which evidence does not violate or contradict any well known natural law or principle, we may not feel at liberty to disregard such verdict.

In this case, if we were triers of facts we might believe appellee to be a chronic plaintiff seeking by devious ways and methods to extort by "hand-made" processes money from those with whom he came in contact, and although we might feel that the verdict is contrary to the preponderance of the evidence, we are powerless in the face of this constitutional provision as construed throughout the years to enter that field so peculiarly belonging to the jury. If this system is faulty and defective the remedy lies with the people and not with the Supreme Court. It must appear then that argument upon the weight of evidence, upon credibility of witnesses, must be regarded as argument to be made to the jury and finally to the trial court to correct the alleged errors of the jury. The verdict of the jury approved by the trial court forecloses our consideration except to determine whether it may be supported by evidence of substantial nature.

We now dispose of the last proposition argued by appellants upon this appeal. They urge that the verdict is excessive, and was rendered as a result of passion and prejudice. We think it might well be conceded that no passion and prejudice are shown unless same appear

from the amount of the recovery. It is argued that the testimony of the physician who describes the alleged injuries should not be believed; that it is corruptly false, demonstrated by X-ray pictures which were charged to have been made by trick photography. Forceful argument, vigorous denunciation and pointed invective are very strongly persuasive that this may be true. We are told by appellants that the plaintiff has suffered no real injury; that the evidence indicating the almost total impairment of certain bodily functions which impairment will remain as permanent lesions was knowingly untrue. This charge is far reaching in its implications. If it was so apparent that the correctness of appellant's charge is true in this regard, the trial judge must have been as well informed of its correctness as appellants and their learned counsel. The evidence that this condition prevailed must rest solely, at this time, in the zeal and advocacy of counsel who present the issue. Again we are forced to assert that these arguments are appropriate to have presented the matters in controversy to the jury and trial judge.

We evade no responsibility in this respect; it does not reach us. If the appellee's testimony and that of witnesses, including the doctor, were believed, the verdict is supported by evidence of a substantial nature. That being true, necessarily the charge of passion and prejudice must be deemed as eliminated. This is a hard case; the kind that makes shipwreck of the law. Affirmed.

GRIFFIN SMITH, C. J.; MCHANEY and HOLT, JJ., dissent. Mr. Justice FRANK G. SMITH concurs in the result.

GRIFFIN SMITH, C. J., (dissenting). J. C. George, plaintiff below and appellee herein, at the time of the alleged injury held commissions as constable and deputy sheriff, and in addition was night watchman in the town or city of Gurdon. He had been so engaged for more than seven years. The so-called "accident" which formed the basis of his suit in the Clark circuit court, with a resulting judgment for $15,000, occurred August 22, 1938.

East Front street in Gurdon runs north and south by the Clark County Bank between the business section

and the railroad property. There is a small park and a monument. On either side of the park there is a driveway wide enough for cars to pass. The driveway leads from Main street to the passenger depot. Main street runs east and west and leads to Highway No. 67.

On the night in question the southbound bus came in on the highway, turned into Main street proceeding east, then turned to the left into the driveway and stopped ten or twelve feet from the walkway used by pedestrians in traveling from the Clark County Bank environment across the railroad to the business section on the west side.

Appellee contends that between one and two o'clock of the morning of August 22 he had completed his "rounds" and had just reached the bank when the bus drove in. While the bus was stationary at its stopping point, appellee walked to a light pole with which he was familiar. While so occupied, appellee claims he saw some one going in the direction of the freight depot, southwest of the point where he was standing. While watching the person or persons he says he thought he saw, he entered into conversation with himself, thereby informing himself that he would cross the tracks and go to the freight house, "and maybe see who it is."

Appellee testified that he then "looked and tried to figure everything was clear." Continuing, he said: "When I started out, this bus backed up without any notice whatever and didn't sound a horn or anything else and slammed into me and I was in the middle of it before I saw it, and it struck me on the leg a little bit and I threw my hand up and gave myself a shove . . . I fell flat and wiggled out from under it some way."

The driver of the bus, he says, and some one else, carried him to a hotel. A doctor was called and gave him a "shot," and he was taken home.

Since that time, appellee contends, he has been in bed most of the time. Was injured in the back. Insists his left leg is practically paralyzed—"can use it a little, but seems like it gets worse all the time." Was in perfect health before the injury. Had never been sick,

according to his original direct testimony, except an attack of pneumonia 25 years ago.

John Smith, a WPA worker, who says he was in Gurdon the night appellee asserts he was injured, corroborates appellee's statement as to the manner in which the so-called "accident" occurred. He testified that when appellee was walking from the bank corner the bus started suddenly and backed out, "and I seen it knock him over." On cross-examination the same witness said: "Listen, he was behind the bus where I could not see it." This witness says he heard the bus motor start. Later he testified: "The bus came up on this side of me and kept me from seeing him."

This witness admitted he had never been in Gurdon before at that time of night; that he did not have a car and had to walk home, a distance of two miles. He didn't have a watch, but "figured" the accident happened about midnight. Did not remember about any trains passing, and could not name a single person he saw in town that night.

Dr. R. L. Bryant testified that he made an X-ray picture of appellee September 9, 1938, "and have seen him three or four times since then." The doctor's opinion was that appellee had a back injury. He found "subluxation of the joints that form the left sacroiliac. Sacroiliac seems to have been injured some on the left side."

In explaining an X-ray picture to the jury, the doctor said: "This does not show up plain. It can be seen better on this side. . . . Normally it is a fixed joint on the picture, and when there is a separation it widens that line." A second picture was introduced, which the doctor said showed a fracture of the fifth lumbar vertebra—the last one that joins the sacrum. The "body of it" was fractured on the right side, the left side being normal.

The only time witness had seen appellee was when the latter came to his office to have the X-ray pictures made. Prescribed some medicine for him October 10, 1938. When appellee called for the examination, he was

on crutches and was "hopping on his left leg, and said he had a severe pain in his back."

Dr. Bryant admitted there was a "regular method of treating cases of this kind in a cast," but had not undertaken anything like that. The patient was being treated by Dr. Green. Dr. Green did not testify.

R. M. Davidson, Missouri Pacific conductor, observed the bus when he was 2½ blocks from it—800 feet, he estimated. His attention was attracted by the noise of the motor in starting: "It was making all the racket in the world." Witness saw the bulk of a man walking toward the rear end of the bus. "It looked like he made two or three steps and the next thing I saw was the outline of a man down in a sitting position leaning against the pole. . . . When the man walked out toward the bus he was walking slowly like he was going to wave at somebody on the bus."

It is in evidence otherwise that before starting, the driver assisted two or three passengers on, and walked around the bus with a hammer tapping the tires to see if they were all "up."

Dave Bryant noticed the bus standing in the driveway. He "sat there a few minutes, watched the passengers get on, saw the driver turn off the inside lights, heard the motor start, and also heard two or three sounds of the horn." The bus started backing out slowly —about the speed a man would walk—and came on back about its own length and stopped, then drove back into the driveway where the passengers were unloaded. No one came to the back end of the bus, and the back end of the bus did not strike anyone. A few minutes later, after he had gone to the freight office, some one reported that Jesse George had been hurt. Witness went to the Commercial Hotel and asked George what the matter was. George replied that he had been watching two boys he thought were trying to break into box cars; that he started walking toward the freight depot, and the bus struck him. "He stated that his mind was on these two fellows, and he was paying no attention to the bus."

John C. Taylor saw a man standing by the light post near the rear of the bus. When the bus started to back out witness was sitting about the fourth seat from the front on the right side, facing the front. He heard the motor start, making quite a noise. Was looking back as the bus started. "As the bus was backing up slowly and as the bus came back and almost—probably just the back corner of the bus was even with him—he got within a step or two of the bus (I could not say exactly, but very close to the bus) and he threw up his hands and fell over on his side and back." Witness was positive George never touched the bus; was looking at him constantly. George was about two steps from the bus when he put up his hands and staggered back. That put him back almost to the pole he was leaning against, and that is where he was lying when the driver got out and went to him. The bus was not going any faster than a man could walk. Witness was a passenger who had come in on the bus, and while it stopped he got out to rest his legs. On cross-examination he said: "Mr. George threw up his hands and staggered back and fell on his side and back and said, 'What do you mean?' "

George W. Dovers, a passenger who got on the bus at Gurdon the night of the alleged injury, arrived there on the train at eleven o'clock. While walking around he first saw George standing by the pole. This was about 20 minutes before the bus came in. "After going to the Rex Cafe, I returned with two other men to get on the bus. I saw Mr. George standing at the same place—in the same position by the pole. After getting on the bus I was seated on the left side about two seats back of the driver. I looked back through the window on the right side of the bus when it started backing out. I saw the man who was standing by the post start walking toward the bus just as the bus started backing. I would judge that he got within two or three steps [of the bus when] he fell backward. He never was very close to the bus. I was looking directly at him and could see him from the waist up, but could not see his feet. . . . Before the driver started the bus he counted his passengers, switched off the inside lights, and started backing like they always

do. I heard the motor start, and do not know of anything around there that could have kept [George] from seeing the bus back out. . . . After the [incident] Mr. George stated that he was walking west looking down toward the freight depot and the first time he saw the bus it was right on him and he put up his hands to push himself away from it, and fell."

Witness examined the side and back of the bus and could not see any prints where any one's hands had touched the bus. There was dust on the bus. If anyone had touched it, it would have shown.

E. M. Bradley and his wife were passengers on the bus. Mr. Bradley verified what other witnesses had said about the conduct of the driver in testing the tires with a hammer. After the bus got in slow motion George "walked out from the post and came toward the side of the bus—something like five or six feet from where I was sitting. [George] would first look toward the front of the bus and then back behind [it]. He was walking terribly slow toward the bus and got within about two and a half or three feet of it, [then] put up his hands and staggered back and fell. I saw George when he first started from the post and [saw him looking] toward the bus."

Mrs. Bradley testified substantially as did her husband, adding: "The bus driver counted the passengers and took something and tapped the tires and said 'all aboard.' He then turned the [inside] lights off, but I do not remember whether he sounded the horn. . . . Mr. George, who had been standing by the post, watched the bus, then [began walking toward it], looking at the driver while he was walking. When he got within a foot or a foot and a half of the bus, he threw up his hands and started staggering backward and fell, kind of on his side. His head and shoulders after he fell were about even with the post."

R. G. Wilkerson, driver of the bus, testified that when he stopped at Gurdon the engine was shut off. Had been driving to Gurdon three or four years, and knew George was night watchman. On the night in question

he noticed George standing near or leaning against the post. Had seen him at the same place before. Witness left the lights burning inside the bus [while it was stationary]. Also, the tail lights were burning. Attended to his routine duties and upon returning from the depot saw George still standing by the post. He then checked passengers to see that they corresponded with the tickets, took a hammer and tapped the tires to see that they were all "up"—which is the last thing done before leaving a station—then got in the bus, turned off the inside lights, started the motor, sounded the horn and began backing out about as fast as a man could walk. He had pulled up 10 or 12 feet clear of the sidewalk when he came in. The only person around the bus was Mr. George, leaning against the post, and George was 10 or 15 feet from the back [of the bus]. There was nothing to keep George from knowing the bus was loaded and ready to start. The motor made considerable noise in the process of acceleration. "When I was backing out, and just as the door of the bus got about even with the post, I heard someone say, 'What do you mean?' I then saw Mr. George over there on the ground within a few feet of the post and about 10 or 12 feet from the bus. I pulled up a little and got out. Mr. George said I had almost backed over him. I asked him how that happened, when he was standing back by the post, and he said: 'I started to walk across there and the bus was almost right up in front of me before I noticed it.' He then stated that he put up his hands against the side of the bus, and shoved himself back, and fell. I wanted to get a doctor, but George told me not to bother; that he would get some of the boys to take him home. He finally agreed to walk over to the hotel, I holding one arm, and another man holding the other. He told me the bus was passing along in front of him before he noticed it and that he had put up his hands unconsciously."

Dr. J. T. McClain, who had known appellee 25 years, was called to the Commercial Hotel the morning of August 22. "George was complaining of his left side and back. I gave him a hypodermic and asked him if he

thought he could go home. He replied that he believed he could. I drove him to his home, where he got out of the car unassisted and walked up the embankment to his house. . . . He smelled pretty strong from the effects of liquor. . . . I called on him the next morning. There were no marks or abrasions on his skin—no evidence of an injury except that when he would be touched at certain places he would say it was hurting. There was no discoloration of any kind. Saw him again that afternoon and he was in about the same condition, except that he had gotten some whiskey and was resting better. Had been around him on his beat at other times and had smelled the odor of liquor on his breath." On cross-examination Dr. McClain said: "He smelled pretty strong of liquor that night and he talked a little like a drunk man and had all the movements of a drunk man."

Dr. Theo. Freedman, of Little Rock, examined appellee October 3, 1934, in collaboration with Dr. Smith, for an alleged injury then complained of. No injury was found, but the X-ray disclosed an arthritis condition, evidenced by "spurs" which come out from the spinal process. There was also decrease in the space of certain vertebra in the lower part of the back.

Dr. D. A. Rhinehart, an X-ray specialist, testified he graduated from the School of Medicine of the Indiana University in 1913, taught anatomy in medical schools six years, and has been doing X-ray work for 19 years. Examined some X-ray pictures October 3rd and 4th, 1934, showing the condition of appellee's back. They showed a small spur on the right side of the lumbar vertebra, and a space between the last or the fifth vertebra on top of the sacrum. The condition was one usually due to arthritis.

Witness was then shown the second X-ray picture introduced in evidence in the instant case as an exhibit to Dr. Bryant's testimony. He stated that he could not see any fracture of the fifth lumbar vertebra, and that the patient [for the purpose of taking the picture] was turned slightly to the left. If a subject is thus turned, the picture appears different. "This man was twisted

a little, [and] the picture does not show any injury to the sacroiliac joint, nor any fracture. The reason one line in the picture shows larger on one side than on the other side is due to the way the picture was taken."

Dr. C. K. Townsend also examined the picture in question, stating that it did not show any fracture, but that it was evident the exposure was taken at an angle.

Dr. Joe F. Shuffield testified that, although appellee complained generally, and particularly of his back, etc., he could sit down and lean back in a chair as well as a normal man could. "You cannot see or feel anything wrong with his back, and the muscles are about normal size. We X-rayed him and could not find anything wrong with the joints and bones in his back." Had examined the Dr. Bryant X-ray picture and saw nothing wrong with the patient except the indications of arthritis heretofore referred to. He testified positively that Dr. Bryant's picture was taken at an angle. Took a specimen of appellee's blood to Little Rock for analysis. It showed syphilis. This disease could cause paralysis. The nervous system and the blood vessels would also be affected. Syphilis could cause paralysis of one leg without affecting the other. Appellee does not have any symptoms that could not be caused by syphilis.

Dr. M. J. Kilbury, clinical pathologist, who examined appellee's blood, testified that three tests were used—Wasserman, Kahn, and Kline. All, he said, showed the presence of syphilis in the blood as strongly as is known —"4-plus positive."

Following the testimony offered by appellant, appellee was recalled and denied having been under the influence of liquor when injured. He denied Dr. McClain's statement that he (appellee) walked up the embankment at his home when the doctor drove him there from the hotel. He said that the paralysis occurred immediately after contact with the bus; contended he was crippled and could not stand alone; denied he had ever had a venereal disease, and insisted there was nothing the matter with him prior to the incident of August 22d.

The prevailing opinion, in its statement of the facts and in its declaration of the applicable law, is the consensus of three judges of this court. A fourth concurs in the result.

Aside from inconsequential testimony the jury's verdict, in respect of appellant's negligence and consequent liability, rests entirely upon the testimony of appellee—the vitally interested party who asked that he be compensated to the extent of $50,000, and who has recovered $15,000. True, the witness, Smith, made certain statements; but, on cross-examination, he admitted that he was not in a position to see the transaction. What he says, therefore, is of but slight importance. The bolstering potentiality of his words is of no more significance than would be the voice of a stranger crying in the wilderness of would-be helpfulness. Such testimony is no more substantial than conversational comment subscribed for its record benefit—for the alimentation it was intended to afford, but which it does not supply. It is the type of testimony no passion-free jury should accept as substantial, and the verdict is one no discriminating trial judge should have believed was sustained by a preponderance of the evidence.

Let us further examine the record to determine, as the trial judge should have determined, where the weight of testimony lies.

Although we are not permitted, in this court, to reverse solely because the weight of evidence does not sustain the verdict, we may, and we should as a matter of judicial duty, analyze and particularize those cases wherein every rule of reason and all of the canons of construction point to a failure upon the part of a trial judge to apply that law which such judge, under his oath of office and the Constitution, is affirmatively required to administer.

In 1929 appellee claimed he was injured. Suit was filed in Clark county against the Gulf Refining Company. Appellee was then a carpenter, assisting in the construction of a building. Among his other duties, as set out in the complaint, the then plaintiff was directed

to carry heavy doors, and ". . . between the place where plaintiff was directed to work in building the doors, and the place where the doors were to be carried and hung, there was a highway, along the side of which was a deep ditch . . . with a levee embankment alongside." The complaint then alleged that plaintiff was directed by his foreman to carry the doors across the highway and across the ditch and levee, and that, "in view of the weight of the doors and of the manner in which the same had to be carried, and of the few men directed to carry the same, and of the depth and width of the ditch and size of said levee and of the smallness of the expense of constructing a bridge or safe passageway across the ditch and levee, it became and was the duty of the defendant, in the exercise of ordinary care for the safety of the plaintiff, to have caused a bridge or some other safe way of passage to be constructed across the ditch and levee."

It was then recited that by reason of the negligence of a fellow-servant, the weight of one of the doors was suddenly thrown upon the plaintiff, causing the following injuries: The tendons connecting the muscles of the plaintiff's back to the backbone were jerked loose from the backbone and the muscles were torn loose from the tendons. A great strain was suddenly forced upon the abdominal muscles of the plaintiff, and his nervous system was thereby shocked and he was otherwise strained and injured so that ". . . plaintiff's back and muscles and tendons thereof have been permanently and seriously injured and the strain upon the abdominal muscles caused the plaintiff to suffer a serious and permanent inguinal hernia, and has also caused the plaintiff to suffer a serious and permanent injury to the plaintiff's nervous system, and that each and every one of the said injuries has so affected the plaintiff that he is now and will always be in a weakened condition."

That suit was settled for a comparatively insignificant sum and the "permanent" nature of the injuries seems to have disappeared.

In 1933 appellee fell over a railroad speeder on the Main street crossing at Gurdon. Then, as in the instant

case, he was "making his regular rounds." In describing this accident he said: "I was crossing from the west side to the east side when all at once when I got over the main line about 10 or 12 feet from the main line the first thing I knew I ran into this speeder. When I did so I fell and the speeder turned over with me. . . . Something struck me and injured my back." The speeder was not in motion until appellee aggravated it. His conclusions as to this injury were that "My back was strained and may bother me as long as I live." He then added, by way of complimentary conversation, that "The settlement I made on account of injuries at Mena was a friendly settlement. I never have had any suit against any railroad or any other corporation on account of any personal injuries." The Gulf Refining Company was not, in contemplation of the complaining party, a corporation, notwithstanding the character of its corporate organization.

As late as 1935 appellee wrote the Missouri Pacific, demanding settlement for his skirmish with the speeder. In the letter he said: "It would be much better for all concerned if you would [reconsider my claim]. I could get medical treatment now and I sure do need it."

In November, 1933, he ran his wife's car into a train at the Main street crossing in Gurdon and claimed damages for the car.

In October, 1935, he got his foot too close to a steam pipe, in consequence of which infection developed. He collected from an insurance company for the foot injury.

On direct examination appellee was asked: "Q. Mr. George, what was your condition before you received this injury? A. I was in perfect health. Q. How long had you been in perfect health? A. Well, I never was sick. I had a spell of pneumonia about 25 years ago, and that is the first time that I had ever been in bed more than two days at one time in my life. Q. You had been in bed other times for what? A. The mumps."

On cross-examination there were the following questions and answers: "Q. Mr. George, you said before this accident occurred that you were a well, strong, and

able-bodied man. A. Absolutely. Q. In fact, there had never been anything the matter with you except some colds? A. I had a spell of pneumonia 25 or 26 years ago. Q. That was all? A. Yes, sir."

That these statements were not true was developed by further cross-examination, as shown, *supra.*

This case was tried on the theory that appellee deliberately walked from the telephone post to a position near the bus, timing himself to contact as the bus backed out, and then put his hand on the bus, or toward it, and simulated injury by falling and crying out.

I am somewhat doubtful of the correctness of this theory. On the contrary, I think the substantial evidence —in fact, all the evidence except appellee's statements— shows that appellee absent-mindedly walked from his place of security just as the bus started; that when appellee was within two or three feet of the bus he suddenly realized his position, and perhaps fell as a consequence of the sudden impulse that impelled him to self-protective action. Certainly his own negligence in walking out behind the bus as it started was the proximate cause of his injury, whatever the injury may have been.

Everybody concedes that the motor was running when the bus began backing out. Whether it had been left idling while the bus was parked (as appellee intimates) or whether it was started when the driver undertook his departure—in either event we know, as a matter of common knowledge, that a bus motor occasions an unusual noise. That, alone, was sufficient to warn appellee that the bus was in motion, or was about to start. We have held, in dozens of cases, that testimony of a person near a railroad that he or she did not hear the bell ring or the whistle blow, and that the witness' hearing was not impaired, is admissible to establish the claim of a plaintiff that statutory signals were not given.

There is no suggestion that appellee's hearing was not of the best, that his eyesight was not good, or that he was unfamiliar with the premises. On the contrary, it was his custom to meet the bus. He knew what its ordinary movements were, knew that after loading it would

back out, and knew it was dangerous to walk immediately back of it at such time. Even though it be held that appellant was guilty of negligence in not sounding the bus horn (if such be true), still appellee's own action in placing himself in the position of peril was the immediate cause of his injuries.

This brings us to a discussion of the credibility to be given appellee's testimony. Certainly, if there is substantial evidence to support the verdict, and if appellant was guilty of negligence, and if appellee was not equally contributorily negligent, a judgment for a sum commensurate with the injury should not be denied. With the exception of Smith's effervescing statements, all of the witnesses disagree so radically with appellee that one or more of three things appears: Either appellee was deliberately falsifying, or he was intoxicated to the extent that he did not know what his actions were, or all of the other witnesses are perjurers. Some of them are wholly disinterested. They merely happened to be passengers on the bus, and incidentally saw the transaction. In substance, they agree that appellee, after the bus started backing out, or coincident therewith, walked from a place of safety into one of peril. Weighed against the unanimity of this evidence, we have the statement of appellee who says he was looking for possible burglars; that before starting across the intervening space he looked to see that all was clear, and that the bus backed out and "slammed into him."

In his direct testimony relating to the previous condition of his health, appellee was untruthful. His misstatements are glaringly perverse; or, in the alternative, he undertook, for an anticipated compensation, to deceive all those with whom he communicated with respect to his former injuries and ills. On cross-examination he asserted that for 25 years there had "never been anything the matter with him" except a spell of pneumonia, and possibly measles. And yet, as late as 1935, we find him petitioning the Missouri Pacific Company to reopen and reconsider his claim for injuries alleged to have been received in connection with his skirmish

with the speeder; and the reason advanced was that of need for treatment.

In a statement dated May 11, 1930, referring to the Mena injury, he said: "I went back to work on the job and did what I could, but was unable to do any heavy lifting. . . . After we finished that job . . . I came back to Gurdon and my back has hurt me since almost continually."

October 17, 1933, in a signed statement, he said: "My back never has gotten well and bothers me now." Again, in the same statement: "I have lost several nights [from] work on account of my injury. I manage to hold the job, but it is painful to do so. Sometimes my back does not pain me and sometimes it does, but when I step in a depression or go to step up on anything, it hurts my back."

September 12, 1934, in another statement, appellee said: "Since I made my original statement to Mr. Pegg in June of this year [with reference to the speeder accident] my condition has not improved and I am still very nervous—more so at some times than at others."

Assuming appellee truthfully delineated his condition in making these statements—and there is no testimony to the contrary other than the want of credibility to be placed in the witness himself—it must follow that he was not truthful in November, 1938, when he undertook to convince the jury that prior to August 22nd of the same year he was in perfect health, and had been so for 25 years.

We have, then, the situation of an interested witness who has impeached himself—a witness whose objective was to recover $50,000, yet a witness branded by scientific experts as syphilitic; a witness who did not even deny having syphilis, although in rebuttal he did disclaim ever having had a venereal disease. Syphilis, being a blood disease, could not be included in appellee's denial, although frankness here suggests the concession that he probably thought he was making a denial.

Against appellee's own repeated declarations of injury in 1929, against his assertions of aggravation in

1933, against the testimony of competent and disinterested witnesses who negative the accusation of negligence upon appellant's part, against Dr. McClain's testimony that appellee, when attended at the hotel immediately after the incident, "Smelled pretty strong of whiskey, talked a little like a drunk man, and had all the movements of a drunk man"; against Dr. McClain's statement that appellee, when driven home, got out of the car unaided and walked up an embankment to his home—in utter disregard of everything suggested by reason and common sense in connection with the affair—we, as members of the appellate court, recline supinely behind a judicial dogma and permit a scandalous miscarriage of justice to be consummated by virtue of a jury's apparent acceptation of testimony so glaringly insufficient as to shock the sensibilities of thinking people.

As was stated by Mr. Justice RIDDICK in *Singer Manufacturing Co.* v. *Rogers,* 70 Ark. 385, 67 S. W. 75, 68 S. W. 153: "The rule established in this court is that, 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 this application of this rule."

In *Catlett* v. *St. Louis, I. M. & S. Railway Company,* 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254, Chief Justice COCKRELL 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?"

These declarations of law as approved by the entire court were discussed in a dissenting opinion written in the case of *Seaman Store Company* v. *Bonner,* 195 Ark. 563, 113 S. W. 1106. In commenting upon the action of a majority of the court in sustaining an unusually large personal injury verdict, the writer there said: "We are no longer shocked. We employ the verdicts of juries as shock absorbers. Certainly no one questions the jury's

exclusive right to pass upon the truth of controverted issues of fact. But it does not follow, because juries have this right, that they have the right also to return any verdict which fancy, passion or prejudice may suggest.

"The rule has been too often announced to be questioned that the verdicts of juries will not be disturbed on account of a finding of fact where there is substantial evidence to support that finding. Our reports are full of such cases, of which I have written a number, and I do not inveigh against or question them. But it does occur to me that there is a growing inclination on our part to shirk our responsibility in reviewing jury trials. We are becoming too prone to wash our hands of responsibility by saying that while a particular verdict should not have been returned and that our own sense of fairness and justice is such that we would not have done so, yet we are concluded by the verdict of the jury.

"The rule is firmly fixed by the numerous decisions of this court that we may not reverse a judgment as having been rendered upon insufficient testimony where the verdict upon which the judgment was rendered is supported by substantial testimony. . . .

"But are we without power to review this testimony? Have we no function to perform in passing upon its legal sufficiency to support a verdict which may have been, and in many cases is, returned, not by the unanimous vote of the jury, but by the vote of only three-fourths thereof? I say we have a duty, of which we are not relieved by the fact that a verdict has been returned. On the contrary, this duty is not imposed upon us until we are called upon to review that verdict. We then have that duty to perform, and can only discharge it by determining, as a matter of law, whether there is a failure of proof or whether the evidence is legally sufficient to warrant the verdict."

The writer of this opinion adheres to the view (presented by a philosophy often discussed but seldom analyzed) that human rights are paramount to property rights; and in litigation where these rights are in conflict, sympathy for the so-called "under dog" invariably

suggests restitution or compensation in favor of the plaintiff where a doubt exists as to relative issues. This adherence to a philosophy of right, however, does not go to the extent of sanctioning perjury and wrecking the rules by which society is maintained in order that one who suddenly finds himself in misfortune may place his hands in the pocket of another and help himself to the abundance he conceives to be deposited there.

It is my view, concurred in by Mr. Justice McHaney and Mr. Justice Holt, that the instant case is without merit. The judgment should be reversed and the cause dismissed.

Missouri Pacific Railroad Company *v.* Johnson.

4-5593 133 S. W. 2d 33

Opinion delivered October 23, 1939.

Thomas B. Pryor, David R. Boatright and *W. L. Curtis,* for appellant.

C. E. Izard and *R. S. Wilson,* for appellee.

BAKER, J. This appeal comes from Crawford circuit court. A judgment was there rendered upon a complaint alleging that the defendant negligently set out a fire on the right-of-way and negligently permitted the fire to spread so as to burn around and close to the home of appellee where his wife lay sick and helpless with tuberculosis. At this particular time she was confined to bed in a Burr Cottage, a structure built for tuberculosis patients, the walls being largely of screen wire so that fresh air was always available, and on that account she, perhaps, suffered more severely as heavy smoke and fumes were blown into the cottage where she rested.

The allegations were further to the effect that she suffered severely on account of the smoke and fumes, not only at the time of the occurrence, but continued thereafter until her death a few months later; that Lee Johnson himself, on account of her increased suffering, was required to stay, or remain at the home to aid or wait upon her during this period. This suit was to recover for such additional suffering as Mrs. Johnson may have endured by reason of the smoke and fumes and for Johnson to recover additional expenses on account of doctor and medical bills and for loss of time, loss of com-

panionship on account of this increased suffering and aggravated condition from causes alleged.

It was alleged, and there was proof offered to support the allegation that defendant's right-of-way had been permitted to grow up and was covered with dry grass and stubble of inflammable nature; that grass and weeds along the right-of-way were sufficient to carry the fire toward and around the house or home of Mr. and Mrs. Johnson. Sectionmen of the railroad company were notified of the fire and joined neighbors and friends of the Johnson family in fighting to get the fire under control. The proof is ample that those who were fighting the fire set out a back-fire around the Johnson house and barn and that from these back-fires made necessary by the burning grass the flames, caused considerable smoke. The smoke covered and filled the home of Johnson and particularly the Burr cottage where Mrs. Johnson was confined. She was severely strangled, much excited and probably frightend. We think it undisputed that, thereafter, her sufferings were much increased over what they had been prior to that time. There was greater weakness, and thereafter she was unable to speak above a whisper, and it was shown that only a short time before there was evidence of prospective recovery. With this general statement of facts we proceed to a presentation and discussion of the diffcult proposition of law presented on this appeal.

The appellant insists, and appellee concedes that if this action may be maintained it must be founded upon the negligence of the appellant in setting out the fire and permitting it to spread. Indeed, it was upon that theory that appellee filed the suit, and it is not contended that it was based or sustained in any particular by the statute making railroads responsible for damages by fire originating upon and spreading from their rights-of-way. Section 11147, Pope's Digest.

Appellee shows that a train had passed going north or toward Fort Smith, only a few minutes before the fire was discovered burning on the right-of-way, and at

places on the railroad dump along the rails where there were dry weeds and grass and inflammable tinder easy to catch fire and burn. The fire spread rapidly, being driven by a wind blowing in the direction of Johnson's home. The appellant denies the alleged negligence and offers in proof the fact that its spark arresters on the locomotive were inspected before the train left North Little Rock and upon its arrival in Fort Smith, one inspection being before the fire occurred and the other immediately after, and such arresters were found to be in good condition upon such examinations.

It is urged most strongly by appellant that the proof of this answers the contentions of negligence made by appellee. This court has heretofore given consideration to very similar propositions and is not now without a guide or precedent in such matters.

One of the first cases on this question which we wish to consider is that of *St. Louis, Iron Mountain & So. Rd. Co.* v. *Thompson-Hailey Co.*, 79 Ark. 12, 94 S. W. 707. This case raised a question of negligence in the matter of damages by fire prior to the passage of what is now § 11147, Pope's Digest, which fixes liability upon railroads for losses by fire set out by locomotives. It was there held "a verdict that a fire was caused by the negligence of the defendant railway company will be supported by evidence that the fire was communicated by sparks from defendant's engine, and that the emission of sparks was caused by negligence of the company either in failing to provide suitable appliances to prevent the escape of sparks or in the operation of the engine."

A striking pertinent announcement was made by this court in the case of *Batte* v. *St. Louis Southwestern Ry. Co.*, 131 Ark. 568, 199 S. W. 907, wherein it was held: "It is then the duty of the railroad company, if it would escape liability, to show that its engine was supplied with the best known appliances to prevent the escape of cinders, that said appliances had been duly inspected, and were in good repair at the time the plaintiff received the

injury, and that its engine was being properly and skillfully managed and operated at the time the injury occurred."

From these striking applicable authorities it appears that the railway company might be held to be negligent in the matter of a fire originating on its tracks and right-of-way under stated conditions, even though it were able to show that its spark arresters or other appliances were of the latest or approved design, because it was held in the cases cited that the duty devolved upon the railroad company, not only to prove these salient facts, but also show that the engine was being skillfully managed and operated at the time of the injury.

The error in the first case cited arose out of the fact that the court instructed the jury that an absolute duty was imposed on the railroad company to exercise ordinary care to use the best appliances and to keep them in good condition. We are indebted to appellant for these citations upon which he relies as supporting the contention of error. The appellee concedes the applicability of the authorities cited but suggests there is not one iota of evidence in the entire record tending to show that the engine or locomotive which is alleged to have set out the fire, was operated with that degree of care required by the authorities mentioned.

In response to appellant's contention, appellee cites us to numerous authorities. *Blanton* v. *Missouri Pac. Rd. Co.,* 182 Ark. 543, 31 S. W. 2d 947; *Missouri Pac. Rd. Co.* v. *Fowler,* 183 Ark. 86, 34 S. W. 2d 1071; *Reeves* v. *St. L.-San F. Ry. Co.,* 171 Ark. 1176, 287 S. W. 166; *Chicago, Rock I. & Pac. Ry. Co.* v. *National Fire Ins. Co.,* 151 Ark. 218, 235 S. W. 1006; *St. Louis-San F. R. R. Co.* v. *Dodd,* 59 Ark. 317, 27 S. W. 227.

A selected case from these citations is *Missouri Pac. R. R. Co.* v. *Fowler, supra,* it is there said: "When fire is discovered shortly after a train has passed, and the proof does not establish some other origin of the fire, the jury is justified in finding that fire originated from sparks from the engine. *Helena S. W. Ry. Co.* v. *Cool-*

idge, 169 Ark. 562, 275 S. W. 896; *Chicago, R. I. & Pac. R. Co.* v. *Cobbs,* 151 Ark. 207, 235 S. W. 995."

There is so made a case of *prima facie* negligence, not rebutted by other evidence to the effect only that the spark arresters were in good condition. No effort is made on the part of the appellant to meet the allegation of negligence arising out of the allegation that the right-of-way was permitted to grow up and become covered with dry tinder or other inflammable substances. Indeed, the description of the place of the origin of the fire, the rapidity with which it moved after being set out is, perhaps, conclusive evidence that the inflammable substances covered the entire area in question. Such a condition has been discussed in an opinion by this court in the case of *St. Louis Iron Mt. & S. Ry. Co.* v. *Coombs,* 76 Ark. 132, 88 S. W. 595, 6 Ann. Cas. 151. The court there said that, under such conditions a *prima facie* case is made for plaintiff, and that it then devolves upon the railroad company to exonorate itself. "The jury having found upon legally sufficient evidence that the fire was communicated by sparks escaping from the engine, the next inquiry presented is whether appellant overcame the presumption of negligence arising therefrom. The engineer and yardwatchman and the regular fireman, testified that they examined the engine immediately after the fire, and found the spark arrester in good condition. Three days later the engine was examined at Newport by an expert from the shops of appellant at Baring Cross, who testified that the spark arrester was of the most approved pattern in use, and was then in good condition. Mr. Luttrell, the superintendent of locomotives of appellant company, testified that the kind of spark arrester on the engine in question was the most approved in practical use, and that, he said: 'I do not think it possible for sparks from any engine equipped like this to set fire to hay from a spark falling 35 or 40 feet.' The engineer testified, also, to the effect that an engine equipped with that kind of spark arrester would not, unless there was some defect or break in it, throw sparks large enough to set fire to anything. There was no testimony on the part of appellant

as to the manner in which the engine was being operated when it passed the building, as the witnesses introduced denied that they passed down by the compress at all."

Further discussion of the alleged negligence to make out a *prima facie* case arising out of negligence is not necessary and would only extend this opinion without increasing the benefits.

We now come to the most serious question that has been presented upon this appeal, and we must confess it has given us great concern. By way of approach to the discussion of that important proposition we think it should be recognized that it is not every case of negligence that gives rise to a cause of action. It is argued in this case, as has been stated by many of the decisions, that "it is well settled that a liability cannot attach to any one for a negligent act. It must be the proximate cause of the resulting injury, and one which, in the light of attendant circumstances, a person of ordinary foresight and prudence could have anticipated." *Mo. Pac. Rd. Co.* v. *Benhan,* 192 Ark. 35, 89 S. W. 2d 928. This announcement by this court was by no means new. It was so held in the case of *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L. R. A., N. S. 1020; *St. Louis I. M. & So. Ry. Co.* v. *Bragg,* 69 Ark. 402, 64 S. W. 266, 86 Am. St. Rep. 206; *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143, 74 Am. St. Rep. 70.

There is also cited and relied upon an opinion written by the late Mr. Justice Cardozo. *Helen Palsgraf* v. *Long Island R. R. Co.,* 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253. Mr. Cardozo was Chief Justice of that court at the time the opinion was written. While his celebrated opinion as presented and interpreted by counsel for appellants apparently does not support the rule as determined by our court, we think it may be said that there was in it at least a recognition that the announcements made were not all inclusive, for he said: "The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed,

there is no occasion to consider what damage might be recovered if there were a finding of a tort. Me may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences however novel or extraordinary." This learned jurist cites many authorities in support of the announcement. We do not think that our conclusions which we will now proceed to state impair to any extent the rule announced in the cited authorities and these decisions must be considered as a presentation and discussion of the particular facts present in the several cases cited.

The announcement of a general principle, however sound, if extended and pursued to its ultimate conclusion may prove ridiculous. An example may not be amiss as an illustration of the point, and we will offer it in place of argument. If we should hold in following the rule that one to be held liable for an alleged negligent act, such act must be the proximate cause of the injury and also be of such a nature that the consequent injury must be one a person of ordinary foresight and prudence would have anticipated, and unless the particular injury suffered could have been so anticipated there is no liability. Such an application of a sound rule destroys liability for negligence. It would be a rare case, indeed in which any ordinary mortal might possess such foresight or power of anticipation that he could in the exercise of such power know or foresee the exact injury, or effect that would come from any form of negligence. No such foresight has ever been possessed by modern man, nor is any such required in the matter of negligence to anticipate the exact injury or nature of it to establish or fix liability as a result thereof.

The late Mr. Justice KIRBY had this very matter under consideration when he wrote the opinion in the case of *Helena Gas Co.* v. *Rogers,* 104 Ark. 59, 147 S. W. 473. In order not to extend unduly this opinion we prefer to adopt the language of Justice KIRBY in the cited opinion, calling attention to that portion of comment wherein he said, ". . . if the act or omission is one which

the party ought, in the exercise of ordinary care, to have anticipated as likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen." The authorities are there cited which support the conclusions set out. This opinion announced without a dissenting voice has never, in that respect, been overruled or modified. We announce it again as a sound conclusion. We think Chief Justice CARDOZO must have had in mind a like situation in the final sentence of the foregoing copied statement from his opinion.

This conclusion does not settle the controversy that has been presented upon this appeal as there is one matter still open to debate arising out of the facts peculiar to this case. It is argued by appellant, and we think we may say it is admitted by appellee that if Mrs. Johnson had not been suffering at the time from tuberculosis the smoke and fumes which covered and filled her little cottage would have done her no substantial harm, and it is suggested and vigorously presented that although the appellant might have anticipated damage arising from the negligent starting of the fire there never could have been that degree of anticipatory vision to enable the agents of the appellant to suspect the helplessness of the sufferer as depicted in this case. We agree with the theory in the completeness of the detail presented, but not with the conclusions appellants insist arise therefrom. The right to recover does not arise out of the helplessness of Mrs. Johnson, nor does that stand in the place of apparent negligence. If it be admitted that appellant should have anticipated that there were homes or residences in the community the conclusion is inevitable that there must have been people living in them, and there might be not only the helplessness of infancy and age, but of possible illness, or that able-bodied persons might be trapped in a burning building or even in the fire racing through the burning grass. So, as suggested by Chief Justice CARDOZO, this negligence was "not at large or in the abstract," or as suggested by ap-

pellant "in the air," but it was negligence affecting property or persons when the fire was permitted to spread to a locality wherein property or human beings might reasonably be anticipated to be and might suffer by reason thereof.

Perhaps many other pertinent authorities relating to the particular issues presented might be set forth and discussed, but we are inclined to think that such discussion would prove burdensome rather than beneficial, and we believe the conclusions above stated are supported by reasonable announcement and interpretation of the principles involved.

This conclusion as above set forth also determines the issue as to instructions criticized upon this appeal. We, therefore, hold the case is without any substantial error. Judgment affirmed.

ARKANSAS TRUST COMPANY, CURATOR, *v.* SIMS.

4-5591 133 S. W. 2d 854

Opinion delivered October 23, 1939.

B. N. Florence, for appellant.

C. D. Harmon, for appellee.

GRIFFIN SMITH, C. J. This appeal is from the chancellor's action in declining to vacate a decree after lapse of the term at which it was rendered.

Kirk Petty, Jr., and Paul, Carl, and Loreene Petty, are minors. Arkansas Trust Company is curator of their estate. Acting on behalf of the minors, the Trust Company loaned certain funds to J. D. Sims and his wife, Doshia. To secure their note, they executed a deed in trust to "Part of Lot Eight of Smith's Survey of acre lots in the Southwest Quarter of the Southwest Quarter of Section Five," etc. The lot is more particularly described by metes and bounds, as shown in the margin.[1]

Default having occurred, J. A. Stallcup, as the designated trustee, and Arkansas Trust Company, as curator, brought suit to foreclose. Complaint was filed March 18, 1937. W. S. Sims, a brother of J. D. Sims, was made a defendant, the allegation being that he claimed an undisclosed interest in the property.

W. S. Sims (March 30, 1937) answered and cross-complained. He claimed purchase from the state of Arkansas of the land in question. Profert was made of deed dated March 8, 1937. He prayed that title to the land

[1] "Part of Lot Eight of Smith's Survey of acre lots in the Southwest Quarter of the Southwest Quarter of Section Five, Township Three South of Range Nineteen West, which part of said Lot Eight is more particularly described as follows: Commence at the southwest corner of said Section Five, which is the common corner of Sections Five, Six, Seven, and Eight, in said township and range and run thence east on the section line 680 feet to the east side of Summer street, thence north 315 feet to the southwest corner of the tract of land herein to be conveyed; thence continuing north along the east line of Summer Street, a distance of 105 feet; thence east along the north line of said Lot Eight, a distance of 136 feet; thence south parallel with Summer street 105 feet, thence west 136 feet, more or less, to the east line of Summer street, and to the place of beginning of the tract herein conveyed."

be divested out of the other interested parties and that it be vested in him.

A default decree was rendered April 28, 1937, wherein W. S. Sims was held to be the true owner of the mortgaged property. It recites due service of process "by summons against the plaintiff, Arkansas Trust Company, curator for [the minors], and against J. D. Sims and Doshia Sims;" that the Trust Company as curator and the minors and other defendants failed to answer, demur, or otherwise plead; that the cause was submitted upon the answer and cross-complaint of W. S. Sims, sometimes known as W. S. Fondren, Jr.; upon the summons served on the Trust Company as curator, and upon the summons served upon J. D. Sims and Doshia Sims, together with the return of the sheriff showing service thereon, ". . . and the evidence of witnesses given orally under oath in open court."

February 8, 1938—nine months and ten days after the decree was rendered—appellants moved the court to set the decree aside. Three reasons are assigned: (1) That fraud was practiced by the successful party in obtaining the decree; (2) that errors in the decree are shown by the infant cross-defendants within twelve months after arriving at their majority; (3) that the decree, as rendered on the cross-complaint, was without notice or service upon the minor defendants, and that they have a valid defense to the cross-complaint.

W. S. Sims demurred to the motion, or complaint, alleging (1) that it did not state facts sufficient to constitute a cause of action in that it failed to give a reasonable excuse for plaintiffs' failure to answer the cross-complaint; (2) that a meritorious defense was not shown to the cross-complaint, and there was a failure to answer; (3) that the subject-matter was *res judicata;* that the complaint does not show there was any fraud practiced by the successful party in obtaining the decree; (5) that there are defective parties plaintiff for the reason that the minors by their mother as next friend were not parties to the original action as individuals, and that J. A. Stallcup was not a party to the original action.

The demurrer was sustained.

It has often been held error, where minors are involved, to decree a foreclosure of property in which they are interested without a *bona fide* defense by the regular guardian, curator, or by a guardian *ad litem,* and without proof of the allegations of the complaint. But, as was said in *Boyd* v. *Roane*, 49 Ark. 397, 5 S. W. 704, "a decree so rendered in the exercise of jurisdiction rightly acquired is not void."

In *Pillow* v. *Sentelle*, 49 Ark. 430, 5 S. W. 783, it was said: "The guardian *ad litem* having appeared and answered the cross-complaint it was not necessary that the minor defendants should have been served with process. They had been served for the purpose of causing them to appear in court. That having been done, the court was authorized to appoint the guardian *ad litem,* who, having accepted the appointment, thereupon became such guardian for the purpose of defending them in the original suit and cross-action growing out of and forming part of it. It would be a useless formality to bring them again into court, by process, for the purpose of reappointing the person already appointed, or appointing another person guardian *ad litem* to defend for them against the cross-complaint, when they already had such guardian and the court had authority to remove him and appoint another in his stead, whenever the interests of the infants required such change. Neither was it necessary that their guardian should be served with process, he having appeared and answered."

In *Woodall* v. *Delatour*, 43 Ark. 521, it was said that the default of a guardian could not prejudice his ward; that it was the court's duty, upon failure of the guardian to appear and make defense, to appoint a guardian *ad litem,* and direct him to answer or make such other defense as should be required, and "Until that was done the court could not proceed in the cause."

Other cases hold that the court, having acquired jurisdiction of the person of the minor through action of the guardian or curator in filing a proceeding in a representative capacity, and the court also having jurisdic-

tion of the subject-matter, a judgment or decree rendered in the absence of a defense is voidable only, and not void.

The Boyd-Roane Case, *supra,* is typical. Commenting on this holding, Mr. Justice WOOD, in writing the court's opinion in *Martin* v. *Gwyn,* 90 Ark. 44, 117 S. W. 754, cited *Richards* v. *Richards, Adm'r.,* 10 Bush 617, and *Pearson* v. *Vance,* 85 Ark. 272, 107 S. W. 986.

Mr. Justice BATTLE, in an opinion for the court in *Sexton* v. *Crebbins,* 80 Ark. 519, 98 S. W. 116, held that the lower court erred in rendering a decree against two minors before a cross-complaint filed against them had been answered. He quoted from § 6023 of Kirby's Digest (now § 1329 of Pope's Digest). The section in full is: "The defense of an infant must be by his regular guardian, or by a guardian appointed to defend for him, where no regular guardian appears, or where the court directs a defense by a guardian appointed for that purpose. No judgment can be rendered against an infant until after a defense by a guardan."

The principle has been emphasized that defense of a minor's legal rights ". . . should not be a mere perfunctory and formal one, but real and earnest. [The guardian or curator] should put in issue, and require proof of, every material allegation of a complaint prejudicial to the infant, whether it be true or not. He is not required to verify the answer, and can make no concessions on his own knowledge. He must put and keep the plaintiff at arm's length." *Pinchback* v. *Graves,* 42 Ark. 222.

Cases are numerous where judgments or decrees were reversed because the infant defendant was not served with summons before a guardian *ad litem* had been appointed. *Moore* v. *Wilson,* 180 Ark. 41, 20 S. W. 2d 310.

If the instant suit is a collateral attack, and if the decree complained of is not void, appellants cannot prevail. It is our view, however, that the proceeding is not a collateral attack within the meaning of our decisions.

Section 8246 of Pope's Digest, subdivision eight, provides that a minor, within twelve months after reaching his or her majority, may move to modify or vacate an erroneous judgment. Reference is made to § 8233 of the Digest. See, also, § 8248 for procedural requirements.

The complaint alleges the original indebtedness, execution of the mortgage or deed in trust, the duty of J. D. and Doshia Sims to pay taxes and insurance, and their failure so to do; the contention of W. S. Sims that he holds a tax title, etc. There is a specific charge of fraud in the alleged conspiracy between J. D. and Doshia Sims upon the one hand and W. S. Sims upon the other, culminating in the attempted purchase by W. S. Sims of the land in question. If it be true that the tax title was acquired for the purpose of aiding J. D. and Doshia Sims to indirectly defeat the deed in trust, the minors had a defense which should have been interposed by the curator, or by a guardian *ad litem* appointed to answer and defend for them.

While the description by metes and bounds of that part of Lot 8 included in the trust deed is good, the state's deed No. 56,645 to forfeited town lot sold to W. S. Sims is hopelessly defective in that it calls for "Pt. 8, SW, SW, Sec. 5, Twp. 3 S, Range 19 W." The particular part which it is sought to convey is not designated. *Northern Road Improvement District of Arkansas County* v. *Zimmerman,* 188 Ark. 627, 67 S. W. 2d 197.

The purpose, and the only purpose of the instant suit, was to have the decree of April 28th vacated because of irregularities, at least one of which appeared upon the face of the record. Mr. Justice HART, in *Hooper* v. *Wist,* 138 Ark. 289, 211 S. W. 143, quoted from the second edition of Black on Judgments, vol. 1, paragraph 252, and approved the text writer's definitions of "direct attack," and "collateral attack," as follows: ". . . the word 'collateral' is always used as the antithesis of 'direct' and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a pro-

ceeding be instituted for that very purpose. If an appeal is taken from a judgment, or a writ of error, or if motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule. Thus, whether a judgment is irregular or erroneous is not a legitimate inquiry in a suit brought for its enforcement."

We conclude, therefore, that the minors, who moved in the name of their curator and by their mother as next friend, had a right, under our statutes, to petition the court to vacate the erroneous judgment, and since the error which calls for an avoidance of the judgment is expressly presented by recitations in the judgment itself, it follows that the chancellor's action in sustaining appellees' demurrer was improper.

Nor does the fact that the Sims note was made payable to the order of "Arkansas Trust Company, curator for [the minors]" afford appellees any relief. Admittedly the note belonged to the Petty children, whose curator properly undertook to collect it for them. Appellees were not prejudiced by reason of the mother's joinder.

The order, judgment, or decree sustaining the demurrer is reversed, and the cause is remanded with directions to vacate the decree of April 28, 1937.

McCrite *v.* Hendrix College.

4-5589 133 S. W. 2d 31

Opinion delivered October 23, 1939.

Batchelor & Batchelor, for appellant.

Joseph R. Brown, for appellee.

HOLT, J. Appellee, Hendrix College, sued appellants, J. W. McCrite and Maud McCrite, in Crawford chancery court on a note executed by appellants on December 7, 1924, to W. R. Willis, trustee for the Wallace Institute, for the sum of $200 with interest at ten per cent., due one year from its date, and to foreclose a mortgage upon lands of appellants given to secure the payment of said note.

Appellants, defendants below, in their answer admitted the execution of the note and mortgage, but specifically pleaded as a complete bar to plaintiff's right of recovery the five-year statute of limitations.

It was alleged in the complaint, and admitted in the answer, that the note and mortgage in question were transferred and assigned to appellee in February, 1934, pursuant to a decree of the Crawford chancery court.

Upon the trial of the cause the learned chancellor found that no payment of principal or interest had been

made on the note since the 7th day of December, 1930, but that the defense of the five-year statute of limitations should be denied for the reason that appellee, Hendrix College, is a charitable institution. A decree was accordingly entered in favor of appellee for $325, and the lands covered by the mortgage ordered sold in satisfaction thereof. From this decree comes this appeal.

The record reflects the following payments on the back of the note in question: "Dec. 1, 1925, by cash (in ink) $20; Nov. 29, 1926, by cash (in ink) $20; Oct. 1, 1927, by cash (in ink) $20; Dec. 4, 1928, by cash (in ink) $20; Dec. 4, 1929, by cash (in ink) $20; indorsement 2-6-30 (in ink); Int. to 12-7-30 (in pencil) $20; indorsement of record (in pencil) 2-8-32; (in pencil) Sept. 1, '34, $5."

Appellee's witness, W. R. Willis, testified: "Q. There are some notations on the back of that note. Do you know anything about them? A. Yes, sir, I made them. They represent the payment of interest." And on cross-examination he further testified relative to the notation of September 1, 1934, of $5: "I don't know myself who paid it. It was mailed to me by letter. I don't know who paid it. It was mailed to me from Carnegie, Oklahoma. Q. Do you know where the defendants lived at that time? A. At Carnegie, Oklahoma. Q. How was the letter signed? A. J. W. McCrite. Q. Upon receipt of that money, you indorsed the payment on the note? A. Yes, sir. . . . Q. How many payments did you credit on this note? A. Six payments. Q. You credited all six of those payments? A. Yes, sir. Q. Can you tell us how those payments were made? A. I don't remember. The last three or four payments have been paid by money order because they were sent to me from up there in Oklahoma. Q. Do you say that all of them were sent to you from Oklahoma? A. I can't say all of them were, but some of them were sent from there. Q. You have a notation in pencil here: 'Interest to 12-7-30, $20.' How was that paid? A. I am sure it was by post office money order because the last three or four payments have been by post office money order. Q. Can you tell what date it was paid? A. No,

sir. I have no idea. When I get them, I just get out the note—I have an idea it was somewhere near this date. When I got the money I would get the note and credit it on the back and send him a receipt for it. . . . Q. You have here in ink, 'endorsement of record 2-8-32.' What does that mean? A. This was put on the record down here—on the mortgage record.''

The testimony of J. W. McCrite, one of the appellants, is to the following effect: He lived at Carnegie, Oklahoma, and never occupied the mortgaged lands personally. The last payment he made on the note was in 1931, and had not seen Mr. Willis since that time. He stated that he always paid by check and not by money order.

Appellants correctly state that there is only one question to be determined here and that is: ''Is the plaintiff (appellee) barred by the Arkansas five-year statute of limitations''?

The case is tried here *de novo*.

Appellants earnestly insist that the trial court erred in holding that appellee, Hendrix College, is a charitable institution, and that the statute of limitations does not apply to it or run against it. In this contention, we think appellants are correct.

We find no evidence in this record that Hendrix College is a charitable institution, and even if it could be held to be a charitable institution still counsel for appellee have cited us to no authority that would justify our holding that, even as a charitable institution, the five-year statute of limitations should not apply to it just as it does to individuals, corporations and others under the laws of this state.

Our statute on limitations, § 8933 of Pope's Digest, makes no such exception, and is as follows: ''Actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward.''

We cannot agree with appellee that this court in *State ex rel., Attorney General,* v. *Van Buren School District No. 42,* 191 Ark. 1096, 89 S. W. 2d 605, adjudged

Hendrix College to be a charitable institution. We think it was not the intention of this court to so hold in that case nor do we think it did so hold.

While we think the learned chancellor announced the wrong ground for the conclusions which he reached, we do not reverse his decree if we find that it can be sustained on some other ground justified by the entire record.

In *Ward* v. *Sturdivant,* 96 Ark. 434, 132 S. W. 204, this court said: "Upon the appeal of a case in equity to this court the cause is heard *de novo.* The appeal brings up the whole case, and this court passes upon the record as to the facts as well as the law. The findings of fact by the chancellor are not conclusive upon appeal. His findings are persuasive only, and this court reviews the evidence as in a case upon trial *de novo.* And if, upon an examination of the whole case, it appears that the decree of the chancellor is correct, it will not be reversed, although it is based upon an erroneous conclusion of fact. *Kelly* v. *Carter,* 55 Ark. 112, 17 S. W. 706; *Niagara Fire Insurance Company* v. *Boon,* 76 Ark. 153, 88 S. W. 915; *Parker* v. *Wells,* 84 Ark. 172, 105 S. W. 75; *Fordyce Lumber Company* v. *Wallace,* 85 Ark. 1, 107 S. W. 160."

After a careful consideration of this record, we have reached the conclusion that a preponderance of the testimony shows that the last payment of $5 on the note in question was made and entered on the back of the note on September 1, 1934, and since suit was properly begun on November 18, 1938, a little more than four years after the last payment, appellee's cause of action was not barred.

The law is well settled in this state that the burden is upon the one pleading the statute of limitations in bar to establish its application by testimony, and this we think appellants have failed to do in this case. *Yaffee Iron & Metal Company* v. *Pulaski County,* 188 Ark. 808, 67 S. W. 2d 1017.

We conclude, therefore, that the decree of the trial court should be affirmed, and it is so ordered.

Opinion delivered October 23, 1939.

Jno. A. Hibbler, for appellant.

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

MEHAFFY, J. The appellant was tried and convicted of murder in the first degree. Motion for new trial was filed and overruled, and the case is here on appeal.

Appellant's first contention is that the verdict is contrary to the law and evidence, and states: "The test of the correctness of the verdict would be whether or not there was sufficient evidence to sustain a conviction if the confession was eliminated."

Section 4018 of Pope's Digest reads as follows: "A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed."

It will, therefore, be seen that the test is not whether there was sufficient evidence to sustain a conviction, but whether there was evidence that such an offense was committed. In other words, before the confession can be introduced against the defendant, there must be evidence that the crime charged was committed by some-

one. The testimony in this case is undisputed that Fred Angeles was murdered by someone, and appellant says in his brief:

"It is true that the deceased, Fred Angeles, was killed by being beaten on the head with a blunt instrument which the state proved to have been a tire hammer."

Dr. Roberts testified that he found the body of Fred Angeles with numerous lacerations or cuts over his head and forehead, and blood was coming from his ears and nose. He was dead when witness arrived, and the body was still warm. There were gaping wounds in the hairy part of his head and forehead, measuring an inch and a half or two inches long. He was able to remove some of the skull. There were eleven distinct wounds on his head. It looked like the blows inflicted were of crushing force. He examined the instrument that the city detectives had, a small hammer. One edge was wedge shaped and the other was round. The wedge of the hammer fit into the cuts or lacerations. The hammer had red stains on it. He testified that the cause of the man's death was an acute brain injury and fractured skull.

Pheophilis Ferner and Charles Chambers testified that when on their way home they heard groaning in the ditch, they struck a match, saw the body, and called an ambulance. Ferner stayed with the body until Chambers got Mrs. James to call for an ambulance. The man was still breathing when the two young men arrived, but he quit moving when the ambulance came. They first called colored people who operated an ambulance, because they thought the man in the ditch was a colored person.

There was other evidence showing that Angeles was murdered. Witnesses found the hammer at appellant's employer's place of business. It was shown that it was the hammer used by appellant and others in their work. The hammer had bloodstains on it. Blood stains were also found on appellant's clothing.

The circuit judge, in the absence of the jury, heard the evidence as to appellant's confession. The appellant claimed that he was mistreated and threatened and that that is the reason he made the confession, and denied that he killed Mr. Angeles, or anybody else. But several witnesses testified that there were no promises, no threats, and that the confession was voluntarily made. He was finally taken to the prosecuting attorney's office and the deputy prosecuting attorney who was trying the case directed the officers to leave the room, and then when no one was present except the appellant and the deputy, appellant repeated his confession and said it was true. He does not claim that any threats were made in the deputy prosecuting attorney's office, or that anything was said by the deputy that induced him to make the statement.

It is admitted that appellant made the confession, or repeated it to the deputy prosecuting attorney, and that nothing was said or done to intimidate him—no threats made, and no promises made. The evidence is overwhelming that the confession was voluntarily made.

We recently said: "In many instances, where the accused is confronted with a confession which he cannot deny having made, he insists that it was not freely and voluntarily made. But that insistence does not render the confession inadmissible, where there is testimony to the effect that it was in fact, freely and voluntarily made. In such cases the practice approved by us, which was followed in the instant case, is for the court to hear the testimony in the absence of the jury as to the circumstances under which the confession was given, and, if there is a substantial question as to whether it was freely and voluntarily made, to submit that question of fact to the jury, after admonishing the jury to disregard the confession unless it was found to have been voluntarily made." *Brown* v. *State, ante* p. 920, 132 S. W. 2d 15; *Morrison* v. *State,* 191 Ark. 720, 87 S. W. 2d 50; *Davis* v. *State,* 182 Ark. 123, 30 S. W. 2d 830.

In the instant case the above rule was strictly followed by the circuit judge. After hearing all the evi-

dence in the absence of the jury, the court made the following ruling:

"All of this testimony is admissible, the court will hold that all of this is admissible, the court holds the questions and the incriminating admissions are voluntary. He will have the opportunity to testify before the jury whether or not they were voluntary, whether there were acts of physical violence used or threats or promises made to him, the jury will have the right to pass on that, the court is only passing on the admissibility of them."

Trial was then resumed in the presence of the jury, and the evidence before the jury showed that the confession was voluntarily made; that there were no promises, no threats, and no inducement to get appellant to make any statement; but his voluntary statement was reduced to writing and signed by him and sworn to before the clerk of the municipal court.

The appellant, himself, denied that the confession was voluntary, and denied that he killed Fred Angeles.

The court fully instructed the jury as to murder, and then told them that there had been some testimony regarding a confession and stated: "But before you can consider any confession as evidence, you must find: First, that he did make a confession; second, that the confession he did make was the one you heard on the witness stand; third, that when he told it he told the truth; fourth, that it was voluntarily made."

The court, continuing, said: "In order for a confession to be voluntary, you must find that it was made without hope of reward or fear of punishment."

He also told the jury that the presumption of law is that any confession made by a defendant when he is in the custody of officers, whether these officers be sheriffs, detectives, policemen, the prosecuting attorney or any other officer, is involuntary and incompetent, and cannot be considered by the jury. He stated that the effect of that presumption was to cast the burden of proof upon the state to prove by a preponderance of the testimony that the confession was voluntary. The state

must overcome this presumption to the satisfaction of the jury, and show that the confession was voluntary.

The court then, at some length, instructed the jury and said that the law presumed any confession or statement involuntary, if made when he was in the custody of officers and under their influence; and stated that the confession must not only be voluntary, but freely made. *Austin* v. *State,* 193 Ark. 833, 103 S. W. 2d 56.

Appellant contends that the court erred in refusing to set aside the verdict, because it was found that Robert Andrews, one of the jurors, was an alien, and a subject of Great Britain. The appellant had the opportunity to examine all the jurors as to their qualifications and eligibility, and it is too late, after the verdict, to urge that the verdict be set aside because one of the jurors was an alien.

In appellant's supplemental motion for new trial, it was alleged that Andrews was an alien and a subject of Great Britain, and for that reason the verdict should be set aside. Appellant calls attention to the Constitution of the state of Arkansas, and to the Arkansas statutes as to qualifications of jurors.

This court recently said: "We have stated the rule on this subject to be that 'when objection is made to a juror after the verdict for the first time, due diligence must be shown by the objecting party,' and that it then 'becomes to some extent a matter of discretion with the trial court as to whether or not the verdict shall be set aside; and when there is no fraud intended or wrong done or collusion on the part of the successful party, it is not reversible error for the trial court to refuse to set aside the verdict'." *Fones Bros. Hdw. Co.* v. *Mears,* 182 Ark. 533, 32 S. W. 2d 313; *Durben* v. *Montgomery,* 145 Ark. 368, 224 S. W. 729.

In the case of *Doyle* v. *State,* 166 Ark. 505, 266 S. W. 459, this court said: "It is asserted that a juror who served at the trial was ineligible to serve for the reason that he had not paid his poll tax. It does not appear, however, that the juror imposed himself on the court

and defendant by representing that he had done so, and this question cannot be raised after trial, when the defendant did not avail himself of the opportunity, on the examination of the jurors on their *voir dire,* to ascertain if they possessed this qualification." *James* v. *State,* 68 Ark. 464, 60 S. W. 29; *Teel* v. *State,* 129 Ark. 180, 195 S. W. 32; *Harmon* v. *State,* 190 Ark. 823, 81 S. W. 2d 30.

The fact that the juror was not a citizen of the United States, not a qualified elector, but was an alien, should have been objected to or his competency challenged when the jurors were questioned on their *voir dire.* If a party fails to do this, he waives any objection on that point, even though the disqualification is unknown to him until after the rendition of the verdict. *Cooper* v. *State,* 27 Okla. Crim. 278, 226 Pac. 1066; *Sprat* v. *State,* 55 Okla. Crim. 1, 23 Pac. 2d 223; *Okershauser* v. *State,* 136 Wis. 111, 116 N. W. 769; *Herndon* v. *State,* 2 Ala. App. 118, 56 So. 85.

It is true that an alien is disqualified to act as a juror; so is a nonresident of the county, or one who has not paid his poll tax. But these objections must be made when the juror is examined in his *voir dire.*

The evidence was ample to support the verdict, and the jury was fully and correctly instructed as to the law.

The judgment is affirmed.

COMMODITY CREDIT CORPORATION *v.* AMERICAN EQUITABLE ASSURANCE COMPANY.

4-5694 133 S. W. 2d 433

Opinion delivered October 30, 1939.

MacDougald, Troutman & Arkwright and *Rose, Loughborough, Dobyns & House,* for appellant.

J. I. Teague and *Verne McMillen,* for appellee.

BAKER, J. Judgment was rendered for appellees, insurance companies, four of which were sued under the above caption in the circuit court of Poinsett county, and the Commodity Credit Corporation has appealed therefrom.

We will attempt a statement of the facts that appear to be without dispute or controversy.

The Trumann Compress & Warehouse Company was engaged in business at Trumann in Poinsett county, and on November 10th, 1935, policies of insurance were issued to the Trumann Compress & Warehouse Company, Inc., "for the account of Whom It May Concern." The appellant had stored several thousand bales of cotton in the warehouse at Trumann for which the Trumann Compress & Warehouse had issued receipts, reciting that the cotton represented by the receipts was insured. The Commodity Credit Corporation had entered into a contract by which it was to pay to the Warehouse Company the sum of five mills per day for each bale of cotton so stored, which payment was to cover insurance and storage charges.

The Warehouse Company at the time these insurance policies were issued paid to the insurance companies $1,750, although the agreement recited it should have paid as down payment $2,000. It later sent checks to the insurance companies to cover the $2,000, but these checks were dishonored.

Fires occurred on April 1st, 2nd, and 4th, 1936, at the time when insurance premiums had not been paid thereon that had become due some months before. The policies of insurance required the Warehouse Company to make monthly reports of the amount of cotton received; and from such reports there would be determined such amounts that might fall due by reason of the increased risks.

At the time of the fire of April 4th, 1936, the insurance companies canceled the policies and there was then due on that date net premiums of $5,283.99. Although the insurance companies might have canceled the policies by reason of failure or delay to pay premiums, they had not done so. There was a loss on account of fires exceeding $12,000, which loss was credited with salvage of burned cotton, leaving a net loss for cotton of $5,455.76. The trial court made some adjustments in amounts and credited the net loss with the net amount of unpaid premiums and gave judgment accordingly to appellant for $476.22. The appellant contends that it is entitled to re-

cover the full amount of the net loss and that it is in no wise liable for the unpaid premiums. The case was decided before the court without the intervention of a jury and the evidence will be given that consideration most favorable to support the findings of the trial court. So in the statements that follow we state the factual matters as we think the trial court may have found them in favor of appellees, giving due regard to such matters as may appear undisputed.

The Trumann Compress & Warehouse Company will be referred to hereinafter as the Warehouse Company, and the Commodity Credit Corporation will be referred to as appellant or as Credit Corporation and the insurance companies will be called appellees or merely insurance companies, in our statements and comments hereinafter set forth.

The warehouse was operating at Trumann, Arkansas, where it had located a large compress and warehouse building, in which was stored all of the cotton damaged or destroyed by the fire above mentioned. In fact, as we understand it, there was considerably more cotton located therein than was injured or damaged. The four insurance companies issued the policies in the aggregate amount of $550,000. The credit corporation had entered into a contract with the warehouse company whereby it was to pay one-half cent per day for each bale of cotton stored with the warehouse company and now says its agreement was that this amount was to pay all warehouse charges and for insurance. Insurance for the previous year was about to be canceled at the time the policies sued on were procured to be issued by appellees. The reason for the cancellation of the older policies, or whether they were policies issued by the same companies as appellees, is not certain, and it perhaps makes no difference at this time who the former insurers were.

Pertinent facts to be considered and which seem to be without substantial dispute are to the effect that the credit corporation might move its cotton unless it could get the protection of the insurance. Mr. M. F. Block of

Paragould, who is the agent for the companies writing the insurance sued upon, in an effort to get policies issued made a trip to St. Louis, and upon his return from St. Louis made a trip to Memphis where he met a managing official of the credit corporation and conferred with him in regard to the policies. Before he had done this he had issued what is known in insurance circles as a "binder," or binding contract and had wired the appellant stating this fact. Mr. Block in his testimony says that certain material matters in these policies were worked out and written by the credit corporation. It did furnish certain provisions that it desired to have incorporated in the policies, and these provisions were made a part thereof, when the policies were issued. The provisions are as follows:

"All or any part of the cotton described in this policy and or certificate having been pledged under the Cotton Loan Plans of the Commodity Credit Corporation, as security for loan granted by said Commodity Credit Corporation or lending agencies, it is a condition of this insurance that in event of loss or damage to any of such cotton so pledged, the basis of adjustment shall be the actual cash value at the time and place of the loss, as set out elsewhere in the printed conditions of this policy or certificate, except that if such actual cash value is less than 12 cents per pound plus accrued interest and accumulated charges, then such actual cash value shall be disregarded and the value of any cotton so pledged shall be deemed to be 12 cents per pound plus interest and accumulated charges.

"Limited liability cotton control act.

"Notwithstanding any of the other terms and provisions of the policy to which this indorsement is attached and made a part, it is understood and agreed that on all cotton for which the assured fails to furnish 'certificates of tagging,' as provided for in the Cotton Control Act, enacted by Congress and approved April 21, 1934, 48 Stat. 598, and all regulations issued thereunder, the price or value, in the event of loss or damage, shall be the amount determined by subtracting from the market value

of such cotton at the date and place of loss or damage the amount of tax levied under the said Cotton Control Act on the ginning of such cotton."

Although the binders had been executed at this time the policies had not been issued because the form that they should take and the provisions therein had not been agreed upon. At the time the credit corporation submitted the provisions it desired to have in the new policies, it suggested that the insurance should be written to "Trumann Compress & Warehouse Company, Inc., for account of Whom It May Concern."

There was a contract entered into between the credit corporation and the warehouse company. This contained many provisions, but the only ones relating directly to any matter of insurance was as set forth. The agreement was that the credit corporation should pay the stipulated price of five mills, or one-half cent per bale for each day the cotton was stored in the warehouse and that this amount was consideration for all storage and for insurance. Some other matters in relation to this contract perhaps should be stated as they have been presented in argument on this appeal.

The warehouse company had agreed to compensate the credit corporation for losses or damages that might accrue by reason of any failure on the part of the warehouse company properly to care for the cotton stored with it or duly compress, or for failure to return to the credit corporation cotton represented by receipts issued.

For other cotton and the damaged cotton, other than that destroyed by fire the warehouse company became indebted to the credit corporation in an amount in excess of $80,000. The credit corporation had not paid under this contract the storage and insurance charges owing at the time of the fire. The credit corporation, however, was not in default in this regard as its contract called for payment to be made when the cotton was removed from the warehouse or on whatever remained in the warehouse on July 1st of that year. The amount owing to the warehouse company was computed and credited on the indebtedness owing by the warehouse to

the credit corporation leaving a balance due the credit corporation by the warehouse company in excess of $51,000. This settlement whereby the warehouse company was paid the full charges for storage and insurance was made after the time of the fire, after notice to the credit corporation of default in the payment of premiums for insurance and, as we understand, after demand by credit corporation for payment of losses that had accrued by reason of, or on account of the fires on the 1st, 2nd, and 4th day of April, 1936.

The warehouse company was insolvent and about that time or shortly thereafter became bankrupt. By the above mentioned process of charging up against the warehouse company the amount it owed the credit corporation and giving credit thereon for storage and insurance charges, the credit corporation reduced the amount of indebtedness owing to it and upon which it probably was required to take substantial losses by reason of the insolvency and bankruptcy of the warehouse company.

We do not think that the above stated facts are determinative of any of the substantial rights of the parties of this controversy, but we state them because it is argued most forcefully by appellant that the judgment of the trial court, if permitted to stand, is such in effect that the credit corporation is required to pay the insurance premiums the second time. While it may be true that that is the legal conclusion warranted by the facts stated, yet it is equally true that the credit corporation has lost no substantial sum of money by this bare bookkeeping process, whereby it credited upon a debt it never could collect the amount of indebtedness owed by the insolvent bankrupt warehouse company.

Appellant claims that it should be protected upon the same theory that it would be if it were a mortgagee and the insurance had been issued to the mortgagor as actual owner of the property and to it as its interest might appear. If that were the exact situation the case would resolve itself into one of simple factual finding and appropriate declarations of legal rights.

In stating our conclusion we proceed upon the theory that the insurance companies knew nothing of any contract between the credit corporation and warehouse company and were not advised as to any matters that might impair or affect any substantial right that they had. Now that the contract has been developed and appears in this record, after giving it due consideration as it has been presented we fail to see how the appellant may derive any comfort from any of its provisions. The insurance did not purport to cover any property belonging to the warehouse company. It covered only cotton stored by the warehouse company and upon which the insurance was written. The argument is not very persuasive that the warehouse company had a lien upon the cotton for storage charges for the reason it had more than that; it had a written contract with the credit corporation to pay all these charges, and no doubt would have been willing to waive its so-called lien at any time to procure this contract. Perhaps this is the effect of the contract, but it is not necessary to decide that matter as it is not in issue. So it would appear that the suggestion might be that the warehouse company had no insurable interest. There is also insistence that the credit corporation had only a lien on this cotton for money loaned. Its entire course of conduct was that of owner. We now call attention to one of the provisions the credit corporation procured to be inserted in the insurance policies as a part thereof. The effect of this provision is that the insurance should cover the full market value of the cotton which market value should be treated for the purpose of insurance as not less than 12 cents per pound and accrued interest and charges. Perhaps a bare statement of this matter may be the determination to a very high degree of the rights of the insured and insurer. The credit corporation filed this suit upon the theory that the insurance was issued to the warehouse company for its benefit and as a third party for whom a contract was made as beneficiary, it had a right to sue.

If we consider the foregoing stated terms of this agreement written into the insurance policies at the request of appellant, and if we further consider that at the time of the fires the cotton might have been worth, say 10 cents per pound on the market, we think the conclusion is irresistible that the insurance was not written for the protection of any beneficiary except the credit corporation. Certainly, if by any theory of being a trustee or general agent for the credit corporation the warehouse company might have sued, it could have recovered the investment the credit corporation had in this cotton only for the exclusive benefit of the credit corporation.

Ordinarily as a result of a fire, however negligent the warehouse company might have been, it would have been liable for no more than the market value at that time. The very terms of this agreement written and requested by the credit corporation, inserted in the insurance contract at its request, is so highly persuasive that the insurance was intended for the protection of the credit corporation alone that we are impelled to agree with the trial court in holding substantially that this was the effect thereof.

We are not ignoring the contract between the warehouse company and the credit corporation which provides that the warehouse company shall carry this insurance. In other words they had a right to agree between themselves in their business relations and dealings with each other that the warehouse company should pay these premiums. They did agree to that and the money was contracted to be furnished for that purpose by the credit corporation though the warehouse company absorbed it in the creation of other indebtedness and did not, on that account, properly apply that portion of the money received for that purpose. In carrying out the provisions of its contract the warehouse company paid the $1,750. The record does not show that there was any agreement or understanding that would amount to even an estoppel binding the insurance companies to accept the warehouse company alone as bound for the premiums. It may have been true that the agent was

expecting that the warehouse company would pay the premiums, but there is no evidence that he acted with, or without, authority in any manner that might be interpreted as a waiver of the payment of the premium by the insured.

If the foregoing statements are not conclusive that the credit corporation in the issuance of these policies was deemed and treated as the sole party insured the effect of such is that the trial court was thoroughly justified in so holding. So, if we may deem the credit corporation as in effect the party whose property was insured there are other deductions that must necessarily follow which we state in our comments and conclusions.

Besides the foregoing stated facts which we have to some extent analyzed there was an agreed statement of facts presented to the trial court as follows:

"Agreed statement of facts.

"It is stipulated and agreed by and between counsel that this cause may be submitted to the court upon the following agreed statement of facts and such other evidence as may be introduced at the trial.

"Commodity Credit Corporation is a corporation organized and existing under the laws of the state of Delaware and is engaged in the business of lending money to farmers, such loans being secured by the deposit of agricultural commodities in warehouses.

"Defendants are corporations engaged in the business of writing fire insurance, and duly authorized to do business in the state of Arkansas.

"Trumann Compress & Warehouse Company, Inc., hereinafter called the Warehouse Company, is a corporation which was engaged, at the time of the transaction hereinafter mentioned, in the warehouse business at Trumann, Arkansas.

"On November 10, 1935, the Warehouse Company purchased fire insurance policies with an aggregate limit of liability of $550,000 and said policies were issued to Trumann Compress & Warehouse Company, Inc., for account of Whom It May Concern. That the defendant

companies carried the percentage set out opposite their respective names:

American Equitable Assurance Company of New York, Policy 4-395105 ..... 20%
Millers National Insurance Company of Chicago, Policy 115122 ..... 50%
Lumbermens Underwriting Alliance of Kansas City, Missouri, Policy 24993 ..... 10%
Pacific Fire Insurance Company of New York, Policy 919 ..... 20%

"All of said policies were in the same form, being the standard Arkansas form of reporting form policies for warehouses, and said policies were outstanding at the time of the fires hereinafter mentioned. A copy of one of said policies, together with all riders attached thereto, is attached hereto, marked 'Exhibit A' and made a part hereof.

"Each of the above listed policies was issued for the sole purpose of covering loss or damage to cotton on which the Commodity Credit Corporation had loans and held insured warehouse receipts. That no insured warehouse receipts were issued by the warehouse company during the time these policies were outstanding, except to the Commodity Credit Corporation, and on which the said Commodity Credit Corporation had loans. A copy of one of said receipts is hereto attached, marked 'Exhibit B' and made a part hereof.

"The cotton on which the Commodity Credit Corporation had made loans was stored with said Warehouse Company under the terms of a written agreement entered into between the Commodity Credit Corporation and the Warehouse Company dated October 25, 1935, a copy of which is hereto attached, marked 'Exhibit C' and made a part hereof.

"To secure the performance of its contract, the Warehouse Company executed to the Commodity Credit Corporation its surety bond, a copy of which bond is hereto attached, marked 'Exhibit D' and made a part hereof.

"At the time of the fires hereinafter mentioned, the Warehouse Company was indebted to the Commodity Credit Corporation in the sum of $21,501.39 as expenses for recompressing, repatching and reconditioning cotton which had been stored with the Warehouse Company and which had been delivered to the Commodity Credit Corporation without having been so recompressed, reconditioned and repatched by the Warehouse Company as was required to be done under the contract. The Warehouse Company was further indebted to the Commodity Credit Corporation in the sum of $21,568.73 for 362 bales of cotton which were delivered to the Commodity Credit Corporation by the Warehouse Company in an unmerchantable condition. The Warehouse Company was further indebted to the Commodity Credit Corporation in the sum of $38,265.16 for 601 bales of cotton which had been deposited in the warehouse, receipts being issued therefor and which the Warehouse Company was unable to locate and deliver to the Commodity Credit Corporation.

"At the time of the fires hereinafter mentioned, the Warehouse Company was entitled to credit of $13,562.62 as the net proceeds received from sale of the above mentioned 362 unmerchantable bales of cotton which were delivered to Commodity Credit Corporation. There were other credits of $3,318.74 for proceeds received from the sale of damaged pickings, and of $817.29 for proceeds received from the sale of light-weight nobs, pickings and paper stock at Trumann. The Commodity Credit Corporation was indebted to Trumann Warehouse Company, Inc., in the sum of $12,221.44 for storage, insurance and all other charges in connection with the storage of cotton.

"Summarizing the above figures the Warehouse Company was indebted to Commodity Credit Corporation in the sum of $81,335.28 and entitled to credits of $29,920.09, leaving a balance due Commodity Credit Corporation of $51,415.19.

"Fires occurred at said warehouse on April 1, 2, and 4, 1936, damaging 197 bales of cotton. Of said bales,

102 were identified as government loan cotton (that is, cotton on which Commodity Credit Corporation had made loans and placed in Trumann Warehouse under insured receipts) and 20 bales were identified as belonging to the U. S. Rubber Company. It was agreed between Commodity Credit Corporation and the United States Rubber Company that the salvage from the unidentified 75 bales should be distributed on a basis of 585/595ths to Commodity Credit Corporation and 10/595ths to United States Rubber Company.

"The value of the cotton damaged by fire was $12,704.62. The 197 damaged bales were sold by the Underwriters Salvage Company for a net amount of $8,125.80. Of this amount $7,248.86, the net amount realized after payment of expenses of reconditioning and other expenses, is held by Underwriters Salvage Company. The net loss to the plaintiff would therefore be $5,455.76, if the sum held by the Underwriters Salvage Company is paid to it.

"The actual market value of all cotton stored under insured receipts at the time of the fires, calculated on 9,949 bales, at 500 pounds each, at 11.87 cents per pound, would be $563,486.92. The loan value, which is arrived at by valuing cotton at twelve cents per pound, which was the amount the Commodity Credit Corporation loaned thereon to producer, and adding accumulated interest and other charges, was approximately $71.77 per 500 pound bale, or $681,455.59 for all cotton stored under insured warehouse receipts.

"The policies were canceled at noon April 4, 1936, after the last fire occurred on that date. The Warehouse Company advanced $1,750 on the premium, but the balance remains unpaid.

"On May 23, 1936, the Warehouse Company was adjudicated bankrupt. Claim was made by the Commodity Credit Corporation against the sureties on the bond executed by the Warehouse Company to the Commodity Credit Corporation. Settlement was made by the sureties on the bond of the Warehouse Company for the amount due the Commodity Credit Corporation after al-

lowing credit for $12,221.44 owing by the Commodity Credit Corporation to the Warehouse Company for all storage and insurance charges."

Many of these matters may properly be considered. The first is that the warehouse company purchased the insurance from the four insurance companies, not on any property belonging to it, but "for the sole purpose of covering loss or damage to cotton on which the Commodity Credit Corporation had loans and held insured warehouse receipts." There were no other insured warehouse receipts except those held by appellant. There is no claim or contention that the warehouse company was the actual or real beneficiary of any insurance. But we find from a policy these selected provisions:

"The premium named in this policy is provisional only.

"The actual premium consideration for the liability assumed hereunder shall be arrived at by the following method.

"It is a condition of this policy that the assured shall report to this company not later than ten days after the first day of each month, the total value on hand as of the last day of the previous month at the location mentioned above. It is further understood and agreed that after the deposit premium named herein has been exhausted the assured shall pay to this company its pro rata proportion of the premium that has been earned for the previous month's coverage and that failing to do so, shall render this policy null and void.

"This company shall not be liaible for more than such proportion of any loss as the limit of liability mentioned above bears to the value of cotton covered by insured receipts at the time of any loss or damage.

"Warranted by the assured: To give immediate notice to this company of any loss or damage; that this company shall have the right to investigate the circumstances attending the same, the condition of the assured's records, the amount of loss and to handle and dispose, of the salvage, if any, and collect premiums due and to

become due under this policy, without admitting liability and without waiving the right to deny liability on account of any breach of warranty or condition of this policy or any right of this company under this policy.

"Warranted by the assured: (A) That he will make and preserve at all times an accurate record of all cotton received and shipped, showing the weight, classification and identity of each bale, its location and change of location, and the dates of all such transactions, which record shall be open at all times to the inspection of any authorized representative of this company upon request; (B) that in the event of loss or damage hereunder, he will deliver such records to this company.

"It is understood and agreed that the amount of insurance set forth above is only provisional, the true intent of this insurance being to fully protect the assured at any and all times to the extent of the value the assured may have at risk hereunder, not exceeding, however, the limit of liability expressed above."

The portion of the policy just above copied is followed by that portion of the same policy which was prepared by the Credit Corporation and was inserted therein as a part of the insurance contract. It seems very definitely to be evidence the trial court might not properly disregard in a determination of the party insured. It is true that in some instances the Warehouse Company is called the "Assured" but it is no less true that the same term is just as applicable to the Credit Corporation. The Credit Corporation accepted the status if not the name "Assured" in dealing with the salvage from the 197 bales of cotton damaged. In the complaint filed it pleaded: "It was agreed between the Commodity Credit Corporation and the United States Rubber Company that the salvage from the unidentified 75 bales should be distributed on the basis . . ." Also "The damaged 197 bales were sold by the Underwriters Salvage Company for a net amount of $8,125.80." The plaintiff was claiming from this $7,248.86. The amount sought when the suit was filed was accordingly reduced.

In regard to the matters stated we have reached the following conclusions: It was the obligation as between the Credit Corporation and Warehouse Company that the latter should pay the insurance premiums. It had so contracted. But there is no proof that the insurance companies or their agent knew this fact. It is argued that the insurers gambled on the results in not cancelling the polices when the default occurred and should not now be permitted to assert a claim for the unpaid premiums. The answer is that since the Credit Corporation was the assured, and had the policies and knew the premiums were provisional and failed to report from month to month the increased amount of cotton insured and stored, it thereby avoided notice of additional premiums provided for in the face of the policies. There is in that respect the undisputed fact that the total value of property on which insurance is claimed was $681,-455.59. On this risk the total insurance was $550,000.

The first question at issue is the right of the insurance companies to set off the unpaid delinquent insurance premiums against the admitted liability. The second question is the right to apportion the insurance to the whole amount at risk.

The trial court determined the facts as suggested above, that is, the Credit Corporation was the "assured" in fact, with its full investment intended to be covered up to the limit of $550,000 that there was no contract to which the insurance companies were parties, or had knowledge, or notice, that the "assured" should not pay premiums.

We think there should be a recognition of the principle that the warehouseman is not required to insure property for the benefit of the owner, but may be liable for negligence in a proper case. *St. Louis Iron Mountain & So. Ry. Co.* v. *Bone,* 52 Ark. 26, 11 S. W. 958; *Kansas City Southern Ry. Co.* v. *Thomas,* 97 Ark. 287, 133 S. W. 1030.

So the obligation of the warehouseman to take insurance was one of contract between the warehouseman and the credit corporation. Indeed, it has been held that

where a warehouseman takes out insurance, such insurance is for the benefit of the owner and the warehouseman is regarded as the agent of the owner thereof. The owner may, at the time of the loss, not know of such insurance. He can ratify or adopt the contract when informed of the insurance after the loss. *Edwards* v. *Cleveland Mill & Power Co.,* 193 N. C. 780, 138 S. E. 131, 53 A. L. R. 1404.

In this case we find no trouble as to the term or expression "Whom It May Concern." We think the evidence is conclusive, if not undisputed, that no one was intended to be designated under that expression except the Credit Corporation. Appellee cites as a rule 26 C. J. 113, the general announcement that even though a person's name does not appear in the application for insurance he is liable for the premiums if in fact he was the principal although the policies were procured by another." There is also cited as applicable *Great Lakes Towing Co.* v. *Mills Transportation Co.,* 83 C.C.A. 607, 155 Fed. 11, 22 L. R. A., N. S., 769. Also the case of *Concord Casualty & Surety Co.* v. *Hemphill & Container Corp. of America,* 318 Pa. 103, 177 Atl. 781.

The appellant distinguishes this last case from the one at bar by arguing that the Container Company is named as insured. That distinction is purely formal and not actual. In this case under consideration the assured is not only proven and admitted, but asserted at every turn. It has also been held that even if a third party elected to avail himself of a contract entered into between others for his benefit he makes the contract his own and must bear the consequent burden if he would reap the benefit. So held in notes, 81 A. L. R. 1292. See, also, *Assets Realization Co.* v. *Cardon,* 72 Utah 597, 272 Pac. 204.

It is there asserted as supported by authority that one may not accept the benefits and reject the burden of a contract he adopts. So we hold that the court was not in error in requiring the insured to accept the burden of the delinquent premiums and credit same upon the amount of recovery.

The only other question is an insistence on the part of appellees that the court erred in fixing the liability in proportion to the amount of insurance carried as compared to the amount at risk. We have heretofore copied the provision from the policies to the effect that the companies are liable for that portion of the loss which the limit of liability stated in the policy bears to the total value of cotton on hand at the time of the loss. It is asserted and admitted that at the time of the fires there was on hand $681,455.59 worth of cotton. The appellant also insists that all of this cotton was covered by insurance, yet it is admitted that the total amount of insurance was $550,000. It is now argued most vigorously that the court erred in apportioning this loss in accordance with that particular provision of the contract above set out and the reason asserted is that the above provision of the policies is in conflict with other portions thereof. However it must be admitted that this particular portion is not ambiguous; that it is clear and unmistakable in its meaning. This provision of the policies seems to be a standard one, consonant with sound principles and uniform use and application, and there is no evidence tending to show that any other portion was intended to be substituted therefor. In truth we have come to the conclusion that if the contention made by appellant is sound, appellant would have been as well protected in this particular case had his insurance been so written that it would have covered only 200 bales of cotton. He could have insisted with the same degree of reasoning that it covered any cotton that might have been destroyed and damaged not in excess of 200 bales and that it covered each bale for the full amount of its value.

We think it clear, therefore, that the court was correct when it held that the insurance companies were liable for $550,000/681,455.59 of the loss.

Our comments have been of undue length perhaps without corresponding benefits to be derived. Our conclusions reached from the facts as they must have been determined by the trial court warrant an affirmance. Affirmed.

STAYTON *v.* STAYTON.

4-5610 132 S. W. 2d 830

Opinion delivered October 30, 1939.

Kaneaster Hodges, for appellant.

Roy D. Campbell, for appellee.

MEHAFFY, J. This action was begun in the Jackson chancery court by Charles G. Henry making Miss Mabel K. Stayton and Mrs. Lotta C. Stayton defendants, depositing in the court the sum of $64.64 representing rentals collected from part of lot 1, block 7 of the original town of Newport, Arkansas, and asking the court to determine the amount to which each of the respective defendants was entitled.

It was alleged that on March 23, 1917, the Arkansas Power & Light Company conveyed to Charles G. Henry and Joseph M. Stayton, their heirs and assigns, certain

described property in Newport, Arkansas. Joseph M. Stayton died testate in 1923, and his last will and testament was duly probated. The will provided: "After the payment of my debts, such personalty as remains is bequeathed to my mother, if she survives, if not to my brother.

"The income from my real estate is devised to my mother, Mabel K. Stayton and brother, upon the death of either, the survivor or survivors share equally therein, and the fee vests in my brother, he to hold one-half thereof as trustee for Mabel K. Stayton for life. If she dies without issue then the whole to vest in my brother absolutely with full power in my brother to sell all or any part thereof and hold or reinvest the same in his discretion.

"This is my last will and testament this first day of January, 1916."

Sallie J. Stayton was the mother of Joseph M. Stayton and John W. Stayton. She died in May, 1929. John W. Stayton, brother of Joseph M. Stayton, died testate in September, 1935.

Mabel K. Stayton was a cousin of Joseph M. Stayton and John W. Stayton. Since the death of John W. Stayton, Charles G. Henry collected the rentals from the property above described, paying therefrom taxes and costs of maintenance, and paid Mrs. Lotta C. Stayton three-eighths of the net income for 1935 and one-eighth to Miss Mabel K. Stayton. The same distribution of rentals was made in 1936.

The plaintiff alleged that he had in his hands $64.64 representing the net rentals for the year 1937; that the defendant, Miss Mabel K. Stayton, demanded the entire sum be paid to her, and Mrs. Lotta C. Stayton demands one-half of the sum be paid to her. The interest of both defendants in the property in question is derived from the will of Joseph M. Stayton. He alleges that to take the responsibility himself of construing the will would place him in a hazardous position, and asked to be allowed to pay the rentals mentioned into court, and be discharged of all liability to the defendants; that the

court construe, interpret and declare the meaning of the will of Joseph M. Stayton and distribute the fund deposited in court to the defendants as it is determined they are entitled.

Lotta C. Stayton filed a separate answer and cross-complaint stating that she was the widow of John W. Stayton and that she was the devisee of her husband's real estate; that John W. Stayton and Joseph M. Stayton each owned an undivided one-fourth in part of lot 1, block 7, Newport; that John W. Stayton and Joseph M. Stayton each owned an undivided one-fourth interest in lot 2, block 7, of the original town of Newport; that at the time of the purchase of lot 1, block 7, Joseph M. Stayton and John W. Stayton were law partners and partners in all business matters; that the consideration to the Arkansas Power & Light Company for the conveyance of part of lot 1, block 7, was legal services rendered by the firm of Stayton & Stayton; that Joseph M. Stayton was named grantee by inadvertence and oversight; that Joseph M. Stayton held title to an undivided one-half of one-half as trustee for John W. Stayton; that the debt assumed by grantees in the conveyance of said property was paid one-half by Charles G. Henry and one-half by the firm of Stayton & Stayton; that Charles G. Henry collected rentals from said property and distributed one-fourth to Joseph M. Stayton and one-fourth to John W. Stayton; that lot 2 of block 7 was purchased by A. H. Lanyon in 1919 and was conveyed one-half to C. G. Henry, one-fourth to Joseph M. Stayton, and one-fourth to John W. Stayton; that during his life Joseph M. Stayton held title to an undivided one-fourth interest in part of lot 1, block 7, as trustee for John W. Stayton. She asked that the one-fourth part of lot 1, block 7, be declared to be the property of John W. Stayton at the time of his death, and that she be declared to have succeeded to his interests. At the time of his death John W. Stayton was the owner of an undivided one-fourth interest in lot 2 and part of lot 1, block 7; that under the will of Joseph M. Stayton, John W. Stayton owned in fee an undivided three-eighths interest in lot 2 of block 7,

and part of lot 1, block 7, and owned in fee the remaining one-eighth interest, subject to a life estate of Mabel K. Stayton; that Mabel K. Stayton should receive one-half of the income of the estate of Joseph M. Stayton, and that John W. Stayton should receive the fee in the entire estate, subject to the payment of one-half of the income to Mabel K. Stayton during her life; that Mabel K. Stayton is now past 60 years of age, is unmarried and will necessarily die without issue, in which event the whole estate of Joseph M. Stayton will vest in John W. Stayton and his assigns. This answer is also a cross-complaint as to an undivided one-fourth interest in part of lot 1, block 7, which it is alleged Joseph M. Stayton held as trustee for John W. Stayton. Lotta C. Stayton prays that the three-fourths of the fund in court be paid to her and one-fourth to Mabel K. Stayton; that Lotta C. Stayton be decreed entitled to an undivided one-half interest to the property in fee of Joseph M. Stayton and that Mabel K. Stayton be decreed entitled to the rents from an undivided one-half interest for her life, and that upon her death the fee to this undivided one-half interest vest in Lotta C. Stayton.

Mabel K. Stayton filed a demurrer to the cross-complaint of Lotta C. Stayton, stating that it did not state a cause of action as it sought to enforce a verbal agreement within the statute of frauds; that the cause is barred by the statute of limitations, and that Lotta C. Stayton and her predecessors in interest are barred by laches.

The court reserved a ruling on the demurrer until the whole case was submitted. Mabel K. Stayton then filed answer and cross-complaint. She admits the allegations of the complaint of Charles G. Henry and enters a general denial to the cross-complaint of Lotta C. Stayton. She pleads the statute of frauds, statute of limitations, and laches, as a defense to the cross-complaint of Lotta C. Stayton. She alleges that the will of Joseph M. Stayton created a right of survivorship in favor of a designated class as to the income of all his real property, and that as a survivor of this class she is entitled to all the income from all the real property of which Joseph M.

Stayton died seized and possessed, and prays for a decree giving her the entire fund deposited in court.

Lotta C. Stayton filed a response to the demurrer and cross-complaint of Mabel K. Stayton and alleged that her cross-complaint did not violate the statute of frauds as it sought to enforce a resulting trust, and was not barred by the statute of limitations because John W. Stayton had always been recognized as owning an undivided one-fourth interest of part of lot 1, block 7; that with C. G. Henry and Joseph M. Stayton as joint tenants, John W. Stayton had been in possession of part of lot 1, block 7, for more than seven years prior to his death. She asked that the fee of an undivided one-fourth interest of part of lot 1, block 7, be vested in her.

On December 3, 1938, the parties filed a stipulation as to the facts, all of which was considered as evidence, and with it filed numerous exhibits. It was agreed John W. Stayton, Sr., the father of Joseph M. and John W., Jr., was at his death the owner of the south one-half of lot 4 and all of lot 5 in block 2; that John W. Stayton, Sr., died intestate and his heirs were Sallie J. Stayton, widow, Joseph M. Stayton and John W. Stayton, Jr., sons, and Mattie S. Waterman, daughter; that Mattie S. Waterman died before any of the other heirs, and her mother succeeded to all of her interest of her father's property by will and deed; that Joseph M. Stayton died in 1923 and left a will which was duly probated, and is set out above. Sallie J. Stayton died testate in 1929. Her will provided: "I devise to my niece, Mabel K. Stayton, lots 11 and 12 of block 2 of Hirsch's Second Addition to the original town of Newport, Arkansas, and the improvements thereon situate. To have and to hold same unto her for the term of her natural life with remainder therein unto my son, John W. Stayton, and unto his heirs and assigns in fee simple forever.

"I devise unto my niece, Mabel K. Stayton, an undivided one-half interest in my real estate other than said lots 11 and 12 of block 2 of Hirsch's Second Addition to the original town of Newport, Arkansas. To have and to hold the same unto her for the term of her natural life,

with remainder therein unto my son, John W. Stayton, and unto his heirs and assigns in fee simple forever.

"I devise unto my son, John W. Stayton, the remaining one-half of my real estate ,other than said lots 11 and 12 of block 2 of Hirsch's Second Addition to the original town of Newport, Arkansas. To have and to hold the same unto him and his heirs and assigns in fee simple forever."

The stipulation further stated that John W. Stayton died testate in 1935 and that his will provided: "All of the remainder of my estate, both real and personal I devise and bequeath to my beloved wife, Lotta. To have and to hold the same unto her in fee simple forever."

The stipulation continued: "That in 1923 Joseph M. Stayton and John W. Stayton were the owners in fee as joint tenants of the Stayton Building, being 20 feet off the south side of lot 10 and six feet off the north side of lot 9 in block 22 of the original town of Newport, Arkansas, each owning an undivided one-half interest; that at her death in 1929 Sallie J. Stayton owned in fee lots 11 and 12 of block 2 of Hirsch's Second Addition to Newport, Arkansas; that it is agreed this cause shall determine their respective rights in part of lot 1 of block 7, south one-half of lot 4 and all of lot 5 of block 2, the Stayton Building being 20 feet off south side lot 10 and six feet off north side of lot 9, block 22, all in the original town of Newport, Arkansas; and lots 11 and 12 of block 2 of Hirsch's Second Addition to Newport, Arkansas; and also wild and uncultivated lands in Sharp and Lawrence counties as the title may appear on the records of deed in those counties."

The stipulation is copied, not from the transcript, but from the abstract of attorneys. It is substantially correct, and contains all the statements of fact necessary to a consideration of the case.

There was attached to the stipulation the documents introduced, including the wills and deeds.

The depositions of Charles G. Henry and Lotta C. Stayton were taken and introduced in evidence; also the depositions of Mabel K. Stayton and E. G. Wallace.

The chancellor entered a decree sustaining the contentions of Lotta C. Stayton, and holding that under the will of Joseph M. Stayton, the income of his estate was devised jointly to Sallie J. Stayton, Mabel K. Stayton and John W. Stayton. The court also held that when Sallie J. Stayton died, Mabel K. Stayton and John W. Stayton shared equally in the income of her estate, and that the fee was vested in John W. Stayton as to all real estate, subject to the life estate in one-half interest to Mabel K. Stayton, and that said property under the will of John W. Stayton, and subject to a one-half interest of Mabel K. Stayton for her life, was vested in Lotta C. Stayton. The court held that Mabel K. Stayton should receive the income from one-half of the real estate of Joseph M. Stayton during her life, and nothing more. The court also found that, by reason of a resulting trust, John W. Stayton was the owner of one-fourth interest of part of lot 1, block 7, described above, and that this property became vested in Lotta C. Stayton under the will of John W. Stayton. He also decreed that the rents from lot 1, block 7, should go one-half to Charles G. Henry, and that Lotta C. Stayton is entitled to three-eighths of the same and Mabel K. Stayton entitled to one-eighth; that of the rents in the hands of C. G. Henry, Lotta C. Stayton shall receive three-fourths and Mabel K. Stayton one-fourth; that Lotta C. Stayton inherited all of the real estate owned by John W. Stayton.

It is unnecessary to set out the decree in full, but as we have already said, the contentions of Lotta C. Stayton were sustained by the court. Miss Mabel Stayton excepted to the decree and prayed and was allowed an appeal to the Supreme Court. The case is, therefore, here on appeal.

Both parties agree that there are but two questions for the decision of this court; the first to be the construction placed on the will of Joseph M. Stayton, and the second is whether a resulting trust in an undivided one-fourth of lot 1, block 7, arose in favor of John W. Stayton.

It is first contended by the appellant that the court erred in refusing to construe the will of Joseph M. Stay-

ton as devising the income of his real property to Sallie J. Stayton, Mabel K. Stayton and John W. Stayton, their survivor or survivors.

Counsel on each side have cited a great many authorities, and it would be impossible to review them all in this opinion.

"The cardinal rule of testamentary construction is to ascertain the intent of the testator and give effect to it, unless the testator attempts to accomplish a purpose, or make a disposition contrary to some rule of law or public policy. All rules of construction are designed to ascertain and give effect to the intention of the testator." *Jackson* v. *Robinson*, 195 Ark. 431, 112 S. W. 2d 417.

Many other decisions of this court could be cited to the same effect. We have also many times held that in construing a will, the whole will must be considered in order to ascertain the intention of the testator.

"The intention of a testator is to be collected from the whole will, and from a consideration of all of the provisions of the instrument, taken together, rather than from any particular form of words. The intention is not to be gathered from detached portions alone, and the court should not consider merely the particular clause of the will which is in dispute. The language employed in a single sentence is not to control as against the evident purpose and intent as shown by the whole will. In other words a will is not to be construed *per parcella,* but by the entirety. As sometimes expressed, the intent is to be ascertained from a full view of everything within the 'four corners of the instrument.' If the whole will clearly indicates what was the testator's intention, the rules of law which aid in the construction of wills need not be invoked." 28 R. C. L. 175, *et seq.*

The will of Joseph M. Stayton has been set out above, and we think it is clear, when the whole will is considered, that the fee vested in John W. Stayton and that he was to hold one-half thereof as trustee for Mabel K. Stayton for her life. When the entire will is considered, we think there can be no doubt about the inten-

tion of the testator. The will expressly states that the fee vests in the brother, and that he is to hold one-half thereof as trustee for Mabel K. Stayton for life. It seems clear that his intention was not to give Mabel K. Stayton all of the income for her life, but only half of it. The provisions of wills must be read together and if there is any conflict, the last provision is controlling.

It is next contended by the appellant that the court erred in decreeing that Joseph M. Stayton held title to an undivided one-fourth interest in lot 1 as trustee for John W. Stayton. We think the facts show conclusively that when the property was purchased, a trust resulted. The evidence shows that the property was regarded by Henry and the two Stayton brothers as being owned jointly. Joseph M. Stayton and John W. Stayton were partners, the evidence shows, not only in the practice of law, but in all their dealings, and after this property was purchased, it was treated by all three as belonging to Henry and the two Staytons. The evidence shows that everything in which the Staytons dealt was treated as partnership business, and we think the evidence in this case shows that the property was purchased and a consideration paid by both Staytons, and that the title was inadvertently taken in the name of Joseph M. Stayton, and that he held one-fourth interest in it as trustee for his brother, John W. Stayton. We think the lower court was correct in holding that there was a resulting trust.

We find no error, and the decree is affirmed.